

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549
FORM 10-K**

(Mark One)

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 2022

or

TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period from _____ to _____

Commission file number 1-32733



ACRES COMMERCIAL REALTY CORP.

(Exact name of registrant as specified in its charter)

Maryland

(State or other jurisdiction of
incorporation or organization)

20-2287134

(I.R.S. Employer
Identification No.)

390 RXR Plaza, Uniondale, New York 11556

(Address of principal executive offices) (Zip Code)

Registrant's telephone number, including area code: **516-535-0015**

Securities registered pursuant to Section 12(b) of the Act:

| Title of each class | Trading Symbol(s) | Name of each exchange on which registered |
|---|-------------------|---|
| Common Stock, \$0.001 par value | ACR | New York Stock Exchange |
| 8.625% Fixed-to-Floating Series C Cumulative Redeemable Preferred Stock | ACRPrC | New York Stock Exchange |
| 7.875% Series D Cumulative Redeemable Preferred Stock | ACRPrD | New York Stock Exchange |

Securities registered pursuant to Section 12 (g) of the Act: None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes No

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes No

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes No

Indicate by check mark whether the registrant has submitted electronically every Interactive Data File required to be submitted pursuant to Rule 405 of Regulation S-T (§ 232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit such files). Yes No

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, a smaller reporting company, or an emerging growth company. See the definitions of "large accelerated filer," "accelerated filer," "smaller reporting company," and "emerging growth company" in Rule 12b-2 of the Exchange Act.

| | | | |
|-------------------------|--------------------------|---------------------------|-------------------------------------|
| Large accelerated filer | <input type="checkbox"/> | Accelerated filer | <input checked="" type="checkbox"/> |
| Non-accelerated filer | <input type="checkbox"/> | Smaller reporting company | <input checked="" type="checkbox"/> |
| | | Emerging growth company | <input type="checkbox"/> |

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act.

Indicate by check mark whether the registrant has filed a report on and attestation to its management's assessment of the effectiveness of its internal control over financial reporting under Section 404(b) of the Sarbanes-Oxley Act (15 U.S.C. 7262(b)) by the registered public accounting firm that prepared or issued its audit report.

If securities are registered pursuant to Section 12(b) of the Act, indicate by check mark whether the financial statements of the registrant included in the filing reflect the correction of an error to previously issued financial statements.

Indicate by check mark whether any of those error corrections are restatements that required a recovery analysis of incentive-based compensation received by any of the registrant's executive officers during the relevant recovery period pursuant to §240.10D-1(b).

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Act). Yes No

The aggregate market value of the voting common equity held by non-affiliates of the registrant, based on the closing price of such stock on the last business day of the registrant's most recently completed second fiscal quarter (June 30, 2022) was \$65,678,313.

The number of outstanding shares of the registrant's common stock on March 6, 2023 was 8,685,452 shares.

DOCUMENTS INCORPORATED BY REFERENCE

The information required by Part III of this Form 10-K, to the extent not set forth herein or by amendment, is incorporated by reference from the registrant's definitive proxy statement to be filed with the Securities and Exchange Commission not later than 120 days after December 31, 2022.

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FORWARD-LOOKING STATEMENTS

In this annual report on Form 10-K, references to “Company,” “we,” “us,” or “our” refer to ACRES Commercial Realty Corp. and its subsidiaries; references to the Company’s “Manager” refer to ACRES Capital, LLC, a subsidiary of ACRES Capital Corp., unless specifically stated otherwise or the context otherwise indicates. This report contains certain forward-looking statements. Forward-looking statements relate to expectations, beliefs, projections, future plans and strategies, anticipated events or trends and similar expressions concerning matters that are not historical facts. In some cases, you can identify forward-looking statements by terms such as “anticipate,” “believe,” “could,” “estimate,” “expects,” “intend,” “may,” “plan,” “potential,” “project,” “should,” “will” and “would” or the negative of these terms or other comparable terminology.

Forward-looking statements contained in this report are based on our beliefs, assumptions and expectations regarding our future performance, taking into account all information currently available to us. These beliefs, assumptions and expectations can change as a result of many possible events or factors, not all of which are known to us or are within our control. If a change occurs, our business, financial condition, liquidity and results of operations may vary materially from those expressed in our forward-looking statements. Forward-looking statements we make in this report are subject to various risks and uncertainties that could cause actual results to vary from our forward-looking statements, including:

- changes in our industry, interest rates, the debt securities markets, real estate markets or the general economy;
- increased rates of default and/or decreased recovery rates on our investments;
- the performance and financial condition of our borrowers;
- the cost and availability of our financings, which depend in part on our asset quality, the nature of our relationships with our lenders and other capital providers, our business prospects and outlook and general market conditions;
- the availability and attractiveness of terms of additional debt repurchases;
- availability, terms and deployment of short-term and long-term capital;
- events giving rise to increases in our current expected credit loss reserve, including the impact of the current economic environment;
- availability of, and ability to retain, qualified personnel;
- changes in our business strategy;
- the degree and nature of our competition;
- the resolution of our non-performing and sub-performing assets;
- the long-term macroeconomic effects of the novel coronavirus (“COVID-19”);
- our ability to comply with financial covenants in our debt instruments;
- the adequacy of our cash reserves and working capital;
- the timing of cash flows, if any, from our investments;
- unanticipated increases in financial and other costs, including a rise in interest rates;
- our ability to maintain compliance with over-collateralization and interest coverage tests in our collateralized debt obligations (“CDOs”) and/or collateralized loan obligations (“CLOs”);
- our dependence on ACRES Capital, LLC (our “Manager”) and ability to find a suitable replacement in a timely manner, or at all, if our Manager or we were to terminate the management agreement;
- environmental and/or safety requirements;
- our ability to satisfy complex rules in order for us to qualify as a real estate investment trust (“REIT”), for federal income tax purposes and qualify for our exemption under the Investment Company Act of 1940, as amended, and our ability and the ability of our subsidiaries to operate effectively within the limitations imposed by these rules;
- legislative and regulatory changes (including changes to laws governing the taxation of REITs or the exemptions from registration as an investment company); and

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- the factors described in this report, including those set forth under the sections captioned “Risk Factors,” “Business” and “Management’s Discussion and Analysis of Financial Conditions and Results of Operations.”

We caution you not to place undue reliance on these forward-looking statements, which speak only as of the date of this report. All subsequent written and oral forward-looking statements attributable to us or any person acting on our behalf are expressly qualified in their entirety by the cautionary statements contained or referred to in this section. Except to the extent required by applicable law or regulation, we undertake no obligation to update these forward-looking statements to reflect events or circumstances after the date of this report or to reflect the occurrence of unanticipated events.

PART I

ITEM 1. BUSINESS

General

We are a Maryland corporation, incorporated in 2005, and a real estate finance company that is organized and conducts our operations to qualify as a real estate investment trust (“REIT”) for federal income tax purposes under Subchapter M of the Internal Revenue Code of 1986, as amended, or the Code. On February 16, 2021, we amended our certificate of incorporation to change our name to ACRES Commercial Realty Corp. from Exantas Capital Corp. Our investment strategy is primarily focused on originating, holding and managing commercial real estate (“CRE”) mortgage loans and equity investments in commercial real estate property through direct ownership and joint ventures. We are externally managed by ACRES Capital, LLC (our “Manager”) a subsidiary of ACRES Capital Corp. (collectively “ACRES”), a private commercial real estate lender exclusively dedicated to nationwide middle market CRE lending with a focus on multifamily, student housing, hospitality, industrial and office property in top United States, or U.S., markets. Our Manager draws upon the management team of ACRES and its collective investment experience to provide its services.

Our objective is to provide our stockholders with total returns over time, including the payment of quarterly distributions when approved by our board of directors, (our “Board”) and capital appreciation, while seeking to manage the risks associated with our investment strategies. We finance a substantial portion of our portfolio investments through borrowing strategies seeking to match the maturities and repricing dates of our financings with the maturities and repricing dates of our investments.

Our investment strategy targets the following CRE credit investments, including:

- Floating-rate first mortgage loans, which we refer to as whole loans;
- First priority interests in first mortgage loans, which we refer to as A-notes;
- Subordinated interests in first mortgage loans, which we refer to as B-notes;
- Preferred equity investments related to CRE that are subordinate to first mortgage loans and are not collateralized by the property underlying the investment; and
- CRE equity investments.

We generate our income primarily from the spread between the revenues we receive from our assets and the cost to finance our ownership of those assets, including corporate debt.

In December 2019, a novel strain of coronavirus (“COVID-19”) was identified. The resulting spread of COVID-19 throughout the globe led the World Health Organization to designate COVID-19 as a pandemic and numerous countries, including the U.S, to declare national emergencies. Many countries responded to the initial and ensuing outbreaks of COVID-19 by instituting quarantines and restrictions on travel and limiting operations of non-essential offices and retail centers, which resulted in the closure or remote operation of non-essential businesses and increased rates of unemployment and market disruption in connection with the economic uncertainty. While the U.S. and certain countries around the world have eased restrictions and financial markets and unemployment rates have stabilized to some degree, the pandemic continues to cause uncertainty in the U.S. and global economies, generally, and the CRE industry in particular.

The aforementioned quarantines and travel restrictions contributed significantly to economic disruptions across the country that directly impacted our borrowers and their ability to pay and to stay current with their debt obligations in 2019 and 2020, causing significant increases in our provisions for credit losses. During this height of the pandemic, we used a variety of legal and structural options to manage credit risk effectively, including through forbearance and extension provisions or agreements. As of December 31, 2022, we have substantially reversed those provisions due to significant improvements in our current and expected macroeconomic operating environments as well as due to improvements in collateral operating performance and market liquidity.

We continue to actively and responsibly manage corporate liquidity and operations in light of the market disruptions caused by COVID-19. However, it is inherently difficult to accurately assess the continuing impact of the pandemic as well as other domestic or global events on our revenues, profitability and financial position. In response, we are focused on maintaining sufficient liquidity while still growing our loan origination business. We continuously monitor the effects of domestic and global events on our operations and financial position to ensure that we remain responsive and adaptable to the dynamic changes in our operating environment.

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The negative impact of COVID-19 on our commercial mortgage-backed securities, or CMBS, investments and 2020 results created a net operating loss (“NOL”) carryforwards and net capital loss carryforwards (“CLCFs”). Our 2020 tax return, completed in October 2021, resulted in NOL carryforwards of \$47.7 million and CLCFs of \$136.9 million, including net capital loss carryforwards from prior years, at our qualified REIT subsidiaries (“QRSs”). Our 2021 tax return, completed in October 2022, resulted in NOL utilization of \$1.1 million and CLCF utilization of \$15.0 million. Additionally, we have NOL carryforwards of \$60.1 million and CLCFs of \$1.0 million at our taxable REIT subsidiaries (“TRSs”).

As of December 31, 2022, we have acquired equity investments in CRE properties to utilize CLCFs in our QRSs. These equity investments offer the opportunity for enhanced capital appreciation returns that may be reinvested into the loan origination pipeline when and if realized.

We typically target transitional floating-rate CRE loans between \$10.0 million and \$100.0 million. During the year ended December 31, 2022 we originated 19 CRE loans with total commitments of \$610.8 million. At December 31, 2022, our CRE loan portfolio comprised \$2.1 billion of floating-rate CRE whole loans with a weighted average spread of 3.78% over the one-month benchmark interest rates utilized, which have a weighted average floor of 0.68%, excluding one whole loan without a benchmark floor. Additionally, our CRE loan portfolio comprised one fully reserved \$4.7 million mezzanine loan at December 31, 2022.

Our Business Strategy

The core components of our business strategy are:

Investment in CRE assets. We are currently invested in CRE whole loans, CRE mezzanine loans and CRE investments. Our goal is to allocate 90% to 100% of our equity to our CRE assets.

Managing our investment portfolio. At December 31, 2022, we managed \$2.1 billion of assets, including \$1.5 billion of assets that were financed and held in variable interest entities. The core of our management process is credit analysis, which our Manager, with the assistance of ACRES, uses to actively monitor our existing investments and as a basis for evaluating new investments. Senior management of ACRES has extensive experience in underwriting the credit risk associated with our targeted asset classes and conducts detailed due diligence on all investments. After we make investments, our Manager actively monitors them for early detection of trouble or deterioration. If a default occurs, we will use our senior management team’s asset management experience in seeking to mitigate the severity of any loss and to optimize the recovery from assets collateralizing the investment.

Managing our interest rate, pricing and liquidity risk. We engage in a number of business activities that are vulnerable to interest rate, pricing and liquidity risk and we seek to manage those risks. The risks on our long-term financing agreements, principally our term financing facilities, are managed by seeking to match the maturity and repricing dates of our financed investments with the maturities and repricing dates of our long-term financing facilities. Additionally, we seek to match investment and financing maturity and repricing dates using securitization vehicles structured by our Manager and, subject to the availability of markets for securitization financings, we expect to continue to use securitizations in the future to accomplish our long-term match funding financing strategy.

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At December 31, 2022, our CRE securitizations, financing facilities with debt outstanding, and mortgage payable were as follows (in thousands):

| | Outstanding Borrowings ⁽¹⁾ | Value of Collateral | Equity at Risk ⁽²⁾ |
|---|--|----------------------------|--------------------------------------|
| At December 31, 2022: | | | |
| CRE Securitizations | | | |
| ACR 2021-FL1 | \$ 671,397 | \$ 802,643 | \$ 127,420 |
| ACR 2021-FL2 | 562,159 | 700,000 | 133,000 |
| Senior Secured Financing Facility | | | |
| Massachusetts Mutual Life Insurance Company | \$ 87,890 | \$ 196,837 | \$ 105,818 |
| CRE -Term Warehouse Financing Facilities | | | |
| JPMorgan Chase Bank, N.A. | \$ 186,783 | \$ 255,095 | \$ 68,768 |
| Morgan Stanley Mortgage Capital Holdings LLC | 141,505 | 198,455 | 56,817 |
| Mortgage Payable | | | |
| Readycap Commercial, LLC | \$ 18,244 | \$ 25,400 | \$ 6,602 |
| Total | <u>\$ 1,667,978</u> | <u>\$ 2,178,430</u> | |

(1) CRE securitizations, senior secured financing facility and mortgage payable include deferred debt issuance costs. Term warehouse financing facilities include accrued interest payable and deferred debt issuance costs.

(2) The senior secured financing facility and term warehouse financing facilities include accrued interest receivable and accrued interest payable, which are excluded from the value of collateral. CRE securitizations reflect the par value of equity investments in retained notes.

The CRE securitizations, senior secured financing facility, term warehouse financing facilities and mortgage payable charge a floating rate of interest. For more information concerning our CRE securitizations, senior secured financing facility, term facilities and mortgage payable, see “Item 7. Management’s Discussion and Analysis of Financial Condition and Results of Operations - Liquidity and Capital Resources,” and Note 12 contained in “Item 8. Financial Statements and Supplementary Data - Notes to Consolidated Financial Statements” of this report. We continuously monitor our compliance with all of the financial covenants. We were in compliance with all financial covenants, as defined in the respective agreements, at December 31, 2022.

Diversification of investments. We manage our investment risk by maintaining a diversified portfolio of CRE mortgage loans and other CRE-related investments. As funds become available for investment or reinvestment, we seek to maintain diversification by property type and geographic location while allocating our capital to investment opportunities that we believe are the most economically attractive. The percentage of assets that we have invested in certain non-qualifying, non-core and other real estate-related investments is subject to the federal income tax requirements for REIT qualification and the requirements for exclusion from regulation under the Investment Company Act of 1940, or the Investment Company Act.

Our Operating Policies

Investment guidelines. We have established investment policies, procedures and guidelines that are reviewed and approved by our Manager’s investment committee and our Board. The investment committee and/or our Board, as applicable, meets regularly to consider and approve proposed specific investments. Our Board monitors the execution of our overall investment strategies and targeted asset classes. We acquire our investments primarily for income. We do not have a policy that requires us to focus our investments in one or more particular geographic areas or industries.

Financing policies. We use leverage in order to increase potential returns to our stockholders and for financing our portfolio. We do not speculate on changes in interest rates. Although we have identified leverage targets for each of our targeted asset classes, our investment policies do not have any minimum or maximum leverage limits. Our Manager’s investment committee has the discretion, without the need for further approval by our Board, to increase the amount of leverage we incur above our targeted range for individual asset classes subject, however, to any leverage constraints that may be imposed by existing financing arrangements.

We use borrowing and securitization strategies to accomplish our long-term match funding financing strategy. Based upon current conditions in the credit markets for collateralized debt obligations and collateralized loan obligations (sometimes, collectively, referred to as CDOs and CLOs) we expect to modestly increase leverage through new CRE debt securitizations and the continued use of our senior secured financing facility and term financing facilities. We may also seek other credit arrangements to finance new investments that we believe can generate attractive risk-adjusted returns, subject to availability.

Credit and risk management policies. Our Manager focuses its attention on credit and risk assessment from the earliest stage of the investment selection process. In addition, our Manager screens and monitors all potential investments to determine their impact on maintaining our REIT qualification under federal income tax laws and our exclusion from investment company status under the Investment Company Act. Portfolio risks, including risks related to credit losses, interest rate volatility, liquidity and counterparty credit, are generally managed on an asset and portfolio type basis by our Manager.

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Floating-Rate Loan Portfolio and Borrowings

As discussed in the “Managing our interest rate, pricing and liquidity risk” section above, our investments in floating-rate assets and utilization of floating-rate borrowings expose us to interest rate risk. In a business environment where benchmark interest rates are increasing significantly, cash flows of the CRE assets underlying our loans may not be sufficient to pay debt service on our loans, which could result in non-performance or default. We partially mitigate this risk by generally requiring our borrowers to purchase interest rate cap agreements with non-affiliated, well-capitalized third parties and by selectively requiring our borrowers to have and maintain debt service reserves. These interest rate caps generally mature prior to the maturity date of the loan and the borrowers are required to pay to extend them. In most cases the sponsors will need to fund additional equity into the properties to cover these costs as the property may not generate sufficient cash flow to pay these costs. At December 31, 2022, 88.8% of the par value of our CRE loan portfolio had interest rate caps in place with a weighted-average maturity of 1.1 years.

Historically, we have used the London Interbank Offered Rate (“LIBOR”) as the benchmark interest rate for our floating-rate whole loans and we have been exposed to LIBOR through our floating-rate borrowings. Many of our floating-rate whole loans, CRE securitizations and term warehouse financing facilities included one-month LIBOR as the original contractual benchmark interest rate. Our unsecured junior subordinated debentures use three-month LIBOR as the contractual benchmark interest rate. In March 2021, the United Kingdom’s, or U.K.’s, Financial Conduct Authority (“FCA”) announced that it would cease publication of the one-week and the two-month USD LIBOR immediately after December 31, 2021, and cease publication of the remaining tenors immediately after June 30, 2023. In July 2021, the U.S. Federal Reserve, in conjunction with the Alternative Reference Rates Committee, a steering committee comprising large U.S. financial institutions, has identified Secured Overnight Financing Rate (“SOFR”) as its preferred alternative rate for LIBOR.

All variable rate loans originated by us beginning January 1, 2022 have been benchmarked to SOFR. Additionally, all of our floating-rate whole loans contain provisions that provide for the transition of the contractual benchmark interest rate to an alternative rate. At December 31, 2022, our loan portfolio had a carrying value of \$2.0 billion of floating rate loans, 68.3% or \$1.4 billion of which have interest rates tied to LIBOR and 31.7% or \$646.2 million of which have interest rates tied to SOFR.

In September 2021 and January 2022, the term warehouse financing facilities with JPMorgan Chase Bank, N.A. (“JPMorgan Chase”) and Morgan Stanley Mortgage Capital Holdings LLC (“Morgan Stanley”), respectively, were amended to allow for the transition to alternative rates, including rates tied to SOFR, subject to benchmark transition events. Additionally, during the year ended December 31, 2022, we entered into a loan agreement to finance the acquisition of a student housing complex, which uses SOFR as its benchmark interest rate. At December 31, 2022, we had \$1.7 billion of floating rate borrowings, 75.8% or \$1.3 billion of which have interest rates tied to LIBOR and 24.2% or \$419.2 million of which have interest rates tied to SOFR.

We expect to complete the process of converting our LIBOR-based loans and borrowings to an applicable benchmark interest rate during 2023.

Refer to “Part I. - Item 1A. Risk Factors - Changes in the method for determining the LIBOR or a replacement of LIBOR may adversely affect the value of our loans, investments and borrowings and could affect our results of operations” for additional detail about the transition away from LIBOR.

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Investment Portfolio

The table below summarizes the amortized costs and net carrying amounts of our investments at December 31, 2022, classified by asset type (dollars in thousands, except amounts in footnotes):

| At December 31, 2022 | Amortized Cost | Net Carrying Amount ⁽¹⁾ | Percent of Portfolio | Weighted Average Coupon |
|---|---------------------|------------------------------------|----------------------|-------------------------|
| Loans held for investment: | | | | |
| CRE whole loans, floating-rate | \$ 2,052,890 | \$ 2,038,787 | 93.56% | 7.99% |
| CRE mezzanine loan | 4,700 | — | 0.00% | 10.00% |
| | <u>2,057,590</u> | <u>2,038,787</u> | <u>93.56%</u> | |
| Other investments: | | | | |
| Investments in unconsolidated entities | 1,548 | 1,548 | 0.07% | N/A ⁽⁴⁾ |
| Investments in real estate ⁽²⁾ | 88,132 | 88,132 | 4.04% | N/A ⁽⁴⁾ |
| Properties held for sale ⁽³⁾ | 50,744 | 50,744 | 2.33% | N/A ⁽⁴⁾ |
| | <u>140,424</u> | <u>140,424</u> | <u>6.44%</u> | |
| Total investment portfolio | <u>\$ 2,198,014</u> | <u>\$ 2,179,211</u> | <u>100.00%</u> | |

(1) Net carrying amount includes an allowance for credit losses of \$18.8 million.

(2) Includes real estate-related right of use assets of \$19.5 million, mortgage payable of \$18.2 million, intangible assets of \$8.9 million, lease liabilities of \$42.9 million and other liabilities of \$64,000.

(3) Includes property held for sale-related liabilities of \$3.0 million.

(4) There are no stated rates associated with these investments.

We hold investments in 100% of the common shares of two trusts, Resource Capital Trust I and RCC Trust II, that were formed for the purpose of providing us with unsecured junior subordinated debt financing and are accounted for as investments in unconsolidated entities.

CRE Debt Investments

Floating-rate whole loans. We predominantly originate floating-rate first mortgage loans, or whole loans, directly to borrowers. The direct origination of whole loans enables us to better control the structure of the loans and to maintain direct lending relationships with borrowers. Additionally, we may acquire whole loans from third parties that conform to our investment strategy. We may create tranches of a loan we originate, consisting of an A-note (described below) and a B-note (described below), as well as mezzanine loans or other participations, which we may hold or sell to third parties. We do not obtain ratings on these investments. With respect to our portfolio at December 31, 2022, our whole loan investments had loan-to-collateral value, or LTV, ratios that typically do not exceed 85%. Typically, our whole loans are structured with an original term of up to three years, with one-year extensions that bring the loan to a maximum term of five years. Substantially all of our CRE loans held at December 31, 2022 were whole loans. We expect to hold our whole loans to maturity.

Senior interests in whole loans (A-notes). We may invest in senior interests in whole loans, referred to as A-notes, either directly originated or purchased from third parties. We do not intend to obtain ratings on these investments. We expect our typical A-note investments to have LTV ratios not exceeding 70% and will generally be structured with an original term of up to three years, with one-year extensions that bring the loan to a maximum term of five years. We expect to hold any A-note investments to maturity. We did not hold any A-note investments at December 31, 2022.

Subordinate interests in whole loans (B-notes). To a lesser extent, we may invest in subordinate interests in whole loans, referred to as B-notes, which we will either directly originate or purchase from third parties. B-notes are loans secured by a first mortgage but are subordinated to an A-note. The subordination of a B-note is generally evidenced by an intercreditor or participation agreement between the holders of the A-note and the B-note. In some instances, the B-note lender may require a security interest in the stock or other equity interests of the borrower as part of the transaction. B-note lenders have the same obligations, collateral and borrower as the A-note lender, but typically are subordinated in recovery upon a default to the A-note lender. B-notes share certain credit characteristics with second mortgages in that both are subject to greater credit risk with respect to the underlying mortgage collateral than the corresponding first mortgage or A-note. We do not intend to obtain ratings on these investments. We expect our typical B-note investments to have LTV ratios between 55% and 80% and will generally be structured with an original term of up to three years, with one-year extensions that bring the loan to a maximum term of five years. We expect to hold any B-note investments to maturity. We did not hold any B-note investments at December 31, 2022.

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In addition to the accrued interest receivable on a B-note, we may earn fees charged to the borrower under the note or additional income by receiving principal payments in excess of the discounted price (below par value) we paid to acquire the note. Our ownership of a B-note with controlling class rights may, in the event the financing fails to perform according to its terms, cause us to pursue our remedies as owner of the B-note, which may include foreclosure on, or modification of, the note. In some cases, the owner of the A-note may be able to foreclose or modify the note against our wishes as owner of the B-note. As a result, our economic and business interests may diverge from the interests of the owner of the A-note.

Mezzanine financing. Historically, we have invested in mezzanine loans that are senior to the borrower's equity in, and subordinate to the mortgage loan on, a property. A mezzanine loan is typically secured by a pledge of the ownership interests in the entity that directly owns the real property or by a second lien mortgage loan on the property. In addition, mezzanine loans typically include credit enhancements such as letters of credit, personal guarantees of the principals of the borrower, or collateral unrelated to the property. A mezzanine loan may be structured so that we receive a stated fixed or variable interest rate on the loan as well as a percentage of gross revenues and a percentage of the increase in the fair market value of the property securing the loan, payable upon maturity, refinancing or sale of the property. Mezzanine loans may also have prepayment lockouts, penalties, minimum profit hurdles and other mechanisms to protect and enhance returns in the event of premature repayment. At December 31, 2022, our loan portfolio included one mezzanine loan with no carrying value.

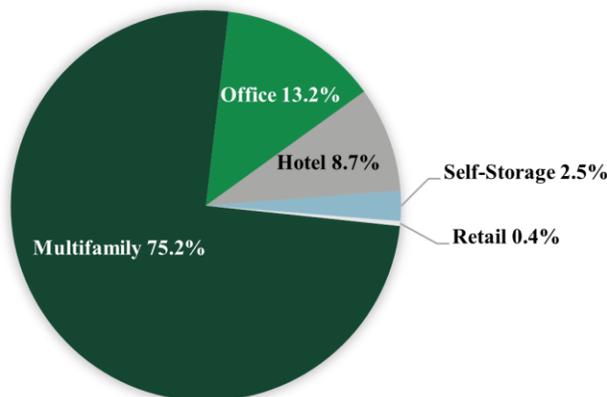
Preferred equity investments. Historically, we have invested in preferred equity investments in entities that own or acquire CRE properties. These investments are subordinate to first mortgage loans and mezzanine debt and are typically structured to provide some credit enhancement differentiating it from the common equity. We expect our preferred equity investments to have LTV ratios between 65% and 90% with stated maturities from three to eight years. We expect to hold preferred equity investments to maturity. We did not hold any preferred equity investments at December 31, 2022.

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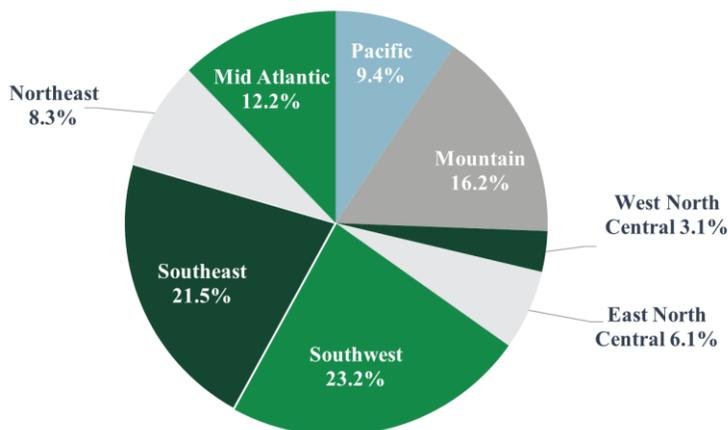
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The following charts describe the property type and the geographic breakdown, by National Council of Real Estate Investment Fiduciaries (“NCREIF”) region of our CRE loan portfolio at December 31, 2022 (based on carrying value):

PROPERTY TYPE AT DECEMBER 31, 2022



GEOGRAPHIC AREA AT DECEMBER 31, 2022



The total CRE loan portfolio, at carrying value, was \$2.0 billion at December 31, 2022.

The Southwest region constituted 23.2% of our portfolio, of which 100.0% was in Texas, and its collateral comprised 95.6% multifamily properties. The Southeast region constituted 21.5% of our portfolio, of which 79.5% was in Florida, and its collateral comprised 85.7% multifamily properties. The Mountain region constituted 16.2% of our portfolio, of which 68.8% was in Arizona, and its collateral comprised 76.5% multifamily properties. We view our investment and credit strategies as being adequately diversified across property types in the Southwest, Southeast and Mountain regions.

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CRE Investments

We may invest directly in the ownership of CRE equity investments by making direct investments where NOL carryforwards exist and can absorb the creation of REIT taxable income or by restructuring CRE loans and taking control of the properties where we believe we can protect capital and ultimately generate capital appreciation. We may acquire CRE equity investments through a joint venture or wholly-owned subsidiary and may classify these investments in real estate as held for investment or held for sale. We intend to primarily use an affiliate of our Manager to manage the CRE equity investments when held. At December 31, 2022, we held four investments in real estate acquired through direct equity investments and two investments in real estate acquired from lending activities (i.e. through the receipt of the deeds-in-lieu of foreclosure on the properties that collateralized former non-performing loans). At December 31, 2022, two of these investments were classified as held for sale.

The following table summarizes the investments in real estate at December 31, 2022 (in thousands, except amounts in footnotes):

| | December 31, 2022 | | |
|--|-------------------|---|----------------|
| | Cost Basis | Accumulated Depreciation & Amortization | Carrying Value |
| Assets acquired: | | | |
| <i>Investments in real estate, equity:</i> | | | |
| Investments in real estate ⁽¹⁾ | \$ 123,219 | \$ (2,251) | \$ 120,968 |
| Right of use assets ⁽²⁾ | 19,664 | (205) | 19,459 |
| Intangible assets ⁽³⁾ | 11,474 | (2,594) | 8,880 |
| Subtotal | 154,357 | (5,050) | 149,307 |
| <i>Investments in real estate from lending activities:</i> | | | |
| Properties held for sale ⁽⁴⁾ | 53,769 | — | 53,769 |
| Total | 208,126 | (5,050) | 203,076 |
| Liabilities assumed: | | | |
| <i>Investments in real estate, equity:</i> | | | |
| Mortgage payable | 18,089 | 155 | 18,244 |
| Other liabilities | 247 | (183) | 64 |
| Lease liabilities ⁽⁵⁾ | 43,260 | (393) | 42,867 |
| Subtotal | 61,596 | (421) | 61,175 |
| <i>Investments in real estate from lending activities:</i> | | | |
| Liabilities held for sale | 3,025 | — | 3,025 |
| Total | 64,621 | (421) | 64,200 |
| Total net investments in real estate and properties held for sale ⁽⁶⁾ | \$ 143,505 | | \$ 138,876 |

(1) Includes \$38.4 million of land, which is not depreciable.

(2) Includes a right of use associated with an acquired ground lease of \$42.4 million accounted for as an operating lease, an above-market lease intangible asset of \$19.0 million and a customer list intangible of \$402,000. Amortization of the above-market lease intangible is booked to real estate expenses on the consolidated statements of operations.

(3) Carrying value includes \$42,000 of an acquired in-place lease intangible asset, \$39,000 of an acquired leasing commission intangible asset, management contract at \$3.1 million, franchise intangible of \$5.3 million and a customer list value of \$427,000.

(4) Includes two properties originally acquired in November 2020 and July 2022 that are being marketed for sale.

(5) Lease liabilities include one ground lease at a hotel property with a remaining term of 93 years. Lease expense for this liability for the year ended December 31, 2022 was \$1.1 million.

(6) Excludes items of working capital, either acquired or assumed.

Competition

See “Item 1A. Risk Factors - Risks Related to Our Investments - We may face competition for suitable investments.”

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Management Agreement

We have a management agreement, amended and restated on July 31, 2020 and further amended on February 16, 2021, or the “Management Agreement,” with our Manager pursuant to which our Manager provides the day-to-day management of our operations. The amended Management Agreement was entered into with our Manager and ACRES Capital Corp. The terms were substantially the same as the previous management agreement, except for the term, board designation rights, termination fee, Manager compensation and definition of incentive compensation, all discussed in detail below.

The Management Agreement requires our Manager to manage our business affairs in conformity with the policies and investment guidelines established by our Board. Our Manager provides its services under the supervision and direction of our Board. Our Manager is responsible for the selection, purchase and sale of our portfolio investments, our financing activities and providing us with investment advisory services. Our Manager and its affiliates also provide us with a Chief Financial Officer and a sufficient number of additional accounting, finance, tax and investor relations professionals. Our Manager receives fees and is reimbursed for its expenses as follows:

- A monthly base management fee equal to 1/12th of the amount of our equity multiplied by 1.50%; provided, however, that for each calendar month through July 31, 2022, such fee was equal to a minimum of \$442,000. At December 31, 2022, the calculated fee was in excess of the minimum fee charged. Under the Management Agreement, “equity” is equal to the net proceeds from issuances of shares of capital stock (or the value of common shares upon the conversion of convertible securities), after deducting any underwriting discounts and commissions and other expenses and costs relating to such issuance, plus or minus our retained earnings (excluding non-cash equity compensation incurred in current or prior periods) less all amounts we have paid for common stock and preferred stock repurchases. The calculation is adjusted for one-time events due to changes in accounting principles generally accepted in the U.S., or GAAP, as well as other non-cash charges, upon approval of our independent directors.
- Incentive compensation, calculated quarterly until the quarter ended December 31, 2022 as follows: (A) 20% of the amount by which our Earnings Available for Distribution (“EAD”) (as defined in the Management Agreement) for a quarter exceeded the product of (i) the weighted average of (x) the book value divided by 10,293,783 and (y) the per share price (including the conversion price, if applicable) paid for our common shares in each offering (or issuance upon the conversion of convertible securities) by us subsequent to September 30, 2017, multiplied by (ii) the greater of (x) 1.75% and (y) 0.4375% plus one-fourth of the Ten Year Treasury Rate for such quarter; multiplied by (B) the weighted average number of common shares outstanding during such quarter; subject to adjustment (a) to exclude events pursuant to changes in GAAP or the application of GAAP as well as non-recurring or unusual transactions or events, after discussion between our Manager and the independent directors and approval by a majority of the independent directors in the case of non-recurring or unusual transactions or events, and (b) to deduct an amount equal to any fees paid directly by a TRS (or any subsidiary thereof) to employees, agents and/or affiliates of the Manager with respect to profits of such TRS (or subsidiary thereof) generated from the services of such employees, agents and/or affiliates, the fee structure of which shall have been approved by a majority of the independent directors and which fees may not exceed 20% of the net income (before such fees) of such TRS (or subsidiary thereof).

With respect to each fiscal quarter commencing with the quarter ending December 31, 2022, an incentive management fee calculated and payable in arrears in an amount, not less than zero, equal to:

- *for the first full calendar quarter ending December 31, 2022*, the product of (a) 20% and (b) the excess of (i) EAD of the Company for such calendar quarter, over (ii) the product of (A) the Company’s book value equity as of the end of such calendar quarter, and (B) 7% per annum;
- *for each of the second, third and fourth full calendar quarters following the calendar quarter ending December 31, 2022*, the excess of (1) the product of (a) 20% and (b) the excess of (i) EAD of the Company for the calendar quarter(s) following September 30, 2022, over (ii) the product of (A) the Company’s book value equity in the calendar quarter(s) following September 30, 2022, and (B) 7% per annum, over (2) the sum of any incentive compensation paid to the Manager with respect to the prior calendar quarter(s) following September 30, 2022 (other than the most recent calendar quarter); and
- *for each calendar quarter thereafter*, the excess of (1) the product of (a) 20% and (b) the excess of (i) EAD of the Company for the previous 12-month period, over (ii) the product of (A) the Company’s book value equity in the previous 12-month period, and (B) 7% per annum, over (2) the sum of any incentive compensation paid to the Manager with respect to the first three calendar quarters of such previous 12-month period; provided, however, that no incentive compensation shall be payable with respect to any calendar quarter unless EAD for the twelve

most recently completed calendar quarters (or such lesser number of completed calendar quarters from September 30, 2022) in the aggregate is greater than zero.

- Per-loan underwriting and review fees in connection with valuations of and potential investments in certain subordinate commercial mortgage pass-through certificates, in amounts approved by a majority of the independent directors.
- Reimbursement of expenses for personnel of our Manager or its affiliates for their services in connection with the making of fixed-rate commercial real estate loans by us, in an amount equal to one percent of the principal amount of each such loan made.
- Reimbursement of out-of-pocket expenses and certain other costs incurred by our Manager and its affiliates that relate directly to us and our operations.
- Reimbursement of our Manager's and its affiliates' expenses for (A) the wages, salaries and benefits of our Chief Financial Officer, and (B) a portion of the wages, salaries and benefits of accounting, finance, tax and investor relations professionals, in proportion to such personnel's percentage of time allocated to our operations.

Incentive compensation is calculated and payable quarterly to our Manager to the extent it is earned. Up to 75% of the incentive compensation is payable in cash and at least 25% is payable in the form of an award of common stock. Our Manager may elect to receive more than 25% of its incentive compensation in common stock. All shares are fully vested upon issuance; however, our Manager may not sell such shares for one year after the incentive compensation becomes due and payable unless the Management Agreement is terminated. Shares payable as incentive compensation are valued as follows:

- if such shares are traded on a securities exchange, at the average of the closing prices of the shares on such exchange over the 30-day period ending three days prior to the issuance of such shares;
- if such shares are actively traded over-the-counter, at the average of the closing bid or sales price as applicable over the 30-day period ending three days prior to the issuance of such shares; and
- if there is no active market for such shares, at the fair market value as reasonably determined in good faith by our Board.

The Management Agreement's current contract term ends on July 31, 2023, and the agreement provides for automatic one-year renewals on such date and on each July 31 thereafter until terminated. Our Board reviews our Manager's performance annually. The Management Agreement may be terminated annually upon the affirmative vote of at least two-thirds of our independent directors, or by the affirmative vote of the holders of at least a majority of the outstanding shares of our common stock, based upon unsatisfactory performance that is materially detrimental to us or a determination by our independent directors that the management fees payable to our Manager are not fair, subject to our Manager's right to prevent such a compensation termination by accepting a mutually acceptable reduction of management fees. Our Board must provide 180 days' prior notice of any such termination. If we terminate the Management Agreement, our Manager is entitled to a termination fee equal to four times the sum of the average annual base management fee and the average annual incentive compensation earned by our Manager during the two 12-month periods immediately preceding the date of termination, calculated as of the end of the most recently completed fiscal quarter before the date of termination.

We may also terminate the Management Agreement for cause with 30 days' prior written notice from our Board. No termination fee is payable in the event of a termination for cause. The Management Agreement defines cause as:

- our Manager's continued material breach of any provision of the Management Agreement following a period of 30 days after written notice thereof;
- our Manager's fraud, misappropriation of funds, or embezzlement against us;
- our Manager's gross negligence in the performance of its duties under the Management Agreement;
- the dissolution, bankruptcy or insolvency, or the filing of a voluntary bankruptcy petition by our Manager; or
- a change of control (as defined in the Management Agreement) of our Manager if a majority of our independent directors determines, at any point during the 18 months following the change of control, that the change of control was detrimental to the ability of our Manager to perform its duties in substantially the same manner conducted before the change of control.

Cause does not include unsatisfactory performance that is materially detrimental to our business.

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Our Manager may terminate the Management Agreement at its option, (A) in the event that we default in the performance or observance of any material term, condition or covenant contained in the Management Agreement and such default continues for a period of 30 days after written notice thereof, or (B) without payment of a termination fee by us, if we become regulated as an investment company under the Investment Company Act, with such termination deemed to occur immediately before such event.

Regulatory Aspects of Our Investment Strategy:

Exclusion from Regulation Under the Investment Company Act

We operate our business so as to be excluded from regulation under the Investment Company Act. Because we conduct our business through wholly-owned subsidiaries, we must ensure not only that we qualify for an exclusion from regulation under the Investment Company Act, but also that each of our subsidiaries also qualifies.

We believe that ACRES Realty Funding, Inc., (“ACRES RF”) the subsidiary that at December 31, 2022 held substantially all of our CRE loan assets, is excluded from Investment Company Act regulation under Section 3(c)(5)(C), a provision designed for companies that do not issue redeemable securities and are primarily engaged in the business of purchasing or otherwise acquiring mortgages and other liens on and interests in real estate. To qualify for this exclusion, at least 55% of ACRES RF’s assets must consist of mortgage loans and other assets that are considered the functional equivalent of mortgage loans for purposes of the Investment Company Act and interests in real properties, which we refer to as Qualifying Interests. Moreover, 80% of ACRES RF’s assets must consist of Qualifying Interests and other real estate-related assets. ACRES RF has not issued, and does not intend to issue, redeemable securities.

We treat our investments in CRE whole loans, A-notes, specific types of B-notes and specific types of mezzanine loans as Qualifying Interests for purposes of determining our eligibility for the exclusion provided by Section 3(c)(5)(C) to the extent such treatment is consistent with guidance provided by the Securities and Exchange Commission, or SEC, or its staff. We believe that SEC staff guidance allows us to treat B-notes as Qualifying Interests where we have unilateral rights to instruct the servicer to foreclose upon a defaulted mortgage loan, replace the servicer in the event the servicer, in its discretion, elects not to foreclose on such a loan, and purchase the A-note in the event of a default on the mortgage loan. We believe, based upon an analysis of existing SEC staff guidance, that we may treat mezzanine loans as Qualifying Interests where (i) the borrower is a special purpose bankruptcy-remote entity whose sole purpose is to hold all of the ownership interests in another special purpose entity that owns commercial real property, (ii) both entities are organized as limited liability companies or limited partnerships, (iii) under their organizational documents and the loan documents, neither entity may engage in any other business, (iv) the ownership interests of either entity have no value apart from the underlying real property which is essentially the only asset held by the property-owning entity, (v) the value of the underlying property in excess of the amount of senior obligations is in excess of the amount of the mezzanine loan, (vi) the borrower pledges its entire interest in the property-owning entity to the lender which obtains a perfected security interest in the collateral and (vii) the relative rights and priorities between the mezzanine lender and the senior lenders with respect to claims on the underlying property are set forth in an intercreditor agreement between the parties which gives the mezzanine lender certain cure and purchase rights in case there is a default on the senior loan. If the SEC staff provides future guidance that these investments are not Qualifying Interests, then we will treat them, for purposes of determining our eligibility for the exclusion provided by Section 3(c)(5)(C), as real estate-related assets or miscellaneous assets, as appropriate. Historically, we have held “whole pool certificates” in mortgage loans, although, at December 31, 2022 and 2021, we had no whole pool certificates in our portfolios. Pursuant to existing SEC staff guidance, we consider whole pool certificates to be Qualifying Interests. A whole pool certificate is a certificate that represents the entire beneficial interest in an underlying pool of mortgage loans. By contrast, a certificate that represents less than the entire beneficial interest in the underlying mortgage loans is not considered to be a Qualifying Interest for purposes of the 55% test, but constitutes a real estate-related asset for purposes of the 80% test.

To the extent ACRES RF holds its CRE loan assets through wholly or majority-owned CRE debt securitization vehicles or special purpose entities, or SPEs, ACRES RF also intends to conduct its operations so that it will not come within the definition of an investment company set forth in Section 3(a)(1)(C) of the Investment Company Act because less than 40% of the value of its total assets (exclusive of government securities and cash items) on an unconsolidated basis will consist of “investment securities,” which we refer to as the 40% test. “Investment securities” exclude U.S. government securities and securities of majority-owned subsidiaries that are not themselves investment companies and are not relying on the exception from the definition of investment company under Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act. Certain of the wholly-owned CRE debt securitization subsidiaries of ACRES RF rely on Section 3(c)(5)(C) for their Investment Company Act exemption, with the result that ACRES RF’s interests in the CRE debt securitization subsidiaries do not constitute “investment securities” for the purpose of the 40% test.

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Our other subsidiaries, RCC Commercial, Inc., or RCC Commercial, RCC Commercial II, Inc., or Commercial II, RCC Commercial III, Inc., or Commercial III, RCC TRS, LLC, or RCC TRS, Resource TRS, LLC, or Resource TRS, and RSO EquityCo, LLC, or RSO Equity, do not qualify for the Section 3(c)(5)(C) exclusion. However, we believe they qualify for exclusion under either Section 3(c)(1) or 3(c)(7). As required by these exclusions, we will not allow any of these entities to make, or propose to make, a public offering of its securities. In addition, with respect to those subsidiaries for which we rely upon the Section 3(c)(1) exclusion, and as required thereby, we limit the number of holders of their securities to not more than 100 persons calculated in accordance with the attribution rules of Section 3(c)(1), and with respect to those subsidiaries for which we rely on the Section 3(c)(7) exclusion, and as required thereby, we limit ownership of their securities to “qualified purchasers.” If we form other subsidiaries, we must ensure that they qualify for an exemption or exclusion from regulation under the Investment Company Act.

Moreover, we must ensure that ACRES Commercial Realty Corp. itself qualifies for an exclusion from regulation under the Investment Company Act. We do so by monitoring the value of our interests in our subsidiaries so that we can ensure that ACRES Commercial Realty Corp. satisfies the 40% test. Our interest in ACRES RF does not constitute an “investment security” for purposes of the 40% test, but our interests in RSO Equity and our investments in the common shares of Resource Capital Trust I and RCC Trust II, both of which are held directly by ACRES Commercial Realty Corp., do. Accordingly, we must monitor the value of our interests in that subsidiary and those investments to ensure that the value of our interests in them does not exceed 40% of the value of our total assets.

We have not received, nor have we sought, a no-action letter from the SEC regarding how our investment strategy fits within the exclusions from regulation under the Investment Company Act. To the extent that the SEC provides more specific or different guidance regarding the treatment of assets as Qualifying Interests or real estate-related assets, we may have to adjust our investment strategy. Any additional or different guidance from the SEC could inhibit our ability to pursue our investment strategy.

Employees and Human Capital

We have no direct employees. Under our Management Agreement, our Manager provides us with all management and support personnel and services necessary for our day-to-day operations. To provide its services, our Manager draws upon the expertise and experience of ACRES. Under our Management Agreement, our Manager and its affiliates also must provide us with our Chief Financial Officer, and a sufficient number of additional accounting, finance, tax and investor relations professionals. We bear the expense of the wages, salaries and benefits of our Chief Financial Officer, and the accounting, finance, tax and investor relations professionals to the extent dedicated to us.

Environmental, Social and Governance (“ESG”) Policies

Together with our Manager, we recognize the critical importance that ESG factors play when making decisions throughout our organization, including in our investment strategy and execution in our workplace. We are committed to being a good corporate citizen and have implemented policies and practices, which cover our day-to-day operations, our investment strategy, hiring practices and training and development.

Internet Address and Availability of Information

Our internet address is www.acresreit.com. We make available, free of charge through a link on our site, all reports filed with or furnished to the SEC as soon as reasonably practicable after such filing or furnishing. Our site also contains our code of business conduct and ethics, corporate governance guidelines and the charters of the audit committee, nominating and governance committee and compensation committee of our Board. A complete list of our filings is available on the SEC’s website at <http://www.sec.gov>.

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ITEM 1A. RISK FACTORS

This section describes material risks affecting our business. In connection with the forward-looking statements that appear in this annual report, you should carefully review the factors discussed below and the cautionary statements referred to in “Forward-Looking Statements.”

Risk Factors Summary

Our risk factors include discussion of risks to our business attributable to the impact of current economic conditions, risks related to our financing, risks related to our operations, risks related to our investments, risks related to our Manager, risks related to our organization and structure, tax risks and general risks, including as follows:

- If current economic and market conditions were to deteriorate, our ability to obtain the capital and financing necessary for growth may be limited, which could limit our profitability, ability to make distributions and the market price of our common stock.
- The outbreak of widespread contagious disease, such as COVID-19, has caused, and may continue to cause, disruptions to the United States and global economy and to our business, which has had, and may continue to have, an adverse impact on our financial condition, our results of operations and our liquidity and capital resources.
- Our portfolio has been financed in material part through the use of leverage that may reduce the return on our investments and cash available for distribution.
- Our repurchase agreements, warehouse facilities and other short-term financings have credit risks that could result in losses.
- We are exposed to loss if lenders under our repurchase agreements, warehouse facilities, senior secured financing facility or other short-term financings liquidate the assets securing those facilities. Moreover, assets acquired by us pursuant to our repurchase agreements, warehouse facilities, senior secured financing facility or other short-term financings may not be suitable for refinancing through long-term arrangements that may require us to liquidate some or all of the related assets.
- We will incur losses on our repurchase transactions if the counterparty to the transactions defaults on its obligation to resell the underlying assets back to us at the end of the transaction term, or if the value of the underlying assets has declined as of the end of the term or if we default in our obligations to purchase the assets.
- We may have to repurchase assets that we have sold in connection with CRE debt securitizations and other securitizations.
- Financing our REIT qualifying assets with repurchase agreements and warehouse facilities could adversely affect our ability to qualify as a REIT.
- Historically, we have financed most of our investments through CRE debt securitizations and have retained the equity. CRE debt securitization equity receives distributions from the CRE debt securitization only if the CRE debt securitization generates enough income to first pay the holders of its debt securities and its expenses.
- If our CRE debt securitization financings fail to meet their performance tests, including over-collateralization requirements, our net income and cash flow from these CRE debt securitizations will be eliminated.
- If we issue debt securities, the terms may restrict our ability to make cash distributions, require us to obtain approval to sell our assets or otherwise restrict our operations in ways that could make it difficult to execute our investment strategy and achieve our investment objectives.
- Depending upon market conditions, we intend to seek financing through CRE debt securitizations, which would expose us to risks relating to the accumulation of assets for use in the CRE debt securitizations.
- We may change our investment strategy without stockholder consent, which may result in riskier investments than those currently targeted.
- Our business is highly dependent on communications and information systems, and systems failures or cybersecurity incidents could significantly disrupt our business, which may, in turn, negatively affect the market price of our common stock and our ability to operate our business.
- Declines in the market values of our investments may reduce periodic reported results, credit availability and our ability to make distributions.

- Increases in interest rates and other factors could reduce the value of our investments, result in reduced earnings or losses and reduce our ability to pay distributions.
- Changes in the method for determining the benchmark rate (LIBOR or a replacement of LIBOR) may adversely affect the value of our loans, investments and borrowings and could affect our results of operations.
- We record some of our portfolio investments, including those classified as assets held for sale, at fair value as estimated by our management and, as a result, there will be uncertainty as to the value of these investments.
- We may face competition for suitable investments.
- Many of our investments may be illiquid, which may result in our realizing less than their recorded value should we need to sell such investments quickly.
- Our investments in real estate and commercial mortgage loans, mezzanine loans and CRE equity investments are subject to the risks inherent in owning the real estate securing or underlying those investments that could result in losses to us.
- Our investments in real estate are subject to particular conditions that may have a negative impact on our results of operations.
- Our investments in real estate are illiquid. We may not be able to dispose of properties when desired or on favorable terms.
- If our allowance for credit losses is not adequate to cover actual future loan and lease losses, our earnings may decline.
- The current expected credit losses, or CECL, model may require us to increase our allowance for credit losses and therefore may have a material adverse effect on our business, financial condition and results of operations.
- Our investment portfolio may have material geographic, sector, property-type and sponsor concentrations.
- We may be exposed to environmental liabilities with respect to properties that we own or take title to in the future.
- We depend on our Manager and ACRES to develop and operate our business and may not find suitable replacements if the Management Agreement terminates.
- Our Manager's fee structure may not create proper incentives, and the incentive compensation we pay our Manager may increase the investment risk of our portfolio.
- Our Manager manages our portfolio pursuant to very broad investment guidelines and our Board does not approve each investment decision, which may result in our making riskier investments.
- Our Manager and ACRES will face conflicts of interest relating to the allocation of investment opportunities and such conflicts may not be resolved in our favor, which could limit our ability to acquire assets and, in turn, limit our ability to make distributions and reduce your overall investment return.
- Our officers and many of the investment professionals that provide services to us through our Manager are also officers or employees of ACRES and may face conflicts regarding the allocation of their time.
- Our charter and bylaws contain provisions that may inhibit potential acquisition bids that you and other stockholders may consider favorable, and the market price of our common stock may be lower as a result.
- Maryland takeover statutes may prevent a change in control of us, and the market price of our common stock may be lower as a result.
- Our rights and the rights of our stockholders to take action against our directors and officers are limited, which could limit your recourse in the event of actions not in your best interests.
- We have not established a minimum distribution payment level and we cannot assure you of our ability to make distributions in the future. In the future, we may use uninvested offering proceeds or borrowed funds to make distributions.
- Loss of our exclusion from regulation under the Investment Company Act would require significant changes in our operations and could reduce the market price of our common stock and our ability to make distributions.
- Legislative, regulatory or administrative changes could adversely affect our stockholders or us.

Risks Related to Impact of Current Economic Conditions

If current economic and market conditions were to deteriorate, our ability to obtain the capital and financing necessary for growth may be limited, which could limit our profitability, ability to make distributions and the market price of our common stock.

We depend upon the availability of adequate debt and equity capital for growth in our operations. Although historically we have been able to raise both debt and equity capital, recent market and economic conditions have made obtaining additional equity capital highly dilutive to existing shareholders and may possibly affect our ability to raise debt capital. If current economic conditions were to deteriorate, our ability to access debt or equity capital on acceptable terms, could be further limited, which could limit our ability to generate growth, our profitability, our ability to make distributions and the market price of our common stock. In addition, as a REIT, we must distribute annually at least 90% of our REIT taxable income, determined without regard to the deduction for dividends paid and excluding net capital gain, to our stockholders and are therefore not able to retain significant amounts of our earnings for new investments, except where the existence of NOL and net capital loss carryforwards enable us to do so. While we may, through our TRSs retain earnings as new capital, we are subject to REIT qualification requirements that limit the value of TRS stock and securities relative to the other assets owned by a REIT.

The outbreak of widespread contagious disease, such as COVID-19, has caused, and may continue to cause, disruptions to the U.S. and global economy and to our business, which has had, and may continue to have, an adverse impact on our financial condition, our results of operations and our liquidity and capital resources.

In December 2019, COVID-19 was identified and the resulting global proliferation of the virus led the World Health Organization to designate COVID-19 as a pandemic and numerous countries, including the U.S., to declare national emergencies. Many countries have responded to the outbreak by instituting quarantines and restrictions on travel, which has resulted in the closure or remote operation of non-essential businesses. While the U.S. and certain countries around the world have eased restrictions and financial markets and unemployment rates have stabilized to some degree, the pandemic continues to cause uncertainty on the U.S. and global economies, generally, and the CRE business in particular.

The COVID-19 pandemic has had, and may continue to have, a material adverse impact on our financial condition, liquidity and results of operations and the market price of our common stock and preferred stock. We expect that these impacts are likely to continue to some extent as the longer-term macro-economic effects of the pandemic continue. Although many or all facets of our business have been or could be impacted by the COVID-19 pandemic, we currently believe the following impacts to be among the most material to us:

- COVID-19 could have a significant long-term impact on the broader economy and the CRE market generally, which would negatively impact the value of the properties collateralizing our loans. Our portfolio includes loans collateralized by hotel, retail, office, multifamily and other property types that are particularly negatively impacted by the pandemic. While we believe the principal amount of our loans is currently generally adequately protected by underlying value, there can be no assurance that as the pandemic continues these values will not be adversely affected, which could impact our ability to realize the entire principal value of some or all of our investments.
- We are actively engaged in discussions with our borrowers, some of whom we expect may face challenges in complying with the terms of their loans. In the past, we have executed extension and forbearance agreements of CRE loans in an effort to reduce the credit risk created as a result of financial difficulties related to the pandemic. We anticipate the future execution of modifications of our loans and potentially instances of default or foreclosure on assets underlying our loans, which may adversely affect the credit profile and realizable value of our assets, our results of operations and our financial condition.
- The shocks to global markets, particularly the real estate credit markets, adversely impacted the market pricing of our CRE securities. Depending on the magnitude and duration of the pandemic's impact, the assets underlying these securities may default on their terms, requiring that we incur credit losses on our portfolio that exceed the allowance for credit losses we have established.

- We have warehouse facilities with numerous lenders and, when utilized, continuously engage in discussions around the value of pledged assets as defined in our agreements with such lenders, potential deleveraging, the application of certain provisions of such agreements to these circumstances and other structural elements under the agreements. When utilized, if we do not have the funds available to make required payments, it would likely result in defaults under the particular facilities affected that, because of cross-default provisions, could result in defaults under other debt instruments as well as potential loss of our assets to the lenders unless we are able to raise the funds from alternative sources, including by selling or financing assets or raising capital, each of which we may be required to do under adverse market conditions or at an inopportune time or on unfavorable terms, or may be unable to do at all. The COVID-19 pandemic has made it very difficult for businesses generally, including us, to access liquidity sources at terms commensurate with those prior to this pandemic, or at all. Pledging additional collateral or otherwise paying down facilities to satisfy our lenders and avoid potential margin calls and loan defaults would reduce our cash available to meet subsequent margin calls and/or future funding requests as well as make other, higher yielding investments, thereby decreasing our liquidity, return on equity, available cash, net income and ability to implement our investment strategy. If we cannot meet lender requirements related to margin calls or other terms of our credit agreements, the lender or counterparty could accelerate our indebtedness, increase the interest rate on advanced funds and terminate our ability to borrow additional funds, which would materially and adversely affect our financial condition and ability to implement our investment strategy.
- The COVID-19 pandemic has in the past reduced, and may reduce, the availability of liquidity sources, but our requirements for liquidity, including future funding commitments and potential margin calls, likely will not be commensurately reduced. If we do not have funds available to meet our obligations, we would have to raise funds from alternative sources, which may be at unfavorable terms or may not be available to us due to the impacts of COVID-19. We expect that the adverse impact of the COVID-19 pandemic may adversely affect our liquidity position and could limit our ability to grow our business and fully execute our business strategy. We seek to preserve and build our liquidity to best position us to weather near-term market uncertainty, satisfy our loan future funding requests and to potentially make new investments, which will cause us to take some or all of the following actions: borrow additional capital, sell assets and /or change our dividend distributions consistent with REIT distribution requirements.
- Interest rates and credit spreads have been significantly impacted since the outbreak of COVID-19. This can result in volatile changes to the fair value of our floating rate loans, fixed-rate loans and CRE securities and also the interest obligations on our floating-rate borrowings, which could result in an increase to our interest expense.

We also have experienced and may continue to experience other negative impacts to our business as a result of the pandemic that could exacerbate other risks, including:

- lack of liquidity in our assets;
- greater risk of loss on our mezzanine loans;
- risk associated with loans that are in transition;
- the concentration of our loans and investments in certain geographies, property types or relationships in areas that may be disproportionately affected by the pandemic;
- risks associated with our securitizations that we use to finance our loans;
- downgrades in credit ratings assigned to our investments;
- the difficulty of estimating provisions for credit losses;
- borrower and counterparty risks;
- operational impacts on ourselves and our third-party advisors, service providers, vendors and counterparties; and
- limitations on our ability to ensure business continuity in the event our, or our third-party advisors' and service providers', continuity of operations plan is not effective or improperly implemented or deployed during the disruption caused by the pandemic.

The rapid development of the pandemic and the resulting economic effects have created uncertainty surrounding the ultimate impact of the COVID-19 pandemic on the global economy generally, and the CRE business in particular. As a result, we cannot project the ultimate adverse impact of the COVID-19 pandemic on the global economy or our business, including our financial condition and performance. The extent of the impact of COVID-19 will depend on future developments, including new information that may emerge about the severity of the pandemic, the timing, scope and effectiveness of additional governmental responses to the pandemic, including the potential re-imposition of quarantines, states of emergencies, restrictions on travel and stay-at-home orders and the ensuing reactions by consumers, companies, governmental entities and global markets.

A prolonged economic slowdown or lengthy or severe recession causing declining real estate values could impair our investments and harm our operations.

We believe the risks associated with our business will be more severe during periods of economic slowdown or recession if these periods are accompanied by declining real estate values. Declining real estate values will likely reduce the level of new mortgage loan originations and other real estate-related investment activities since borrowers often use the appreciation in their existing real estate holdings or the expected appreciation in value-add projects to support the purchase of or incremental investment in additional properties. Further, declining real estate values significantly increase the likelihood that we will incur losses on our loans in the event of default because the value of our collateral may be insufficient to cover our investment in the loan. Any sustained period of increased payment delinquencies, foreclosures or losses could adversely affect our ability to invest in, sell or securitize loans, which could materially and adversely affect our results of operations, financial condition, liquidity and our ability to pay distributions.

Risks Related to Our Financing

Our portfolio has been financed in material part through the use of leverage that may reduce the return on our investments and cash available for distribution.

Our portfolio has been financed in material part through the use of leverage and, as credit market conditions permit, we will seek such financing in the future. Using leverage subjects us to risks associated with debt financing, including the risks that:

- the cash provided by our operating activities will not be sufficient to meet required payments of principal and interest,
- the cost of financing may increase relative to the income from the assets financed, reducing the income we have available to pay distributions, and
- our investments may have maturities that differ from the maturities of the related financing and, consequently, the risk that the terms of any refinancing we obtain will not be as favorable as the terms of existing financing.

If we are unable to secure refinancing of our currently outstanding financing, when due, on acceptable terms, we may be forced to dispose of some of our assets at disadvantageous terms or to obtain financing at unfavorable terms, either of which may result in losses to us or reduce the cash flow available to meet our debt service obligations or to pay distributions.

Financing that we may obtain and financing we have obtained through CRE debt securitizations typically require, or will require, us to maintain a specified ratio of the amount of the financing to the value of the assets financed. A decrease in the value of these assets may lead to margin calls or calls for the pledge of additional assets, which we will have to satisfy. We may not have sufficient funds or unpledged assets to satisfy any such calls, which could result in our loss of distributions from and interests in affected CRE debt securitizations, which would reduce our assets, income and ability to make distributions.

Our repurchase agreements, warehouse facilities and other short-term financings have credit risks that could result in losses.

If we accumulate assets for a CRE debt securitization on a short-term credit facility and do not complete the CRE debt securitization financing, or if a default occurs under the facility, the short-term lender may sell the assets and we would be responsible for the amount by which the original purchase price of the assets exceeds their sale price, up to the amount of our investment or guaranty.

We may lose money on our repurchase transactions if the counterparty to the transaction defaults on its obligation to resell the underlying security back to us at the end of the transaction term, or if the value of the underlying security has declined as of the end of the term or if we default on our obligations under the repurchase agreements.

We are exposed to loss if lenders under our repurchase agreements, warehouse facilities, senior secured financing facility or other short-term financings liquidate the assets securing those facilities. Moreover, assets acquired by us pursuant to our repurchase agreements, warehouse facilities, senior secured financing facility or other short-term financings may not be suitable for refinancing through long-term arrangements and may require us to liquidate some or all of the related assets.

We have entered into repurchase agreements, warehouse facilities and senior secured financing facility and expect in the future to seek additional debt to finance our growth. Lenders typically have the right to liquidate assets securing or acquired under these facilities upon the occurrence of specified events, such as an event of default. We are exposed to loss if the proceeds received by the lender upon liquidation are insufficient to satisfy our obligation to the lender. We are also subject to the risk that the assets subject to such repurchase agreements, warehouse facilities or other debt might not be suitable for long-term refinancing or securitization transactions. If we are unable to refinance these assets on a long-term basis, or if long-term financing is more expensive than we anticipated at the time of our acquisition of the assets to be financed, we might be required to liquidate assets.

We will incur losses on our repurchase transactions if the counterparty to the transactions defaults on its obligation to resell the underlying assets back to us at the end of the transaction term, or if the value of the underlying assets has declined as of the end of the term or if we default in our obligations to purchase the assets.

When engaged in repurchase transactions, we generally sell assets to the transaction counterparty and receive cash from the counterparty. The counterparty must resell the assets back to us at the end of the term of the transaction. Because the cash we receive from the counterparty when we initially sell the assets is less than the market value of those assets, if the counterparty defaults on its obligation to resell the assets back to us we will incur a loss on the transaction. We will also incur a loss if the value of the underlying assets has declined as of the end of the transaction term, as we will have to repurchase the assets for their initial value but would receive assets worth less than that amount. If we default upon our obligation to repurchase the assets, the counterparty may liquidate them at a loss, which we are obligated to repay. Any losses we incur on our repurchase transactions would reduce our equity and our earnings, and thus our cash available for distribution to our stockholders.

We may have to repurchase assets that we have sold in connection with CRE debt securitizations and other securitizations.

If any of the assets that we originate or acquire and sell or securitize do not comply with representations and warranties that we make about them, we may have to repurchase these assets from the CRE debt securitization or securitization vehicle, or replace them. In addition, we may have to indemnify purchasers for losses or expenses incurred as a result of a breach of a representation or warranty. Any significant repurchases or indemnification payments could materially reduce our liquidity, earnings and ability to make distributions.

Financing our REIT qualifying assets with repurchase agreements and warehouse facilities could adversely affect our ability to qualify as a REIT.

We have entered into and intend to enter into, sale and repurchase agreements under which we nominally sell certain REIT qualifying assets to a counterparty and simultaneously enter into an agreement to repurchase the sold assets. We believe that we will be treated for U.S. federal income tax purposes as the owner of the assets that are the subject of any such agreement, notwithstanding that we may transfer record ownership of the assets to the counterparty during the term of the agreement. It is possible, however, that the Internal Revenue Service, or IRS, could assert that we did not own the assets during the term of the sale and repurchase agreement, in which case our ability to qualify as a REIT would be adversely affected. If any of our REIT qualifying assets are subject to a repurchase agreement and are sold by the counterparty in connection with a margin call, the loss of those assets could impair our ability to qualify as a REIT. Accordingly, unlike other REITs, we may be subject to additional risk regarding our ability to qualify and maintain our qualification as a REIT.

Historically, we have financed most of our investments through CRE debt securitizations and have retained the equity. CRE debt securitization equity receives distributions from the CRE debt securitization only if the CRE debt securitization generates enough income to first pay the holders of its debt securities and its expenses.

Historically, we have financed most of our investments through CRE debt securitizations in which we retained the equity interest. Depending on market conditions and credit availability, we intend to use CRE debt securitizations to finance our investments in the future. The equity interests of a CRE debt securitization are subordinate in right of payment to all other securities issued by the CRE debt securitization. The equity is usually entitled to all of the income generated by the CRE debt securitization after the CRE debt securitization pays all of the interest due on the debt securities and its other expenses. However, there will be little or no income available to the CLO equity if there are excessive defaults by the issuers of the underlying collateral, which would significantly reduce the value of that interest. Reductions in the value of the equity interests we have in a CRE debt securitization, if we determine that they are other-than-temporary, will reduce our earnings. In addition, the liquidity of the equity securities of CLOs is constrained and, because they represent a leveraged investment in the CRE debt securitization's assets, the value of the equity securities will generally have greater fluctuations than the value of the underlying collateral.

If our CRE debt securitization financings fail to meet their performance tests, including over-collateralization requirements, our net income and cash flow from these CRE debt securitizations will be eliminated.

Our CRE debt securitizations generally provide that the principal amount of their assets must exceed the principal balance of the related securities issued by them by a certain amount, commonly referred to as "over-collateralization." If delinquencies and/or losses exceed specified levels, based on the analysis by the rating agencies (or any financial guaranty insurer) of the characteristics of the assets collateralizing the securities issued by the CRE debt securitization issuer, the required level of over-collateralization may be increased or may be prevented from decreasing as would otherwise be permitted if losses or delinquencies did not exceed those levels. A failure by a CRE debt securitization to satisfy an over-collateralization test typically results in accelerated distributions to the holders of the senior debt securities issued by the CRE debt securitization entity, resulting in a reduction or elimination of distributions to more junior securities until the over-collateralization requirements have been met or the senior debt securities have been paid in full.

Our equity holdings and, when we acquire debt interests in CRE debt securitizations, our debt interests, if any, generally are subordinate in right of payment to the other classes of debt securities issued by the CRE debt securitization entity. Accordingly, if over-collateralization tests are not met, distributions on the subordinated debt and equity we hold in these CLOs will cease, resulting in a substantial reduction in our cash flow. Other tests (based on delinquency levels, interest coverage or other criteria) may restrict our ability to receive cash distributions from assets collateralizing the securities issued by the CRE debt securitization entity. Although at December 31, 2022, all of our CRE debt securitizations met their performance tests, we cannot assure you that our CRE debt securitizations will satisfy the performance tests in the future. For information concerning compliance by our CRE debt securitizations with their over-collateralization tests, see "Item 7. Management's Discussion and Analysis of Financial Condition and Results of Operation - Liquidity and Capital Resources."

If any of our CRE debt securitizations fail to meet collateralization or other tests relevant to the most senior debt issued and outstanding by the CRE debt securitization issuer, an event of default may occur under that CRE debt securitization. If that occurs, our Manager's ability to manage the CRE debt securitization likely would be terminated and our ability to attempt to cure any defaults in the CRE debt securitization would be limited, which would increase the likelihood of a reduction or elimination of cash flow and returns to us in those CLOs for an indefinite time.

If we issue debt securities, the terms may restrict our ability to make cash distributions, require us to obtain approval to sell our assets or otherwise restrict our operations in ways that could make it difficult to execute our investment strategy and achieve our investment objectives.

Any debt securities we may issue in the future will likely be governed by an indenture or other instrument containing covenants restricting our operating flexibility. Holders of senior securities may be granted the right to hold a perfected security interest in certain of our assets, to accelerate payments due under the indenture if we breach financial or other covenants, to restrict distributions, and to require us to obtain their approval to sell assets. These covenants could limit our ability to operate our business or manage our assets effectively. Additionally, any convertible or exchangeable securities that we issue may have rights, preferences and privileges more favorable than those of our common stock. We, and indirectly our stockholders, will bear the cost of issuing and servicing such securities.

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Depending upon market conditions, we intend to seek financing through CRE debt securitizations, which would expose us to risks relating to the accumulation of assets for use in the CRE debt securitizations.

Historically, we have financed a significant portion of our assets through the use of CRE debt securitizations, and have accumulated assets for these financings through short-term credit facilities, typically repurchase agreements or warehouse facilities. Depending upon market conditions, and, consequently, the extent to which such financing is available to us, we expect to seek similar financing arrangements in the future. In addition to risks discussed above, these arrangements could expose us to other credit risks, including the following:

- An event of default under one short-term facility may constitute a default under other credit facilities we may have, potentially resulting in asset sales and losses to us, as well as increasing our financing costs or reducing the amount of investable funds available to us.
- We may be unable to acquire a sufficient amount of eligible assets to maximize the efficiency of a CRE debt securitization issuance, which would require us to seek other forms of term financing or liquidate the assets. We may not be able to obtain term financing on acceptable terms, or at all, and liquidation of the assets may be at prices less than those we paid, resulting in losses to us.
- Using short-term financing to accumulate assets for a CRE debt securitization issuance may require us to obtain new financing as the short-term financing matures. Residual financing may not be available on acceptable terms, or at all. Moreover, an increase in short-term interest rates at the time that we seek to enter into new borrowings may reduce the spread between the income on our assets and the cost of our borrowings. This would reduce returns on our assets, which would reduce earnings and, in turn, cash available for distribution to our stockholders.

We may be subject to losses arising from current and future guarantees of debt and contingent obligations of our subsidiaries or joint venture partners.

We may guarantee the performance of the obligations of our subsidiaries, including credit and repurchase facilities, derivative agreements, unsecured indebtedness and indebtedness incurred by our joint venture partners. Non-performance on such obligations may cause losses to us in excess of the capital invested in our subsidiary or the relevant joint venture and there is no assurance that we will have sufficient capital to cover any such losses.

The debt facilities that we use to finance our investments may require us to provide additional collateral.

If the market value of the loans or investments pledged or sold by us to a funding source decline in value, we may be required by the lender to provide additional collateral or pay down a portion of the funds advanced. We may not have the funds available to pay down such future debt, which could result in defaults. Posting additional collateral to support these facilities would reduce our liquidity and limit our ability to leverage our assets. In the event we do not have sufficient liquidity to meet such requirements, lenders can accelerate the indebtedness, increase interest rates and terminate our ability to borrow. Further, lenders may require us to maintain a certain amount of uninvested cash or set aside unlevered assets sufficient to maintain a specified liquidity position. As a result, we may not be able to leverage our assets as fully as we would choose, which could reduce our return on assets. In the event that we are unable to meet these collateral obligations, our financial condition could deteriorate rapidly.

Risks Related to Our Operations

We may change our investment strategy without stockholder consent, which may result in riskier investments than those currently targeted.

Subject to maintaining our qualification as a REIT and our exclusion from regulation under the Investment Company Act, we may change our investment strategy, including the percentage of assets that may be invested in each asset class, or in the case of securities, in a single issuer, at any time without the consent of our stockholders, which could result in our making investments that are different from, and possibly riskier than, the investments described in this report. A change in our investment strategy may increase our exposure to interest rate, credit market and real estate market fluctuations, all of which may reduce the market price of our common stock and reduce our ability to make distributions to stockholders. Furthermore, a change in our asset allocation could result in our making investments in asset categories different from those described in this report.

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We believe earnings available for distribution ("EAD"), a non-GAAP financial measure, is an appropriate measure to evaluate our performance and ability to pay dividends; however, in certain instances EAD may not be reflective of actual economic results.

We utilize EAD as a measure to evaluate our performance and ability to pay dividends and believe that it is useful to analysts, investors and other parties in the evaluations of REITs. We believe EAD is a useful measure of our performance and ability to pay dividends because it excludes the effects of certain transactions and GAAP adjustments that we believe are not necessarily indicative of our current CRE loan origination portfolio and other CRE-related investments and operations. EAD excludes (i) non-cash equity compensation expense, (ii) unrealized gains or losses, (iii) non-cash provision for loan losses, (iv) non-cash impairments on securities, (v) non-cash amortization of discounts or premiums associated with borrowings, (vi) net income or loss from limited partnership interests owned at the initial measurement date, (vii) net income or loss from non-core assets, (viii) real estate depreciation and amortization, (ix) foreign currency gains or losses and (x) income or losses from discontinued operations. EAD may also be adjusted periodically to exclude certain one-time events pursuant to changes in GAAP and certain non-cash items. Although pursuant to the Management Agreement we calculate incentive compensation using EAD excluding incentive compensation payable to our Manager, we include incentive compensation payable to our Manager in EAD for reporting purposes. EAD does not represent net income or cash generated from operating activities and should not be considered as an alternative to GAAP net income or as a measure of liquidity under GAAP. Our methodology for calculating EAD may differ from methodologies used by other companies to calculate similar supplemental performance measures, and accordingly, our reported EAD may not be comparable to similar performance measures used by other companies.

If we fail to maintain an effective system of internal controls, we may not be able to accurately report our financial results or prevent fraud.

If we fail to maintain an effective system of internal control, fail to correct any flaws in the design or operating effectiveness of internal controls over financial reporting and disclosure, or fail to prevent fraud, our stockholders could lose confidence in our financial and other reporting, which could harm our business and the trading price of our common stock.

Our due diligence may not reveal all of an investment's weaknesses.

Before investing in any asset, we will assess the strength and skills of the asset's management and operations, the value of the asset and, for debt investments, the value of any collateral securing the debt, the ability of the asset or underlying collateral to service the debt and other factors that we believe are material to the performance of the investment. In making the assessment and otherwise conducting customary due diligence, we will rely on the resources available to us and, in some cases, an investigation by third parties. Our due diligence processes, however, may not uncover all facts that may be relevant to an investment decision.

Our business is highly dependent on communications and information systems, and systems failures or cybersecurity incidents could significantly disrupt our business, which may, in turn, negatively affect the market price of our common stock and our ability to operate our business.

We depend on the information systems of our Manager, ACRES and third parties. Any failure or interruption of our systems or cyber-attacks or security breaches of our networks or systems could cause delays or other problems in our lending activities. A disruption or breach could also lead to unauthorized access to and release, misuse, loss or destruction of our confidential information or personal or confidential information of our Manager, ACRES or third parties, which could lead to regulatory fines, litigation, costs of remediating the breach and reputational harm. In addition, we also face the risk of operational failure, termination or capacity constraints of any of the third parties with which we do business or that facilitate our business activities, including clearing agents or other financial intermediaries we use to facilitate our securities transactions, if their respective systems experience failure, interruption, cyber-attacks, or security breaches. If unauthorized parties gain access to our technology systems, they may be able to steal, publish, delete or modify private and sensitive information. Although we have implemented various measures to manage risks relating to these types of events, such systems could prove to be inadequate and, if compromised, could become inoperable for extended periods of time, cease to function properly or fail to adequately secure private information, including material nonpublic information. We may face increased costs as we continue to evolve our cyber defenses in order to contend with changing risks. These costs and losses associated with these risks are difficult to predict and quantify, but could have a significant adverse effect on our operating results.

The costs related to cyber or other security threats or disruptions may not be fully insured or indemnified by other means. As our and our borrowers' reliance on technology has increased, so have the risks posed to our information systems, both internal and those provided by third party service providers, and the information systems of our borrowers. We have implemented processes, procedures and internal controls to help mitigate cybersecurity risks and cyber intrusions, but these measures, as well as our increased awareness of the nature and extent of a risk of a cyber-incident, do not guarantee that a cyber-incident will not occur and/or that our operations or confidential information will not be negatively impacted by such an incident.

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Computer malware, viruses, computer hacking and phishing attacks have become more prevalent in our industry and may occur on our systems. We rely heavily on our financial, accounting and other data processing systems. Although we have not detected a material cybersecurity breach to date, other financial services institutions have reported material breaches of their systems, some of which have been significant. Even with all reasonable security efforts, not every breach can be prevented or even detected. It is possible that we have experienced an undetected breach. There is no assurance that we, or the third parties that facilitate our business activities, have not or will not experience a breach. Cyber-attacks on our network or other systems could have a material adverse effect on our business and results of operations, due to, among other things, the loss of investor or proprietary data, interruptions or delays in the operation of our business and damage to our reputation. There can be no assurance that measures we take to ensure the integrity of our systems will provide protection, especially because cyberattack techniques used change frequently or are not recognized until successful. It is difficult to determine what, if any, negative impact may directly result from any specific interruption or cyber-attacks or security breaches of our networks or systems (or the networks or systems of third parties that facilitate our business activities) or any failure to maintain performance, reliability and security of our technical infrastructure, but such computer malware, viruses and computer hacking and phishing attacks may negatively affect our operations.

Risks Related to Our Investments

Declines in the market values of our investments may reduce periodic reported results, credit availability and our ability to make distributions.

Historically, we have classified a substantial portion of our assets for accounting purposes as “available-for-sale.” As a result, reductions in the market values of those assets were directly charged to accumulated other comprehensive loss and reduce our stockholders’ equity. A decline in these values would reduce the book value of our assets. Moreover, if there is an indication of credit quality issues for a specific investment, under the current expected credit losses, or CECL, accounting guidance, we must record a provision to our earnings in order to estimate expected losses.

A decline in the market value of our assets may also adversely affect us in instances where we have borrowed money based on the market value of those assets. If the market value of those assets declines, the lender may require us to post additional collateral to support the loan. If we are unable to post the additional collateral, we would have to repay some portion or all of the loan, which may require us to sell assets, which could potentially be under adverse market conditions. As a result, our earnings would be reduced or we could sustain losses, and cash available to make distributions could be reduced or eliminated.

Increases in interest rates and other factors could reduce the value of our investments, result in reduced earnings or losses and reduce our ability to pay distributions.

A significant risk associated with our investment in CRE-related loans, and, historically, our CMBS and other debt investments is the risk that either or both of long-term and short-term interest rates increase significantly. If long-term rates increase, the market value of our assets would decline. Even if assets underlying investments we may own in the future are guaranteed by one or more persons, including government or government-sponsored agencies, those guarantees do not protect against declines in market value of the related assets caused by interest rate changes. At the same time, with respect to assets that are not match-funded or that have been acquired with variable rate or short-term financing, an increase in short-term interest rates would increase our interest expense, reducing our net interest spread or possibly result in negative cash flow from those assets. This could result in reduced profitability and distributions or losses.

Changes in the method for determining the benchmark rate (LIBOR or a replacement of LIBOR) may adversely affect the value of our loans, investments and borrowings and could affect our results of operations.

Historically, we have utilized LIBOR as a benchmark interest rate for the pricing of our CRE loans and have been exposed to LIBOR through our issuance of notes on our securitizations and the use of term facilities and repurchase agreements. In July 2017, the U.K. FCA announced that it would phase out LIBOR as a benchmark by the end of 2021. In March 2021, the FCA announced that it would cease publication of the one-week and two-month USD LIBOR immediately after December 31, 2021 and cease publication of the remaining tenors immediately after June 30, 2023. Additionally, the U.S. Federal Reserve encouraged companies to cease using LIBOR as a benchmark rate by December 31, 2021. The U.S. Federal Reserve, in conjunction with the Alternative Reference Rates Committee, a steering committee comprising large U.S. financial institutions, has identified SOFR, a new index calculated by short-term repurchase agreements backed by U.S. Treasury securities, as its preferred alternative rate for LIBOR.

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In connection with such recommendations and developments, all variable rate loans originated by us beginning January 1, 2022 have been benchmarked to SOFR. All of our floating-rate loans contain terms that allow for the transition to alternative rates. In September 2021 and January 2022, the term warehouse financing facilities with JPMorgan Chase and Morgan Stanley, respectively, were amended to allow for the transition to alternative rates, including rates tied to SOFR, subject to benchmark transition events. When LIBOR ceases to exist, we may need to amend our remaining loan and borrowing agreements that utilize LIBOR as a factor in determining the interest rate or hedge against fluctuations in LIBOR based on a new standard that is established, if any. Any resulting differences in interest rate standards among our assets and our borrowings may result in interest rate mismatches between our assets and the borrowings used to fund such assets. The transition from LIBOR to SOFR or to another alternative rate may result in financial market disruptions and significant increases in benchmark rates, resulting in increased financing costs to us, any of which could have an adverse effect on our business, results of operations, financial condition, and the market price of our common stock.

Investing in mezzanine debt, preferred equity, mezzanine or other subordinated tranches of CMBS involves greater risks of loss than senior secured debt investments.

Subject to maintaining our qualification as a REIT and exclusion from regulation under the Investment Company Act, we may invest in mezzanine debt, preferred equity and mezzanine or other subordinated tranches of CMBS. We currently have investments in mezzanine debt. These types of investments carry a higher degree of risk of loss than senior secured debt investments such as our whole loan investments because, in the event of default and foreclosure, holders of senior liens will be paid in full before mezzanine investors. Depending on the value of the underlying collateral at the time of foreclosure, there may not be sufficient assets to pay all or any part of amounts owed to mezzanine investors. Moreover, mezzanine and other subordinate debt investments may have higher LTV than conventional senior lien financing, resulting in less equity in the collateral and increasing the risk of loss of principal. If a borrower defaults or declares bankruptcy, we may be subject to agreements restricting or eliminating our rights as a creditor, including rights to call a default, cure a default, foreclose on collateral, and accelerate maturity or control decisions made in bankruptcy proceedings. In addition, the prices of lower credit quality securities are generally less sensitive to interest rate changes than more highly rated investments, but more sensitive to economic downturns or individual issuer developments because the ability of obligors of investments underlying the securities to make principal and interest payments may be impaired. In such event, existing credit support relating to the securities' structure may not be sufficient to protect us against loss of our principal. For additional risks regarding real estate-related loans, see "Risks Related to Investments- Our commercial mortgage loans and mezzanine loans are subject to the risks inherent in owning the real estate securing or underlying those investments that could result in losses to us."

Our investments in preferred equity involve a greater risk of loss than traditional first mortgage debt investments we make.

We may make preferred equity investments in entities that own or acquire CRE properties. Preferred equity investments involve a higher degree of risk than first mortgage loans due to a variety of factors, including the risk that, similar to mezzanine loans, such investments are subordinate to first mortgage loans and are not collateralized by property underlying the investment. Unlike mezzanine loans, preferred equity investments generally do not have a pledge of the ownership interests of the entity that owns the interest in the entity owning the property. Although as a holder of preferred equity we may enhance our position with covenants that limit the activities of the entity in which we hold an interest and protect our equity by obtaining an exclusive right to control the underlying property after an event of default, should such a default occur on our investment, we would only be able to proceed against the entity in which we hold an interest, and not the property owned by such entity and underlying our investment. As a result, we may not recover some or all of our investment.

We record some of our portfolio investments, including those classified as assets held for sale, at fair value as estimated by our management and, as a result, there will be uncertainty as to the value of these investments.

We currently hold, and expect that we will hold in the future, portfolio investments that are not publicly traded. The fair value of securities and other investments that are not publicly traded may not be readily determinable. We value these investments quarterly at fair value as determined under policies approved by our Board. Because such valuations are inherently uncertain, may fluctuate over short periods of time and may be based on estimates, our determinations of fair value may differ materially from the values that we would have obtained if a ready market for them existed. The value of our common stock will likely decrease if our determinations regarding the fair value of these investments are materially higher than the values that we ultimately realize upon their disposal.

We may face competition for suitable investments.

There are numerous REITs and other financial investors seeking to invest in the types of assets we target. This competition may cause us to forgo particular investments or to accept economic terms or structural features that we would not otherwise have accepted, and it may cause us to seek investments outside of our currently targeted areas. Competition for investment assets may slow our growth or limit our profitability and ability to make distributions to our stockholders.

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We may not have control over certain of our CRE loans and CRE investments.

Our ability to manage our portfolio of loans and investments may be limited by the form in which they are made. In certain situations, we may:

- acquire investments subject to rights of senior classes and servicers under inter-creditor or servicing agreements;
- acquire only a minority and/or non-controlling participation in an underlying investment;
- co-invest with third parties through partnerships, joint ventures or other entities, thereby acquiring non-controlling interests; or
- rely on independent third-party management or strategic partners with respect to the management of an asset.

Therefore, we may not be able to exercise control over the loan or investment. Such financial assets may involve risks not present in investments where senior creditors, servicers or third-party controlling investors are not involved. Our rights to control the process following a borrower default may be subject to the rights of senior creditors or servicers whose interests may not be aligned with ours. A third party partner or co-venturer may have financial difficulties resulting in a negative impact on such asset, may have economic or business interest or goals which are inconsistent with ours, or may be in a position to take action contrary to our investment objectives. In addition, in certain circumstances we may be liable for the actions of our third-party partners or co-venturers.

Many of our investments may be illiquid, which may result in our realizing less than their recorded value should we need to sell such investments quickly.

If we determine to sell one or more of our investments, we may encounter difficulties in finding buyers in a timely manner as real estate debt and other of our investments generally cannot be disposed of quickly, especially when market conditions are poor. Moreover, some of these assets may be subject to legal and other restrictions on resale. If we are required to liquidate all or a portion of our portfolio quickly, we may realize significantly less than the value at which we have previously recorded our investments. In addition, we may face other restrictions on our ability to liquidate an investment in a business entity to the extent that we, our Manager or ACRES has or could be attributed with material non-public information regarding such business entity. These factors may limit our ability to vary our portfolio promptly in response to changes in economic or other conditions and may also limit our ability to use portfolio sales as a source of liquidity, which could limit our ability to make distributions to our stockholders or repay debt.

Our commercial mortgage loans and mezzanine loans are subject to the risks inherent in owning the real estate securing or underlying those investments that could result in losses to us.

Commercial mortgage loans are secured by, and mezzanine loans depend on, the performance of the underlying property and are subject to risks of delinquency and foreclosure, and risks of loss, that are greater than similar risks associated with loans made on the security of single-family residential properties. The ability of a borrower to repay a loan or make distributions secured by or dependent upon an income-producing property typically depends primarily upon the successful operation of the property rather than upon the existence of independent income or assets of the borrower. If the net operating income of the property is reduced, the borrower's ability to repay the loan or ability to make distributions may be impaired. Net operating income of an income producing property can be affected by, among other things:

- tenant mix, success of tenant businesses, tenant bankruptcies and property management decisions;
- property location and condition;
- competition from comparable types of properties;
- shifts in consumer habits or adoption of telework policies;
- changes in laws that increase operating expenses or limit rents that may be charged;
- any need to address environmental contamination at the property;
- the occurrence of any uninsured casualty at the property;
- changes in national, regional or local economic conditions and/or the conditions of specific industry segments in which the lessees may operate;

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- declines in regional or local real estate values;
- declines in regional or local rental or occupancy rates;
- increases in interest rates, real estate tax rates and other operating expenses;
- the availability of debt or equity financing;
- increases in costs of construction material;
- changes in governmental rules, regulations and fiscal policies, including environmental legislation and zoning laws; and
- acts of God, terrorism, pandemic, social unrest and civil disturbances.

We risk loss of principal on defaulted CRE loans we hold to the extent of any deficiency between the value we can realize from the sale of the collateral securing the loan upon foreclosure and the loan's principal and accrued interest. Moreover, foreclosure of a mortgage loan can be an expensive and lengthy process that could reduce the net amount we can realize on the foreclosed mortgage loan. In a bankruptcy of a mortgage loan borrower, the mortgage loan will be deemed to be secured only to the extent of the value of the underlying collateral at the time of bankruptcy as determined by the bankruptcy court, and the lien securing the mortgage loan will be subject to the avoidance powers of the bankruptcy trustee or debtor-in-possession to the extent the lien is unenforceable under state law.

We may be obligated to fund a portion of the loan at one or more future dates. We may not have the funds available at such future date(s) to meet our funding obligation under the loan. In that event, we would likely be in breach of the loan documents unless we are able to raise the capital, which we may not be able to achieve on favorable terms or at all. Additionally, if we are in breach of the loan documents, the borrower may file a claim against us for failure to perform under the loan documents.

For a discussion of additional risks associated with mezzanine loans, see "Risks Related to Our Investments - Investing in mezzanine debt, preferred equity and mezzanine or other subordinated debt investments involves greater risks of loss than senior secured debt investments."

If our allowance for credit losses is not adequate to cover actual future loan losses, our earnings may decline.

We maintain an allowance for credit losses to provide for loan defaults and non-performance by borrowers of their obligations. Our allowance for credit losses may not be adequate to cover actual future loan losses and future provisions for credit losses could materially reduce our income. We base our allowance for credit losses on historical loss experience, current portfolio and market conditions and reasonable and supportable forecasts for the duration of each respective loan. However, losses have in the past, and may in the future, exceed our current estimates, and the difference could be substantial. The amount of future losses is susceptible to changes in economic, operating and other conditions that may be beyond our control and difficult to estimate, including changes in interest rates, changes in borrowers' creditworthiness and the value of collateral securing loans. Additionally, if we seek to expand our loan portfolios, we may need to make additional provisions for credit losses to ensure that the allowance remains at levels deemed appropriate by our management for the size and quality of our portfolios. While we believe that our allowance for credit losses at December 31, 2022 is adequate to cover our anticipated losses, we cannot assure you that it will not increase in the future. Any increase in our allowance for credit losses will reduce our income and, if sufficiently large, could cause us to incur significant losses.

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The CECL model may require us to increase our allowance for credit losses and therefore may have a material adverse effect on our business, financial condition and results of operations.

The CECL allowance required is a valuation account that is deducted from the related loans' and debt securities' amortized cost basis on our consolidated balance sheets, which reduces our total stockholders' equity. Additional changes to the CECL allowance are recognized through net income on our consolidated statements of operations. While the guidance does not require any particular method for determining the CECL allowance, it does specify the allowance should be based on relevant information about past events, including historical loss experience, current portfolio and market conditions, and reasonable and supportable forecasts for the duration of each respective loan. Because our methodology for determining CECL allowances may differ from the methodologies employed by other companies, our CECL allowances may not be comparable with the CECL allowances reported by other companies. In addition, other than pursuant to a few narrow exceptions, the guidance requires that all financial instruments subject to the CECL model have some amount of reserve to reflect the GAAP principal underlying the CECL model that all loans, debt securities, and similar assets have some inherent risk of loss, regardless of credit quality, subordinate capital, or other mitigating factors. Accordingly, the adoption of the CECL model materially affected our determination of the allowance for credit losses and required us to increase our allowance upon adoption and recognize provisions for credit losses earlier in the lending cycle. Moreover, the CECL model has created more volatility in the level of our allowance for credit losses. If we are required to materially increase our level of allowance for credit losses for any reason, such increase could adversely affect our business, financial condition and results of operations.

Our investment portfolio may have material geographic, sector, property-type and sponsor concentrations.

We may have material geographic concentrations related to our direct or indirect investments in real estate loans and properties. We also may have material concentrations in the property types and industry sectors that are in our loan portfolio. Where we have any kind of concentration risk in our investments, we may be affected by sector-specific economic or other problems that are not reflected in the national economy generally or in more diverse portfolios. Where we have a significant concentration of investments with a small number of sponsors, we may be materially affected by an individual sponsors' performance. An adverse development in that area of concentration could reduce the value of our investment and our return on that investment and, if the concentration affects a material amount of our investments, impair our ability to execute our investment strategies successfully, reduce our earnings and reduce our ability to make distributions.

The B-notes in which we may invest may be subject to additional risks relating to the privately negotiated structure and terms of the transaction, which may result in losses to us.

We may invest in B-notes. A B-note is a loan typically secured by a first mortgage on a single large commercial property or group of related properties and subordinated to a senior note secured by the same first mortgage on the same collateral. As a result, if a borrower defaults, there may not be sufficient funds remaining for B-note owners after payment to the senior note owners. Since each transaction is privately negotiated, B-notes can vary in their structural characteristics and risks. For example, the rights of holders of B-notes to control the process following a borrower default may be limited in certain investments. Depending upon market and economic conditions, we may make B-note investments at any time. B-notes are less liquid than other forms of CRE debt investments, such as CMBS, and, as a result, we may be able to dispose of underperforming or non-performing B-note investments only at a significant discount to book value.

We may be exposed to environmental liabilities with respect to properties that we own or take title to in the future.

In the course of our business, we have made direct investments in, and expect we will continue to make direct investments in, properties or taken title to, and expect we will in the future take title to, real estate through foreclosure on collateral underlying real estate debt investments. When we do take title to any property, we could be subject to environmental liabilities with respect to it. In such a circumstance, we may be held liable to a governmental entity or to third parties for property damage, personal injury, investigation and clean-up costs they incur as a result of environmental contamination, or may have to investigate or clean up hazardous or toxic substances, or chemical releases at a property. The costs associated with investigation or remediation activities could be substantial and could reduce our income and ability to make distributions. Additionally, the presence of hazardous substances on a property we own may adversely affect our ability to sell the property.

Real estate ownership is subject to particular conditions that may have a negative impact on our results of operations.

We are subject to all of the inherent risks associated with the ownership of real estate. We may not be successful in the development or redevelopment/expansion of the acquired properties. In addition, the real estate investments may not perform as well as expected, impacting our anticipated return on investment. We are subject to other risks in connection with any acquisition, development and redevelopment/expansion activities, including the following:

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- acquisition or construction costs of a project may be higher than projected, potentially making the project unfeasible or unprofitable;
- development, redevelopment or expansions may take considerably longer than expected, delaying the commencement due to supply chain disruptions;
- we may be unable to obtain zoning, occupancy or other governmental approvals; and
- occupancy rates and rents may not meet our projections and the project may not be accretive.

We risk the loss of our investment if a development or redevelopment/expansion project is unsuccessful, either because it is not meeting our expectations when operational or was not completed according to the project planning.

Real estate property investments are illiquid. We may not be able to dispose of properties when desired or on favorable terms.

Real estate investments are relatively illiquid. Many factors that are beyond our control affect the real estate market. Our ability to quickly sell or exchange any of our properties in response to changes in economic and other conditions will be limited. No assurances can be given that we will recognize full value, at a price and at terms that are acceptable to us, for any property that we are required to sell for liquidity reasons. Our inability to respond rapidly to changes in the performance of our investments could adversely affect our financial condition and results of operations.

We may not have control, or control may be limited, over certain of our loans and real estate equity investments.

Some of our loans or real estate equity investments may be co-lender, joint venture or other arrangements in which we share the rights, obligations and benefits of the loan or real estate equity investment with other lenders, servicers or joint venture partners. We may need the consent of these parties to exercise our rights under the respective agreements, including rights with respect to amendment of loan documentation, enforcement proceedings in the event of default and the institution of, and control over, foreclosure proceedings. The participants of these agreements may have interests that may not be aligned with ours and may be able to take actions to which we object but will be bound if our investment interest represents a noncontrolling interest. We may be adversely affected by such actions. Additionally, our co-lenders, servicers or joint venture partners may have financial difficulties and may not be able to perform their financial obligations in accordance with their respective agreements, in which case we may be obligated to perform on their behalf. If we do not have the capital available or are unable to access funding, we may not have the capital available to meet those obligations, which will most likely result in a default under the respective agreement and could adversely affect our results of operations and financial condition.

Risks Related to Our Manager

We depend on our Manager and ACRES to develop and operate our business and may not find suitable replacements if the Management Agreement terminates.

We have no direct employees. Our officers, portfolio managers, administrative personnel and support personnel are employees of ACRES. We have no separate facilities and completely rely on our Manager; and ACRES has significant discretion as to the implementation of our operating policies and investment strategies. If our Management Agreement terminates, we may be unable to find a suitable replacement for our Manager. Moreover, we believe that our success depends to a significant extent upon the experience of the portfolio managers and officers of our Manager and ACRES who provide services to us, whose continued service is not guaranteed. The departure of any such persons could harm our investment performance.

Our Manager's fee structure may not create proper incentives, and the incentive compensation we pay our Manager may increase the investment risk of our portfolio.

Our Manager is entitled to receive a base management fee equal to 1/12th of our equity, as defined in the Management Agreement, multiplied by 1.50%; provided, however, that for each calendar month through July 31, 2022, such fee was equal to a minimum of \$442,000. Since the base management fee is based on our outstanding equity, our Manager could be incentivized to recommend strategies that increase our equity, and there may be circumstances where increasing our equity will not optimize the returns for our stockholders.

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In addition to its base management fee, our Manager is entitled to receive incentive compensation. Until the quarter ended December 31, 2022, this compensation was equal to 20% of the amount by which our EAD, as defined in the Management Agreement, for a quarter exceeded the product of the weighted average of the book value divided by 10,293,783 and the per share price (including the conversion price, if applicable) paid for our common shares in each offering (or issuance upon the conversion of convertible securities) by us subsequent to September 30, 2017, multiplied by the greater of 1.75% or 0.4375% plus one-fourth of the average ten-year U.S. Treasury rate for such quarter, multiplied by the weighted average number of common shares outstanding during the quarter, subject to certain adjustments.

For the first full calendar quarter ended December 31, 2022, the incentive compensation was equal to 20% of the amount by which our EAD for the quarter exceeded the product of our book value equity as of the end of such calendar quarter, and 7% per annum. For each of the second, third and fourth full calendar quarters following the calendar quarter ended December 31, 2022, the calculation will be the excess of the product of 20% and the excess of our EAD for the calendar quarter(s) following September 30, 2022, over the product of our book value equity in the calendar quarter(s) following September 30, 2022, and 7% per annum, over the sum of any incentive compensation paid to our Manager with respect to the prior calendar quarter(s) following September 30, 2022 (other than the most recent calendar quarter).

In evaluating investments and other management strategies, the opportunity to earn incentive compensation based on EAD may lead our Manager to place undue emphasis on the maximization of EAD at the expense of other criteria, such as preservation of capital, in order to achieve higher incentive compensation. Investments with higher yields generally have higher risk of loss than investments with lower yields. If our interests and those of our Manager are not aligned, the execution of our business plan and our results of operations could be adversely affected, which could adversely affect our results of operations and financial condition.

Our Manager manages our portfolio pursuant to very broad investment guidelines and our Board does not approve each investment decision, which may result in our making riskier investments.

Our Manager is authorized to follow very broad investment guidelines. While our directors periodically review our investment guidelines and our investment portfolio, they do not review all of our proposed investments. In addition, in conducting periodic reviews, the directors may rely primarily on information provided to them by our Manager. Furthermore, our Manager may use complex strategies, and transactions entered into by our Manager, which may be difficult or impossible to unwind by the time they are reviewed by the directors. Our Manager has great latitude within the broad investment guidelines in determining the types of investments it makes for us. Poor investment decisions could impair our ability to make distributions to our stockholders.

Termination of the Management Agreement by us without cause is difficult and could be costly.

Termination of our Management Agreement without cause is difficult and could be costly. We may terminate the Management Agreement without cause only annually upon the affirmative vote of at least two-thirds of our independent directors or by a vote of the holders of at least a majority of our outstanding common stock, based upon unsatisfactory performance by our Manager that is materially detrimental to us or a determination that the management fee payable to our Manager is not fair. Moreover, with respect to a determination that the management fee is not fair, our Manager may prevent termination by accepting a mutually acceptable reduction of management fees. We must give not less than 180 days' prior notice of any termination. Upon any termination without cause, our Manager will be paid a termination fee equal to four times the sum of the average annual base management fee and the average annual incentive compensation earned by it during the two 12-month periods immediately preceding the date of termination, calculated as of the end of the most recently completed fiscal quarter before the date of termination.

Our Manager and ACRES will face conflicts of interest relating to the allocation of investment opportunities and such conflicts may not be resolved in our favor, which could limit our ability to acquire assets and, in turn, limit our ability to make distributions and reduce your overall investment return.

Our Management Agreement does not prohibit our Manager, or ACRES from investing in or managing entities that invest in asset classes that are the same as, or similar to, our targeted asset classes, except that they may not raise funds for, sponsor or advise any new publicly-traded REIT that invests primarily in MBS in the U.S. We rely on our Manager to identify suitable investment opportunities for us. Our executive officers and several of the other key real estate professionals, acting on behalf of our Manager, are also the key real estate professionals acting on behalf of the advisors of other investment programs sponsored by, and other clients managed by, ACRES. As such, these investment programs and clients rely on many of the same real estate professionals as will future programs and vehicles sponsored by ACRES. Many investment opportunities that are suitable for us may also be suitable for one or more of these investment programs or clients. When an investment opportunity becomes available, the allocation committee established by ACRES, in accordance with its investment allocation policies and procedures, will offer the opportunity to the investment program or clients for which the investment opportunity is most suitable based on the available capital, investment objectives, portfolio and criteria of each. Thus, the allocation committees could direct attractive investment opportunities to an investment program or client other than us, which could result in us not investing in investment opportunities that could provide an attractive return or investing in investment opportunities that provide less attractive returns. Any of the foregoing may reduce our ability to make distributions to you.

Our officers and many of the investment professionals that provide services to us through our Manager are also officers or employees of ACRES and may face conflicts regarding the allocation of their time.

Our officers, other than our Chief Financial Officer, Chief Accounting Officer and several accounting and tax professionals on their staff, as well as the officers, directors and employees of ACRES who provide services to us, are not required to work full time on our affairs, and may devote significant time to the affairs of ACRES. As a result, there may be significant conflicts between us, on the one hand, and our Manager and ACRES on the other, regarding allocation of our Manager's and ACRES' resources to the management of our investment portfolio.

We have engaged in and may again engage in transactions with entities affiliated with our Manager. Our policies and procedures may be insufficient to address any conflicts of interest that may arise.

We have established policies and procedures regarding review, approval and ratification of transactions that may give rise to a conflict of interest between persons affiliated or associated with our Manager and us. In the ordinary course of our business, we have ongoing relationships and have engaged in and may again engage in transactions with entities affiliated or associated with our Manager. See "Item 13. Certain Relationships and Related Transactions and Director Independence - Relationships and Related Transactions" in this report. Our policies and procedures may not be sufficient to address any conflicts of interest that arise.

Our Manager's liability is limited under the Management Agreement, and we have agreed to indemnify our Manager against certain liabilities.

Our Manager does not assume any responsibility other than to render the services called for under the Management Agreement, and will not be responsible for any action of our Board in following or declining to follow its advice or recommendations. ACRES, our Manager, their directors, managers, officers, employees and affiliates will not be liable to us, any subsidiary of ours, our directors, our stockholders or any subsidiary's stockholders for acts performed in accordance with and pursuant to the Management Agreement, except for acts constituting bad faith, willful misconduct, gross negligence, or reckless disregard of their duties under the Management Agreement. We have agreed to indemnify the parties for all damages and claims arising from acts not constituting bad faith, willful misconduct, gross negligence, or reckless disregard of duties, performed in good faith in accordance with and pursuant to the Management Agreement.

Risks Related to Our Organization and Structure

Our charter and bylaws contain provisions that may inhibit potential acquisition bids that you and other stockholders may consider favorable, and the market price of our common stock may be lower as a result.

Our charter and bylaws contain provisions that may have an anti-takeover effect and inhibit a change in our Board. These provisions include the following:

- *There are ownership limits and restrictions on transferability and ownership in our charter.* For purposes of assisting us in maintaining our REIT qualification under the Code, our charter generally prohibits any person from beneficially or constructively owning more than 9.8% in value or number of shares, whichever is more restrictive, of any class or series of our outstanding capital stock. This restriction may:
 - discourage a tender offer or other transactions or a change in the composition of our Board or control that might involve a premium price for our shares or otherwise be in the best interests of our stockholders; or
 - result in shares issued or transferred in violation of such restrictions being automatically transferred to a trust for a charitable beneficiary, resulting in the forfeiture of those shares.
- *Our charter permits our Board to issue stock with terms that may discourage a third-party from acquiring us.* Our Board may amend our charter without stockholder approval to increase the total number of authorized shares of stock or the number of shares of any class or series and issue common or preferred stock having preferences, conversion or other rights, voting powers, restrictions, limitations as to distributions, qualifications, or terms or conditions of redemption as determined by our Board. Thus, our Board could authorize the issuance of stock with terms and conditions that could have the effect of discouraging a takeover or other transaction in which holders of some or a majority of our shares might receive a premium for their shares over the then-prevailing market price.
- *Our charter and bylaws contain other possible anti-takeover provisions.* Our charter and bylaws contain other provisions, including advance notice procedures for the introduction of business and the nomination of directors, that may have the effect of delaying or preventing a change in control of us or the removal of existing directors and, as a result, could prevent our stockholders from being paid a premium for their common stock over the then-prevailing market price.

Maryland takeover statutes may prevent a change in control of us, and the market price of our common stock may be lower as a result.

Maryland Control Share Acquisition Act. Maryland law provides that “control shares” of a corporation acquired in a “control share acquisition” will have no voting rights except to the extent approved by a vote of two-thirds of the votes eligible to be cast on the matter under the Maryland Control Share Acquisition Act, or the Maryland Act. The Maryland Act defines “control shares” as voting shares of stock that, if aggregated with all other shares of stock owned by the acquirer or in respect of which the acquirer is able to exercise or direct the exercise of voting power (except solely by virtue of a revocable proxy), would entitle the acquirer to exercise voting power in electing directors within one of the following ranges of voting power: one-tenth or more but less than one-third, one-third or more but less than a majority, or a majority or more of all voting power. A “control share acquisition” means the acquisition of control shares, subject to specific exceptions.

If voting rights or control shares acquired in a control share acquisition are not approved at a stockholders’ meeting or if the acquiring person does not deliver an acquiring person statement as required by the Maryland Act then, subject to specific conditions and limitations, the issuer may redeem any or all of the control shares for fair value. If voting rights of such control shares are approved at a stockholders’ meeting and the acquirer becomes entitled to vote a majority of the shares entitled to vote, all other stockholders may exercise appraisal rights.

Our bylaws contain a provision exempting acquisitions of our shares from the Maryland Act. However, our Board may amend our bylaws in the future to repeal this exemption.

Business combinations. Under Maryland law, “business combinations” between a Maryland corporation and an interested stockholder or an affiliate of an interested stockholder are prohibited for five years after the most recent date on which the interested stockholder becomes an interested stockholder. These business combinations include a merger, consolidation, share exchange or, in circumstances specified in the statute, an asset transfer or issuance or reclassification of equity securities. An interested stockholder is defined as:

- any person who beneficially owns ten percent or more of the voting power of the corporation’s shares; or
- an affiliate or associate of the corporation who, at any time within the two-year period before the date in question, was the beneficial owner of ten percent or more of the voting power of the then outstanding voting stock of the corporation.

A person is not an interested stockholder under the statute if the board of directors approved in advance the transaction by which such person otherwise would have become an interested stockholder. However, in approving a transaction, the board of directors may provide that its approval is subject to compliance, at or after the time of approval, with any terms and conditions determined by the board.

After the five-year prohibition, any business combination between the Maryland corporation and an interested stockholder generally must be recommended by the board of directors of the corporation and approved by the affirmative vote of at least:

- 80% of the votes entitled to be cast by holders of outstanding shares of voting stock of the corporation; and
- two-thirds of the votes entitled to be cast by holders of voting stock of the corporation other than shares held by the interested stockholder with whom or with whose affiliate the business combination is to be effected or held by an affiliate or associate of the interested stockholder.

These super-majority vote requirements do not apply if the corporation’s common stockholders receive a minimum price, as defined under Maryland law, for their shares in the form of cash or other consideration in the same form as previously paid by the interested stockholder for its shares.

The statute permits exemptions from its provisions, including business combinations that are exempted by the board of directors before the time that the interested stockholder becomes an interested stockholder.

Our rights and the rights of our stockholders to take action against our directors and officers are limited, which could limit your recourse in the event of actions not in your best interests.

Our charter limits the liability of our directors and officers to our stockholders and us for money damages, except for liability resulting from:

- actual receipt of an improper benefit or profit in money, property or services; or
- a final judgment based upon a finding of active and deliberate dishonesty by the director or officer that was material to the cause of action adjudicated.

In addition, our charter authorizes us to, and we do, indemnify our present and former directors and officers for actions taken by them in those capacities to the maximum extent permitted by Maryland law. Our bylaws require us to indemnify each present or former director or officer, to the maximum extent permitted by Maryland law, in the defense of any proceeding to which he or she is made, or threatened to be made, a party by reason of his or her service to us. In addition, we may be obligated to fund the defense costs incurred by our directors and officers.

Our right to take action against our Manager is limited.

The obligation of our Manager under the Management Agreement is to render its services in good faith. It will not be responsible for any action taken by our Board or investment committee in following or declining to follow its advice and recommendations. Furthermore, as discussed above under - “Risks Related to Our Manager,” it will be difficult and costly for us to terminate the Management Agreement without cause. In addition, we will indemnify our Manager, ACRES and their officers and affiliates for any actions taken by them in good faith.

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We have not established a minimum distribution payment level and we cannot assure you of our ability to make distributions in the future. In the future, we may use uninvested offering proceeds or borrowed funds to make distributions.

We expect to make quarterly distributions to our stockholders in amounts such that we distribute all or substantially all of our taxable income in each year, subject to certain adjustments. We have not established a minimum distribution payment level, and our ability to make distributions may be impaired by the risk factors described in this report. All distributions will be made at the discretion of our Board and will depend on our earnings, our financial condition, maintenance of our REIT qualification and other factors as our Board may deem relevant from time to time. We may not be able to make distributions in the future. In addition, some of our distributions may include a return of capital. To the extent that we decide to make distributions in excess of our current and accumulated taxable earnings and profits, such distributions would generally be considered a return of capital for federal income tax purposes. A return of capital is not taxable, but it has the effect of reducing the holder's tax basis in its investment. Although we currently do not expect that we will do so, we have in the past and may in the future also use proceeds from any offering of our securities that we have not invested or borrowed funds to make distributions. If we use uninvested offering proceeds to pay distributions in the future, we will have less funds available for investment and, as a result, our earnings and cash available for distribution would be less than we might otherwise have realized had such funds been invested. Similarly, if we borrow to fund distributions, our future interest costs would increase, thereby reducing our future earnings and cash available for distribution from what they otherwise would have been.

Loss of our exclusion from regulation under the Investment Company Act would require significant changes in our operations and could reduce the market price of our common stock and our ability to make distributions.

We rely on an exclusion from registration as an investment company afforded by Section 3(a)(1)(C) of the Investment Company Act. To qualify for this exclusion, we do not engage in the business of investing, reinvesting, owning, holding, or trading securities and we do not own "investment securities" with a value that exceeds 40% of the value of our total assets (exclusive of government securities and cash items) on an unconsolidated basis. We may not be able to maintain such a mix of assets in the future, and attempts to maintain such an asset mix may impair our ability to pursue otherwise attractive investments. In addition, these rules are subject to change and such changes may have an adverse impact on us. We may need to avail ourselves of alternative exclusions and exemptions that may require a change in the organizational structure of our business.

Furthermore, as it relates to our investment in our real estate subsidiary, ACRES RF, we rely on an exclusion from registration as an investment company afforded by Section 3(c)(5)(C) of the Investment Company Act. Given the material size of ACRES RF relative to our 3(a)(1)(C) exclusion, were ACRES RF to be deemed to be an investment company (other than by application of the Section 3(c)(1) exemption for closely held companies and the Section 3(c)(7) exemption for companies owned by "qualified purchasers"), we would not qualify for our 3(a)(1)(C) exclusion. Under the Section 3(c)(5)(C) exclusion, ACRES RF is required to maintain, on the basis of positions taken by the SEC staff in interpretive and no-action letters, a minimum of 55% of the value of the total assets of its portfolio in Qualifying Interests and a minimum of 80% in Qualifying Interests and real estate-related assets, with the remainder permitted to be miscellaneous assets. Because registration as an investment company would significantly affect ACRES RF's ability to engage in certain transactions or to organize itself in the manner it is currently organized, we intend to maintain its qualification for this exclusion from registration.

Historically, we treat our investments in mezzanine loans and our investments in CMBS as Qualifying Interests for purposes of determining our eligibility for the exclusion provided by Section 3(c)(5)(C) to the extent such treatment is consistent with guidance provided by the SEC or its staff. In the absence of specific guidance or guidance that otherwise supports the treatment of these investments as Qualifying Interests, we will treat them, for purposes of determining our eligibility for the exclusion provided by Section 3(c)(5)(C), as real estate-related assets or miscellaneous assets, as appropriate.

If ACRES RF's portfolio does not comply with the requirements of the exclusion we rely upon, it could be forced to alter its portfolio by selling or otherwise disposing of a substantial portion of the assets that are not Qualifying Interests or by acquiring a significant position in assets that are Qualifying Interests. Altering its portfolio in this manner may have an adverse effect on its investments if it is forced to dispose of or acquire assets in an unfavorable market, and may adversely affect our stock price.

If it were established that we were an unregistered investment company, there would be a risk that we would be subject to monetary penalties and injunctive relief in an action brought by the SEC that we would be unable to enforce contracts with third parties, that third parties could seek to obtain rescission of transactions undertaken during the period it was established that we were an unregistered investment company, and that we would be subject to limitations on corporate leverage that would have an adverse impact on our investment returns.

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Rapid changes in the values of our real estate-related investments may make it more difficult for us to maintain our qualification as a REIT or exclusion from regulation under the Investment Company Act.

If the market value or income potential of our real estate-related investments declines as a result of economic conditions, increased interest rates, prepayment rates or other factors, we may need to increase our real estate-related investments and income and/or liquidate our non-qualifying assets in order to maintain our REIT qualification or exclusion from registration under the Investment Company Act. If the decline in real estate asset values and/or income occurs quickly, this may be especially difficult to accomplish. We may have to make investment decisions that we otherwise would not make absent REIT qualification and Investment Company Act considerations.

Risks Related to Our REIT Status and Certain Other Tax Items

Complying with REIT requirements may cause us to forgo otherwise attractive opportunities.

To qualify as a REIT for federal income tax purposes, we must continually satisfy various tests regarding the sources of our income, the nature and diversification of our assets, the amounts we distribute to our stockholders and the ownership of our common stock. In order to meet these tests, we may be required to forgo investments we might otherwise make. Thus, compliance with the REIT requirements may hinder our investment performance.

In particular, at least 75% of our assets at the end of each calendar quarter must consist of real estate assets, government securities, cash and cash items. For this purpose, “real estate assets” generally include interests in real property, such as land, buildings, leasehold interests in real property, stock of other entities that qualify as REITs, interests in mortgage loans secured by real property, investments in stock or debt investments during the one-year period following the receipt of new capital and regular or residual interests in a real estate mortgage investment conduit (“REMIC”). In addition, the amount of securities of a single issuer, other than a TRS, that we hold must generally not exceed either 5% of the value of our gross assets or 10% of the vote or value of such issuer’s outstanding securities.

Certain of the assets that we hold are not qualified and will not be qualified real estate assets for purposes of the REIT asset tests. CMBS securities should generally qualify as real estate assets. However, to the extent that we own non-REMIC collateralized mortgage obligations or other debt investments secured by mortgage loans (rather than by real property) or secured by non-real estate assets, or debt securities that are not secured by mortgages on real property, those securities are likely not qualifying real estate assets for purposes of the REIT asset test, and will not produce qualifying real estate income. Further, whether securities held by warehouse lenders or financed using repurchase agreements are treated as qualifying assets or as generating qualifying real estate income for purposes of the REIT asset and income tests depends on the terms of the warehouse or repurchase financing arrangement.

We generally will be treated as the owner of any assets that collateralize CRE debt securitization transactions to the extent that we retain all of the equity of the securitization vehicle and do not make an election to treat such securitization vehicle as a TRS, as described in further detail below. It may be possible to reduce the impact of the REIT asset and gross income requirements by holding certain assets through our TRSs, subject to certain limitations as described below.

Our qualification as a REIT and exemption from U.S. federal income tax with respect to certain assets may depend on the accuracy of legal opinions or advice rendered or given or statements by the issuers of securities in which we invest, and the inaccuracy of any such opinions, advice or statements may adversely affect our REIT qualification and result in significant corporate level tax.

When purchasing securities, we have relied and may rely on opinions or advice of counsel for the issuer of such securities, or statements made in related offering documents, for purposes of determining whether such securities represent debt or equity securities for U.S. federal income tax purposes, and also to what extent those securities constitute REIT real estate assets for purposes of the REIT asset tests and produce income that qualifies under the 75% REIT gross income test. In addition, when purchasing CLO equity, we have relied and may rely on opinions or advice of counsel regarding the qualification of interests in the debt of such CLOs for U.S. federal income tax purposes. The inaccuracy of any such opinions, advice or statements may adversely affect our REIT qualification and result in significant corporate-level tax.

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We may realize excess inclusion income that would increase our tax liability and that of our stockholders.

Excess inclusion income could result if we hold a residual interest in a REMIC or if we were to own an interest in a taxable mortgage pool. Excess inclusion income also is generated if we issue debt obligations, such as certain CRE debt securitizations, with two or more maturities and the terms of the payments on these obligations bore a relationship to the payments that we received on our mortgage related securities securing those debt obligations. While we do not expect to acquire significant amounts of residual interests in REMICs, nor do we currently own residual interests in taxable mortgage pools, we do issue debt in certain CRE debt securitizations that generates excess inclusion income.

If we realize excess inclusion income and allocate it to stockholders, this income cannot be offset by net operating losses of the stockholders. If the stockholder is a tax-exempt entity, then this income would be fully taxable as unrelated business taxable income under Section 512 of the Code. If the stockholder is a foreign person, it would be subject to federal income tax withholding on this income without reduction or exemption pursuant to any otherwise applicable income tax treaty.

If we realize excess inclusion income, we will be taxed at the highest corporate income tax rate on a portion of such income that is allocable to the percentage of our stock held in record name by “disqualified organizations,” which are generally cooperatives, governmental entities and tax-exempt organizations that are exempt from unrelated business taxable income. To the extent that our stock owned by “disqualified organizations” is held in record name by a broker-dealer or other nominee, the broker/dealer or other nominee would be liable for the corporate level tax on the portion of our excess inclusion income allocable to the stock held by the broker-dealer or other nominee on behalf of “disqualified organizations.” We expect that disqualified organizations will own our stock. Because this tax would be imposed on us, all of our investors, including investors that are not disqualified organizations, would bear a portion of the tax cost associated with the classification of us or a portion of our assets as a taxable mortgage pool. A regulated investment company or other pass through entity owning stock in record name will be subject to tax at the highest corporate rate on any excess inclusion income allocated to its owners that are disqualified organizations. Finally, if we fail to qualify as a REIT, our taxable mortgage pool securitizations will be treated as separate corporations, for federal income tax purposes that cannot be included in any consolidated corporate tax return.

Failure to qualify as a REIT would subject us to federal income tax, which would reduce the cash available for distribution to our stockholders.

We believe that we have been organized and operated in a manner that has enabled us to qualify as a REIT for federal income tax purposes commencing with our taxable year ended on December 31, 2005. However, the federal income tax laws governing REITs are extremely complex, and interpretations of the federal income tax laws governing qualification as a REIT are limited. Qualifying as a REIT requires us to meet various tests regarding the nature of our assets and our income, the ownership of our outstanding stock, and the amount of our distributions on an ongoing basis.

If we fail to qualify as a REIT in any calendar year and we do not qualify for certain statutory relief provisions, we will be subject to federal income tax, including any applicable alternative minimum tax on our taxable income, at regular corporate rates. Distributions to stockholders would not be deductible in computing our taxable income. Corporate tax liability would reduce the amount of cash available for distribution to our stockholders. Under some circumstances, we might need to borrow money or sell assets in order to pay that tax. Furthermore, if we fail to maintain our qualification as a REIT and we do not qualify for the statutory relief provisions, we no longer would be required to distribute substantially all of our REIT taxable income, determined without regard to the dividends paid deduction and excluding net capital gains, to our stockholders. Unless our failure to qualify as a REIT was excused under federal tax laws, we could not re-elect to qualify as a REIT until the fifth calendar year following the year in which we failed to qualify. In addition, if we fail to qualify as a REIT, our taxable mortgage pool securitizations will be treated as separate corporations for U.S. federal income tax purposes.

A determination that we have not made required distributions would subject us to tax or require us to pay a deficiency dividend; payment of tax would reduce the cash available for distribution to our stockholders.

In order to qualify as a REIT, in each calendar year we must distribute to our stockholders at least 90% of our REIT taxable income, determined without regard to the deduction for dividends paid and excluding net capital gain. To the extent that we satisfy the 90% distribution requirement, but distribute less than 100% of our taxable income, we will be subject to federal corporate income tax on our undistributed income. In addition, we will incur a 4% nondeductible excise tax on the amount, if any, by which our distributions in any calendar year are less than the sum of:

- 85% of our ordinary income for that year;
- 95% of our capital gain net income for that year; and

- 100% our undistributed taxable income from prior years.

We intend to make distributions to our stockholders in a manner intended to satisfy the 90% distribution requirement and to distribute all or substantially all of our net taxable income to avoid both corporate income tax and the 4% nondeductible excise tax. There is no requirement that a domestic TRS distribute its after-tax net income to its parent REIT or their stockholders and our U.S. TRSs may determine not to make any distributions to us. However, non-U.S. TRSs will generally be deemed to distribute their earnings to us on an annual basis for federal income tax purposes, regardless of whether such TRSs actually distribute their earnings.

Our taxable income may substantially exceed our net income as determined by GAAP because, for example, realized capital losses will be deducted in determining our GAAP net income but may not be deductible in computing our taxable income. In addition, we may invest in assets that generate taxable income in excess of economic income or in advance of the corresponding cash flow from the assets, referred to as phantom income. Although some types of phantom income are excluded to the extent they exceed 5% of our REIT taxable income in determining the 90% distribution requirement, we will incur corporate income tax and the 4% nondeductible excise tax with respect to any phantom income items if we do not distribute those items on an annual basis. As a result, we may generate less cash flow than taxable income in a particular year. It is also possible that a loss that we treat as an ordinary loss would be recharacterized as a capital loss. In such event we might have to pay tax for the year in question or pay a deficiency dividend so that we meet the dividends paid requirement for that year. In all such events, we may be required to use cash reserves, incur debt, or liquidate non-cash assets at rates or times that we regard as unfavorable in order to satisfy the distribution requirement and to avoid corporate income tax and the 4% nondeductible excise tax in that year.

If we make distributions in excess of our current and accumulated earnings and profits, they will be treated as a return of capital, which will reduce the adjusted basis of your stock. To the extent such distributions exceed your adjusted basis, you may recognize a capital gain upon distribution.

Unless you are a tax-exempt entity, distributions that we make to you generally will be subject to tax as ordinary income to the extent of our current and accumulated earnings and profits as determined for federal income tax purposes. If the amount we distribute to you exceeds your allocable share of our current and accumulated earnings and profits, the excess will be treated as a return of capital to the extent of your adjusted basis in your stock, which will reduce your basis in your stock but will not be subject to tax. To the extent the amount we distribute to you exceeds both your allocable share of our current and accumulated earnings and profits and your adjusted basis, this excess amount will be treated as a gain from the sale or exchange of a capital asset. For risks related to the use of uninvested offering proceeds or borrowings to fund distributions to stockholders, see - “Risks Related to Our Organization and Structure. - We have not established a minimum distribution payment level and we cannot assure you of our ability to make distributions in the future.”

Our ownership of and relationship with our TRSs will be limited and a failure to comply with the limits would jeopardize our REIT qualification and may result in the application of a 100% excise tax.

A REIT may own up to 100% of the securities of one or more TRSs. A TRS may earn specified types of income or hold specified assets that would not be qualifying income or assets if earned or held directly by the parent REIT. Both the subsidiary and the REIT must jointly elect to treat the subsidiary as a TRS. A corporation of which a TRS directly or indirectly owns more than 35% of the voting power or value of the stock will automatically be treated as a TRS. Overall, no more than 20% of the value of a REIT’s assets may consist of stock or securities of one or more TRSs. A TRS will pay federal, state and local income tax at regular corporate rates on any income that it earns, whether or not it distributes that income to us. In addition, the TRS rules limit the deductibility of interest paid or accrued by a TRS to its parent REIT to assure that the TRS is subject to an appropriate level of corporate taxation. The rules also impose a 100% excise tax on certain transactions between a TRS and its parent REIT that are not conducted on an arm’s-length basis.

Exantas Real Estate TRS, Inc. (“XAN RE TRS”) will pay federal, state and local income tax on its taxable income, and its after-tax net income is available for distribution to us but is not required to be distributed to us. Income that is not distributed to us by our U.S. TRS will not be subject to the REIT 90% distribution requirement and therefore will not be available for distributions to our stockholders. We anticipate that the aggregate value of the securities we hold in our TRS will be less than 20% of the value of our total assets, including our TRS securities. We will monitor the compliance of our investments in TRSs with the rules relating to value of assets and transactions not on an arm’s-length basis. We cannot assure you, however, that we will be able to comply with such rules.

Complying with REIT requirements may limit our ability to hedge effectively.

The REIT provisions of the Code substantially limit our ability to hedge MBS and related borrowings. Under these provisions, our annual gross income from qualifying and non-qualifying hedges of our borrowings, together with any other income not generated from qualifying real estate assets, cannot exceed 25% of our gross income. In addition, our aggregate gross income from non-qualifying hedges, fees and certain other non-qualifying sources cannot exceed 5% of our annual gross income determined without regard to income from qualifying hedges. As a result, we might have to limit our use of advantageous hedging techniques or implement those hedges through XAN RE TRS. This could increase the cost of our hedging activities or expose us to greater risks associated with changes in interest rates than we would otherwise want to bear.

The tax on prohibited transactions will limit our ability to engage in transactions, including certain methods of securitizing mortgage loans that would be treated as sales for federal income tax purposes.

A REIT's net income from prohibited transactions is subject to a 100% tax. In general, prohibited transactions are sales or other dispositions of property, other than foreclosure property, but including mortgage loans, held primarily for sale to customers in the ordinary course of business. We might be subject to this tax if we were able to sell or securitize loans in a manner that was treated as a sale of the loans for federal income tax purposes. Therefore, in order to avoid the prohibited transactions tax, we may choose not to engage in certain sales of loans and may limit the structures we utilize for our securitization transactions even though such sales or structures might otherwise be beneficial to us.

Legislative, regulatory or administrative changes could adversely affect our stockholders or us.

Legislative, regulatory or administrative changes could be enacted or promulgated at any time, either prospectively or with retroactive effect, and may adversely affect our stockholders and/or us.

The Tax Cuts and Jobs Act, or TCJA, made significant changes to the U.S. federal income tax rules for taxation of individuals and corporations, generally effective for taxable years beginning after December 31, 2017. In addition to reducing corporate and individual tax rates, the TCJA eliminates or restricts various deductions. Most of the changes applicable to individuals are temporary and apply only to taxable years beginning after December 31, 2017 and before January 1, 2026. The TCJA makes numerous large and small changes to the tax rules that do not affect the REIT qualification rules directly but may otherwise affect us or our stockholders.

While the changes in the TCJA generally appear to be favorable with respect to REITs, the extensive changes to non-REIT provisions in the Code may have unanticipated effects on our stockholders or us. Moreover, Congressional leaders have recognized that the process of adopting extensive tax legislation in a short amount of time without hearings and substantial time for review is likely to have led to drafting errors, issues needing clarification and unintended consequences that will have to be revisited in subsequent tax legislation. It is not clear if or when Congress will address these issues or when the IRS will issue administrative guidance on the changes made in the TCJA.

We urge you to consult with your own tax advisor with respect to the status of the TCJA and other legislative, regulatory or administrative developments and proposals and their potential effect on an investment in shares of our common stock.

Dividends paid by REITs do not qualify for the reduced tax rates provided for under current law.

Dividends paid by REITs are generally not eligible for the reduced 15% maximum tax rate for dividends paid to individuals (20% for those with taxable income above certain thresholds that are adjusted annually under current law). The more favorable rates applicable to regular corporate dividends could cause stockholders who are individuals to perceive investments in REITs to be relatively less attractive than investments in the stock of non-REIT corporations that pay dividends to which more favorable rates apply, which could reduce the value of the stocks of REITs. However, under the TCJA, regular dividends from REITs are treated as income from a pass-through entity and are eligible for a 20% deduction. As a result, our regular dividends are taxed at 80% of an individual's marginal tax rate. The current maximum rate is 37% resulting in a maximum tax rate of 29.6%. Dividends from REITs as well as regular corporate dividends will also be subject to a 3.8% Medicare surtax for taxpayers with modified adjusted gross income above \$200,000 (if single) or \$250,000 (if married and filing jointly).

We may lose our REIT qualification or be subject to a penalty tax if we modify mortgage loans or acquire distressed debt in a way that causes us to fail our REIT gross income or asset tests.

Many of the terms of our mortgage loans, mezzanine loans and B-notes and the loans supporting our MBS have been modified and may in the future be modified to avoid foreclosure actions and for other reasons. If the terms of the loan are modified in a manner constituting a “significant modification,” such modification triggers a deemed exchange for tax purposes of the original loan for the modified loan. Under existing Treasury Regulations, if a loan is secured by real property and other property and the highest principal amount of the loan outstanding during a taxable year exceeds the fair market value of the real property securing the loan as of (1) the date we agreed to acquire or originate the loan or (2) in the event of certain significant modifications, the date we modified the loan, then a portion of the interest income from such a loan will not be qualifying income for purposes of the 75% gross income test, but will be qualifying income for purposes of the 95% gross income test. Although the law is not entirely clear, a portion of the loan may not be treated as a qualifying “real estate asset” for purposes of the 75% asset test. The non-qualifying portion of such a loan would be subject to, among other requirements, the 10% value test.

Revenue Procedure 2011-16, as modified and superseded by Revenue Procedure 2014-51, provides a safe harbor pursuant to which we will not be required to redetermine the fair market value of the real property securing a loan for purposes of the REIT gross income and asset tests in connection with a loan modification that is: (1) occasioned by a borrower default; or (2) made at a time when we reasonably believe that the modification to the loan will substantially reduce a significant risk of default on the original loan. We cannot assure you that all of our loan modifications have qualified or will qualify for the safe harbor in Revenue Procedure 2011-16, as modified and superseded by Revenue Procedure 2014-51. To the extent we significantly modify loans in a manner that does not qualify for that safe harbor, we will be required to redetermine the value of the real property securing the loan at the time it was significantly modified. In determining the value of the real property securing such a loan, we may not obtain third-party appraisals, but rather may rely on internal valuations. No assurance can be provided that the IRS will not successfully challenge our internal valuations. If the terms of our mortgage loans, mezzanine loans and B-notes and loans supporting our MBS are significantly modified in a manner that does not qualify for the safe harbor in Revenue Procedure 2011-16, as modified and superseded by Revenue Procedure 2014-51, and the fair market value of the real property securing such loans has decreased significantly, we could fail the 75% gross income test, the 75% asset test and/or the 10% value test. Unless we qualified for relief under certain cure provisions in the Code, such failures could cause us to fail to qualify as a REIT.

Our subsidiaries and we have invested and may invest in the future in distressed debt, including distressed mortgage loans, mezzanine loans, B-notes and MBS. Revenue Procedure 2011-16, as modified and superseded by Revenue Procedure 2014-51, provides that the IRS will treat a distressed mortgage loan acquired by a REIT that is secured by real property and other property as producing in part non-qualifying income for the 75% gross income test. Specifically, Revenue Procedure 2011-16, as modified and superseded by Revenue Procedure 2014-51, indicates that interest income on a loan will be treated as qualifying income based on the ratio of (1) the fair market value of the real property securing the loan determined as of the date the REIT committed to acquire the loan and (2) the face amount of the loan (and not the purchase price or current value of the loan). The face amount of a distressed mortgage loan and other distressed debt will typically exceed the fair market value of the real property securing the debt on the date the REIT commits to acquire the debt. We believe that we will continue to invest in distressed debt in a manner consistent with complying with the 75% gross income test and maintaining our qualification as a REIT.

The failure of a loan subject to a repurchase agreement, a mezzanine loan or a preferred equity investment to qualify as a real estate asset would adversely affect our ability to qualify as a REIT.

We have entered into and we intend to continue to enter into sale and repurchase agreements under which we nominally sell certain of our loan assets to a counterparty and simultaneously enter into an agreement to repurchase the sold assets. We believe that we have been and will be treated for U.S. federal income tax purposes as the owner of the loan assets that are the subject of any such agreement notwithstanding that the agreement may transfer record ownership of the assets to the counterparty during the term of the agreement. It is possible, however, that the IRS could assert that we did not own the loan assets during the term of the sale and repurchase agreement, in which case we could fail to qualify as a REIT.

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In addition, we have acquired in the past and may continue to acquire mezzanine loans, which are loans secured by equity interest in a partnership or limited liability company that directly or indirectly owns real property, and preferred equity investments, which are senior equity interests in entities that own or acquire real properties. In Revenue Procedure 2003-65, or the Revenue Procedure, the IRS provided a safe harbor pursuant to which a mezzanine loan, if it meets each of the requirements contained in the Revenue Procedure, will be treated by the IRS as a real estate asset for purposes of the REIT asset tests, and interest derived from the mezzanine loan will be treated as qualifying mortgage interest for purposes of the REIT 75% income test. Although the Revenue Procedure provides a safe harbor on which taxpayers may rely, it does not prescribe rules of substantive tax law. We have acquired and may continue to acquire mezzanine loans that may not meet all of the requirements for reliance on this safe harbor. In the event we own a mezzanine loan that does not meet the safe harbor, the IRS could challenge the loan's treatment as a real estate asset for purposes of the REIT asset and income tests, and if the challenge were sustained, we could fail to qualify as a REIT.

General Risk Factors

We cannot predict the effects on us of actions taken by the U.S. government and governmental agencies in response to economic conditions in the U.S.

In response to economic and market conditions, U.S. and foreign governments and governmental agencies have established or proposed a number of programs designed to improve the financial system and credit markets, and to stimulate economic growth. Many governments, including federal, state and local governments in the U.S., are incurring substantial budget deficits and seeking financing in international and national credit markets as well as proposing or enacting austerity programs that seek to reduce government spending, raise taxes, or both. Many credit providers, including banks, may need to obtain additional capital before they will be able to expand their lending activities. We are unable to evaluate the effects these programs and conditions will have upon our financial condition, income, or ability to make distributions to our stockholders.

ITEM 1B. UNRESOLVED STAFF COMMENTS

None.

ITEM 2. PROPERTIES

We maintain offices in Uniondale, New York and Philadelphia, Pennsylvania. Our principal office is located in leased space at 390 RXR Plaza, Uniondale, New York 11556. We do not own any material principal real property, other than certain investments in real estate properties.

ITEM 3. LEGAL PROCEEDINGS

Refer to "Part II - Item 8. Financial Statements and Supplementary Data – Note 24 - Commitments and Contingencies" for the applicable disclosures.

ITEM 4. MINE SAFETY DISCLOSURES

Not applicable.

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PART II**ITEM 5. MARKET FOR REGISTRANT’S COMMON EQUITY, RELATED STOCKHOLDER MATTERS AND ISSUER PURCHASES OF EQUITY SECURITIES****Market Information**

Our common stock is listed on the New York Stock Exchange, or NYSE, under the symbol “ACR”.

We are organized and conduct our operations to qualify as a real estate investment trust (“REIT”) which requires that we distribute at least 90% of our REIT taxable income. As a result of losses incurred during the year ended December 31, 2020 in connection with the economic impact of the novel coronavirus (“COVID-19”) pandemic, we received significant net operating loss (“NOL”) carryforwards. NOLs are able to offset future taxable income, limiting the requirement for common share distributions. We also recognized net capital loss carryforwards as finalized in our 2020 tax return. During the year ended December 31, 2022, all taxable income was distributed in the form of a preferred share distribution, and therefore, no common share distribution was required. As we continue to take steps necessary to stabilize our earnings available for distribution (“EAD”), our board of directors, (our “Board”), will establish a plan for the prudent resumption of the payment of common share distributions. No assurance, however, can be given as to the amounts or timing of future distributions as such distributions are subject to our earnings, financial condition, capital requirements and such other factors as our Board deems relevant.

The following table summarizes our current and estimated tax loss carryforwards (dollars in millions):

| Tax Asset Item | Tax Year Recognized | REIT (QRS) Tax Loss Carryforwards | | TRS Tax Loss Carryforwards | |
|--|---------------------|-----------------------------------|-----------------|----------------------------|---------------|
| | | Operating | Capital | Operating | Capital |
| Net Operating Loss Carryforwards: | | | | | |
| Cumulative as of 2021 | 2021 Return | \$ 46.6 | \$ — | \$ 60.1 | \$ — |
| Net Capital Loss Carryforwards: | | | | | |
| Cumulative as of 2021 | 2021 Return | — | 121.9 | — | 1.0 |
| Total tax asset estimates | | \$ 46.6 | \$ 121.9 | \$ 60.1 | \$ 1.0 |
| Useful life | | Unlimited | 5 years | Various | 5 years |

During the year ended December 31, 2021, we generated \$1.1 million of taxable income which was offset by our cumulative NOL, leaving \$46.6 million to carry forward to future years. NOL can generally be carried forward to offset both ordinary taxable income and capital gains in future years. The Tax Cuts and Jobs Act (“TCJA”) along with revisions made by the Coronavirus Aid, Relief, and Economic Security Act (“CARES”) reduced the deduction for NOLs to 80% of taxable income and granted an indefinite carryforward period.

Additionally, \$15.0 million of net capital gains was reported on our tax return for the year ended December 31, 2021. This was offset with our cumulative total net capital losses, leaving \$121.9 million to carry forward to future years. No capital losses expired during 2021.

We also have tax assets in our taxable REIT subsidiaries (“TRS”). These tax assets are analyzed and disclosed quarterly in our financial statements. As of December 31, 2022, our TRSs have \$39.9 million of pre-TCJA NOLs, some of which are set to expire beginning in 2044, \$20.2 million of NOLs with an indefinite carryforward period and net capital loss carryforwards of \$1.0 million.

On February 16, 2021, we completed a one-for-three reverse stock split, which reduced the number of shares of our common stock that were issued and outstanding immediately prior to the effectiveness of the reverse stock split. At the date of the stock split, the number of shares of our authorized common stock was not affected by the reverse stock split and the par value of our common stock remained unchanged at \$0.001 per share. The reverse stock split reduced the number of shares of our common stock that were outstanding at February 16, 2021 from 29,194,460 to 9,731,371 after the cancellation of all fractional shares. No fractional shares were issued in connection with the reverse stock split. Stockholders who otherwise held fractional shares of our common stock as a result of the reverse stock split received a cash payment in lieu of such fractional shares.

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In May 2021, we filed an amendment to our charter to decrease the total number of authorized shares from 225,000,000 to 141,666,666 shares, consisting of 41,666,666 shares of common stock, \$0.001 par value per share (decreased from 125,000,000 shares of common stock) and 100,000,000 shares of preferred stock, \$0.001 par value per share. The reduction in authorized shares of common stock is in proportion to the 1-for-3 reverse split noted above.

At March 6, 2023, there were 8,685,452 shares of common stock outstanding held by 206 holders of record. The 206 holders of record include Cede & Co., which holds shares as nominee for The Depository Trust Company, which itself holds shares on behalf of the beneficial owners of our common stock. Such information was obtained through our registrar and transfer agent.

The following table summarizes certain information about our 2005 Stock Incentive Plan, Third Amended and Restated Omnibus Equity Compensation Plan and ACRES Commercial Realty Corp. Manager Incentive Plan at December 31, 2022:

| Plan Category | (a) Number of Securities to be Issued Upon Exercise of Outstanding Options, Warrants and Rights | (b) Weighted-Average Exercise Price of Outstanding Options, Warrants and Rights | (c) Number of Securities Remaining Available for Future Issuance Under Equity Compensation Plans Excluding Securities Reflected in Column (a) |
|--|--|--|--|
| Equity compensation approved by security holders: | | | |
| Restricted stock ⁽¹⁾ | 583,333 | N/A | |
| Equity compensation plans not approved by security holders | N/A | N/A | |
| Total | 583,333 | | 1,034,155 |

(1) All restricted stock awards consist of unvested shares.

Our 8.625% Fixed-to-Floating Series C Cumulative Redeemable Preferred Stock, or Series C Preferred Stock, is listed on the NYSE and trades under the symbol “ACRPrC.” We have declared and paid the specified quarterly dividend per share of \$0.5390625 through January 2023. No dividends are currently in arrears on the Series C Preferred Stock.

In May 2021, and subsequently in June 2021, we issued the 7.875% Series D Cumulative Redeemable Preferred Stock, or Series D Preferred Stock, which is listed on the NYSE and trades under the symbol “ACRPrD.” On October 4, 2021, we and our Manager entered into an Equity Distribution Agreement with JonesTrading Institutional Services LLC, as placement agent, pursuant to which we may issue and sell from time to time up to 2.2 million shares of the Series D Preferred Stock. In December 2021, we issued additional Series D Preferred Stock pursuant to this agreement. We have declared and paid the specified quarterly dividend per share of \$0.4921875 through January 2023. No dividends are currently in arrears on the Series D Preferred Stock.

Issuer Purchases of Equity Securities

In March 2016, our Board approved a securities repurchase program. In November 2020, our Board authorized and approved the continued use of our existing share repurchase program in order to repurchase up to \$20.0 million of our outstanding shares of common stock. In July 2021, the authorized amount was fully utilized.

In November 2021, our Board authorized and approved the continued use of our existing share repurchase program to repurchase an additional \$20.0 million of our outstanding common stock. At December 31, 2022, \$7.2 million remains available under this repurchase program.

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The following table presents information about our common stock repurchases made during the year ended December 31, 2022 in accordance with our repurchase program (dollars in thousands, except per share amounts):

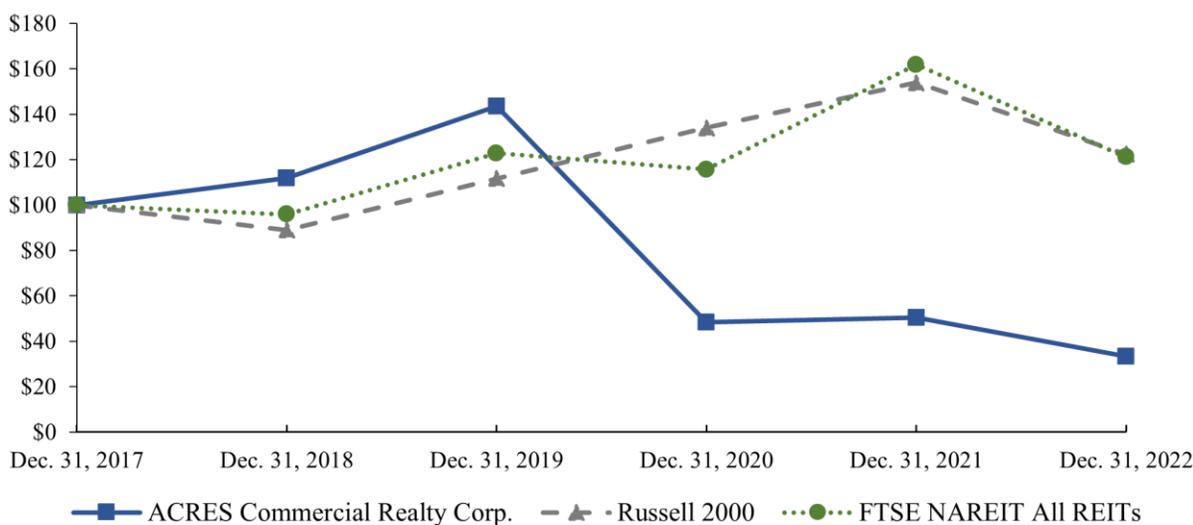
| | Common Stock | | | |
|--|----------------------------------|---|--|--|
| | Total Number of Shares Purchased | Average Price Paid per Share ⁽¹⁾ | Total Number of Shares Purchased as Part of Publicly Announced Plans or Programs | Approximate Dollar Value of Shares that may yet be Purchased under the Plans or Programs |
| January 3, 2022 - January 31, 2022 | 153,522 | \$ 12.53 | 153,522 | \$ 14,409 |
| February 1, 2022 - February 28, 2022 | 85,777 | 12.05 | 85,777 | 13,377 |
| March 1, 2022 - March 31, 2022 | 75,253 | 12.33 | 75,253 | 12,450 |
| April 1, 2022 - April 29, 2022 | 60,410 | 13.06 | 60,410 | 11,662 |
| May 2, 2022 - May 31, 2022 | 45,743 | 10.91 | 45,743 | 11,164 |
| June 1, 2022 - June 30, 2022 | 131,577 | 9.19 | 131,577 | 9,957 |
| July 1, 2022 - July 29, 2022 | 58,719 | 8.22 | 58,719 | 9,476 |
| August 1, 2022 - August 31, 2022 | 81,586 | 9.58 | 81,586 | 8,696 |
| September 1, 2022 - September 30, 2022 | 58,122 | 9.43 | 58,122 | 8,149 |
| October 3, 2022 - October 31, 2022 | 39,057 | 8.69 | 39,057 | 7,810 |
| November 1, 2022 - November 30, 2022 | 42,940 | 10.14 | 42,940 | 7,376 |
| December 1, 2022 - December 31, 2022 | 16,272 | 9.76 | 16,272 | 7,217 |
| Total | 848,978 | \$ 10.75 | 848,978 | |

(1) The average price paid per share as reflected above includes broker fees and commissions.

Performance Graph

The following line graph presentation compares cumulative total shareholder returns on our common stock with the Russell 2000 Index and the FTSE NAREIT All REIT Index for the period from December 31, 2017 to December 31, 2022. The graph and table assume that \$100 was invested in each of our common stock, the Russell 2000 Index and the FTSE NAREIT All REIT Index on December 31, 2017, and that all dividends were reinvested. This data is furnished by the Research Data Group.

COMPARISON OF 5 YEAR CUMULATIVE TOTAL RETURN*
Among ACRES Commercial Realty Corp., the Russell 2000 Index
and the FTSE NAREIT All REITs Index



*\$100 invested on December 31, 2017 in stock or index, including reinvestment of dividends.

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ITEM 7. MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS

The following discussion should be read in conjunction with our consolidated financial statements and accompanying notes included in "Item 8. Financial Statements and Supplementary Data" of this annual report on Form 10-K.

We have omitted discussion of the earliest of the three years covered by our consolidated financial statements presented in this report as that disclosure is included in our Annual Report on Form 10-K for the year ended December 31, 2021 filed with the Securities and Exchange Commission ("SEC") on March 9, 2022. You are encouraged to reference the discussion and analysis of our results of operations for the year ended December 31, 2020 compared to the year ended December 31, 2021 in "Item 7. Management's Discussion and Analysis of Financial Condition and Results of Operations" within that report.

Overview

We are a Maryland corporation and an externally managed REIT that is primarily focused on originating, holding and managing commercial real estate ("CRE") mortgage loans and other commercial real estate-related debt investments. On July 31, 2020, our management contract was acquired from Exantas Capital Manager Inc., a subsidiary of C-III Capital Partners LLC, by ACRES Capital, LLC (our "Manager"), a subsidiary of ACRES Capital Corp. (collectively, "ACRES"), a private commercial real estate lender exclusively dedicated to nationwide middle market CRE lending with a focus on multifamily, student housing, hospitality, office and industrial in top United States ("U.S.") markets (the "ACRES acquisition"). Our Manager draws upon the management team of ACRES and its collective investment experience to provide its services. Our objective is to provide our stockholders with total returns over time, including quarterly distributions and capital appreciation, while seeking to manage the risks associated with our investment strategies as well as to maximize long-term stockholder value by maintaining stability through our available liquidity and diversified CRE loan portfolio.

An important aspect of the ACRES acquisition was that it delivered operational liquidity in order to mitigate additional potential margin call risk as a result of the market volatility that was created by the COVID-19 pandemic (see below), which allowed us to focus on asset management within the portfolio in efforts to restart loan originations and underwriting. Our Manager has and expects to continue to leverage the complementary nature of our lending platforms, its experience and its network of relationships to enhance our new business loan pipeline. Additionally, our Manager continuously monitors for new capital opportunities and executes on agreements that enhance our returns.

In December 2019, COVID-19 was identified. The resulting spread of COVID-19 throughout the globe led the World Health Organization to designate COVID-19 as a pandemic and numerous countries, including the U.S, to declare national emergencies. Many countries responded to the initial and ensuing outbreaks of COVID-19 by instituting quarantines and restrictions on travel and limiting operations of non-essential offices and retail centers, which resulted in the closure or remote operation of non-essential businesses, increased rates of unemployment and market disruption in connection with the economic uncertainty. The aforementioned quarantines and travel restrictions contributed significantly to economic disruptions across the country that directly impacted our borrowers and their ability to pay and to stay current with their debt obligations in 2020 and 2021, causing significant increases in our provisions for credit losses. During the height of the pandemic, we used a variety of legal and structural options to manage credit risk effectively, including through forbearance and extension provisions or other agreements.

Due in large part to the development and distribution of vaccines and other treatments, the U.S. and other countries around the world have eased or removed restrictions entirely, financial markets are more liquid, collateral performance has improved and unemployment rates have stabilized to some degree; as such, at December 31, 2022, we have substantially reversed provisions for credit losses related to macroeconomic factors impacted by COVID-19. For additional discussion with respect to the potential impact of COVID-19 on our liquidity and capital resources, see "Liquidity and Capital Resources."

Currently, domestic and global markets are grappling with managing rising inflation rates, supply chain disruptions and energy market dislocations. These additional market pressures are manifesting themselves in higher consumer prices and have led domestic and global monetary policy makers to raise historically low short-term interest rates at rates much faster than originally anticipated by domestic and global financial markets in hopes of containing inflation and staving off or tempering an economic recession. The U.S. Federal Reserve has raised the Federal Funds rate by 4.25% in seven rate hikes between March 2022 and December 2022 to combat inflation, and more rate hikes are expected in the near future. These increases in the cost of capital and goods are expected to cause short-term dislocations in various investment and financing markets in which we participate as we and other market participants adjust to the new financing environment.

We continuously monitor the effects of domestic and global events, including but not limited to the current and expected impacts of inflation, labor shortages, supply chain matters and rising interest rates, on our operations and financial position to ensure

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that we remain responsive and adaptable to the dynamic changes in our operating environment. However, it is inherently difficult to accurately assess the continuing impact of domestic or global macroeconomic events on our revenues, profitability and financial position. In response, we continue to actively and responsibly manage corporate liquidity and operations in light of changing macroeconomic circumstances, and our Manager continuously monitors for new capital opportunities and executes on agreements that are expected to enhance our returns.

During the year ended December 31, 2021, we issued 4,600,000 shares of new 7.875% Series D Cumulative Redeemable Preferred Stock (“Series D Preferred Stock”) for net proceeds of \$110.4 million, which includes the underwriting discounts and offering costs. In October 2021, we and our Manager entered into an Equity Distribution Agreement (the “Preferred ATM Agreement”) with JonesTrading Institutional Services LLC, as placement agent (“JonesTrading”), pursuant to which we may issue and sell from time to time up to 2.2 million shares of the Series D Preferred Stock. During the year ended December 31, 2021, we received net proceeds of \$194,000 from the issuance of 7,857 shares of Series D Preferred Stock governed by the Preferred ATM Agreement. During the year ended December 31, 2022, the Company did not issue any Series D Preferred Stock through this agreement.

During the year ended December 31, 2021, we issued \$150.0 million of principal of new 5.75% senior unsecured notes due 2026 (“5.75% Senior Unsecured Notes”) for net proceeds of \$146.7 million, which includes debt issuance costs. Using the proceeds, we fully redeemed our \$50.0 million of principal of 12.00% senior unsecured notes (“12.00% Senior Unsecured Notes”) for \$55.3 million, which included a \$5.0 million make-whole amount, and partially repurchased \$55.7 million of principal of 4.50% convertible senior notes due 2022 (“4.50% Convertible Senior Notes”) during the year ended December 31, 2021. We incurred a loss on extinguishment of \$9.0 million, which comprised a \$5.0 million make-whole amount on the 12.00% Senior Unsecured Notes and \$4.0 million of acceleration of the unamortized market discounts. We also accelerated the amortization of debt issuance costs of \$522,000, which are reflected in interest expense during the year ended December 31, 2021.

In February 2022, we repurchased \$39.8 million par value of our 4.50% Convertible Senior Notes. In conjunction with the repurchase, we accelerated \$460,000 of the convertible note discount, which was recorded as an extinguishment of debt cost, and \$114,000 of deferred debt issuance costs, which were recorded in interest expense. In August 2022, the remaining \$48.2 million of outstanding 4.50% Convertible Senior Notes were paid off upon maturity at par.

The remaining proceeds from these transactions are intended to be used for loan originations and for general corporate purposes in order to improve and grow book value and earnings.

We target originating transitional floating-rate CRE loans between \$10.0 million and \$100.0 million. In March 2020, due to the market disruptions caused by the COVID-19 pandemic, we halted loan originations to manage our liquidity. In conjunction with the capital commitments secured through the ACRES acquisition, we resumed originating floating-rate CRE loans in November 2020. During the year ended December 31, 2022, we originated 19 floating-rate CRE whole loans with total commitments of \$610.8 million. Loan payoffs during the year ended December 31, 2022 were \$399.6 million and net unfunded commitments were \$21.2 million, producing a net increase to the portfolio of \$190.0 million.

Our CRE loan portfolio, which had a \$2.0 billion and \$1.9 billion carrying value at December 31, 2022 and 2021, respectively, comprised:

- First mortgage loans, which we refer to as whole loans. These loans are typically secured by first liens on CRE property, including the following property types: multifamily, office, hotel, self-storage, retail, student housing, manufactured housing, industrial, healthcare and mixed-use. At December 31, 2022 and 2021, our whole loans had a carrying value of \$2.0 billion and \$1.9 billion, respectively, or 100.0% and 99.8%, respectively, of the CRE loan portfolio.
- Mezzanine debt that is senior to borrower’s equity but is subordinated to other third-party debt. These loans are subordinated CRE loans, usually secured by a pledge of the borrower’s equity ownership in the entity that owns the property or by a second lien mortgage on the property. At December 31, 2021, our mezzanine loans had a carrying value of \$4.4 million, or 0.2%, of the CRE loan portfolio. At December 31, 2022, our mezzanine loans had no carrying value.
- Preferred equity investments that are subordinate to first mortgage loans and mezzanine debt. At December 31, 2020, our preferred equity investments had a carrying value of \$26.0 million, or 1.7% respectively, of the CRE loan portfolio. During the year ended December 31, 2021, our preferred equity investments paid off, generating \$28.8 million of proceeds.

We generate our income primarily from the spread between the revenues we receive from our assets and the cost to finance our ownership of those assets, including corporate debt.

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While the CRE whole loans included in the CRE loan portfolio are substantially composed of floating-rate loans benchmarked to market rates including the London Interbank Offered Rate (“LIBOR”) and the Secured Overnight Financing Rate (“SOFR”), asset yields are protected through the use of benchmark floors and minimum interest periods that typically range from 12 to 18 months at the time of a loan’s origination. Our benchmark floors provide asset yield protection when the benchmark interest rate falls below an in-place benchmark floor. Our net investment returns are enhanced by a decline in the cost of our floating-rate liabilities that do not have benchmark floors. Our net investment returns will be negatively impacted by the rising cost of our floating-rate liabilities that do not have floors until the benchmark interest rate is above the benchmark floor, at which point our floating-rate loans and floating-rate liabilities will be match funded, effectively locking in our net interest margin until the benchmark floor rate is activated again or the floating-rate loan is paid off or refinanced.

In a business environment where benchmark interest rates are increasing significantly, cash flows of the CRE assets underlying our loans may not be sufficient to pay debt service on our loans, which could result in non-performance or default. We partially mitigate this risk by generally requiring our borrowers to purchase interest rate cap agreements with non-affiliated, well-capitalized third parties and by selectively requiring our borrowers to have and maintain debt service reserves. These interest rate caps generally mature prior to the maturity date of the loan and the borrowers are required to pay to extend them. In most cases the sponsors will need to fund additional equity into the properties to cover these costs as the property may not generate sufficient cash flow to pay these costs. At December 31, 2022, 88.8% of the par value of our CRE loan portfolio had interest rate caps in place with a weighted-average maturity of 1.1 years.

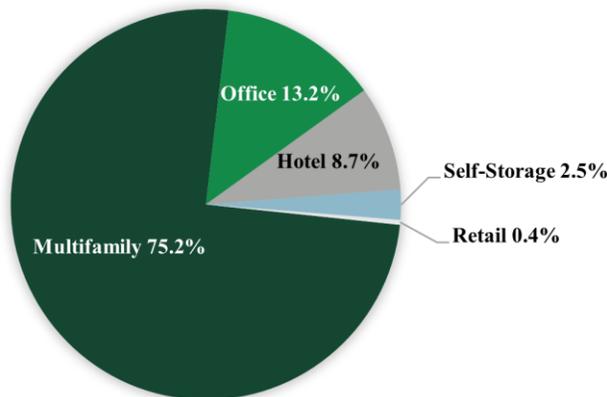
At December 31, 2022, our par-value \$2.1 billion floating-rate CRE loan portfolio, which includes one whole loan without a benchmark floor, had a weighted average benchmark floor of 0.68%. At December 31, 2021, our par-value \$1.9 billion floating rate CRE loan portfolio, which includes one whole loan without a benchmark floor, had a weighted average benchmark floor of 0.75%. The decrease in the weighted average benchmark floor was a result of older CRE floating-rate loans with higher floors paying off and being replaced with newer loans with lower floors. With the trend of rising benchmark interest rates in 2022 (both LIBOR and SOFR), we have seen the coupons on all of our floating-rate assets and debt rise accordingly. Because we have equity invested in each floating-rate loan, and because in all instances the benchmark interest rates are above our loan floors, the rise in interest rates expected by the market will result in an increase in our net interest income. See “Interest Rate Risk” in “Item 7A: Quantitative and Qualitative Disclosures About Market Risk.”

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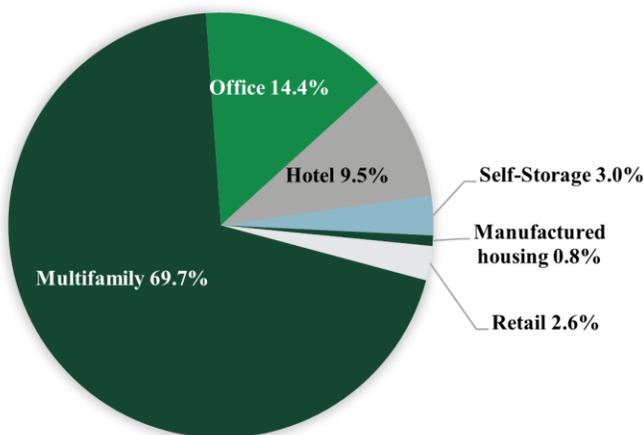
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Our portfolio comprises loans with a diverse array of collateral types and locations. We increased our multifamily portfolio allocation to 75.2% at December 31, 2022 up from 69.7% at December 31, 2021. The following charts show our portfolio allocation by property type at December 31, 2022 and 2021:

PROPERTY TYPE AT DECEMBER 31, 2022



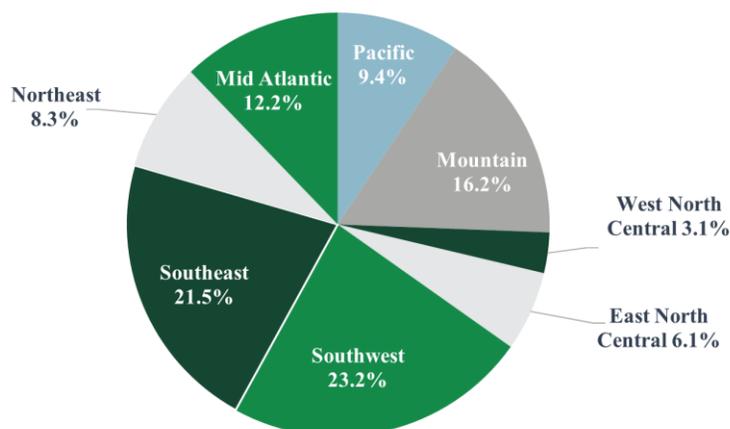
PROPERTY TYPE AT DECEMBER 31, 2021



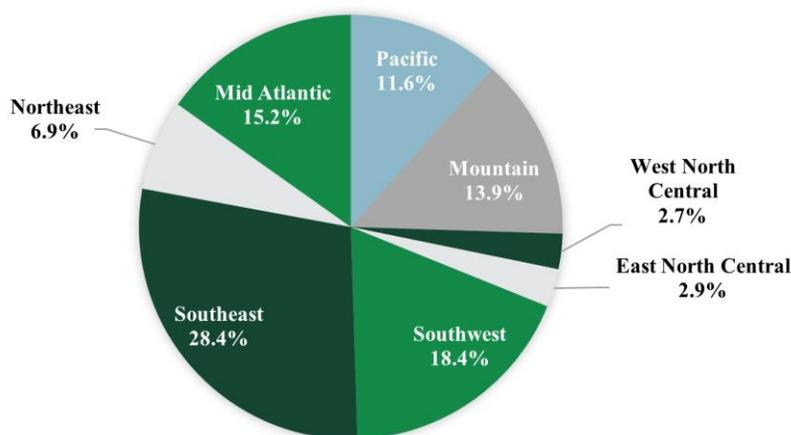
Our properties are located throughout the U.S., with two and one National Council of Real Estate Investment Fiduciaries (“NCREIF”) regions in excess of 20% of the total portfolio carrying value at December 31, 2022 and 2021, respectively. At December 31, 2022, the Southwest and Southeast regions were in excess of 20%. At December 31, 2021, the Southeast region exceeded 20%. The following charts shows our portfolio allocation by property type at December 31, 2022 and 2021:

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GEOGRAPHIC AREA AT DECEMBER 31, 2022



GEOGRAPHIC AREA AT DECEMBER 31, 2021



All but three of our loans were current on contractual payments at December 31, 2022. Each of these three loans, which were in maturity default, had recent appraisals in excess of their par balances and, as such, did not require individual reserves for current expected credit losses (“CECL”). Additionally, we have executed extensions on eight loans at a weighted average extension of four months in exchange for \$690,000 of fees during the year ended December 31, 2022.

During the year ended December 31, 2022, we acquired properties with a total fair value of \$51.6 million through direct equity investments. In July 2022, we acquired one property for \$14.3 million by taking the deed-in-lieu of foreclosure on a property that formerly collateralized a non-performing CRE whole loan and reported this property as held for sale at December 31, 2022 and was sold for \$15.1 million. We expect to book a nominal gain in February 2023. During the year ended December 31, 2021, we acquired properties with a total fair value of \$46.4 million through direct equity investments and taking the deed-in-lieu of foreclosure on a property that formerly collateralized a non-performing CRE whole loan.

The existence of net capital loss carryforwards allow for potential future capital gains on these investments to be shielded from income taxes. At December 31, 2022 and 2021, the total carrying value of our net real estate-related assets and liabilities was \$138.9 million and \$83.3 million, respectively, on six and four properties, respectively, owned.

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We use leverage to enhance our returns. The cost of borrowings to finance our investments is a significant part of our expenses. Our net interest income depends on our ability to control these expenses relative to our revenue. Our CRE loans may initially be financed with term facilities, such as CRE loan warehouse financing facilities, in anticipation of their ultimate securitization. We ultimately seek to finance our CRE loans through the use of non-recourse long-term, match-funded CRE debt securitizations.

Our asset-specific borrowings comprised CRE debt securitizations, term warehouse financing facilities and our senior secured financing facility. In May 2021, we closed ACRES Commercial Realty 2021-FL1 Issuer, Ltd. (“ACR 2021-FL1”), a new CRE debt securitization financing \$802.6 million of CRE loans with \$675.2 million of non-recourse, floating-rate notes at a weighted average cost of one-month LIBOR plus 1.49%. Simultaneously, we executed the optional redemption on Exantas Capital Corp. 2019-RSO7, Ltd. (“XAN 2019-RSO7”) and paid off the remaining notes. In December 2021, we closed ACRES Commercial Realty 2021-FL2 Issuer, Ltd. (“ACR 2021-FL2”), a new CRE debt securitization financing \$700.0 million of CRE loans with \$567.0 million of non-recourse, floating-rate notes at a weighted average cost of one-month LIBOR plus 1.80%. Each of these 2021 CLOs provides for a two-year reinvestment period that allows us to reinvest CRE loan payoffs and principal paydown proceeds into the securitizations, pending certain eligibility criteria are met and rating agency approval is obtained. The reinvestment feature of the securitizations will allow us to extend the securitizations’ financing lives at favorable interest rates through the reinvestment of loan payoff proceeds into new loans.

In February 2022 and March 2022, we exercised the optional redemptions of Exantas Capital Corp. 2020-RSO8, Ltd. (“XAN 2020-RSO8”) and Exantas Capital Corp. 2020-RSO9, Ltd. (“XAN 2020-RSO9”), respectively, and all of the outstanding senior notes were paid off from the sales proceeds of certain of the securitizations’ assets.

At December 31, 2022 and 2021, we had outstanding balances on our CRE loan term warehouse financing facilities of \$328.3 million and \$66.8 million, respectively, or 17.6% and 3.7%, respectively, of total outstanding borrowings. At December 31, 2022 and 2021, we had outstanding balances of \$1.2 billion and \$1.5 billion, respectively, on CRE debt securitizations, or 66.1% and 80.8%, respectively, of total outstanding borrowings. At December 31, 2022, we had outstanding borrowings on our senior secured financing facility of \$87.9 million, or 4.7% of total outstanding borrowings. At December 31, 2021, we had no outstanding borrowings on our senior secured financing facility.

In January 2020, we adopted updated accounting guidance that replaced the incurred loss approach with the CECL model for the determination of our allowance for loan losses. We reevaluate our CECL allowance quarterly, incorporating our current expectations of macroeconomic factors considered in the determination of our CECL reserves. The CECL model projected significantly increased expected credit losses during the year ended December 31, 2020 of \$34.3 million in connection with the adverse market conditions caused by the COVID-19 pandemic.

During the year ended December 31, 2021, we recorded a net reversal of credit losses, which reflected improvements in macroeconomic conditions, improved collateral operating performance and improvements in individually-evaluated loans. At December 31, 2021, the CECL allowance on our CRE loan portfolio was \$8.8 million or 0.5% of our \$1.9 billion loan portfolio.

During the year ended December 31, 2022, we recorded a provision of credit losses, which reflected changes in macroeconomic conditions and a specific, full reserve on one mezzanine loan with a par value of \$4.7 million. At December 31, 2022, the CECL allowance on our CRE loan portfolio was \$18.8 million or 0.9% of our \$2.1 billion loan portfolio.

During the year ended December 31, 2022, we recorded charge-offs of \$2.3 million primarily attributable to the January 2022 repayment of a CRE loan with a \$2.3 million allowance.

During the year ended December 31, 2021, we recorded charge-offs of \$4.2 million primarily attributable to: (i) the receipt of the deed-in-lieu of foreclosure of a property formerly-collateralizing a CRE loan with a \$2.3 million allowance at the time of transaction in October 2021 and (ii) the November 2021 sale of a CRE loan note for \$7.6 million of proceeds, net of costs, with a \$1.7 million allowance at the time of sale, including \$60,000 of reversing realized gains from the September 30, 2021 allowance.

We historically used derivative financial instruments, including interest rate swaps, to hedge a portion of the interest rate risk associated with our borrowings. In April 2020, we terminated all interest rate hedges in conjunction with the disposition of our financed commercial mortgage-backed securities (“CMBS”) portfolio. At December 31, 2022 and 2021, we had unrealized losses in connection with the terminated hedges of \$6.6 million and \$8.5 million, respectively, which will be amortized into interest expense over the remaining life of the debt. During the year ended December 31, 2022 and 2021, we recognized amortization expense on these terminated contracts of \$1.8 million and \$1.9 million, respectively.

Common stock book value was \$24.54 per share at December 31, 2022, a \$0.67 per share, or 3%, increase from December 31, 2021.

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Impact of Reference Rate Reform

As discussed in the “Overview” section above, our CRE whole loans and our asset-specific borrowings are primarily benchmarked to one-month LIBOR and one-month Term SOFR. In March 2021, the United Kingdom’s Financial Conduct Authority announced that it would cease publication of the one-week and two-month USD LIBOR immediately after December 31, 2021 and cease publication of the remaining tenors immediately after June 30, 2023. In July 2021, the U.S. Federal Reserve, in conjunction with the Alternative Reference Rates Committee, a steering committee comprising large U.S. financial institutions, has identified SOFR as its preferred alternative rate for LIBOR.

All variable rate loans originated by us beginning January 1, 2022 have been benchmarked to SOFR. Additionally, all of our floating-rate whole loans contain provisions that provide for the transition of the contractual benchmark interest rate to an alternative rate. At December 31, 2022, our loan portfolio had a carrying value of \$2.0 billion of floating rate loans, 68.3% or \$1.4 billion of which have interest rates tied to LIBOR and 31.7% or \$646.2 million of which have interest rates tied to SOFR.

In September 2021 and January 2022, the term warehouse financing facilities with JPMorgan Chase Bank, N.A. (“JPMorgan Chase”) and Morgan Stanley Mortgage Capital Holdings LLC (“Morgan Stanley”), respectively, were amended to allow for the transition to alternative rates, including rates tied to SOFR, subject to benchmark transition events. Additionally, during the year ended December 31, 2022, we entered into a loan agreement to finance the acquisition of a student housing complex, which uses SOFR as its benchmark interest rate. At December 31, 2022, we had \$1.7 billion of floating rate borrowings, 75.8% or \$1.3 billion of which have interest rates tied to LIBOR and 24.2% or \$419.2 million of which have interest rates tied to SOFR.

We expect to complete the process of converting our LIBOR-based loans and borrowings to an applicable benchmark interest rate during 2023.

The transition from LIBOR to SOFR or to another alternative rate may result in financial market disruptions and significant increases in benchmark interest rates, resulting in increased financing costs to us, any of which could have an adverse effect on our business, results of operations, financial condition, and the market price of our common stock. See “Part I. Item 1A. Risk Factors - Changes in the method for determining the benchmark rate (LIBOR or a replacement of LIBOR) may adversely affect the value of our loans, investments and borrowings and could affect our results of operations” for additional discussion on the risk related to ongoing reference rate reform.

Results of Operations

Our net loss allocable to common shares for the year ended December 31, 2022 was \$8.8 million, or \$(1.00) per share-basic (\$1.00) per share-diluted), as compared to net income allocable to common shares of \$18.0 million, or \$1.85 per share-basic (\$1.85 per share-diluted), for the year ended December 31, 2021.

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Net Interest Income

The following table analyzes the change in interest income and interest expense for the comparative years ended December 31, 2022 and 2021 by changes in volume and changes in rates. The changes attributable to the combined changes in volume and rate have been allocated proportionately, based on absolute values, to the changes due to volume and changes due to rates (dollars in thousands, except amounts in footnotes):

| | Year Ended December 31, 2022 Compared to Year Ended December 31, 2021 | | | |
|--|---|-------------------------------|-------------------|------------|
| | Net Change | Percent Change ⁽¹⁾ | Due to Changes in | |
| | | | Volume | Rate |
| Increase (decrease) in interest income: | | | | |
| CRE whole loans ⁽²⁾ | \$ 26,751 | 27% | \$ 15,498 | \$ 11,253 |
| Legacy CRE loan ⁽²⁾⁽³⁾ | (608) | (95)% | (670) | 62 |
| CRE preferred equity investments ⁽²⁾ | (1,378) | (100)% | (1,378) | — |
| CMBS | (161) | (100)% | (161) | — |
| Other | 638 | 658% | 638 | — |
| Total increase in interest income | 25,242 | 25% | 13,927 | 11,315 |
| Increase (decrease) in interest expense: | | | | |
| Securitized borrowings: ⁽⁴⁾ | | | | |
| XAN 2019-RSO7 Senior Notes | (5,172) | (100)% | (5,172) | — |
| XAN 2020-RSO8 Senior Notes | (6,989) | (85)% | (7,380) | 391 |
| XAN 2020-RSO9 Senior Notes | (8,280) | (90)% | (8,550) | 270 |
| ACR 2021-FL1 Senior Notes | 15,511 | 196% | 4,932 | 10,579 |
| ACR 2021-FL2 Senior Notes | 21,388 | 6,146% | 20,723 | 665 |
| Senior secured financing facility | (165) | (4)% | (204) | 39 |
| CRE - term warehouse financing facilities ⁽⁴⁾ | 8,467 | 148% | 4,757 | 3,710 |
| 4.50% Convertible Senior Notes ⁽⁴⁾ | (6,595) | (71)% | (6,595) | — |
| 5.75% Senior Unsecured Notes ⁽⁴⁾ | 5,771 | 167% | 5,771 | — |
| 12.00% Senior Unsecured Notes ⁽⁴⁾ | (3,934) | (93)% | (3,934) | — |
| Unsecured junior subordinated debentures | 865 | 40% | — | 865 |
| Hedging ⁽⁴⁾ | (118) | (6)% | (118) | — |
| Total increase (decrease) in interest expense | 20,749 | 34% | 4,230 | 16,519 |
| Net increase (decrease) in net interest income | \$ 4,493 | | \$ 9,697 | \$ (5,204) |

(1) Percent change is calculated as the net change divided by the respective interest income or interest expense for the year ended December 31, 2021.

(2) Includes decreases in fee income of \$2.0 million and \$73,000 recognized on our CRE whole loans and legacy CRE loan, respectively, and an increase of \$64,000 on our preferred equity investments, that were due to changes in volume.

(3) Includes the change in interest income recognized on one legacy CRE loan with an amortized cost of \$11.5 million at December 31, 2021 classified as a CRE loan on the consolidated balance sheets. The loan paid off in January 2022.

(4) Includes decreases in amortization expense of \$6.6 million, \$2.6 million, \$153,000 and \$118,000 on our securitized borrowings, 4.50% Convertible Senior Notes, 12.00% Senior Unsecured Notes and terminated interest rate swap agreements, respectively, and increases in amortization expense of \$186,000 and \$380,000 on our CRE - term warehouse financing facilities and 5.75% Senior Unsecured Notes, respectively, that were due to changes in volume.

Net Change in Interest Income for the Comparative Years Ended December 31, 2022 and 2021:

Aggregate interest income increased by \$25.2 million for the comparative years ended December 31, 2022 and 2021. We attribute the change to the following:

CRE whole loans. The increase of \$26.8 million for the comparative years ended December 31, 2022 and 2021 was primarily attributable to a net increase in the size of the total loan portfolio over the comparative periods as well as an increase in benchmark interest rates.

Legacy CRE loan. The decrease of \$608,000 for the comparative years ended December 31, 2022 and 2021 was primarily attributable to the payoff of our one remaining legacy CRE whole loan in January 2022.

CRE preferred equity investments. The decrease of \$1.4 million for the comparative years ended December 31, 2022 and 2021 was attributable to the payoffs of the preferred equity investments in March 2021 and April 2021.

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CMBS. The decrease of \$161,000 for the comparative years ended December 31, 2022 and 2021 was attributable to the disposition of our two remaining CMBS securities in March 2021.

Other. The increase of \$638,000 for the comparative years ended December 31, 2022 and 2021 was primarily attributable to an increase in yields on our interest earning money market accounts and restricted cash in our CRE securitizations.

Net Change in Interest Expense for the Comparative Years Ended December 31, 2022 and 2021:

Aggregate interest expense increased by \$20.7 million for the comparative years ended December 31, 2022 and 2021. We attribute the change to the following:

Securitized borrowings. The net increase of \$16.5 million for the comparative years ended December 31, 2022 and 2021 was primarily attributable to the issuance of ACR 2021-FL1 in May 2021 and ACR 2021-FL2 in December 2021 and an increase in benchmark interest rates over the comparative periods. These increases were partially offset by the liquidations of XAN 2019-RSO7, XAN 2020-RSO8 and XAN 2020-RSO9.

CRE - term warehouse financing facilities. The increase of \$8.5 million for the comparative years ended December 31, 2022 and 2021 was primarily attributable to increased utilization of the facilities over the comparative periods as well as an increase in benchmark interest rates.

4.5% Convertible Senior Notes. The decrease of \$6.6 million is primarily attributable to the redemption of the remaining \$88.0 million of these notes during the year ended December 31, 2022.

5.75% Senior Unsecured Notes. The increase of \$5.8 million for the comparative years ended December 31, 2022 and 2021 was attributable to the issuance of our 5.75% Senior Unsecured Notes in August 2021.

12.00% Senior Unsecured Notes. The decrease of \$3.9 million for the comparative years ended December 31, 2022 and 2021 was attributable to the redemption of the entire outstanding balance of our 12.00% Senior Unsecured Notes in August 2021.

Unsecured junior subordinated debentures. The increase of \$865,000 for the comparative years ended December 31, 2022 and 2021 was attributable to an increase in the benchmark interest rate for our unsecured junior subordinated debentures over the comparative periods.

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Average Net Yield and Average Cost of Funds:

The following table presents the average net yield and average cost of funds for the years ended December 31, 2022 and 2021 (dollars in thousands, except amounts in footnotes):

| | Year Ended December 31, 2022 | | | Year Ended December 31, 2021 | | |
|---|------------------------------|---------------------------|--|------------------------------|---------------------------|--|
| | Average Amortized Cost | Interest Income (Expense) | Average Net Yield (Cost of Funds) ⁽¹⁾ | Average Amortized Cost | Interest Income (Expense) | Average Net Yield (Cost of Funds) ⁽¹⁾ |
| Interest-earning assets | | | | | | |
| CRE whole loans, floating-rate ⁽²⁾ | \$ 2,000,737 | \$ 125,035 | 6.25% | \$ 1,650,512 | \$ 98,284 | 5.95% |
| Legacy CRE loan ⁽²⁾ | 158 | 29 | 18.08% | 11,516 | 637 | 5.53% |
| CRE mezzanine loan | 4,700 | 475 | 9.96% | 4,700 | 475 | 9.96% |
| CRE preferred equity investments ⁽²⁾ | — | — | —% | 8,202 | 1,378 | 16.80% |
| CMBS | — | — | —% | 4,196 | 161 | 3.90% |
| Other | 85,729 | 735 | 0.86% | 96,264 | 97 | 0.10% |
| Total interest income/average net yield | 2,091,324 | 126,274 | 6.04% | 1,775,390 | 101,032 | 5.69% |
| Interest-bearing liabilities | | | | | | |
| Collateralized by: | | | | | | |
| CRE whole loans ⁽³⁾ | 1,578,403 | (65,356) | (4.09)% | 1,217,251 | (40,596) | (3.24)% |
| General corporate debt: | | | | | | |
| Unsecured junior subordinated debentures | 51,548 | (3,020) | (5.78)% | 51,548 | (2,155) | (4.12)% |
| 4.50% Convertible Senior Notes ⁽⁴⁾ | 34,252 | (2,690) | (7.75)% | 120,276 | (9,285) | (7.61)% |
| 5.75% Senior Unsecured Notes ⁽⁵⁾ | 147,209 | (9,219) | (6.26)% | 55,513 | (3,448) | (6.21)% |
| 12.00% Senior Unsecured Notes ⁽⁶⁾⁽⁷⁾ | — | (306) | —% | 29,551 | (4,240) | (14.35)% |
| Hedging ⁽⁸⁾ | — | (1,733) | —% | — | (1,851) | —% |
| Total interest expense/average cost of funds | 1,811,412 | (82,324) | (4.38)% | 1,474,139 | (61,575) | (3.96)% |
| Total net interest income | | \$ 43,950 | | | \$ 39,457 | |

- (1) Average net yield includes net amortization/accretion and fee income and is computed based on average amortized cost.
- (2) Includes fee income of \$9.4 million recognized on our floating-rate CRE whole loans for the year ended December 31, 2022 and \$11.4 million and \$73,000 on our floating-rate CRE whole loans and legacy CRE loan, respectively, for the year ended December 31, 2021. During the year ended December 31, 2021, net amortization expense of \$64,000 was recorded on the preferred equity investments in connection with their payoffs.
- (3) Includes amortization expense of \$6.6 million and \$13.1 million for the years ended December 31, 2022 and 2021, respectively, on our interest-bearing liabilities collateralized by CRE whole loans.
- (4) Includes aggregated amortization expense of \$1.1 million and \$3.7 million for the years ended December 31, 2022 and 2021, respectively, on our 4.50% Convertible Senior Notes. The amortization expense for the year ended December 31, 2021 included \$304,000 of acceleration of deferred debt issuance costs in connection with the repurchase of \$55.7 million principal amount of 4.50% Convertible Senior Notes during the period.
- (5) Includes amortization expense of \$594,000 and \$214,000 for the years ended December 31, 2022 and 2021, respectively, on our 5.75% Senior Unsecured Notes.
- (6) Includes amortization expense of \$306,000 and \$459,000 for the years ended December 31, 2022 and 2021, respectively, on our 12.00% Senior Unsecured Notes. The amortization expense for the year ended December 31, 2021 included \$218,000 of acceleration of deferred debt issuance costs in connection with the redemption of all \$50.0 million principal amount of 12.00% Senior Unsecured Notes during the period.
- (7) The outstanding par balance of our 12.00% Senior Unsecured Notes was redeemed in full in August 2021. At any time and from time to time prior to July 31, 2022, we were permitted to elect to issue up to \$75.0 million of principal of additional notes. The interest expense incurred during the year ended December 31, 2022 composed of amortization of deferred debt issuance costs on the remaining availability.
- (8) Includes net amortization expense of \$1.7 million and \$1.9 million for the years ended December 31, 2022 and 2021, respectively, on 22 terminated interest rate swap agreements that were in net loss positions at the time of termination. The remaining net losses, reported in accumulated other comprehensive loss on the consolidated balance sheets, will be amortized as an expense over the remaining life of the debt.

Real Estate Income and Other Revenue

The following table sets forth information relating to our real estate income and other revenue for the comparative years ended December 31, 2022 and 2021 (dollars in thousands):

| | Years Ended December 31, | | Dollar Change | Percent Change |
|--|--------------------------|-----------|---------------|----------------|
| | 2022 | 2021 | | |
| Real estate income and other revenue: | | | | |
| Real estate income | \$ 31,129 | \$ 10,553 | \$ 20,576 | 195% |
| Other revenue | 91 | 65 | 26 | 40% |
| Total | \$ 31,220 | \$ 10,618 | \$ 20,602 | 194% |

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Aggregate real estate income and other revenue increased by \$20.6 million for the comparative years ended December 31, 2022 and 2021. We attribute the changes to the acquisition of two revenue-generating properties in the fourth quarter of 2021 and two additional revenue-generating properties in the second quarter of 2022. Real estate income at our hotel property acquired in 2020 additionally benefited from increased personal and business travel resulting from lifted COVID-19 restrictions that occurred late in the spring of 2022. Additionally, we received a deed in lieu of foreclosure in the third quarter of 2022 on a hotel property that has been revenue generating since the deed was received.

Operating Expenses

Year Ended December 31, 2022 as compared to the Year Ended December 31, 2021

The following table sets forth information relating to our operating expenses for the years presented (dollars in thousands):

| | <u>Years Ended December 31,</u> | | | <u>Percent Change</u> |
|--|---------------------------------|-----------------|----------------------|-----------------------|
| | <u>2022</u> | <u>2021</u> | <u>Dollar Change</u> | |
| Operating expenses: | | | | |
| General and administrative | \$ 10,575 | \$ 11,602 | \$ (1,027) | (9)% |
| Real estate expenses | 33,854 | 10,601 | 23,253 | 219% |
| Management fees - related party | 7,035 | 6,089 | 946 | 16% |
| Equity compensation - related party | 3,562 | 1,722 | 1,840 | 107% |
| Corporate depreciation and amortization | 85 | 94 | (9) | (10)% |
| Provision for (reversal of) credit losses, net | 12,295 | (21,262) | 33,557 | 158% |
| Total | <u>\$ 67,406</u> | <u>\$ 8,846</u> | <u>\$ 58,560</u> | 662% |

Aggregate operating expenses increased by \$58.6 million for the comparative years ended December 31, 2022 and 2021. We attribute the changes to the following:

General and administrative. General and administrative expenses decreased by \$1.0 million for the comparative years ended December 31, 2022 and 2021. The following table summarizes the information relating to our general and administrative expenses for the years presented (dollars in thousands):

| | <u>Years Ended December 31,</u> | | | <u>Percent Change</u> |
|---|---------------------------------|------------------|----------------------|-----------------------|
| | <u>2022</u> | <u>2021</u> | <u>Dollar Change</u> | |
| General and administrative | | | | |
| Professional services | \$ 5,464 | \$ 5,872 | \$ (408) | (7)% |
| D&O insurance | 1,380 | 1,395 | (15) | (1)% |
| Wages and benefits | 1,227 | 1,598 | (371) | (23)% |
| Operating expenses | 867 | 1,172 | (305) | (26)% |
| Director fees | 825 | 709 | 116 | 16% |
| Dues and subscriptions | 755 | 756 | (1) | (0)% |
| Travel | 49 | 31 | 18 | 58% |
| Tax penalties, interest & franchise tax | 8 | 69 | (61) | (88)% |
| Total | <u>\$ 10,575</u> | <u>\$ 11,602</u> | <u>\$ (1,027)</u> | (9)% |

The decrease in general and administrative expenses for the comparative years ended December 31, 2022 and 2021 was primarily attributable to a decrease in professional services, wages and benefits and operating expenses reimbursable to the Manager.

Real estate expenses. The increase of \$23.3 million for the comparative years ended December 31, 2022 and 2021 was primarily attributable to the acquisition of two properties, a hotel and a student housing complex, in April 2022, as well as the acquisition of two office properties in October 2021. The increase was also attributable to increased operating expenses incurred on a hotel property acquired in November 2020 due to growth in its operations in the current year and due to the incremental operating expenses incurred on a hotel property on which we received the deed-in-lieu of foreclosure in July 2022.

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Management fees - related party. The increase of \$946,000 for the comparative years ended December 31, 2022 and 2021 was primarily attributable to an increase in our base management fees during the year ended December 31, 2022. As of July 31, 2020, as part of the Fourth Amended and Restated Management Agreement, as amended (“Management Agreement”), the monthly base management fee payable to our Manager was amended to be the greater of 1/12th of the amount of our equity multiplied by 1.50% or \$442,000 through July 31, 2022. In June 2021, the base management fee calculation exceeded the \$442,000 for the first time since the execution of the Management Agreement in connection with the issuance of the 7.875% Series D Cumulative Redeemable Preferred Stock (“Series D Preferred Stock”). As a result, the management fees incurred during the year ended December 31, 2022 were greater than those incurred during the year ended December 31, 2021.

The increase in management fees - related party is also attributable to a \$340,000 incentive management fee to the Manager recorded in the fourth quarter of 2022, of which \$170,000 was payable in cash and \$170,000 was payable in common stock. Per the Management Agreement, with respect to each fiscal quarter commencing with the quarter ended December 31, 2022, an incentive management fee calculated and payable in arrears in an amount, not less than zero, equal to, for the first full calendar quarter ended December 31, 2022, the product of (a) 20% and (b) the excess of (i) our EAD for such calendar quarter, over (ii) the product of (A) our book value equity as of the end of such calendar quarter, and (B) 7% per annum.

Equity compensation. The increase of \$1.8 million for the comparative years ended December 31, 2022 and 2021 was primarily attributable to shares granted in the second quarter 2022 and the second quarter 2021 under our Manager Incentive Plan, which will vest 25% for four years, on each anniversary of the issuance date.

Provision for (reversal of) credit losses, net. The provision for credit losses of \$12.3 million for the year ended December 31, 2022 was primarily attributable to a general decline in macroeconomic conditions and one specific, full reserve for our remaining mezzanine loan with a par value of \$4.7 million. The reversal of credit losses of \$21.3 million for the year ended December 31, 2021 was attributable to overall, general improvements in expected macroeconomic conditions at the time and improvements in property-level operations on loan collateral at that time.

Other Income (Expense)

Year Ended December 31, 2022 as compared to Year Ended December 31, 2021

The following table sets forth information relating to our other income (expense) for the years presented (dollars in thousands):

| | <u>Years Ended December 31,</u> | | | Percent Change |
|--|---------------------------------|-------------------|----------------------|-----------------------|
| | <u>2022</u> | <u>2021</u> | <u>Dollar Change</u> | |
| Other income (expense): | | | | |
| Net realized and unrealized gain on investment securities available-for-sale and loans and derivatives | \$ — | \$ 878 | \$ (878) | (100)% |
| Loss on extinguishment of debt | (460) | (9,006) | 8,546 | (95)% |
| Gain on sale of real estate | 1,870 | — | 1,870 | 100% |
| Other income | 1,588 | 822 | 766 | 93% |
| Total | <u>\$ 2,998</u> | <u>\$ (7,306)</u> | <u>\$ 10,304</u> | (141)% |

Aggregate other income (expense) increased \$10.3 million for the comparative years ended December 31, 2022 and 2021. We attribute the change to the following:

Net realized and unrealized (loss) gain on investment securities available-for-sale and loans and derivatives. The decrease of \$878,000 for the year ended December 31, 2022 was attributable to the sale of our two remaining CMBS securities for proceeds of \$3.0 million, which generated non-recurring gains of \$878,000 in March 2021.

Loss on extinguishment of debt. The increase of \$8.5 million for the comparative years ended December 31, 2022 and 2021 was attributable to the full redemption of our 12.00% Senior Unsecured Notes in the third quarter of 2021, which resulted in \$7.8 million of losses, and the partial repurchase of our 4.50% Convertible Senior Notes in February 2022, which resulted in \$460,000 of non-cash losses in connection with the acceleration of the ratable market discount.

Gain on sale of real estate. The increase of \$1.9 million during the year ended December 31, 2022 was attributed to the sale of an office property in the East North Central Region that generated \$1.9 million of non-recurring gains.

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Other Income. The increase of \$766,000 during the comparative years ended December 31, 2022 and 2021 was primarily attributable to a loan recovery received during the year ended December 31, 2022 on a middle market loan that was previously charged off. In addition, a reversal of previously accrued property taxes and other trade payables that were considered settled upon final payments to the buyer occurred to generate income of \$361,000.

Financial Condition

Summary

Our total assets were \$2.4 billion at December 31, 2022 as compared to \$2.3 billion at December 31, 2021.

Investment Portfolio

The tables below summarize the amortized cost and net carrying amount of our investment portfolio, classified by asset type, at December 31, 2022 and 2021 as follows (dollars in thousands, except amounts in footnotes):

| At December 31, 2022 | Amortized Cost | Net Carrying Amount ⁽¹⁾ | Percent of Portfolio | Weighted Average Coupon |
|---|---------------------|------------------------------------|----------------------|-------------------------|
| Loans held for investment: | | | | |
| CRE whole loans, floating-rate | \$ 2,052,890 | \$ 2,038,787 | 93.56% | 7.99% |
| CRE mezzanine loan | 4,700 | — | 0.00% | 10.00% |
| | <u>2,057,590</u> | <u>2,038,787</u> | <u>93.56%</u> | |
| Other investments: | | | | |
| Investments in unconsolidated entities | 1,548 | 1,548 | 0.07% | N/A ⁽⁴⁾ |
| Investments in real estate ⁽²⁾ | 88,132 | 88,132 | 4.04% | N/A ⁽⁴⁾ |
| Properties held for sale ⁽³⁾ | 50,744 | 50,744 | 2.33% | N/A ⁽⁴⁾ |
| | <u>140,424</u> | <u>140,424</u> | <u>6.44%</u> | |
| Total investment portfolio | <u>\$ 2,198,014</u> | <u>\$ 2,179,211</u> | <u>100.00%</u> | |

| At December 31, 2021 | Amortized Cost | Net Carrying Amount ⁽¹⁾ | Percent of Portfolio | Weighted Average Coupon |
|---|---------------------|------------------------------------|----------------------|-------------------------|
| Loans held for investment: | | | | |
| CRE whole loans, floating-rate ⁽⁵⁾ | \$ 1,877,851 | \$ 1,869,301 | 95.44% | 4.43% |
| CRE mezzanine loan | 4,700 | 4,445 | 0.23% | 10.00% |
| | <u>1,882,551</u> | <u>1,873,746</u> | <u>95.67%</u> | |
| Other investments: | | | | |
| Investments in unconsolidated entities | 1,548 | 1,548 | 0.08% | N/A ⁽⁴⁾ |
| Investments in real estate ⁽²⁾ | 65,465 | 65,465 | 3.34% | N/A ⁽⁴⁾ |
| Property held for sale ⁽³⁾ | 17,846 | 17,846 | 0.91% | N/A ⁽⁴⁾ |
| | <u>84,859</u> | <u>84,859</u> | <u>4.33%</u> | |
| Total investment portfolio | <u>\$ 1,967,410</u> | <u>\$ 1,958,605</u> | <u>100.00%</u> | |

- (1) Net carrying amount includes an allowance for credit losses of \$18.8 million and \$8.8 million at December 31, 2022 and 2021, respectively.
- (2) Includes real estate related right of use assets of \$19.5 million and \$5.5 million, intangible assets of \$8.9 million and \$3.9 million, lease liabilities of \$42.9 million and \$3.1 million and other liabilities of \$64,000 and \$169,000 at December 31, 2022 and 2021, respectively. Also includes a mortgage payable of \$18.2 million at December 31, 2022. There was no mortgage payable at December 31, 2021.
- (3) Includes property held for sale-related liabilities of \$3.0 million at December 31, 2022. There were no property held for sale-related liabilities at December 31, 2021.
- (4) There were no stated rates associated with these investments.
- (5) Includes one legacy CRE loan, underwritten prior to 2010, with an amortized cost of \$11.5 million at December 31, 2021, that paid off in January 2022.

CRE loans. During the year ended December 31, 2022, we originated \$610.8 million of floating-rate CRE whole loan commitments (of which \$87.6 million was unfunded loan commitments), funded \$66.4 million of previously unfunded loan commitments and received \$399.6 million in proceeds from loan payoffs and paydowns.

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The following is a summary of our loans at December 31, 2022 and 2021 (dollars in thousands, except amounts in footnotes):

| Description | Quantity | Principal | Unamortized (Discount) Premium, net ⁽¹⁾ | Amortized Cost | Allowance for Credit Losses | Carrying Value | Contractual Interest Rates ⁽²⁾ | Maturity Dates ⁽³⁾⁽⁴⁾ |
|-------------------------------------|----------|---------------------|---|---------------------|--------------------------------|---------------------|---|---|
| At December 31, 2022: | | | | | | | | |
| CRE loans held for investment: | | | | | | | | |
| Whole loans ⁽⁵⁾⁽⁶⁾ | 81 | \$ 2,065,504 | \$ (12,614) | \$ 2,052,890 | \$ (14,103) | \$ 2,038,787 | 1M BR plus 2.85% to 1M BR plus | January 2023 to July 2026 |
| Mezzanine loan ⁽⁵⁾ | 1 | 4,700 | — | 4,700 | (4,700) | — | 10.00% | June 2028 |
| Total CRE loans held for investment | | <u>\$ 2,070,204</u> | <u>\$ (12,614)</u> | <u>\$ 2,057,590</u> | <u>\$ (18,803)</u> | <u>\$ 2,038,787</u> | | |
| At December 31, 2021: | | | | | | | | |
| CRE loans held for investment: | | | | | | | | |
| Whole loans ⁽⁵⁾⁽⁶⁾ | 93 | \$ 1,891,795 | \$ (13,944) | \$ 1,877,851 | \$ (8,550) | \$ 1,869,301 | 1M BR plus 2.70% to 1M BR plus | January 2022 to September 2025 |
| Mezzanine loan ⁽⁵⁾ | 1 | 4,700 | — | 4,700 | (255) | 4,445 | 10.00% | June 2028 |
| Total CRE loans held for investment | | <u>\$ 1,896,495</u> | <u>\$ (13,944)</u> | <u>\$ 1,882,551</u> | <u>\$ (8,805)</u> | <u>\$ 1,873,746</u> | | |

- (1) Amounts include unamortized loan origination fees of \$12.3 million and \$13.6 million and deferred amendment fees of \$308,000 and \$307,000 at December 31, 2022 and 2021, respectively. Additionally, the amounts include unamortized loan acquisition costs of \$7,300 at December 31, 2021. At December 31, 2022, there were no unamortized loan acquisition costs.
- (2) Our whole loan portfolio of \$2.1 billion and \$1.9 billion had a weighted-average benchmark rate (“BR”) floor of 0.68% and 0.75% at December 31, 2022 and 2021, respectively. Benchmark rates comprise one-month LIBOR or one-month Term SOFR. At December 31, 2022 and 2021, all but one of our floating-rate whole loans had one-month benchmark floors.
- (3) Maturity dates exclude contractual extension options, subject to the satisfaction of certain terms that may be available to the borrowers.
- (4) Maturity dates exclude three whole loans, with amortized costs of \$51.6 million and \$27.9 million, in maturity default at December 31, 2022 and 2021, respectively.
- (5) Substantially all loans are pledged as collateral under various borrowings at December 31, 2022 and 2021.
- (6) CRE whole loans had \$158.2 million and \$157.6 million in unfunded loan commitments at December 31, 2022 and 2021, respectively. These unfunded loan commitments are advanced as the borrowers formally request additional funding, as permitted under the loan agreement, and any necessary approvals have been obtained.

At December 31, 2022, 23.2%, 21.5% and 16.2% of our CRE loan portfolio was concentrated in the Southwest, Southeast and Mountain regions, respectively, based on carrying value, as defined by NCREIF. At December 31, 2021, 28.4%, 18.4% and 15.2% of our CRE loan portfolio was concentrated in the Southeast, Southwest and Mid-Atlantic regions, respectively, based on carrying value. No single loan or investment represented more than 10% of our total assets and no single investment group generated over 10% of our total revenue.

Investments in unconsolidated entities. Our investments in unconsolidated entities at December 31, 2022 and 2021 comprised a 100% interest in the common shares of Resource Capital Trust I (“RCT I”) and RCC Trust II (“RCT II”), respectively, with a value of \$1.5 million in the aggregate, or 3.0% of each trust. We record our investments in RCT I’s and RCT II’s common shares as investments in unconsolidated entities using the cost method, recording dividend income when declared by RCT I and RCT II. During the years ended December 31, 2022 and 2021, we recorded dividends from the investments in RCT I’s and RCT II’s common shares, reported in other revenue on the consolidated statements of operations, of \$91,000 and \$65,000, respectively.

Investments in real estate and property held for sale. During the year ended December 31, 2022, we acquired two new real estate properties through direct equity investments. We determined that the acquisition of the two properties should be accounted for as asset acquisitions. The combined acquisition-date fair value of \$51.6 million was determined using third-party valuations.

In September 2022, we sold an office property in the East North Central region that we previously designated as a property held for sale. The office property sold for \$19.3 million with selling costs of \$532,000, resulting in a gain on sale of \$1.9 million.

In July 2022, we received the deed-in-lieu of foreclosure on a hotel property in the Northeast region. We determined that the acquisition of the property should be accounted for as an asset acquisition, and the acquisition-date fair value of \$14.3 million was determined using a third-party valuation. The carrying value of the property was \$13.5 million at December 31, 2022 and was reported as property held for sale on the consolidated balance sheets. There was no gain or loss recognized on conversion of the loan to property held for sale. In February 2023, this property was sold for \$15.1 million and we expect to record a modest gain on the sale in the first quarter of 2023.

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In September 2022, we reclassified another hotel property in the Northeast region with a carrying value of \$36.9 million to property held for sale.

The following table summarizes the book value of our investments in real estate and related intangible assets at December 31, 2022 (in thousands, except amounts in the footnotes):

| | December 31, 2022 | | |
|--|-------------------|---|-------------------|
| | Cost Basis | Accumulated Depreciation & Amortization | Carrying Value |
| Assets acquired: | | | |
| <i>Investments in real estate, equity:</i> | | | |
| Investments in real estate ⁽¹⁾ | \$ 123,219 | \$ (2,251) | \$ 120,968 |
| Right of use assets ⁽²⁾ | 19,664 | (205) | 19,459 |
| Intangible assets ⁽³⁾ | 11,474 | (2,594) | 8,880 |
| Subtotal | <u>154,357</u> | <u>(5,050)</u> | <u>149,307</u> |
| <i>Investments in real estate from lending activities:</i> | | | |
| Properties held for sale ⁽⁴⁾ | 53,769 | — | 53,769 |
| Total | <u>208,126</u> | <u>(5,050)</u> | <u>203,076</u> |
| Liabilities assumed: | | | |
| <i>Investments in real estate, equity:</i> | | | |
| Mortgage payable | 18,089 | 155 | 18,244 |
| Other liabilities | 247 | (183) | 64 |
| Lease liabilities ⁽⁵⁾ | 43,260 | (393) | 42,867 |
| Subtotal | <u>61,596</u> | <u>(421)</u> | <u>61,175</u> |
| <i>Investments in real estate from lending activities:</i> | | | |
| Liabilities held for sale | 3,025 | — | 3,025 |
| Total | <u>64,621</u> | <u>(421)</u> | <u>64,200</u> |
| Total net investments in real estate and properties held for sale ⁽⁶⁾ | <u>\$ 143,505</u> | | <u>\$ 138,876</u> |

(1) Includes \$38.4 million of land, which is not depreciable.

(2) Includes a right of use associated with an acquired ground lease of \$42.4 million accounted for as an operating lease, an above-market lease intangible asset of \$19.0 million and a customer list intangible of \$402,000. Amortization of the above-market lease intangible is booked to real estate expenses on the consolidated statements of operations.

(3) Carrying value includes \$42,000 of an acquired in-place lease intangible asset, \$39,000 of an acquired leasing commission intangible asset, management contract of \$3.1 million, franchise intangible of \$5.3 million and a customer list value of \$427,000.

(4) Includes two properties originally acquired in November 2020 and July 2022.

(5) Lease liabilities include one ground lease at a hotel property with a remaining term of 93 years. Lease expense for this liability for the year ended December 31, 2022 was \$1.1 million.

(6) Excludes items of working capital, either acquired or assumed.

Financing Receivables

The following tables show the activity in the allowance for credit losses for the years ended December 31, 2022 and 2021 (in thousands):

| | Years Ended December 31, | |
|--|--------------------------|-----------------|
| | 2022 | 2021 |
| Allowance for credit losses at beginning of year | \$ 8,805 | \$ 34,310 |
| Provision for (reversal of) credit losses | 12,295 | (21,262) |
| Charge offs | (2,297) | (4,243) |
| Allowance for credit losses at end of year | <u>\$ 18,803</u> | <u>\$ 8,805</u> |

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During the year ended December 31, 2020, higher expected unemployment and increased volatility in CRE asset pricing and liquidity as a result of the COVID-19 pandemic significantly impacted assumptions in our CECL estimates and resulted in a net provision for credit losses of \$30.8 million. However, the discovery and distribution of vaccines and other treatments for COVID-19 led to a recovery of the global economy and markets worldwide, which resulted in a net reversal of credit losses of \$21.3 million during the year ended December 31, 2021. The ensuing macroeconomic factors, including expected increases in inflation, short-term interest rates, energy prices and continued global supply chain dislocation trending negative, compounded by an increase in portfolio credit risk indicated in property-level cash flows that collateralize our loans, resulted in a net provision of expected credit losses of \$12.3 million during the year ended December 31, 2022.

In addition to our general estimate of credit losses, we may also be required to individually evaluate collateral-dependent loans for credit losses if it has determined that foreclosure or sale of the loan or the underlying collateral is probable. At December 31, 2022 and 2021, \$4.7 million and \$2.3 million, respectively, of our allowance for credit losses resulted from collateral-dependent loans that were individually evaluated for credit losses, details of which follow:

During the year ended December 31, 2022, we individually evaluated the following loans:

- One office mezzanine loan in the Northeast region with a principal balance of \$4.7 million. We fully reserved this loan in the fourth quarter of 2022.
- One retail loan in the Northeast region with a principal balance of \$8.0 million. This property has an as-is appraised value in excess of its principal balance, and, as such, had no CECL allowance at December 31, 2022.
- One office loan in the Southwest region with a principal balance of \$20.7 million. This property has an as-is appraised value in excess of its principal balance, and, as such, had no CECL allowance at December 31, 2022.

During the year ended December 31, 2021, we individually evaluated the following loans:

- An office loan in the East North Central region with a \$19.9 million principal balance. We recorded a \$2.3 million CECL allowance in the third quarter of 2021 to reflect the as-is appraised value of the property of \$17.6 million. Upon receipt of the property in full satisfaction of the loan in the fourth quarter of 2021, we charged off the \$2.3 million CECL allowance and recorded the property as a property held for sale on our consolidated balance sheets at its fair value of \$17.6 million.
- A hotel loan in the Northeast region with a \$9.3 million principal balance. We recorded a \$1.8 million CECL allowance in the third quarter of 2021 that reflected our estimate of fair value less costs of sale of \$7.5 million at September 30, 2021. Upon sale of the loan in November 2021, we received proceeds of \$7.6 million, net of costs of sale, and charged off the remaining \$1.7 million CECL allowance.
- A retail loan in the Pacific region with an \$11.5 million principal balance. At December 31, 2021, we had a recorded \$2.3 million CECL allowance that reflected the loss taken on the loan as a result of a discounted payoff received on the loan in January 2022 in full satisfaction of the loan.
- A hotel loan in the East North Central region with an \$8.4 million principal balance. We received payment in full on this loan in January 2022; and, as such, there was no CECL allowance recorded at December 31, 2021.
- A hotel loan in the Northeast region with a \$14.0 million principal balance. The hotel loan has an as-is appraised value in excess of its principal balance, and, as such, had no CECL allowance at December 31, 2021.

Credit quality indicators

Commercial Real Estate Loans

CRE loans are collateralized by a diversified mix of real estate properties and are assessed for credit quality based on the collective evaluation of several factors, including but not limited to: collateral performance relative to underwritten plan, time since origination, current implied and/or re-underwritten loan-to-collateral value (“LTV”) ratios, loan structure and exit plan. Depending on the loan’s performance against these various factors, loans are rated on a scale from 1 to 5, with loans rated 1 representing loans with the highest credit quality and loans rated 5 representing the loans with the lowest credit quality. The factors evaluated provide general criteria to monitor credit migration in our loan portfolio; as such, a loan’s rating may improve or worsen, depending on new information received.

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The criteria set forth below should be used as general guidelines and, therefore, not every loan will have all of the characteristics described in each category below.

| Risk Rating | Risk Characteristics |
|-------------|--|
| 1 | <ul style="list-style-type: none"> • Property performance has surpassed underwritten expectations. • Occupancy is stabilized, the property has had a history of consistently high occupancy, and the property has a diverse and high quality tenant mix. |
| 2 | <ul style="list-style-type: none"> • Property performance is consistent with underwritten expectations and covenants and performance criteria are being met or exceeded. • Occupancy is stabilized, near stabilized or is on track with underwriting. |
| 3 | <ul style="list-style-type: none"> • Property performance lags behind underwritten expectations. • Occupancy is not stabilized and the property has some tenancy rollover. |
| 4 | <ul style="list-style-type: none"> • Property performance significantly lags behind underwritten expectations. Performance criteria and loan covenants have required occasional waivers. • Occupancy is not stabilized and the property has a large amount of tenancy rollover. |
| 5 | <ul style="list-style-type: none"> • Property performance is significantly worse than underwritten expectations. The loan is not in compliance with loan covenants and performance criteria and may be in default. Expected sale proceeds would not be sufficient to pay off the loan at maturity. • The property has a material vacancy rate and significant rollover of remaining tenants. • An updated appraisal is required upon designation and updated on an as-needed basis. |

All CRE loans are evaluated for any credit deterioration by debt asset management and certain finance personnel on at least a quarterly basis. Historically, mezzanine loans and preferred equity investments may have experienced greater credit risks due to their nature as subordinated investments.

For the purpose of calculating the quarterly provision for credit losses under CECL, we pool CRE loans based on the underlying collateral property type and utilize a probability of default and loss given default methodology for approximately one year after which we immediately revert to a historical mean loss ratio. In order to calculate the historical mean loss ratio, we utilize our full, 16 year underwriting history in the determination of historical losses, along with the market loss history from a selected population from an engaged third-party provider's database that were similar to our loan types, loan sizes, durations, interest rate structure and general LTV profiles.

Credit risk profiles of CRE loans, at amortized cost, were as follows (in thousands, except amounts in the footnote):

| | Rating 1 | Rating 2 | Rating 3 | Rating 4 | Rating 5 | Total ⁽¹⁾ |
|------------------------------|-------------|--------------------|-------------------|-------------------|------------------|----------------------|
| At December 31, 2022: | | | | | | |
| Whole loans, floating-rate | \$ — | \$1,635,376 | 309,491 | \$ 85,226 | \$ 22,797 | \$2,052,890 |
| Mezzanine loan | — | — | — | — | 4,700 | 4,700 |
| Total | <u>\$ —</u> | <u>\$1,635,376</u> | <u>\$309,491</u> | <u>\$ 85,226</u> | <u>\$ 27,497</u> | <u>\$2,057,590</u> |
| At December 31, 2021: | | | | | | |
| Whole loans, floating-rate | \$ — | \$1,456,330 | \$ 273,078 | \$ 123,762 | \$ 24,681 | \$1,877,851 |
| Mezzanine loan | — | — | — | 4,700 | — | 4,700 |
| Total | <u>\$ —</u> | <u>\$1,456,330</u> | <u>\$ 273,078</u> | <u>\$ 128,462</u> | <u>\$ 24,681</u> | <u>\$1,882,551</u> |

(1) The total amortized cost of CRE loans excluded accrued interest receivable of \$11.9 million and \$6.1 million at December 31, 2022 and 2021, respectively.

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Credit risk profiles of CRE loans by origination year at amortized cost were as follows (in thousands, except amounts in footnotes):

| | 2022 | 2021 | 2020 | 2019 | 2018 | Prior | Total ⁽¹⁾ |
|--|------------|--------------|------------|-----------|------------|-------|----------------------|
| At December 31, 2022: | | | | | | | |
| Whole loans, floating-rate: ⁽²⁾ | | | | | | | |
| Rating 2 | \$ 526,606 | \$ 1,003,060 | \$ 64,944 | \$ 26,977 | \$ 13,789 | \$ — | \$ 1,635,376 |
| Rating 3 | | 192,490 | 44,657 | 27,881 | 44,463 | — | 309,491 |
| Rating 4 | — | — | — | 20,742 | 64,484 | — | 85,226 |
| Rating 5 | — | — | — | 22,797 | — | — | 22,797 |
| Total whole loans, floating-rate | 526,606 | 1,195,550 | 109,601 | 98,397 | 122,736 | — | 2,052,890 |
| Mezzanine loan (rating 5) | — | — | — | — | 4,700 | — | 4,700 |
| Total | \$ 526,606 | \$ 1,195,550 | \$ 109,601 | \$ 98,397 | \$ 127,436 | \$ — | \$ 2,057,590 |

| | 2021 | 2020 | 2019 | 2018 | 2017 | Prior | Total ⁽¹⁾ |
|--|--------------|------------|------------|------------|------|-----------|----------------------|
| At December 31, 2021: | | | | | | | |
| Whole loans, floating-rate: ⁽²⁾ | | | | | | | |
| Rating 2 | \$ 1,230,810 | \$ 150,513 | \$ 55,510 | \$ 19,497 | \$ — | \$ — | \$ 1,456,330 |
| Rating 3 | 33,781 | 24,604 | 136,305 | 60,888 | — | 17,500 | 273,078 |
| Rating 4 | — | — | 28,446 | 86,096 | — | 9,220 | 123,762 |
| Rating 5 | — | — | 22,385 | — | — | 2,296 | 24,681 |
| Total whole loans, floating-rate | 1,264,591 | 175,117 | 242,646 | 166,481 | — | 29,016 | 1,877,851 |
| Mezzanine loan (rating 4) | — | — | — | 4,700 | — | — | 4,700 |
| Total | \$ 1,264,591 | \$ 175,117 | \$ 242,646 | \$ 171,181 | \$ — | \$ 29,016 | \$ 1,882,551 |

(1) The total amortized cost of CRE loans excluded accrued interest receivable of \$11.9 million and \$6.1 million at December 31, 2022 and 2021, respectively.

(2) Acquired CRE whole loans are grouped within each loan's year of issuance.

We had one additional mezzanine loan that was included in assets held for sale, and that loan had no carrying value at December 31, 2022 and 2021.

Loan Portfolios Aging Analysis

The following table presents the CRE loan portfolio aging analysis as of the dates indicated for CRE loans, at amortized cost (in thousands, except amounts in footnotes):

| | 30-59 Days | 60-89 Days | Greater than 90 Days ⁽¹⁾ | Total Past Due | Current ⁽²⁾ | Total Loans Receivable ⁽³⁾ | Total Loans > 90 Days and Accruing |
|-------------------------------|------------|------------|-------------------------------------|----------------|------------------------|---------------------------------------|------------------------------------|
| At December 31, 2022: | | | | | | | |
| Whole loans, floating-rate | \$ — | \$ — | \$ 28,767 | \$ 28,767 | \$ 2,024,123 | \$ 2,052,890 | \$ — |
| Mezzanine loan ⁽⁴⁾ | — | — | — | — | 4,700 | 4,700 | — |
| Total | \$ — | \$ — | \$ 28,767 | \$ 28,767 | \$ 2,028,823 | \$ 2,057,590 | \$ — |
| At December 31, 2021: | | | | | | | |
| Whole loans, floating-rate | \$ — | \$ — | \$ 19,916 | \$ 19,916 | \$ 1,857,935 | \$ 1,877,851 | \$ 19,916 |
| Mezzanine loan | — | — | — | — | 4,700 | 4,700 | — |
| Total | \$ — | \$ — | \$ 19,916 | \$ 19,916 | \$ 1,862,635 | \$ 1,882,551 | \$ 19,916 |

(1) During the years ended December 31, 2022 and 2021, we recognized interest income of \$1.5 million and \$2.0 million, respectively, on two loans with principal payments past due greater than 90 days at December 31, 2022.

(2) Includes one whole loan with total amortized costs of \$22.8 million and \$8.0 million, respectively, in maturity default at December 31, 2022 and 2021, respectively.

(3) The total amortized cost of CRE loans excluded accrued interest receivable of \$11.9 million and \$6.1 million at December 31, 2022 and 2021, respectively.

(4) Fully reserved at December 31, 2022.

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At December 31, 2022 and 2021, we had three whole loans in maturity default, with total amortized costs of \$51.6 million and \$27.9 million, respectively. During the year ended December 31, 2022, we received the deed-in-lieu of foreclosure on a hotel property in the Northeast region that collateralized a whole loan with an amortized cost of \$14.0 million and that was in maturity default at June 30, 2022. In February 2023, we sold the hotel property in the Northeast region for \$15.1 million. During the year ended December 31, 2021, we received the deed-in-lieu of foreclosure on an office property in the East North Central region that collateralized a whole loan that was in maturity default at December 31, 2020 with an amortized cost of \$19.9 million. In September 2022, the office property sold for \$19.3 million with selling costs of \$532,000, resulting in a gain on sale of \$1.9 million.

At December 31, 2022, one whole loan, with a total amortized cost of \$8.0 million, was past due on interest payments.

At December 31, 2021, three whole loans, including two loans that had maturity defaults, with a total amortized cost of \$30.4 million were past due on interest payments.

During the year ended December 31, 2022, two whole loans in maturity default at December 31, 2021, including one loan that was past due on interest payments at December 31, 2021, paid off principal of \$17.6 million. The payoff on one loan was the result of a discounted payoff and resulted in a realized loss of \$2.3 million for which a CECL allowance was established as of December 31, 2021.

Troubled-Debt Restructurings (“TDRs”)

During the year ended December 31, 2022, we entered into 12 agreements that extended eight loans by a weighted average period of four months and, in certain cases, modified certain other loan terms. One formerly forbore loan was in maturity default at December 31, 2022.

No loan modifications during the year ended December 31, 2022 resulted in TDRs.

Restricted Cash

At December 31, 2022, we had restricted cash of \$38.6 million, which consisted of \$38.2 million held within our five consolidated securitization entities and \$400,000 held in escrow for deposits or tax payments at our real estate properties or pledged with minimum reserve balance requirements. At December 31, 2021, we had restricted cash of \$248.4 million, which consisted of \$248.1 million held within our seven consolidated securitization entities and \$360,000 held in various reserve accounts.

The decrease of \$209.8 million was primarily attributable to the close of ACR 2021-FL1 and ACR 2021-FL2, executed in May and December 2021, respectively, which hold reinvestment capabilities at the securitization level. ACR 2021-FL1 and ACR 2021-FL2 held \$138.1 million and \$99.0 million, respectively, in restricted cash at December 31, 2021. We expect to utilize a significant portion of the restricted cash at ACR 2021-FL1 and ACR 2021-FL2 at December 31, 2022 to acquire loans or future funding participations for the securitizations’ portfolios, see “Liquidity and Capital Resources.”

Accrued Interest Receivable

The following table summarizes our accrued interest receivable at December 31, 2022 and 2021 (in thousands):

| | December 31, | | Net Change |
|--|------------------|-----------------|-----------------|
| | 2022 | 2021 | |
| Accrued interest receivable from loans | \$ 11,936 | \$ 6,106 | \$ 5,830 |
| Accrued interest receivable from promissory note, escrow, sweep and reserve accounts | 33 | 6 | 27 |
| Total | <u>\$ 11,969</u> | <u>\$ 6,112</u> | <u>\$ 5,857</u> |

The increase of \$5.9 million in accrued interest receivable during the year ended December 31, 2022 was primarily attributable to rising benchmark rates.

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Other Assets

The following table summarizes our other assets at December 31, 2022 and 2021 (in thousands):

| | December 31, | | Net Change |
|-----------------------------------|-----------------|-----------------|-------------------|
| | 2022 | 2021 | |
| Tax receivables and prepaid taxes | \$ 224 | \$ 2,120 | \$ (1,896) |
| Other receivables | 1,086 | 1,573 | (487) |
| Other prepaid expenses | 2,181 | 1,367 | 814 |
| Fixed assets - non real estate | 326 | 401 | (75) |
| Other assets, miscellaneous | 547 | 21 | 526 |
| Total | <u>\$ 4,364</u> | <u>\$ 5,482</u> | <u>\$ (1,118)</u> |

The decrease of \$1.1 million in other assets was primarily attributable to the receipt of a \$1.9 million tax refund. That receipt was offset by a \$814,000 increase in other prepaid expenses, resulting from the prepayment of property taxes on a hotel property acquired in November 2020 and two office properties acquired in October 2021.

Deferred Tax Assets

At both December 31, 2022 and 2021, our net deferred tax asset was zero, resulting from a full valuation allowance of \$21.2 million and \$21.4 million, respectively, on our gross deferred tax asset as we believed it was more likely than not that some or all of the deferred tax assets would not be realized. We will continue to evaluate our ability to realize the tax benefits associated with deferred tax assets by analyzing forecasted taxable income using both historical and projected future operating results, the reversal of existing temporary differences, taxable income in prior carry back years (if permitted) and the availability of tax planning strategies.

Derivative Instruments

Historically, a significant market risk to us was interest rate risk. We had sought to manage the extent to which net income changes as a result of fluctuation of changes in interest rates by matching adjustable-rate assets with variable-rate borrowings. We sought to mitigate the potential impact on net income (loss) of adverse fluctuations in interest rates incurred on our borrowings by entering into hedging agreements. We classified our interest rate hedges as cash flow hedges, which are hedges that eliminate the risk of changes in the cash flows of a financial asset or liability.

We terminated all of our interest rate swap positions associated with our prior financed CMBS portfolio in April 2020. At termination, we realized a loss of \$11.8 million. At December 31, 2022 and 2021, we had losses of \$6.6 million and \$8.5 million, respectively, recorded in accumulated other comprehensive loss, which will be amortized into earnings over the remaining life of the debt. During the years ended December 31, 2022 and 2021, we recorded amortization expense, reported in interest expense on the consolidated statements of operations, of \$1.8 million and \$1.9 million, respectively.

At December 31, 2022 and 2021, we had unrealized gains of \$256,000 and \$347,000, respectively, attributable to two terminated interest rate swaps, in accumulated other comprehensive loss on the consolidated balance sheets, to be accreted into earnings over the remaining life of the debt. During the years ended December 31, 2022 and 2021, we recorded accretion income, reported in interest expense on the consolidated statements of operations, of \$91,000 in each year.

The following table presents the effect of derivative instruments on our consolidated statements of operations for the years presented (in thousands):

| | Consolidated Statements of Operations Location | Realized and Unrealized Gain (Loss) ⁽¹⁾ | |
|---------------------------------------|--|--|---------------------------------|
| | | Year Ended December 31, 2022 | Year Ended December 31, 2021 |
| Interest rate swap contracts, hedging | Interest expense | \$ (1,733) | \$ (1,851) |

(1) Negative values indicate a decrease to the associated consolidated statements of operations line items.

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Senior Secured Financing Facility, Term Warehouse Financing Facilities and Mortgage Payable

Borrowings under our senior secured financing facility, term warehouse financing facilities and mortgage payable are guaranteed by us or one or more of our subsidiaries. The following table sets forth certain information with respect to our borrowings (dollars in thousands, except amounts in footnotes):

| | December 31, 2022 | | | | December 31, 2021 | | | |
|---|------------------------|---------------------|-----------------------------------|--------------------------------|------------------------|---------------------|-----------------------------------|--------------------------------|
| | Outstanding Borrowings | Value of Collateral | Number of Positions as Collateral | Weighted Average Interest Rate | Outstanding Borrowings | Value of Collateral | Number of Positions as Collateral | Weighted Average Interest Rate |
| Senior Secured Financing Facility | | | | | | | | |
| Massachusetts Mutual Life Insurance Company ⁽¹⁾ | \$ 87,890 | \$196,837 | 8 | 7.94% | \$ (3,432) | \$170,791 | 9 | 5.75% |
| CRE - Term Warehouse Financing Facilities ⁽²⁾ | | | | | | | | |
| JPMorgan Chase Bank, N.A. ⁽³⁾ | 186,783 | 255,095 | 11 | 6.74% | 18,875 | 37,167 | 3 | 2.85% |
| Morgan Stanley Mortgage Capital Holdings LLC ⁽⁴⁾ | 141,505 | 198,455 | 10 | 7.00% | 47,896 | 64,860 | 3 | 2.03% |
| Mortgage Payable | | | | | | | | |
| Readycap Commercial, LLC ⁽⁵⁾ | 18,244 | 25,400 | 1 | 8.08% | — | — | — | — |
| Total | <u>\$ 434,422</u> | <u>\$675,787</u> | | | <u>\$ 63,339</u> | <u>\$272,818</u> | | |

(1) Includes \$3.7 million and \$3.4 million of deferred debt issuance costs at December 31, 2022 and 2021, respectively.

(2) Outstanding borrowings includes accrued interest payable.

(3) Includes \$1.1 million and \$1.8 million of deferred debt issuance costs at December 31, 2022 and 2021, respectively, which includes \$356,000 of deferred debt issuance costs at December 31, 2021 from another term warehouse financing facilities with no balance that matured in October 2022.

(4) Includes \$1.4 million and \$2.2 million of deferred debt issuance costs at December 31, 2022 and 2021, respectively.

(5) Includes \$466,000 of deferred debt issuance costs at December 31, 2022.

We were in compliance with all covenants in the respective agreements at December 31, 2022 and 2021.

Senior Secured Financing Facility

On July 31, 2020, our indirect, wholly owned subsidiary (“Holdings”), along with its direct wholly owned subsidiary (the “Borrower”), entered into a \$250.0 million Loan and Servicing Agreement (the “MassMutual Loan Agreement”) with Massachusetts Mutual Life Insurance Company (“MassMutual”) and the other lenders party thereto (the “Lenders”). The asset-based revolving loan facility (the “MassMutual Facility”) provided under the MassMutual Loan Agreement has been used to finance our core CRE lending business. The MassMutual Facility initially had an interest rate of 5.75% per annum payable monthly and matured on July 31, 2027. We paid a commitment fee as well as other reasonable closing costs. The loans under the MassMutual Facility were available for drawing during the first two years of the MassMutual Facility (the “Availability Period”). During the Availability Period, an unused commitment fee of 0.50% per annum (payable monthly) on unused commitments under the MassMutual Loan Agreement was payable for each day on which less than 75% of the total commitment is drawn.

Pursuant to the MassMutual Loan Agreement, the Borrower’s obligations under the MassMutual Loan Agreement are secured by the Borrower’s assets and Holdings’ equity interests in the Borrower, including all distributions, proceeds and profits from Holdings’ interests in the Borrower.

In September 2020, the MassMutual Loan Agreement was amended pursuant to which (i) the initial portfolio assets were revised and an agreed advance rate for each initial portfolio asset (each, an “Initial Portfolio Asset Advance Rate”) was set, and (ii) the revolving loan facility under the MassMutual Loan Agreement was amended to require the initial lender (currently MassMutual) to provide a specific advance rate for any future eligible portfolio assets and to limit the aggregate total amount of advances outstanding at any time to both the total facility amount and, in lieu of a 55% LTV, a borrowing base as of any required date of determination equal to the sum of, in each case, the product of the advance rate for such eligible portfolio asset (including in respect of the initial portfolio assets, the applicable Initial Portfolio Asset Advance Rate therefor) and the then determined value of such eligible portfolio asset.

In May 2021, the MassMutual Loan Agreement was amended pursuant to which (i) Mass Mutual consented to Borrower’s formation of certain subsidiaries to hold real estate and (ii) such subsidiaries agreed to entered into guaranty agreements in favor of the secured parties under the Mass Mutual Loan Agreement.

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In connection with the MassMutual Loan Agreement, we entered into a Guaranty (the “MassMutual Guaranty”) among ourselves, Exantas Real Estate Funding 2018-RSO6 Investor, LLC (“RSO6”), Exantas Real Estate Funding 2019-RSO7 Investor, LLC (“RSO7”) and Exantas Real Estate Funding 2020-RSO8 Investor, LLC (“RSO8”), each our indirect, wholly owned subsidiary, in favor of the secured parties under the MassMutual Loan Agreement. As of December 31, 2022, RSO6, RSO7 and RSO8 no longer exist. Pursuant to the MassMutual Guaranty, we fully guaranteed all payments and performance of Holdings and the Borrower under the MassMutual Loan Agreement. Additionally, we, and previously RSO6, RSO7 and RSO8, made certain representations and warranties and agreed to not incur debt or liens, each subject to certain exceptions, and agreed to provide the Lenders with certain information.

The MassMutual Loan Agreement contained events of default, subject to certain materiality thresholds and grace periods, customary for this type of financing arrangement. The remedies for such events of default are also customary for this type of transaction.

The MassMutual Loan Agreement was further amended in several instances pursuant to which (i) MassMutual consented to the formation of certain subsidiaries to hold real estate and (ii) such subsidiaries agreed to enter into guaranty agreements in favor of the secured parties under the MassMutual Loan Agreement.

In July 2022, Holdings, the Borrower and the Lenders entered into the Fifth Amendment to the MassMutual Loan Agreement (the “Amendment”) to (i) extend the availability period from July 31, 2022 to August 31, 2022 and (ii) amend the interest rate on the outstanding principal amount of the borrowings, with respect to borrowings made in connection with eligible portfolio assets transferred to any borrower after the effective date of the Amendment to the rate per annum determined by the initial lender and otherwise, 5.75% per annum. In August 2022, Holdings, the Borrower and the Lenders entered into the Sixth Amendment to the MassMutual Loan Agreement to extend the availability period from August 31, 2022 to October 15, 2022.

In December 2022, Holdings, the Borrower and the Lenders entered into an Amended and Restated Loan and Servicing Agreement, which amends and restates the existing loan and servicing agreement, and reflects a senior secured term loan facility, not to exceed \$500.0 million, composed of individual loan series issued upon mutual agreement of the Borrower and Lenders. Each loan series will be available for three months after the closing date agreed upon by the Borrower and Lender (“Commitment Period”), subject to the maximum dollar amount agreed upon for that series. The Commitment Period is subject to immediate termination upon the occurrence of an event of default. Each loan series will have a final maturity of five years from the end of the issuance date for the loan series unless an additional time is mutually agreed upon by Lenders and Borrower. The advance rate on portfolio assets will be mutually agreed upon by Lenders and Borrower. Each loan series will have its own mutually agreed upon interest rate equal to one-month Term SOFR plus the applicable spread.

The Amended and Restated Loan and Servicing Agreement contains events of default, subject to certain materiality thresholds and grace periods, customary for this type of financing arrangement. The remedies for such events of default are also customary for this type of transaction and include declaring the final maturity date to have occurred and advances due and liquidation of the assets securing the series.

CRE - Term Warehouse Financing Facilities

In February 2012, an indirect wholly-owned subsidiary of ours entered into a master repurchase and securities agreement, which was subsequently replaced with an amended and restated master repurchase agreement in July 2018, (the “Wells Fargo Facility”) with Wells Fargo Bank, N.A. (“Wells Fargo”) to finance the origination of CRE loans. In October 2021, the Wells Fargo Facility matured.

In April 2018, an indirect wholly-owned subsidiary of ours entered into a master repurchase agreement (the “Barclays Facility”) with Barclays to finance the origination of CRE loans. In connection with the Barclays Facility, we entered into a guaranty agreement (the “Barclays Guaranty”) pursuant to which we fully guaranteed all payments and performance under the Barclays Facility. In March 2021, we amended the Barclays Facility to extend the revolving period through October 2021. In October 2021, we amended the revolving period of the Barclays Facility to October 2022 and modified the guaranty to limit financial covenants to be applicable when there are outstanding transactions. In February 2022, we amended the Barclays Facility to add market terms regarding the replacement of LIBOR upon determination of a benchmark transition event. In October 2022, the Barclays Facility matured.

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In October 2018, an indirect wholly-owned subsidiary of ours entered into a Master Repurchase and Securities Contract Agreement (the "JPMorgan Chase Facility") with JPMorgan Chase to finance the origination of CRE loans. In connection with the JPMorgan Chase Facility, we entered into a guarantee agreement (the "JPMorgan Chase Guarantee") pursuant to which we fully guaranteed all payments and performance under the JPMorgan Chase Facility. In May 2020, we entered into an amendment to the JPMorgan Chase Guarantee that revised its minimum equity financial covenant as of February 29, 2020. In October 2020, we entered into an amendment to the JPMorgan Chase Guarantee that revised a covenant definition so that credit losses are determined in accordance with a risk rating-based methodology. In September and October 2021, the JPMorgan Chase Facility was amended twice, resulting in (i) the extension of the JPMorgan Chase Facility's maturity date to October 2024, (ii) an update to our tangible net worth requirement and minimum liquidity covenant as set forth in the guarantee agreement and (iii) a modification of market terms regarding the replacement of LIBOR upon determination of a benchmark transition event. In November 2022, the JPMorgan Chase Facility was amended for the following (i) EBITDA to interest expense ratio, (ii) maximum ratio of total indebtedness to its total equity, and (iii) minimum unencumbered liquidity requirement, each through September 2023. The JPMorgan Chase Facility has a maximum facility amount of \$250.0 million, charges interest of one-month benchmark plus market spreads and matures in October 2024.

In November 2021, an indirect wholly-owned subsidiary of ours entered into a Master Repurchase and Securities Contract Agreement (the "Morgan Stanley Facility") with Morgan Stanley Mortgage Capital Holdings LLC ("Morgan Stanley") to finance the origination of CRE loans. Each repurchase transaction will specify its own terms, such as identification of the assets subject to the transaction, sale price, repurchase price and rate. In January 2022, such subsidiary entered into the First Amendment to Master Repurchase and Securities Contract Agreement (the "Morgan Stanley Amendment") with Morgan Stanley, which amended the Morgan Stanley Facility to add market terms regarding the replacement of LIBOR upon determination of a benchmark transition event. In November 2022, the Morgan Stanley Facility was amended for the following (i) EBITDA to interest expense ratio, (ii) maximum ratio of total indebtedness to its total equity, and (iii) minimum unencumbered liquidity requirement, each through March 2024. The Morgan Stanley Facility has a maximum facility amount of \$250.0 million, charges interest of one-month benchmark plus market spreads and matures in November 2024. We also have the right to request an extension for an additional one-year period.

Mortgage Payable

In April 2022, Chapel Drive West, LLC, a wholly owned subsidiary of Charles Street – ACRES FSU Student Venture, LLC (the "FSU Student Venture") entered into a loan agreement (the "Mortgage") with Readycap Commercial, LLC ("Readycap") to finance the acquisition of a student housing complex. The Mortgage is interest only and has a maximum principal balance of \$20.4 million, of which, \$18.7 million was advanced in the initial funding. Initially, the Mortgage charged interest of 30-day average SOFR plus a spread of 3.80%. In October 2022, the Mortgage was amended to charge interest of one-month Term SOFR. The Mortgage matures in April 2025, subject to two one-year extension options.

The Mortgage contains events of default, subject to certain materiality thresholds and grace periods, customary for this type of financing arrangement. The remedies for such events of default are also customary for this type of transaction.

Construction Loan

In January 2023, Chapel Drive East, LLC, a wholly owned subsidiary of the FSU Student Venture, entered into a loan agreement (the "Construction Loan Agreement") with Oceanview Life and Annuity Company ("Oceanview") to finance the construction of a student housing complex (the "Construction Loan"). The Construction Loan is interest only and has a maximum principal balance of \$48.0 million. The Construction Loan charges one-month Term SOFR plus a spread of 6.00% and matures in February 2025, subject to three one-year extension options.

In addition to the Construction Loan, we entered into a financing agreement with Florida Pace Funding Agency to fund energy efficient building improvements and has a maximum principal balance of \$15.5 million. This agreement charges fixed interest of 7.26% and matures in July 2053.

In connection with our investment in the student housing complex, ACRES RF entered into guarantees related to the Construction Loan made by Chapel Drive East, LLC. Pursuant to the guarantees, Jason Pollack, Frank Dellaglio and ACRES RF (collectively, the "Guarantors"), for the benefit of Oceanview, provided limited "bad boy" guaranties to Oceanview pursuant to the Construction Loan Agreement until the earlier of the payment in full of the indebtedness or the date of a sale of the property pursuant to a foreclosure of the mortgage or deed or other transfer in lieu of foreclosure is accepted by Oceanview. The Guarantors also entered into a Completion Guaranty Agreement for the benefit of Oceanview to guaranty the timely completion of the project in accordance with the Construction Loan Agreement, as well as a Carry Guaranty Agreement, for the benefit of Oceanview to guaranty and the unconditional payment by Chapel Drive East, LLC of all customary or necessary costs and expenses incurred in connection with the operation, maintenance and management of the property and an Environmental Indemnity Agreement jointly and severally in favor of Oceanview whereby the Guarantors serving as Indemnitors provided environmental representations and warranties, covenants and

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indemnifications (collectively the "Guaranties"). The Guaranties include certain financial covenants required of ACRES RF, including required net worth and liquidity requirements.

Securitizations

XAN 2019-RSO7

In April 2019, we closed XAN 2019-RSO7, a \$687.2 million CRE securitization transaction that provided financing for transitional CRE loans. In May 2021, we exercised the optional redemption on XAN 2019-RSO7 in conjunction with the closing of ACR 2021-FL1 (see below).

XAN 2020-RSO8

In March 2020, we closed XAN 2020-RSO8, a \$522.6 million CRE debt securitization transaction that provided financing for CRE loans. In March 2022, we exercised the optional redemption of XAN 2020-RSO8, and all of the outstanding senior notes were paid off from the sales proceeds of certain of the securitization's assets.

XAN 2020-RSO9

In September 2020, we closed XAN 2020-RSO9, a \$297.0 million CRE debt securitization transaction that provided financing for CRE loans. In February 2022, we exercised the optional redemption of XAN 2020-RSO9, and all of the outstanding senior notes were paid off from the sales proceeds of certain of the securitization's assets.

ACR 2021-FL1

In May 2021, we closed ACR 2021-FL1, a \$802.6 million CRE debt securitization transaction that provided financing for CRE loans. ACR 2021-FL1 includes a reinvestment period, which ends in May 2023, that allows it to acquire CRE loans for reinvestment into the securitization using uninvested principal proceeds. ACR 2021-FL1 issued a total of \$675.2 million of non-recourse, floating-rate notes to third parties at par. Additionally, ACRES RF retained 100% of the Class F and Class G notes and a subsidiary of ACRES RF retained 100% of the outstanding preference shares. The preference shares are subordinated in right of payment to all other securities issued by ACR 2021-FL1.

All of the notes issued mature in June 2036, although we have the right to call the notes beginning on the payment date in May 2023 and thereafter.

ACR 2021-FL2

In December 2021, we closed ACR 2021-FL2, a CRE debt securitization transaction that can finance up to \$700.0 million of CRE loans. ACR 2021-FL2 includes a reinvestment period, which ends in December 2023, that allows it to acquire CRE loans for reinvestment into the securitization using uninvested principal proceeds. The reinvestment period includes a 180-day ramp-up acquisition period during which CRE loans for reinvestment into the securitization can be acquired using proceeds from the issuance of the securitization. ACR 2021-FL2 issued a total of \$567.0 million of non-recourse, floating-rate notes to third parties at par. Additionally, ACRES RF retained 100% of the Class F and Class G notes and a subsidiary of ACRES RF retained 100% of the outstanding preference shares. The preference shares are subordinated in right of payment to all other securities issued by ACR 2021-FL2.

All of the notes issued mature in January 2037, although we have the right to call the notes beginning on the payment date in December 2023 and thereafter.

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At December 31, 2022, we retain equity in the following securitizations (in thousands, except amounts in footnotes):

| | <u>Closing Date</u> | <u>Maturity Date</u> | <u>Reinvestment Period End ⁽¹⁾</u> | <u>Total Note Paydowns from Closing Date through December 31, 2022</u> |
|--------------|---------------------|----------------------|---|--|
| ACR 2021-FL1 | May 2021 | June 2036 | May 2023 | \$ — |
| ACR 2021-FL2 | December 2021 | January 2037 | December 2023 | \$ — |

(1) The reinvestment period is the period in which principal proceeds received may be used to acquire new CRE loans or the funded commitments of existing collateral for reinvestment into the securitization.

Corporate Debt

Unsecured Junior Subordinated Debentures

During 2006, we formed RCT I and RCT II for the sole purpose of issuing and selling capital securities representing preferred beneficial interests. RCT I and RCT II are not consolidated into our consolidated financial statements because we are not deemed to be the primary beneficiary of these entities. In connection with the issuance and sale of the capital securities, we issued junior subordinated debentures to RCT I and RCT II of \$25.8 million each, representing our maximum exposure to loss. The debt issuance costs associated with the junior subordinated debentures for RCT I and RCT II were included in borrowings and were amortized into interest expense on the consolidated statements of operations using the effective yield method over a ten year period.

There were no unamortized debt issuance costs associated with the junior subordinated debentures for RCT I and RCT II outstanding at December 31, 2022 and 2021. The interest rates for RCT I and RCT II, at December 31, 2022, were 8.68% and 8.36%, respectively. The interest rates for RCT I and RCT II, at December 31, 2021, were 4.17% and 4.08%, respectively.

The rights of holders of common securities of RCT I and RCT II are subordinate to the rights of the holders of capital securities only in the event of a default; otherwise, the common securities' economic and voting rights are pari passu with the capital securities. The capital and common securities of RCT I and RCT II are subject to mandatory redemption upon the maturity or call of the junior subordinated debentures held by each. Unless earlier dissolved, RCT I will dissolve in May 2041 and RCT II will dissolve in September 2041. The junior subordinated debentures are the sole assets of RCT I and RCT II, which mature in June 2036 and October 2036, respectively, and may currently be called at par.

4.50% Convertible Senior Notes

We issued \$143.8 million aggregate principal of our 4.50% convertible senior notes due 2022 ("4.50% Convertible Senior Notes") in August 2017.

During the year ended December 31, 2021, we repurchased \$55.7 million of our 4.50% Convertible Senior Notes, resulting in a charge to earnings of \$1.5 million, comprising an extinguishment of debt charge of \$1.2 million in connection with the acceleration of the market discount and interest expense of \$304,000 in connection with the acceleration of deferred debt issuance costs.

During the year ended December 31, 2022, we repurchased \$39.8 million of our 4.50% Convertible Senior Notes, resulting in a charge to earnings of \$574,000, comprising an extinguishment of debt charge of \$460,000 in connection with the acceleration of the market discount and interest expense of \$114,000 in connection with the acceleration of deferred debt costs. In August 2022, the remaining \$48.2 million of outstanding 4.5% Convertible Senior Notes were paid off upon maturity at par.

Senior Unsecured Notes

5.75% Senior Unsecured Notes Due 2026

On August 16, 2021, we issued \$150.0 million of our 5.75% Senior Unsecured Notes pursuant to our Indenture, dated August 16, 2021 (the "Base Indenture"), between Wells Fargo, now Computershare Trust Company, N.A. ("CTC"), as trustee (the "Trustee"), and us as supplemented by the First Supplemental Indenture, dated August 16, 2021, between Wells Fargo, now CTC, and us (the "Supplemental Indenture" and, together with the Base Indenture, the "Indenture"). Prior to May 15, 2026, we may at our option redeem the 5.75% Senior Unsecured Notes, in whole or in part, at a redemption price equal to the sum of (i) 100% of the principal amount of the notes to be redeemed, plus accrued and unpaid interest to, but not including, the redemption date, and (ii) a make-whole premium. On or after May 15, 2026, we may at our option redeem the 5.75% Senior Unsecured Notes, at any time, in whole or in part, on not less than 15 nor more than 60 days' prior notice, at a redemption price equal to 100% of the principal amount of the 5.75% Senior Unsecured Notes to be redeemed, plus accrued and unpaid interest to, but not including, the redemption date.

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The Indenture contains restrictive covenants that, among other things, require us to maintain certain financial ratios. The foregoing limitations are subject to exceptions as set forth in the Supplemental Indenture. At December 31, 2022, we were in compliance with these covenants. The Indenture provides for customary events of default that include, among other things (subject in certain cases to customary grace and cure periods): (i) non-payment of principal or interest, (ii) breach of certain covenants contained in the Indenture or the 5.75% Senior Unsecured Notes, (iii) an event of default or acceleration of certain other indebtedness of ours or a subsidiary in which we have invested at least \$75 million in capital within the applicable grace period and (iv) certain events of bankruptcy or insolvency. Generally, if an event of default occurs (subject to certain exceptions), CTC or the holders of at least 25% in aggregate principal amount of the then outstanding 5.75% Senior Unsecured Notes may declare all of the notes to be due and payable.

12.00% Senior Unsecured Notes

On July 31, 2020, we entered into the Note and Warrant Purchase Agreement with Oaktree Capital Management, L.P. (“Oaktree”) and MassMutual pursuant to which we could have issued to Oaktree and MassMutual from time to time up to \$125.0 million aggregate principal amount of 12.00% Senior Unsecured Notes. The 12.00% Senior Unsecured Notes had an annual interest rate of 12.00%, payable up to 3.25% (at our election) as pay-in-kind interest and the remainder as cash interest. On July 31, 2020, we issued to Oaktree \$42.0 million aggregate principal amount of the 12.00% Senior Unsecured Notes. In addition, on July 31, 2020, we issued to MassMutual \$8.0 million aggregate principal amount of the 12.00% Senior Unsecured Notes. At any time and from time to time prior to January 31, 2022, we could have elected to issue to Oaktree and MassMutual up to \$75.0 million aggregate principal amount of additional 12.00% Senior Unsecured Notes.

On August 18, 2021, we entered into an agreement with Oaktree and MassMutual that provided for the redemption in full of the 12.00% Senior Unsecured Notes, including a waiver of certain sections of the Note and Warrant Purchase Agreement. On August 20, 2021, the redemption was consummated and a payment to Oaktree and MassMutual was made for an aggregate \$55.3 million, which consisted of (i) principal in the amount of \$50.0 million, (ii) interest in the amount of \$329,000 and (iii) a make-whole amount of \$5.0 million. In connection with the redemption, we recorded a charge to earnings of \$8.0 million, comprising an extinguishment of debt charge of \$7.8 million in connection with (i) the \$5.0 million net make-whole amount and (ii) the \$2.8 million acceleration of the remaining market discount; and interest expense of \$218,000 in connection with the acceleration of deferred debt issuance costs.

In January 2022, we entered into an amendment of the Note and Warrant Purchase Agreement that extended the time to July 2022 that we could elect to issue to Oaktree and MassMutual up to \$75.0 million of principal of additional notes. At any time and from time to time prior to July 31, 2022, we may have elected to issue to Oaktree and MassMutual warrants to purchase an additional 699,992 shares of the common stock for a purchase price equal to the principal amount of the 12.00% Senior Unsecured Notes being issued. The warrants were immediately exercisable on issuance and expire seven years from the issuance date. The warrants could be exercised with cash or as a net exercise. We did not issue any additional notes under this agreement and it expired as of July 31, 2022.

Equity

Total equity at December 31, 2022 was \$441.3 million and gave effect to \$6.4 million of net unrealized losses on our terminated cash flow hedges, shown as a component of accumulated other comprehensive loss. Equity at December 31, 2021 was \$448.2 million and gave effect to \$8.1 million of unrealized gains on our terminated cash flow hedges shown as a component of accumulated other comprehensive loss. The decrease in equity during the year ended December 31, 2022 was primarily attributable to common stock repurchases.

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Balance Sheet - Book Value Reconciliation

The following table rolls forward our common stock book value for the three months and year ended December 31, 2022 (in thousands, except per share data and amounts in footnotes):

| | Three Months Ended December 31, 2022 | | Year Ended December 31, 2022 | |
|---|---|------------------|------------------------------|------------------|
| | Total Amount | Per Share Amount | Total Amount | Per Share Amount |
| Common stock book value at beginning of period ⁽¹⁾ | \$ 216,026 | \$ 25.08 | \$ 221,596 | \$ 23.87 |
| Net loss allocable to common shares ⁽²⁾ | (7,431) | (0.87) | (8,799) | (1.03) |
| Change in other comprehensive income on derivatives | 401 | 0.05 | 1,733 | 0.20 |
| Repurchase of common stock ⁽³⁾ | (934) | 0.18 | (9,128) | 1.32 |
| Impact to equity of share-based compensation | 914 | 0.10 | 3,574 | 0.18 |
| Total net increase (decrease) | (7,050) | (0.54) | (12,620) | 0.67 |
| Common stock book value at end of period ⁽⁴⁾ | \$ 208,976 | \$ 24.54 | \$ 208,976 | \$ 24.54 |

- (1) Per share calculations exclude unvested restricted stock, as disclosed on the consolidated balance sheets, of 583,333 shares at December 31, 2022 and September 30, 2022, respectively, and 333,329 shares at December 31, 2021, and include warrants to purchase up to 391,995 shares of common stock at December 31, 2022 and September 30, 2022, respectively, and 466,661 shares of common stock at December 31, 2021, respectively. The denominators for the calculation were 8,516,762, 8,615,031 and 9,282,411 at December 31, 2022, September 30, 2022, and December 31, 2021, respectively.
- (2) The per share amounts are calculated with the denominator referenced in footnote (1) at December 31, 2022. We calculated net loss per common share-diluted of \$(0.87) and \$(1.00) using the weighted average diluted shares outstanding during the three and twelve months ended December 31, 2022, respectively.
- (3) In November 2021, our Board authorized and approved the continued use of our existing share repurchase program to repurchase up to \$20.0 million of our outstanding common stock. We purchased 1.1 million shares for \$12.8 million through December 31, 2022. Because we repurchased our common stock at significant discounts to book value, these repurchases were accretive to per share book value since the inception of the program.
- (4) We calculated common stock book value as total stockholders' equity of \$435.5 million less preferred stock equity of \$226.5 million at December 31, 2022.

Management Agreement Equity

Our monthly base management fee, as defined in our Management Agreement, is equal to the greater of (i) 1/12th of the amount of our equity multiplied by 1.50% or (ii) \$442,000 through July 31, 2022 and is calculated and paid monthly in arrears.

The following table summarizes the calculation of equity, as defined in the Management Agreement (in thousands):

| | Amount |
|---|--------------|
| At December 31, 2022: | |
| Proceeds from capital stock issuances, net ⁽¹⁾ | \$ 1,330,472 |
| Retained earnings, net ⁽²⁾ | (643,998) |
| Payments for repurchases of capital stock | (239,750) |
| Total | \$ 446,724 |

- (1) Deducts underwriting discounts and commissions and other expenses and costs relating to such issuances.
- (2) Excludes non-cash equity compensation expense incurred to date.

Earnings Available for Distribution

Commencing with our financial results for the quarter ended March 31, 2022, we replaced the term Core Earnings with the term Earnings Available for Distribution ("EAD"), and Core Earnings results from comparative reporting periods have been relabeled Earnings Available for Distribution. EAD is a non-GAAP financial measure intended to supplement our financial results computed in accordance with accounting principles generally accepted in the United States of America ("GAAP"), and we believe EAD will serve as a useful indicator for investors in evaluating our performance and ability to pay dividends.

EAD excludes the effects of certain transactions and adjustments in accordance with GAAP that we believe are not necessarily indicative of our current CRE loan portfolio and other CRE-related investments and operations. EAD excludes income (loss) from all non-core assets such as commercial finance, middle market lending, residential mortgage lending, certain legacy CRE loans and other non-CRE assets designated as assets held for sale at the initial measurement date of December 31, 2016.

EAD, for reporting purposes, is defined as GAAP net income (loss) allocable to common shares, excluding (i) non-cash equity compensation expense, (ii) unrealized gains and losses, (iii) non-cash provisions for credit losses, (iv) non-cash impairments on securities, (v) non-cash amortization of discounts or premiums associated with borrowings, (vi) net income or loss from a limited partnership interest owned at the initial measurement date, (vii) net income or loss from non-core assets, (viii) real estate depreciation

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and amortization, (ix) foreign currency gains or losses and (x) income or loss from discontinued operations. EAD may also be adjusted periodically to exclude certain one-time events pursuant to changes in GAAP and certain non-cash items.

Although pursuant to the Management Agreement we calculate incentive compensation using EAD that excludes incentive compensation payable to our Manager, we include incentive compensation payable to our Manager in calculating EAD for reporting purposes.

The following table provides a reconciliation from GAAP net (loss) income allocable to common shares to EAD allocable to common shares for the periods presented (dollars in thousands, except per share amounts and amounts in the footnotes):

| | Years Ended December 31, | | | |
|--|--------------------------|----------------|------------------|------------------|
| | 2022 | Per Share Data | 2021 | Per Share Data |
| Net (loss) income allocable to common shares - GAAP | \$ (8,799) | \$ (1.00) | \$ 18,036 | \$ 1.85 |
| Realized gain on sale of investment in real estate | (1,870) | (0.21) | — | — |
| Net (loss) income allocable to common shares - GAAP, adjusted | \$ (10,669) | \$ (1.21) | \$ 18,036 | \$ 1.85 |
| Reconciling items from continuing operations: | | | | |
| Non-cash equity compensation expense | 3,562 | 0.40 | 1,722 | 0.18 |
| Non-cash provision for (reversal of) CRE credit losses | 12,295 | 1.39 | (21,262) | (2.18) |
| Realized loss on sale of investment in real estate | (372) | (0.04) | — | — |
| Realized loss on core activities ⁽¹⁾⁽²⁾ | — | — | (6,988) | (0.72) |
| Unrealized gain on core activities ⁽¹⁾ | — | — | (878) | (0.09) |
| Real estate depreciation and amortization | 5,113 | 0.58 | 2,860 | 0.29 |
| Non-cash amortization of discounts or premiums associated with borrowings | 1,271 | 0.14 | 6,937 | 0.71 |
| Net income from non-core assets ⁽³⁾ | (787) | (0.09) | (247) | (0.03) |
| Reconciling items from CRE assets: | | | | |
| Net interest income on legacy CRE assets ⁽³⁾ | (29) | — | (637) | (0.06) |
| Earnings Available for Distribution allocable to common shares | <u>\$ 10,384</u> | <u>\$ 1.17</u> | <u>\$ (457)</u> | <u>\$ (0.05)</u> |
| Weighted average common shares - diluted on Earnings Available for Distribution allocable to common shares | | | | |
| | <u>8,877</u> | | <u>9,736</u> | |
| Earnings Available for Distribution per common share - diluted | <u>\$ 1.17</u> | | <u>\$ (0.05)</u> | |

- (1) In March 2021, the CMBS portfolio was sold for \$3.0 million, representing a total realized loss of \$5.2 million that was included in EAD during the year ended December 31, 2021. Unrealized gain on core activities includes the unrealized gains and losses on the residual CMBS portfolio, which were previously excluded from EAD.
- (2) In November 2021, one CRE loan was sold for proceeds, net of costs, of \$7.6 million, representing a total realized loss of \$1.7 million that was included in EAD during the year ended December 31, 2021.
- (3) Non-core assets are investments and securities owned by us at the initial measurement date in (i) commercial finance, (ii) middle market lending, (iii) residential mortgage lending, (iv) legacy CRE loans designated as held for sale and (v) other non-CRE assets included in assets held for sale.

EAD in accordance with the Management Agreement, which excludes incentive compensation payable, was \$5.6 million, or \$0.64 per common share outstanding, for the three months ended December 31, 2022. Incentive compensation payable was \$340,000 at December 31, 2022.

Incentive Compensation Hurdle

Prior to the quarter ended December 31, 2022, in accordance with the Management Agreement, incentive compensation was earned by our Manager when our EAD (as defined in the Management Agreement) for such quarter exceeded an amount equal to: (1) the weighted average of (a) book value (as defined in the Management Agreement) as of the end of such quarter divided by 10,293,783 shares and (b) the price per share (including the conversion price, if applicable) paid for common shares in each offering (or issuance, upon the conversion of convertible securities) by us subsequent to September 30, 2017, in each case at the time of issuance, multiplied by (2) the greater of (a) 1.75% and (b) 0.4375% plus one-fourth of the ten year treasury rate, as defined in the Management Agreement, for such quarter (the “Incentive Compensation Hurdle”).

Commencing with the quarter ended December 31, 2022, incentive compensation was calculated and payable in arrears in an amount, not less than zero, equal to:

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- (i) *for the first full calendar quarter ended December 31, 2022*, the product of (a) 20% and (b) the excess of (i) our EAD (as defined in the Management Agreement) for such calendar quarter, over (ii) the product of (A) our book value equity (as defined in the Management Agreement) as of the end of such calendar quarter, and (B) 7% per annum;
- (ii) *for each of the second, third and fourth full calendar quarters following the calendar quarter ended December 31, 2022*, the excess of (1) the product of (a) 20% and (b) the excess of (i) our EAD (as defined in the Management Agreement) for the calendar quarter(s) following September 30, 2022, over (ii) the product of (A) our book value equity (as defined in the Management Agreement) in the calendar quarter(s) following September 30, 2022, and (B) 7% per annum, over (2) the sum of any incentive compensation paid to our Manager with respect to the prior calendar quarter(s) following September 30, 2022 (other than the most recent calendar quarter); and
- (iii) *for each calendar quarter thereafter*, the excess of (1) the product of (a) 20% and (b) the excess of (i) our EAD (as defined in the Management Agreement) for the previous 12-month period, over (ii) the product of (A) our book value equity (as defined in the Management Agreement) in the previous 12-month period, and (B) 7% per annum, over (2) the sum of any incentive compensation paid to our Manager with respect to the first three calendar quarters of such previous 12-month period; provided, however, that no incentive compensation shall be payable with respect to any calendar quarter unless EAD (as defined in the Management Agreement) for the 12 most recently completed calendar quarters (or such lesser number of completed calendar quarters from September 30, 2022) in the aggregate is greater than zero.

The following table summarizes the calculation of the Incentive Compensation Hurdle for the three months ended December 31, 2022 (dollars in thousands, except per share data):

| Book Value Equity | Amount |
|--|---------------|
| Stockholders' equity less equity attributable to any outstanding preferred stock at September 30, 2022 | \$ 216,026 |
| Cumulative EAD from and after October 1, 2022 to the end of the most recently completed calendar quarter | 5,560 |
| Amount paid to repurchase common stock after October 1, 2022 | (934) |
| Book value equity at December 31, 2022 | \$ 220,652 |
| Incentive Compensation Hurdle ⁽¹⁾ | \$ 3,861 |
| Average closing price of 30 day period ending three days prior to issuance date | \$ 9.55 |

(1) Calculated as book value equity at December 31, 2022 multiplied by 1.75% (7% per annum).

The amount by which EAD (as defined in the Management Agreement) exceeds the Incentive Compensation Hurdle is multiplied by 20% to arrive at incentive compensation for the quarter.

Liquidity and Capital Resources

Liquidity is a measurement of our ability to meet potential cash requirements, including ongoing commitments to pay dividends, fund investments, repay borrowings and provide for other general business needs, including payment of our base management fee and incentive compensation. Our ability to meet our on-going liquidity needs is subject to our ability to generate cash from operating activities and our ability to maintain and/or obtain additional debt financing and equity capital together with the funds referred to below.

During the year ended December 31, 2022, our principal sources of liquidity were: (i) gross proceeds of \$404.9 million from our CRE - term warehouse financing facilities, (ii) gross proceeds of \$245.0 million from CRE whole loan purchases by our managed CRE securitizations ACR 2021-FL1 and ACR 2021-FL2, (iii) proceeds of \$101.7 million from our senior secured financing facility, (iv) net proceeds of \$57.9 million from repayments on our CRE portfolio, (v) proceeds of \$57.6 million from purchase of loan advances by our managed CRE securitizations ACR 2021-FL1 and ACR 2021-FL2, (vi) net proceeds of \$18.7 million from the sale of a real estate property held for sale, (vii) net proceeds of \$18.7 million for a mortgage payable for one of our real estate investments and, (viii) net proceeds of \$13.7 million from the liquidation of one of our CRE securitizations. These sources of liquidity were offset by our deployments in CRE whole loans and real estate investments, the partial repurchase and extinguishment of our 4.50% Convertible Senior Notes, repurchases of common stock, distributions on our preferred stock and ongoing operating expenses and substantially resulted in the \$66.2 million of unrestricted cash we held at December 31, 2022.

The outstanding balance of our loan to ACRES Capital Corp., the parent of our Manager, was \$11.3 million and \$11.6 million at December 31, 2022 and 2021, respectively. The note bears interest at 3.00% per annum, payable monthly, and matures in July 2026, subject to two one-year extensions, at ACRES Capital Corp.'s option, and amortizes at a rate of \$25,000 per month.

We utilize a variety of financing arrangements to finance certain assets. We generally utilize the following five types of financing arrangements:

1. *Senior Secured Financing Facility:* Our senior secured financing facility allows us to borrow against loans and real estate investments that we own. This facility has an individual floating rate loan series structure that have a three month commitment period after the financing is approved by the lender, subject to the maximum dollar amount agreed upon for the series. Each floating rate loan series will have mutually agreed upon terms including (i) total commitment, including the capacity to fund future funding commitments, where applicable; (ii) advance rate on portfolio assets; (iii) interest rate composed of one-month Term SOFR plus a market rate spread; and (iv) maturity date of five years from the issuance date for the loan series unless an additional time is mutually agreed upon by the parties. The facility has a maximum portfolio LTV of 85% and contains customary events of default, subject to certain materiality thresholds and grace periods, customary for this type of financing arrangement.
2. *Term Warehouse Financing Facilities (CRE loans):* Term warehouse financing facilities effectively allow us to borrow against loans that we own. Under these agreements, we transfer loans to a counterparty and agree to purchase the same loans from the counterparty at a price equal to the transfer price plus interest. The counterparty retains the sole discretion over both whether to purchase the loan from us and, subject to certain conditions, the collateral value of such loan for purposes of determining whether we are required to pay margin to the counterparty. Generally, if the lender determines (subject to certain conditions) that the value of the collateral in a repurchase transaction has decreased by more than a defined minimum amount, we would be required to repay any amounts borrowed in excess of the product of (i) the revised collateral or market value multiplied by (ii) the applicable advance rate. During the term of these agreements, we receive the principal and interest on the related loans and pay interest to the counterparty.
3. *Securitizations:* We seek non-recourse long-term financing from securitizations of our investments in CRE loans. The securitizations generally involve a senior portion of our loan but may involve the entire loan. Securitization generally involves transferring notes to a special purpose vehicle (or the issuing entity), which then issues one or more classes of non-recourse notes pursuant to the terms of an indenture. The notes are secured by the pool of assets. In exchange for the transfer of assets to the issuing entity, we receive cash proceeds from the sale of non-recourse notes. Securitizations of our portfolio investments might magnify our exposure to losses on those portfolio investments because the retained subordinate interest in any particular overall loan would be subordinate to the loan components sold and we would, therefore, absorb all losses sustained with respect to the overall loan before the owners of the senior notes experience any losses with respect to the loan in question.
4. *Mortgage payable:* We have entered into a loan agreement to finance the acquisition of a student housing complex. This loan is interest only and has a maximum principal balance, most of which was advanced in the initial funding. The loan agreement contains events of default, subject to certain materiality thresholds and grace periods, customary for this type of financing arrangement. The remedies for such events of default are also customary for this type of transaction.
5. *Construction loan:* We have entered into a loan agreement to finance the construction of a student housing complex. This loan is interest only and has a maximum principal balance of \$48.0 million. The loan agreement contains events of default, subject to certain materiality thresholds and grace periods, customary for this type of financing arrangement. The remedies for such events of default are also customary for this type of transaction. Additionally, we have entered into a financing agreement to fund energy efficient building improvements at this student housing complex, with a maximum principal balance of \$15.5 million.

The issuances of ACR 2021-FL1 and ACR 2021-FL2 include 24-month reinvestment periods ending in May 2023 and December 2023, respectively, that allow us to reinvest CRE loan payoffs and paydowns into the securitizations upon the satisfaction of certain eligibility and reinvestment criteria along with rating agency approval. The reinvestment feature of the securitizations will allow us to extend the securitizations' financing capability by increasing the useful lives of the senior notes through the reinvestment of loan proceeds into new loans. We are also able to acquire future funding participations of the collateral in the securitizations during the reinvestment period.

We were in compliance with all of our covenants at December 31, 2022 in accordance with the terms provided in agreements with our lenders.

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We are continuing to monitor the COVID-19 pandemic and its impact on us, the borrowers underlying our commercial real estate-related loans (and their tenants), our financing sources, and the economy as a whole. Because the severity, magnitude and duration of the COVID-19 pandemic and its economic consequences are uncertain, rapidly changing and difficult to predict, the pandemic's impact on our operations and liquidity remains uncertain and difficult to predict. Further discussion of the potential impacts on us from the COVID-19 pandemic is provided in the section entitled "Risk Factors-Impact of Current Economic Conditions" in Part I, Item 1A of this Annual Report on Form 10-K.

At December 31, 2022, we had a senior secured financing facility, term warehouse financing facilities, and a mortgage payable as summarized below (in thousands, except amounts in footnotes):

| | <u>Execution Date</u> | <u>Maturity Date</u> | <u>Maximum Capacity</u> | <u>Facility Principal Outstanding</u> | <u>Availability</u> |
|--|-----------------------|----------------------|-------------------------|---------------------------------------|---------------------|
| Senior Secured Financing Facility ⁽¹⁾ | | | | | |
| Massachusetts Mutual Life Insurance Company | July 2020 | December 2027 | \$ 500,000 | \$ 91,549 | \$ 408,451 |
| CRE - Term Warehouse Financing Facilities ⁽²⁾⁽³⁾ | | | | | |
| JPMorgan Chase Bank, N.A. | October 2018 | October 2024 | 250,000 | 187,369 | 62,631 |
| Morgan Stanley Mortgage Capital Holdings LLC | November 2021 | November 2024 | 250,000 | 142,586 | 107,414 |
| Mortgage Payable ⁽⁴⁾ | | | | | |
| Readycap Commercial, LLC | April 2022 | April 2025 | 20,375 | 18,710 | 1,665 |
| Total | | | | <u>\$ 440,214</u> | |

- (1) Facility principal outstanding excludes deferred debt issuance costs of \$3.7 million at December 31, 2022. In December 2022, we amended the previously revolving fixed rate credit facility to a floating rate term loan series structure. Each loan series will have a maturity date of five years from the issuance date for the loan series.
- (2) Facilities principal outstanding excludes accrued interest payable of \$894,000 and deferred debt issuance costs of \$2.6 million at December 31, 2022.
- (3) In October 2022, we allowed our \$250.0 million Barclays term warehouse financing facility to mature.
- (4) Facility principal outstanding excludes deferred debt issuance costs of \$466,000 at December 31, 2022.

The following table summarizes the average principal outstanding on our financing arrangements during the three months ended December 31, 2022 and 2021 and the principal outstanding on our financing arrangements at December 31, 2022 and 2021 (in thousands, except amounts in footnotes):

| Financing Arrangement | Three Months Ended December 31, 2022 | | Three Months Ended December 31, 2021 | |
|---|---|---|---|--|
| | Average Principal Outstanding | Principal Outstanding ⁽¹⁾⁽²⁾⁽³⁾ | Average Principal Outstanding | Principal Outstanding ⁽¹⁾⁽²⁾ |
| Senior secured financing facility | \$ 88,795 | \$ 91,549 | \$ 32,021 | \$ — |
| Term warehouse financing facilities - CRE loans | 359,829 | 329,955 | 397,744 | 71,020 |
| Mortgage payable | 18,710 | 18,710 | — | — |
| Total | <u>\$ 467,334</u> | <u>\$ 440,214</u> | <u>\$ 429,765</u> | <u>\$ 71,020</u> |

- (1) Excludes accrued interest payable on the senior secured financing facility collateralized by CRE loans and investments in real estate of \$202,000 and \$26,000 and deferred debt issuance costs of \$3.7 million and \$3.4 million at December 31, 2022 and 2021, respectively.
- (2) Excludes accrued interest payable on term warehouse financing facilities collateralized by CRE loans of \$894,000 and \$58,000 and deferred debt issuance costs of \$2.6 million and \$4.3 million at December 31, 2022 and 2021, respectively.
- (3) Excludes deferred debt issuance costs on mortgage payable of \$466,000 at December 31, 2022.

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The following table summarizes the maximum month-end principal outstanding on our financing arrangements during the periods presented (in thousands, except amount in footnotes):

| Financing Arrangement | Maximum Month-End Principal Outstanding During the | |
|--|--|-----------|
| | Years Ended December 31, | |
| | 2022 | 2021 |
| Senior secured financing facility | \$ 94,549 | \$ 77,407 |
| Term warehouse financing facilities - CRE loans ⁽¹⁾ | 392,716 | 423,585 |
| Mortgage payable | 18,710 | — |

(1) Decreases in the maximum month-end outstanding principal balances for the periods presented resulted from the financing of CRE loans into our CRE securitizations.

Historically, we financed the acquisition of our investments through CDOs and securitizations that essentially match the maturity and repricing dates of these financing vehicles with the maturities and repricing dates of our investments. In the past, we have derived substantial operating cash from our equity investments in our CDOs and securitizations, which will cease if the CDOs and securitizations fail to meet certain tests. Through December 31, 2022, we did not experience difficulty in maintaining our existing CDO and securitization financing and passed all of the critical tests required by these financings.

The following table sets forth the distributions received by us and coverage test summaries for our active securitizations at the periods presented (in thousands, except amounts in footnotes):

| Name | Cash Distributions For the Year Ended | | Overcollateralization Cushion ⁽¹⁾ | | Annualized Interest Coverage Cushion ⁽²⁾⁽³⁾ | Reinvestment Period End ⁽⁴⁾ |
|--------------|---------------------------------------|-------------------|--|---------------------------------|--|--|
| | December 31, 2022 | December 31, 2021 | At December 31, 2022 | At the Initial Measurement Date | At December 31, 2022 | |
| | ACR 2021-FL1 | \$ 21,141 | \$ 17,727 | \$ 6,758 | \$ 6,758 | |
| ACR 2021-FL2 | 14,537 | — | 5,652 | 5,652 | 15,323 | December 2023 |

(1) Overcollateralization cushion represents the amount by which the collateral held by the securitization issuer exceeds the minimum amount required.

(2) Interest coverage includes annualized amounts based on the most recent trustee statements.

(3) Interest coverage cushion represents the amount by which annualized interest income expected exceeds the annualized amount payable on our active securitizations.

(4) The reinvestment period is the period in which principal proceeds received may be used to acquire new CRE loans or the funded commitments of existing collateral for reinvestment into the securitization.

The following table sets forth the distributions made by and liquidation details for our liquidated securitizations for the periods presented (in thousands):

| Name | Cash Distributions For the Year Ended | | Liquidation Details | | |
|------------------------------|---------------------------------------|-------------------|---------------------|---|--|
| | December 31, 2022 | December 31, 2021 | Liquidation Date | Remaining Assets at the Liquidation Date ⁽¹⁾ | |
| XAN 2019-RSO7 | \$ — | \$ 9,339 | May 2021 | \$ 391,168 | |
| XAN 2020-RSO9 ⁽²⁾ | \$ 14,308 | \$ 7,944 | February 2022 | \$ 111,335 | |
| XAN 2020-RSO8 | \$ 1,628 | \$ 13,830 | March 2022 | \$ 171,225 | |

(1) The remaining assets at the liquidation date were distributed to us in exchange for our notes owned and preference shares in the respective securitization.

(2) Cash distributions for the year ended December 31, 2022 included a principal distribution on our preference share at liquidation of \$13.5 million for XAN 2020-RSO9.

At December 31, 2022, our liquidity consisted of \$66.2 million of unrestricted cash and cash equivalents, \$13.7 million of unlevered financeable CRE loans and \$37.7 million of cash held for reinvestment at our CRE securitizations.

Our leverage ratio, defined as the ratio of borrowings to total equity, may vary as a result of the various funding strategies we use. At December 31, 2022 and 2021, our leverage ratio under GAAP was 4.2 and 4.0 times, respectively. The leverage ratio increase through December 31, 2022 was primarily attributable to the net increase in asset specific borrowing while being offset by the payoff of our 4.50% convertible senior notes and leverage also increased due to the net decrease in total equity primarily from our common stock repurchase program.

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Net Operating Losses and Loss Carryforwards

The following table sets forth the net operating losses and loss carryforwards for the periods presented (in millions):

| Tax Asset Item | Tax Year Recognized | REIT (QRS) Tax Loss Carryforwards | | TRS Tax Loss Carryforwards | |
|--|---------------------|-----------------------------------|-----------------|----------------------------|---------------|
| | | Operating | Capital | Operating | Capital |
| Net Operating Loss Carryforwards: | | | | | |
| Cumulative as of 2021 | 2021 Return | \$ 46.6 | \$ — | \$ 60.1 | \$ — |
| Net Capital Loss Carryforwards: | | | | | |
| Cumulative as of 2021 | 2021 Return | — | 121.9 | — | 1.0 |
| Total tax asset estimates | | \$ 46.6 | \$ 121.9 | \$ 60.1 | \$ 1.0 |
| Useful life | | Unlimited | 5 years | Various | 5 years |

During the year ended December 31, 2021, we generated \$1.1 million of taxable income which was offset by our cumulative net operating losses (“NOL”), leaving \$46.6 million to carry forward to future years. NOL can generally be carried forward to offset both ordinary taxable income and capital gains in future years. The Tax Cuts and Jobs Act (“TCJA”) along with revisions made by the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act reduced the deduction for NOLs to 80% of taxable income and granted an indefinite carryforward period.

Additionally, \$15.0 million of net capital gains was reported on our tax return for the year ended December 31, 2021. This was offset with our cumulative total net capital losses, leaving \$121.9 million to carry forward to future years. No capital losses expired during 2021 or 2022.

We also have tax assets in our taxable REIT subsidiaries (“TRS”). These tax assets are analyzed and disclosed quarterly in our financial statements. As of December 31, 2021, our TRSs have \$39.9 million of pre-TCJA NOLs, some of which are set to expire beginning in 2044, \$20.2 million of NOLs with an indefinite carryforward period and net capital loss carryforwards of \$1.0 million.

Distributions

We did not pay distributions on our common shares during the years ended December 31, 2020, 2021 and 2022 as we were focused on prudently retaining and managing sufficient excess liquidity in connection with the economic impact of the COVID-19 pandemic. As a result of losses during that year, we received significant NOL carryforwards and net capital loss carryforwards, as finalized in our 2020 tax return. We intend to retain taxable income by utilizing our NOL carryforwards and expect to generate capital gains to use a portion of our net capital loss carryforwards, thereby growing book value and our investable equity base. As we continue to take steps necessary to stabilize our earnings available for distribution, our Board will establish a plan for the prudent resumption of the payment of common share distributions. No assurance, however, can be given as to the amounts or timing of future distributions as such distributions are subject to our earnings, financial condition, capital requirements and such other factors as our Board deems relevant.

We intend to continue to make regular quarterly distributions to holders of our preferred stock.

U.S. federal income tax law generally requires that a REIT distribute at least 90% of its REIT taxable income annually, determined without regard to the deduction for dividends paid and excluding net capital gains, and that it pay tax at regular corporate rates to the extent that it annually distributes less than 100% of its taxable income. Before we pay any dividend, whether for U.S. federal income tax purposes or otherwise, we must first meet both our operating and debt service requirements on our repurchase agreements and other debt payable. If our cash available for distribution is less than our taxable income, we could be required to sell assets or borrow funds to make cash distributions, or we may make a portion of the required distribution in the form of a taxable stock distribution or distribution of debt securities.

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Contractual Obligations and Commitments

| | Contractual Commitments (dollars in thousands, except amounts in footnotes) | | | | |
|---|---|-----------------------------|--------------------|--------------------|------------------------------|
| | Payments due by Period | | | | |
| | Total | Less than 1 year | 1 - 3 years | 3 - 5 years | More than 5 years |
| At December 31, 2022: | | | | | |
| CRE securitizations | \$ 1,242,223 | \$ — | \$ — | \$ — | \$ 1,242,223 |
| Senior secured financing facility ⁽¹⁾ | 91,549 | — | — | 91,549 | — |
| CRE - term warehouse financing facilities ⁽²⁾⁽³⁾ | 330,849 | — | 330,849 | — | — |
| Mortgage payable ⁽⁴⁾ | 18,710 | — | 18,710 | — | — |
| 5.75% Senior Unsecured Notes ⁽⁵⁾ | 150,000 | — | — | 150,000 | — |
| Unsecured junior subordinated debentures ⁽⁶⁾ | 51,548 | — | — | — | 51,548 |
| Lease liabilities ⁽⁷⁾ | 856,189 | 1,583 | 5,490 | 6,000 | 843,116 |
| Unfunded commitments on CRE loans ⁽⁸⁾ | 158,195 | 8,985 | 149,210 | — | — |
| Base management fees ⁽⁹⁾ | 6,701 | 6,701 | — | — | — |
| Total | \$ 2,905,964 | \$ 17,269 | \$ 504,259 | \$ 247,549 | \$ 2,136,887 |

(1) Excludes \$202,000 of accrued interest payable at December 31, 2022.

(2) Includes \$894,000 of accrued interest payable at December 31, 2022.

(3) In October 2022, we allowed our Barclays term warehouse financing facility to mature.

(4) Excludes \$88,000 of accrued interest payable at December 31, 2022.

(5) Excludes \$34.5 million of interest expense payable through maturity in August 2026.

(6) Excludes \$27.5 million and \$28.5 million of estimated interest expense payable through maturity, in June 2036 and October 2036, respectively.

(7) Lease liabilities includes a ground rent lease for a hotel property with a remaining term of 93 years and an annual growth rate of 3%.

(8) Unfunded commitments on our originated CRE loans generally fall into two categories: (i) pre-approved capital improvement projects and (ii) new or additional construction costs subject, in each case, to the borrower meeting specified criteria. Upon completion of the improvements or construction, we would receive additional interest income on the advanced amount. At December 31, 2022, we had unfunded commitments on 57 CRE whole loans.

(9) Base management fees presented are based on an estimate of base management fees payable to our Manager over the next 12 months. Our Management Agreement also provides for an incentive compensation arrangement that is based on operating performance. The incentive compensation is not a fixed and determinable amount, and therefore it is not included in this table.

Off-Balance Sheet Arrangements**General**

At December 31, 2022, we did not maintain any relationships with unconsolidated entities or financial partnerships that were established for the purpose of facilitating off-balance sheet arrangements or contractually narrow or limited purposes, although we do have interests in unconsolidated entities not established for those purposes. Except as set forth below, at December 31, 2022, we had not guaranteed obligations of any unconsolidated entities or entered into any commitment or letter of intent to provide additional funding to any such entities.

Unfunded CRE Loan Commitments

In the ordinary course of business, we make commitments to borrowers whose loans are in our CRE loan portfolio to provide additional loan funding in the future. Disbursement of funds pursuant to these commitments is subject to the borrower meeting pre-specified criteria. These commitments are subject to the same underwriting requirements and ongoing portfolio maintenance as are the on-balance sheet financial investments that we hold. Since these commitments may expire without being drawn upon, the total commitment amount does not necessarily represent future cash requirements. Whole loans had \$158.2 million and \$157.6 million in unfunded loan commitments at December 31, 2022 and 2021, respectively. Preferred equity investments had \$2.5 million in unfunded investment commitments at December 31, 2020. The preferred equity investments paid off during the year ended December 31, 2021. Unfunded commitments are not considered in the CECL reserve if they are unconditionally cancellable.

Guarantees and Indemnifications

In the ordinary course of business, we may provide guarantees and indemnifications that contingently obligate us to make payments to the guaranteed or indemnified party based on changes in the value of an asset, liability or equity security of the guaranteed or indemnified party. As such, we may be obligated to make payments to a guaranteed party based on another entity's failure to perform or achieve specified performance criteria, or we may have an indirect guarantee of the indebtedness of others.

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As part of our May 2017 sale of our equity interest in Pearlmark Mezz, we entered into an indemnification agreement whereby we indemnified the purchaser against realized losses of up to \$4.3 million on one mezzanine loan until its final maturity date in 2020. As a result of the indemnified party's partial sale of the mezzanine loan, our maximum exposure was reduced to \$536,000 in 2019. In October 2020, the mezzanine loan paid off its balance to the indemnified party, resulting in the extinguishment of our liability.

In January 2023, Chapel Drive East, LLC, a wholly owned subsidiary of the FSU Student Venture, entered into a loan agreement (the "Construction Loan Agreement") with Oceanview Life and Annuity Company ("Oceanview") to finance the construction of a student housing complex (the "Construction Loan").

In connection with our investment in the student housing complex, ACRES RF entered into guarantees related to the Construction Loan. Pursuant to the guarantees, Jason Pollack, Frank Dellaglio and ACRES RF (collectively, the "Guarantors"), for the benefit of Oceanview, provided limited "bad boy" guaranties to Oceanview pursuant to the Construction Loan Agreement until the earlier of the payment in full of the indebtedness or the date of a sale of the property pursuant to a foreclosure of the mortgage or deed or other transfer in lieu of foreclosure is accepted by Oceanview. The Guarantors also entered into a Completion Guaranty Agreement for the benefit of Oceanview to guaranty the timely completion of the project in accordance with the Construction Loan Agreement, as well as a Carry Guaranty Agreement, for the benefit of Oceanview to guaranty and unconditional payment by Chapel Drive East, LLC of all customary or necessary costs and expenses incurred in connection with the operation, maintenance and management of the property and an Environmental Indemnity Agreement jointly and severally in favor of Oceanview whereby the Guarantors serving as Indemnitors provided environmental representations and warranties, covenants and indemnifications (collectively the "Guaranties"). The Guaranties include certain financial covenants required of ACRES RF, including required net worth and liquidity requirements.

Critical Accounting Policies and Estimates

Our consolidated financial statements are prepared by management in accordance with GAAP. The preparation of financial statements in conformity with GAAP requires that we make estimates and assumptions that may affect the value of our assets or liabilities and disclosure of contingent assets and liabilities at the date of our financial statements, and our financial results. We believe that certain of our policies are critical because they require us to make difficult, subjective and complex judgments about matters that are inherently uncertain. The critical policies summarized below relate to valuation of investment securities, accounting for derivative financial instruments and hedging activities, income taxes, allowance for credit losses and variable interest entities ("VIEs"). We have reviewed these accounting policies with our Board and believe that all of the decisions and assessments upon which our financial statements are based were reasonable at the time made based upon information available to us at the time.

Allowance for Credit Losses

We maintain an allowance for credit loss on our loans held for investment. CRE loans that are held for investment are carried at cost, net of unamortized acquisition premiums or discounts, loan fees and origination costs as applicable. Effective January 1, 2020, we determine our allowance for credit losses, consistent with GAAP, by measuring CECL on the loan portfolio on a quarterly basis. We utilize a probability of default and loss given default methodology over a reasonable and supportable forecast period after which we revert to the historical mean loss ratio, utilizing a blended approach sourced from our own historical losses and the market losses from an engaged third party's database, to be applied for the remaining estimable period. The CECL model requires us to make significant judgments, including: (i) the selection of a reasonable and supportable forecast period, (ii) the selection and weighting of appropriate macroeconomic forecast scenarios, (iii) projections for the amounts and timing of future fundings of committed balances and prepayments on CRE investments, (iv) the determination of the risk characteristics in which to pool financial assets, and (v) the appropriate historical loss data to use in the model. Unfunded commitments are not considered in the CECL reserve if they are unconditionally cancellable by us.

We measure the loan portfolio's credit losses by grouping loans based on similar risk characteristics under CECL, which is typically based on the loan's collateral type. We regularly evaluate the risk characteristics of our loan portfolio to determine whether a different pooling methodology is more accurate. Further, if we determine that foreclosure of a loan's collateral is probable or repayment of the loan is expected through sale or operation of the collateral and the borrower is experiencing financial difficulty, expected credit losses are measured as the difference between the current fair value of the collateral and the amortized cost of the loan. Fair value may be determined based on (i) the present value of estimated cash flows; (ii) the market price, if available; or (iii) the fair value of the collateral less estimated disposition costs.

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While a loan exhibiting credit quality deterioration may remain on accrual status, the loan is placed on non-accrual status at such time as (i) management believes that scheduled debt service payments will not be met within the coming 12 months; (ii) the loan becomes 90 days past due; (iii) management determines the borrower is incapable of, or has ceased efforts toward, curing the cause of the credit deterioration; or (iv) the net realizable value of the loan's underlying collateral approximates our carrying value for such loan. While on non-accrual status, we recognize interest income only when an actual payment is received if a credit analysis supports the borrower's principal repayment capacity. When a loan is placed on non-accrual, previously accrued interest is reversed from interest income.

We utilize the contractual life of our loans to estimate the period over which we measure expected credit losses. Estimates for prepayments and extensions are incorporated into the inputs for our CECL model. Modifications to loan terms, such as a modification in connection with a TDR, where a concession is granted to a borrower experiencing financial difficulty, may result in the extension of the loan's life and an increase in the allowance for credit losses. In March 2020, the Financial Accounting Standards Board ("FASB") concurred with a joint statement of federal and state banking regulators that eased the requirements to classify a modification as a TDR if the modification was granted in connection with the effects of the COVID-19 pandemic. The measurement of the impact of TDRs on the expected credit losses occurs when a TDR is reasonably expected. If the concession granted on a TDR can only be captured through a discounted cash flow analysis, then we will individually assess the loan for expected credit losses using the discounted cash flow method.

In order to calculate the historical mean loss ratio applied to the loan portfolio, we utilize historical losses from our full underwriting history, along with the market loss history of a selected population of loans from a third party's database that are similar to our loan types, loan sizes, durations, interest rate structure and general LTV profiles. We may make adjustments to the historical loss history for qualitative or environmental factors if we believe there is evidence that the estimate for expected credit losses should be increased or decreased.

We record write-offs against the allowance for credit losses if we deem that all or a portion of a loan's balance is uncollectible. If we receive cash in excess of some or all of the amounts we previously wrote off, we record a recovery to increase the allowance for credit losses.

As part of the evaluation of the loan portfolio, we assess the performance of each loan and assign a risk rating based on the collective evaluation of several factors, including but not limited to: collateral performance relative to underwritten plan, time since origination, current implied and/or re-underwritten LTV ratios, risk inherent in the loan structure and exit plan. Loans are rated "1" through "5," from least risk to greatest risk, in connection with this review.

Prior to the implementation of CECL, we calculated our allowance for credit losses through the calculation of general and specific reserves. The general reserve, established for loans not determined to be impaired individually, was based on our loan risk ratings. We recorded a general reserve equal to 1.5% of the aggregate face values of loans with a risk rating of "3," plus 5.0% of the aggregate face values of loans with a risk rating of "4." Loans with a risk rating of "5" were individually measured for impairment to be included in a specific reserve on a quarterly basis.

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Investment in Real Estate

We acquire investments in real estate through direct equity investments and as a result of our lending activities (i.e. through foreclosure or the receipt of the deed-in-lieu of foreclosure on a property). Acquired investments in real estate assets are recorded initially at fair value in accordance with U.S. GAAP. We allocate the purchase price of our acquired assets and assumed liabilities based on the relative fair values of the assets acquired and liabilities assumed.

We evaluate whether property obtained as a result of our lending activities should be identified as held for sale. If a property is determined to be held for sale, all of the acquired assets and assumed liabilities will be recorded in property held for sale on the consolidated balance sheets and recorded at the lower of cost or fair value. Once a property is classified as held for sale, depreciation expense is no longer recorded.

Investments in real estate are carried net of accumulated depreciation. We depreciate real property, building and tenant improvements and furniture, fixtures, and equipment using the straight-line method over the estimated useful lives of the assets. We amortize any acquired intangible assets using the straight-line method over the estimated useful lives of the intangible assets. We amortize the value allocated to lease right of use assets and related in-place lease liabilities, when determined to be operating leases, using the straight-line method over the remaining lease term. The value allocated to any associated above or below market lease intangible asset or liability is amortized to lease expense over the remaining lease term.

Ordinary repairs and maintenance are expensed as incurred. Costs related to the improvement of the real property are capitalized and depreciated over their useful lives.

We depreciate investments in real estate and amortize intangible assets over the estimated useful lives of the assets as follows:

| Category | Term |
|-----------------------------------|---|
| Building | 35 to 40 years |
| Building improvements | 8 to 35 years |
| Site improvements | 10 years |
| Tenant improvements | Shorter of lease term or expected useful life |
| Furniture, fixtures and equipment | 3 to 12 years |
| Right of use assets | 7 to 94 years |
| Intangible assets | 90 days to 18 years |
| Lease liabilities | 7 to 94 years |

Revenue Recognition

Interest income from our loan portfolio is recognized over the life of each loan using the effective interest method and is recorded on the accrual basis. Premiums and discounts are amortized or accreted into income using the effective yield method. If a loan with a premium or discount is prepaid, we immediately recognize the unamortized portion as a decrease or increase to interest income. In addition, we defer loan origination and extension fees and loan origination costs and recognize them over the life of the related loan with interest income using the straight-line method, which approximates the effective yield method. Income recognition is suspended for loans at the earlier of the date at which payments become 90 days past due or when, in our opinion, a full recovery of principal and income becomes doubtful. When the ultimate collectability of the principal is in doubt, all payments received are applied to principal under the cost recovery method. When the ultimate collectability of the principal is not in doubt, contractual interest is recorded as interest income when received, under the cash method, until an accrual is resumed when the loan becomes contractually current and performance is demonstrated to be resumed.

Through our investments in real estate, we earn revenue associated with rental operations and hotel operations, which are presented in real estate income on the consolidated statements of operations.

Rental operating revenue consists of fixed contractual base rent arising from tenant leases at our office properties under operating leases. Revenue is recognized on a straight-line basis over the non-cancelable terms of the related leases. For leases that have fixed and measurable rent escalations, the difference between such rental income earned and the cash rent due under the provisions of the lease is recorded in our consolidated balance sheets. We move to cash basis operating lease income recognition in the period in which collectability of all lease payments is no longer considered probable. At such time, any uncollectible receivable balance will be written off.

Hotel operating revenue consists of amounts derived from hotel operations, including room sales and other hotel revenues. We recognize hotel operating revenue when guest rooms are occupied, services have been provided or fees have been earned. Revenues are recorded net of any sales, occupancy or other taxes collected from customers on behalf of third parties. The following provides additional detail on room revenue and other operating revenue:

- Room revenue is recognized when our hotel satisfies its performance obligation of providing a hotel room. The hotel reservation defines the terms of the agreement including an agreed-upon rate and length of stay. Payment is typically due and paid in full at the end of the stay with some customers prepaying for their rooms prior to the stay. Payments received from a customer prior to arrival are recorded as an advance deposit and are recognized as revenue at the time of occupancy.
- Other operating revenue is recognized at the time when the goods or services are provided to the customer or when the performance obligation is satisfied. Payment is due at the time that goods or services are rendered or billed.

Variable Interest Entities

We consolidate entities that are VIEs where we have determined that we are the primary beneficiary of such entities. Once it is determined that we hold a variable interest in a VIE, management performs a qualitative analysis to determine (i) if we have the power to direct the matters that most significantly impact the VIE's financial performance; and (ii) if we have the obligation to absorb the losses of the VIE that could potentially be significant to the VIE or the right to receive the benefits of the VIE that could potentially be significant to the VIE. If our variable interest possesses both of these characteristics, we are deemed to be the primary beneficiary and would be required to consolidate the VIE. This assessment must be done on an ongoing basis.

At December 31, 2022, we determined that we are the primary beneficiary of five VIEs that are consolidated.

Recent Accounting Pronouncements

Accounting Standards Adopted in 2022

In August 2020, the Financial Accounting Standards Board ("FASB") issued guidance that removes certain separation models for convertible debt instruments and convertible preferred stock that require the separation into a debt component and an equity or derivative component. Consequently, a convertible debt instrument will be accounted for as a single liability measured at its amortized cost, if no other features require bifurcation and recognition as derivatives and the convertible instrument is not issued with substantial premiums accounted for as paid-in capital. By removing those separation models, the interest rate of convertible debt instruments typically will be closer to the coupon interest rate. The guidance also revises the derivative scope exception for contracts in an entity's own equity and improves the consistency of EPS calculations. Adoption did not have a material impact on our consolidated financial statements.

Accounting Standards to be Adopted in Future Periods

In March 2022, the FASB issued an amendment eliminating certain previously issued accounting guidance for troubled debt restructurings ("TDRs") and enhancing disclosure requirements surrounding refinancings, restructurings, and write-offs. Current GAAP provides an exception to general recognition and measurement guidance for loan restructurings if they meet specific criteria to be considered TDRs. If a modification is a TDR, incremental expected losses are recorded in the allowance for credit losses upon modification and specific disclosures are required. The new amendment eliminates the TDR recognition and measurement guidance and requires the reporting entity to evaluate whether the modification represents a new loan or a continuation of an existing loan, consistent with accounting for other loan modifications. The amendment also requires public business entities to disclose current-period gross write-offs by year of origination for certain financing receivables and net investments in leases. For entities that have adopted the previously issued guidance amended by this update, which we did during the year ended December 31, 2020, this update is effective for fiscal years beginning after December 15, 2022, including interim periods within those fiscal years. Early adoption is permitted for entities that have adopted the previously issued guidance amended by this update. We are in the process of evaluating the impact of this guidance.

Inflation

Virtually all of our assets and liabilities are interest rate sensitive in nature. As a result, interest rates and other factors influence our performance far more than does inflation. Changes in interest rates do not necessarily correlate with inflation rates or changes in inflation rates. Our consolidated financial statements are prepared in accordance with GAAP and our distributions are determined by our Board based primarily on our maintaining our REIT qualification; in each case, our activities and balance sheet are measured with reference to historical cost and/or fair market value without considering inflation.

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Subsequent Events

We have evaluated subsequent events through the filing of this report and determined that, except for the subsequent events referred to in Note 7, Note 8, Note 12 and Note 24 of our consolidated financial statements, there have not been any events that have occurred that would require adjustments to or disclosures in our consolidated financial statements.

ITEM 7A. QUANTITATIVE AND QUALITATIVE DISCLOSURES ABOUT MARKET RISK

At December 31, 2022, the primary components of our market risk were credit risk, counterparty risk, financing risk and interest rate risk, as described below. While we do not seek to avoid risk completely, we do seek to assume risk that can be quantified from historical experience, to actively manage that risk, to earn sufficient compensation to justify assuming that risk and to maintain capital levels consistent with the risk we undertake or to which we are exposed.

Credit Risks

Our loans and investments are subject to credit risk. The performance and value of our loans and investments depend upon the sponsors' ability to operate the properties that serve as our collateral so that they produce cash flows adequate to pay interest and principal due to us. To monitor this risk, ACRES Capital, LLC's asset management team reviews our investment portfolios and in certain instances is in regular contact with our borrowers, monitoring performance of the collateral and enforcing our rights as necessary.

In addition, we are exposed to the risks generally associated with the commercial real estate ("CRE") market, including variances in occupancy rates, capitalization rates, absorption rates, and other macroeconomic factors beyond our control. We seek to manage these risks through our underwriting and asset management processes.

The COVID-19 pandemic significantly impacted the CRE markets as numerous state, local, and federal regulations were issued that imposed restrictions on travel and economic activity to contain the spread of the contagion, causing reduced occupancy, requests from tenants for rent deferral or abatement, and delays in construction and development projects. While many of these restrictions have been lifted, the reduced economic activity experienced during the COVID-19 pandemic could still severely impact borrowers' businesses, financial condition and liquidity and may result in borrowers being unwilling or unable to meet their obligations to us in part or in full.

In a business environment where benchmark interest rates are increasing significantly, cash flows of the CRE assets underlying our loans may not be sufficient to pay debt service on our loans, which could result in non-performance or default. We partially mitigate this risk by generally requiring our borrowers to purchase interest rate cap agreements with non-affiliated, well-capitalized third parties and by selectively requiring our borrowers to have and maintain debt service reserves. These interest rate caps generally mature prior to the maturity date of the loan and the borrowers are required to pay to extend them. In most cases the sponsors will need to fund additional equity into the properties to cover these costs as the property may not generate sufficient cash flow to pay these costs. At December 31, 2022, 88.8% of par value of our CRE loan portfolio had interest rate caps in place with a weighted-average maturity of 1.1 years.

These macroeconomic conditions may persist into the future and impair our borrowers' ability to comply with the terms under our loan agreements. We maintain a robust asset management relationship with our borrowers and have utilized these relationships to address the potential impacts of the COVID-19 pandemic, rising interest rates and other macroeconomic factors on our loans secured by properties experiencing cash flow pressure. While we believe the principal amounts of our loans are generally adequately protected by underlying collateral value, there is a risk that we will not realize the entire principal value of certain investments. In order to mitigate that risk, we have proactively engaged with our borrowers, particularly with those with near-term maturities, in order to maximize recovery.

Counterparty Risk

The nature of our business requires us to hold our cash and cash equivalents and obtain financing from with various financial institutions. This exposes us to the risk that these financial institutions may not fulfill their obligations to us under these various contractual arrangements. We mitigate this exposure by depositing our cash and cash equivalents and entering into financing agreements with high credit-quality institutions.

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Financing Risk

We finance our target assets using our CRE debt securitizations, a senior secured financing facility and warehouse financing facilities. Over time, as market conditions change, we may use other forms of leverage in addition to these methods of financing. Weakness or volatility in the financial markets, the CRE and mortgage markets or the economy generally, such as through the impact of the COVID-19 pandemic, could adversely affect one or more of our lenders or potential lenders and could cause one or more of our lenders or potential lenders to be unwilling or unable to provide us with financing, or to decrease the amount of our available financing, or to increase the costs of that financing.

Interest Rate Risk

Our business model is such that rising interest rates will increase our net income, while declining interest rates will decrease net income, subject to the impact of interest rate floors. As of December 31, 2022, 99.8% of our CRE loan portfolio by par value earned a floating rate of interest and may be financed with liabilities that both pay interest at floating rates and that are fixed. Floating-rate loans financed with fixed rate liabilities have a negative correlation with declining interest rates to the extent of our financing. The remaining 0.2% of our CRE loan portfolio by par value earned a fixed rate of interest and may be financed with liabilities that pay interest at fixed rates. To the extent that interest rate floors on our floating-rate CRE loans are in the money, our net interest will have a negative correlation with rising interest rates to the extent of those interest rate floors. Our floating-rate loan portfolio of \$2.1 billion has a weighted-average one-month LIBOR floor of 0.68% at December 31, 2022. Additionally, all interest rate floors on our CRE loan portfolio were in the money at December 31, 2022.

The following table estimates the hypothetical impact on our net interest income assuming an immediate increase or decrease of 100 basis points in the applicable interest rate benchmark (in thousands, except per share data):

| Net Assets Subject to Interest Rate Sensitivity ⁽¹⁾⁽²⁾⁽³⁾ | Year Ended December 31, 2022 | | | |
|--|--|--|--|--|
| | 100 Basis Point Decrease ⁽⁴⁾ | | 100 Basis Point Increase | |
| | Increase (Decrease) to Net Interest Income | Increase (Decrease) to Net Interest Income Per Share | Increase (Decrease) to Net Interest Income | Increase (Decrease) to Net Interest Income Per Share |
| \$ 350,229 | \$ (4,891) | \$ (0.56) | \$ 3,539 | \$ 0.41 |

(1) Includes our floating-rate CRE loans at December 31, 2022.

(2) Includes amounts outstanding on our securitizations, CRE term warehouse financing facilities, senior secured financing facility and unsecured junior subordinated debentures.

(3) Certain of our floating rate loans are subject to a benchmark rate floor.

(4) Decrease in rates assumes the applicable benchmark rate does not fall below 0%.

Risk Management

To the extent consistent with maintaining our status as a REIT, we seek to manage our interest rate risk exposure to protect our variable rate debt against the effects of major interest rate changes. We generally seek to manage our interest rate risk by monitoring and adjusting, if necessary, the reset index and interest rate related to our borrowings.

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ITEM 8. FINANCIAL STATEMENTS AND SUPPLEMENTARY DATA

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REPORT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM

Board of Directors and Shareholders
ACRES Commercial Realty Corp.

Opinion on the financial statements

We have audited the accompanying consolidated balance sheets of ACRES Commercial Realty Corp. (a Maryland corporation) and subsidiaries (the “Company”) as of December 31, 2022 and 2021, the related consolidated statements of operations, comprehensive income (loss), changes in equity, and cash flows for each of the three years in the period ended December 31, 2022, and the related notes and financial statement schedules included under Item 15(a) (collectively referred to as the “financial statements”). In our opinion, the financial statements present fairly, in all material respects, the financial position of the Company as of December 31, 2022 and 2021, and the results of its operations and its cash flows for each of the three years in the period ended December 31, 2022, in conformity with accounting principles generally accepted in the United States of America.

We also have audited, in accordance with the standards of the Public Company Accounting Oversight Board (United States) (“PCAOB”), the Company’s internal control over financial reporting as of December 31, 2022, based on criteria established in the 2013 *Internal Control—Integrated Framework* issued by the Committee of Sponsoring Organizations of the Treadway Commission (“COSO”), and our report dated March 7, 2023 expressed an unqualified opinion.

Basis for opinion

These financial statements are the responsibility of the Company’s management. Our responsibility is to express an opinion on the Company’s financial statements based on our audits. We are a public accounting firm registered with the PCAOB and are required to be independent with respect to the Company in accordance with the U.S. federal securities laws and the applicable rules and regulations of the Securities and Exchange Commission and the PCAOB.

We conducted our audits in accordance with the standards of the PCAOB. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether due to error or fraud. Our audits included performing procedures to assess the risks of material misstatement of the financial statements, whether due to error or fraud, and performing procedures that respond to those risks. Such procedures included examining, on a test basis, evidence regarding the amounts and disclosures in the financial statements. Our audits also included evaluating the accounting principles used and significant estimates made by management, as well as evaluating the overall presentation of the financial statements. We believe that our audits provide a reasonable basis for our opinion.

Critical audit matter

The critical audit matter communicated below is a matter arising from the current period audit of the financial statements that was communicated or required to be communicated to the audit committee and that: (1) relates to accounts or disclosures that are material to the financial statements and (2) involved our especially challenging, subjective, or complex judgments. The communication of the critical audit matter does not alter in any way our opinion on the financial statements, taken as a whole, and we are not, by communicating the critical audit matter below, providing separate opinions on the critical audit matter or on the accounts or disclosures to which they relate.

Allowance for credit losses on CRE whole loans

As described in Note 2 and Note 7 to the financial statements, and in accordance with Accounting Standard Codification 326, Financial Instruments – Credit Losses, the Company utilizes a current expected credit loss methodology to determine the allowance for credit losses on its commercial real estate (CRE) whole loans. The Company measures lifetime expected credit losses on CRE whole loans on a pooled basis, based on shared risk characteristics or individually for collateral-dependent loans. To estimate the allowance for credit losses on pooled CRE whole loans, the Company utilizes a probability of default times loss given default methodology, which incorporates individual loan characteristics, historical loss experience and the weighting of forecasted economic scenarios. For loans determined to be collateral-dependent that are individually evaluated, the reserve is calculated based on the difference between the current fair value of the collateral and the amortized cost of the loan. We identified the allowance for credit losses as a critical audit matter.

The principal considerations for our determination that the allowance for credit losses is a critical audit matter are that management is required to make significant judgments in determining the accuracy of loan level data input into the estimate, the weighing of the

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forecasted economic scenarios, and in evaluating whether factors are present that indicate if an individual loan does not share risk characteristics of the pool. For loans that are determined to be collateral-dependent and individually evaluated, the assessment of fair value of the underlying collateral involves subjective assumptions. Evaluating these conclusions made by management required significant auditor judgment in obtaining sufficient and appropriate audit evidence related to these management determinations.

Our audit procedures related to the allowance for credit losses included the following, among others:

- We tested the design and operating effectiveness of controls over the calculation of the allowance for credit losses, which included controls related to the completeness and accuracy of loan specific data used on pooled CRE whole loans, identification of loans that no longer share risk characteristics of the portfolio and required individual evaluation, weighting of forecasted economic scenarios on pooled CRE whole loans, and for individually evaluated loans, review of the collateral valuation used in determining if the amortized cost of the loan exceeds the current fair value of the collateral.
- For a selection of pooled CRE whole loans, we evaluated the completeness and accuracy of loan specific data used in the calculation of the allowance for credit losses.
- We inspected a selection of pooled CRE whole loan files to analyze the completeness of management's identification and evaluation of collateral dependent loans.
- We assessed the weighting of the various economic scenarios selected by management that were applied to pooled CRE whole loans by inspecting the underlying assumptions of the various scenarios and considering other relevant and reliable third-party evidence.
- For individually evaluated CRE whole loans, with the assistance of our valuation specialists, we evaluated the reasonableness of the valuation methodology and significant assumptions made to value the collateral, to determine if the amortized cost exceeds current fair value of the collateral, thereby necessitating an allowance for credit loss.

/s/ GRANT THORNTON LLP

We have served as the Company's auditor since 2005.

San Francisco, California

March 7, 2023

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ACRES COMMERCIAL REALTY CORP. AND SUBSIDIARIES
CONSOLIDATED BALANCE SHEETS
(in thousands, except share and per share data)

| | December 31 | |
|---|---------------------|---------------------|
| | 2022 | 2021 |
| ASSETS ⁽¹⁾ | | |
| Cash and cash equivalents | \$ 66,232 | \$ 35,500 |
| Restricted cash | 38,579 | 248,431 |
| Accrued interest receivable | 11,969 | 6,112 |
| CRE loans | 2,057,590 | 1,882,551 |
| Less: allowance for credit losses | (18,803) | (8,805) |
| CRE loans, net | 2,038,787 | 1,873,746 |
| Principal paydowns receivable | — | 14,899 |
| Loan receivable - related party | 11,275 | 11,575 |
| Investments in unconsolidated entities | 1,548 | 1,548 |
| Properties held for sale | 53,769 | 17,846 |
| Investments in real estate | 120,968 | 59,308 |
| Right of use assets | 20,281 | 5,951 |
| Intangible assets | 8,880 | 3,877 |
| Other assets | 4,364 | 5,482 |
| Total assets | <u>\$ 2,376,652</u> | <u>\$ 2,284,275</u> |
| LIABILITIES ⁽²⁾ | | |
| Accounts payable and other liabilities | \$ 10,391 | \$ 7,025 |
| Management fee payable - related party | 898 | 561 |
| Accrued interest payable | 6,921 | 5,937 |
| Borrowings | 1,867,033 | 1,814,424 |
| Lease liabilities | 43,695 | 3,537 |
| Distributions payable | 3,262 | 3,262 |
| Accrued tax liability | 113 | 1 |
| Liabilities held for sale | 3,025 | 1,333 |
| Total liabilities | <u>1,935,338</u> | <u>1,836,080</u> |
| EQUITY | | |
| Preferred stock, par value \$0.001: 10,000,000 shares authorized 8.625% Fixed-to-Floating Series C Cumulative Redeemable Preferred Stock, liquidation preference \$25.00 per share; 4,800,000 and 4,800,000 shares issued and outstanding | 5 | 5 |
| Preferred stock, par value \$0.001: 6,800,000 shares authorized 7.875% Series D Cumulative Redeemable Preferred Stock, liquidation preference \$25.00 per share; 4,607,857 and 4,607,857 shares issued and outstanding | 5 | 5 |
| Common stock, par value \$0.001: 41,666,666 shares authorized; 8,708,100 and 9,149,079 shares issued and outstanding (including 583,333 and 333,329 unvested restricted shares) | 9 | 9 |
| Additional paid-in capital | 1,174,202 | 1,179,863 |
| Accumulated other comprehensive loss | (6,394) | (8,127) |
| Distributions in excess of earnings | (732,359) | (723,560) |
| Total stockholders' equity | 435,468 | 448,195 |
| Non-controlling interests | 5,846 | — |
| Total equity | 441,314 | 448,195 |
| TOTAL LIABILITIES AND EQUITY | <u>\$ 2,376,652</u> | <u>\$ 2,284,275</u> |

The accompanying notes are an integral part of these statements

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ACRES COMMERCIAL REALTY CORP. AND SUBSIDIARIES
CONSOLIDATED BALANCE SHEETS - (Continued)
(in thousands, except share and per share data)

| | December 31 | |
|---|---------------------|---------------------|
| | 2022 | 2021 |
| (1) Assets of consolidated variable interest entities (“VIEs”) included in total assets above: | | |
| Restricted cash | \$ 38,180 | \$ 248,371 |
| Accrued interest receivable | 8,184 | 3,826 |
| CRE loans, pledged as collateral ⁽³⁾ | 1,456,649 | 1,601,482 |
| Principal paydowns receivable | — | 14,899 |
| Other assets | 119 | 36 |
| Total assets of consolidated VIEs | <u>\$ 1,503,132</u> | <u>\$ 1,868,614</u> |
| (2) Liabilities of consolidated VIEs included in total liabilities above: | | |
| Accounts payable and other liabilities | \$ 93 | \$ 315 |
| Accrued interest payable | 3,083 | 997 |
| Borrowings | 1,233,556 | 1,466,499 |
| Total liabilities of consolidated VIEs | <u>\$ 1,236,732</u> | <u>\$ 1,467,811</u> |

(3) Excludes the allowance for credit losses.

The accompanying notes are an integral part of these statements

ACRES COMMERCIAL REALTY CORP. AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF OPERATIONS
(in thousands, except share and per share data)

| | Years Ended December 31, | | |
|---|--------------------------|------------|--------------|
| | 2022 | 2021 | 2020 |
| REVENUES | | | |
| Interest income: | | | |
| CRE loans | \$ 125,539 | \$ 100,774 | \$ 101,303 |
| Securities | — | 161 | 6,717 |
| Other | 735 | 97 | 223 |
| Total interest income | 126,274 | 101,032 | 108,243 |
| Interest expense | 82,324 | 61,575 | 58,008 |
| Net interest income | 43,950 | 39,457 | 50,235 |
| Real estate income | 31,129 | 10,553 | — |
| Other revenue | 91 | 65 | 76 |
| Total revenues | 75,170 | 50,075 | 50,311 |
| OPERATING EXPENSES | | | |
| General and administrative | 10,575 | 11,602 | 14,335 |
| Real estate expenses | 33,854 | 10,601 | 298 |
| Management fees - related party | 7,035 | 6,089 | 6,054 |
| Equity compensation - related party | 3,562 | 1,722 | 3,136 |
| Corporate depreciation and amortization | 85 | 94 | 49 |
| Provision for (reversal of) credit losses, net | 12,295 | (21,262) | 30,815 |
| Total operating expenses | 67,406 | 8,846 | 54,687 |
| | 7,764 | 41,229 | (4,376) |
| OTHER INCOME (EXPENSE) | | | |
| Net realized and unrealized gain (loss) on investment securities available-for-sale and loans and derivatives | — | 878 | (186,610) |
| Fair value adjustments on financial assets held for sale | — | — | (8,768) |
| Gain on conversion of real estate | — | — | 1,570 |
| Loss on extinguishment of debt | (460) | (9,006) | — |
| Gain on sale of real estate | 1,870 | — | — |
| Other income | 1,588 | 822 | 471 |
| Total other income (expense) | 2,998 | (7,306) | (193,337) |
| INCOME (LOSS) BEFORE TAXES | 10,762 | 33,923 | (197,713) |
| Income tax expense | (336) | — | — |
| NET INCOME (LOSS) | 10,426 | 33,923 | (197,713) |
| Net income allocated to preferred shares | (19,422) | (15,887) | (10,350) |
| Net loss allocable to non-controlling interest, net of taxes | 197 | — | — |
| NET (LOSS) INCOME ALLOCABLE TO COMMON SHARES | \$ (8,799) | \$ 18,036 | \$ (208,063) |
| NET (LOSS) INCOME PER COMMON SHARE - BASIC | \$ (1.00) | \$ 1.85 | \$ (19.33) |
| NET (LOSS) INCOME PER COMMON SHARE - DILUTED | \$ (1.00) | \$ 1.85 | \$ (19.33) |
| WEIGHTED AVERAGE NUMBER OF COMMON SHARES OUTSTANDING - BASIC | 8,811,761 | 9,736,268 | 10,763,261 |
| WEIGHTED AVERAGE NUMBER OF COMMON SHARES OUTSTANDING - DILUTED | 8,811,761 | 9,763,217 | 10,763,261 |

The accompanying notes are an integral part of these statements

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ACRES COMMERCIAL REALTY CORP. AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF COMPREHENSIVE INCOME (LOSS)
(in thousands)

| | <u>Years Ended December 31,</u> | | |
|---|---------------------------------|------------------|---------------------|
| | <u>2022</u> | <u>2021</u> | <u>2020</u> |
| Net income (loss) | \$ 10,426 | \$ 33,923 | \$ (197,713) |
| Other comprehensive income (loss): | | | |
| Reclassification adjustments for realized losses on investment securities available-for-sale included in net income loss | — | — | 185,463 |
| Unrealized losses on investment securities available-for-sale, net | — | — | (191,283) |
| Reclassification adjustments associated with net unrealized losses from interest rate swaps included in net income (loss) | 1,733 | 1,851 | 1,254 |
| Unrealized losses on derivatives, net | — | — | (7,233) |
| Total other comprehensive income (loss) | <u>1,733</u> | <u>1,851</u> | <u>(11,799)</u> |
| Comprehensive income (loss) before allocation to preferred shares | 12,159 | 35,774 | (209,512) |
| Net loss allocated to non-controlling interests shares | 197 | — | — |
| Net income allocated to preferred shares | (19,422) | (15,887) | (10,350) |
| Comprehensive (loss) income allocable to common shares | <u>\$ (7,066)</u> | <u>\$ 19,887</u> | <u>\$ (219,862)</u> |

The accompanying notes are an integral part of these statements

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ACRES COMMERCIAL REALTY CORP. AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF CHANGES IN EQUITY
FOR THE YEARS ENDED DECEMBER 31, 2022, 2021 AND 2020
(in thousands, except share and per share data)

| | <u>Common Stock</u> | | Series C Preferred Stock | Series D Preferred Stock | Additional Paid-In Capital | Accumulated Other Comprehensive Income (Loss) | Retained Earnings (Distributions in Excess of Earnings) | Total Stockholders' Equity | Non- Controlling Interest | Total Equity |
|--|---------------------|--------------|--------------------------------|--------------------------------|----------------------------------|--|---|----------------------------------|---------------------------------|-------------------|
| | Shares | Amount | | | | | | | | |
| Balance, December 31, 2019 | 10,626,864 | \$ 11 | \$ 5 | \$ — | \$ 1,085,062 | \$ 1,821 | \$ (530,501) | \$ 556,398 | \$ — | \$ 556,398 |
| Cumulative effect of accounting change for adoption of credit loss guidance | — | — | — | — | — | — | (3,032) | (3,032) | — | (3,032) |
| Balance, January 1, 2020 | 10,626,864 | 11 | 5 | — | 1,085,062 | 1,821 | (533,533) | 553,366 | — | 553,366 |
| Equity component of 12% Senior Unsecured Notes | — | — | — | — | 3,108 | — | — | 3,108 | — | 3,108 |
| Purchase and retirement of common stock | (535,485) | (1) | — | — | (5,364) | — | — | (5,365) | — | (5,365) |
| Stock-based compensation | 80,906 | — | — | — | (1) | — | — | (1) | — | (1) |
| Amortization of stock-based compensation | — | — | — | — | 3,136 | — | — | 3,136 | — | 3,136 |
| Forfeiture of unvested stock | (9,996) | — | — | — | — | — | — | — | — | — |
| Net loss | — | — | — | — | — | — | (197,713) | (197,713) | — | (197,713) |
| Distributions and accrual of cumulative preferred stock dividends | — | — | — | — | — | — | (10,350) | (10,350) | — | (10,350) |
| Securities available-for-sale without an allowance for credit losses, fair value adjustment, net | — | — | — | — | — | (5,820) | — | (5,820) | — | (5,820) |
| Designated derivatives, fair value adjustment | — | — | — | — | — | (5,979) | — | (5,979) | — | (5,979) |
| Balance, December 31, 2020 | <u>10,162,289</u> | <u>\$ 10</u> | <u>\$ 5</u> | <u>\$ —</u> | <u>\$ 1,085,941</u> | <u>\$ (9,978)</u> | <u>\$ (741,596)</u> | <u>\$ 334,382</u> | <u>\$ —</u> | <u>\$ 334,382</u> |

The accompanying notes are an integral part of these statements

ACRES COMMERCIAL REALTY CORP. AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF CHANGES IN EQUITY
FOR THE YEARS ENDED DECEMBER 31, 2022, 2021 AND 2020 - (Continued)

(in thousands, except share and per share data)

| | <u>Common Stock</u> | | Series C Preferred Stock | Series D Preferred Stock | Additional Paid-In Capital | Accumulated Other Comprehensive Income (Loss) | Retained Earnings (Distributions in Excess of Earnings) | Total Stockholders' Equity | Non- Controlling Interest | Total Equity |
|---|---------------------|-------------|--------------------------------|--------------------------------|----------------------------------|--|---|----------------------------------|---------------------------------|-------------------|
| | Shares | Amount | | | | | | | | |
| Balance, January 1, 2021 | 10,162,289 | \$ 10 | \$ 5 | \$ — | \$ 1,085,941 | \$ (9,978) | \$ (741,596) | \$ 334,382 | \$ — | \$ 334,382 |
| Proceeds from issuance of preferred stock | — | — | — | 5 | 115,189 | — | — | 115,194 | — | 115,194 |
| Offering costs | — | — | — | — | (4,589) | — | — | (4,589) | — | (4,589) |
| Purchase and retirement of common stock | (1,346,539) | (1) | — | — | (18,400) | — | — | (18,401) | — | (18,401) |
| Stock-based compensation | 333,329 | — | — | — | — | — | — | — | — | — |
| Amortization of stock-based compensation | — | — | — | — | 1,722 | — | — | 1,722 | — | 1,722 |
| Net income | — | — | — | — | — | — | 33,923 | 33,923 | — | 33,923 |
| Distributions and accrual of cumulative preferred stock dividends | — | — | — | — | — | — | (15,887) | (15,887) | — | (15,887) |
| Amortization of terminated derivatives | — | — | — | — | — | 1,851 | — | 1,851 | — | 1,851 |
| Balance, December 31, 2021 | <u>9,149,079</u> | <u>\$ 9</u> | <u>\$ 5</u> | <u>\$ 5</u> | <u>\$ 1,179,863</u> | <u>\$ (8,127)</u> | <u>\$ (723,560)</u> | <u>\$ 448,195</u> | <u>\$ —</u> | <u>\$ 448,195</u> |

The accompanying notes are an integral part of these statements

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ACRES COMMERCIAL REALTY CORP. AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF CHANGES IN EQUITY
FOR THE YEARS ENDED DECEMBER 31, 2022, 2021 AND 2020 - (Continued)
(in thousands, except share and per share data)

| | <u>Common Stock</u> | | | | Additional Paid-In Capital | Accumulated Other Comprehensive Income (Loss) | Retained Earnings (Distributions in Excess of Earnings) | Total Stockholders' Equity | Non- Controlling Interest | Total Equity |
|---|---------------------|-------------|--------------------------------|--------------------------------|----------------------------------|--|---|----------------------------------|---------------------------------|-------------------|
| | Shares | Amount | Series C Preferred Stock | Series D Preferred Stock | | | | | | |
| Balance, January 1, 2022 | 9,149,079 | \$ 9 | \$ 5 | \$ 5 | \$ 1,179,863 | \$ (8,127) | \$ (723,560) | \$ 448,195 | \$ — | \$ 448,195 |
| Offering costs | — | — | — | — | (101) | — | — | (101) | — | (101) |
| Conversion of 4.5% convertible senior notes | — | — | — | — | 4 | — | — | 4 | — | 4 |
| Exercise of warrants at \$0.03 per share | 74,666 | — | — | — | 2 | — | — | 2 | — | 2 |
| Purchase and retirement of common stock | (848,978) | — | — | — | (9,128) | — | — | (9,128) | — | (9,128) |
| Stock-based compensation | 333,333 | — | — | — | — | — | — | — | — | — |
| Amortization of stock-based compensation | — | — | — | — | 3,562 | — | — | 3,562 | — | 3,562 |
| Contributions from non-controlling interests | — | — | — | — | — | — | — | — | 6,043 | 6,043 |
| Net income | — | — | — | — | — | — | 10,623 | 10,623 | (197) | 10,426 |
| Distributions and accrual of cumulative preferred stock dividends | — | — | — | — | — | — | (19,422) | (19,422) | — | (19,422) |
| Amortization of terminated derivatives | — | — | — | — | — | 1,733 | — | 1,733 | — | 1,733 |
| Balance, December 31, 2022 | <u>8,708,100</u> | <u>\$ 9</u> | <u>\$ 5</u> | <u>\$ 5</u> | <u>\$ 1,174,202</u> | <u>\$ (6,394)</u> | <u>\$ (732,359)</u> | <u>\$ 435,468</u> | <u>\$ 5,846</u> | <u>\$ 441,314</u> |

The accompanying notes are an integral part of these statements

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ACRES COMMERCIAL REALTY CORP. AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF CASH FLOWS
(in thousands)

| | Years Ended December 31, | | |
|--|--------------------------|-------------|--------------|
| | 2022 | 2021 | 2020 |
| CASH FLOWS FROM OPERATING ACTIVITIES: | | | |
| Net income (loss) | \$ 10,426 | \$ 33,923 | \$ (197,713) |
| Adjustments to reconcile net income (loss) from continuing operations to net cash provided by continuing operating activities: | | | |
| Provision for (reversal of) credit losses, net | 12,295 | (21,262) | 30,815 |
| Depreciation, amortization and accretion | 7,491 | 13,988 | 6,524 |
| Amortization of stock-based compensation | 3,562 | 1,722 | 3,136 |
| Loss on the extinguishment of debt | 460 | 4,043 | — |
| Net realized and unrealized (gain) loss on investment securities available-for-sale and loans and derivatives | — | (878) | 186,545 |
| Gain on sale of real estate | (1,870) | — | — |
| Net gain on conversion to real estate | — | — | (1,794) |
| Fair value and other adjustments on asset held for sale | — | — | 8,768 |
| Changes in operating assets and liabilities: | | | |
| (Increase) decrease in accrued interest receivable, net of purchased interest | (6,138) | 1,347 | (322) |
| Increase in interest receivable - related party | — | — | (39) |
| Increase (decrease) in management fee payable | 337 | 119 | (259) |
| Increase (decrease) in accounts payable and other liabilities | 2,743 | 4,101 | (559) |
| Decrease in lease liability | (94) | (39) | — |
| Increase (decrease) in accrued interest payable | 985 | (39) | 1,536 |
| Decrease (increase) in other assets | 2,500 | 3,567 | (4,828) |
| Net cash provided by operating activities | 32,697 | 40,592 | 31,810 |
| CASH FLOWS FROM INVESTING ACTIVITIES: | | | |
| Origination and purchase of loans | (583,543) | (1,381,660) | (298,094) |
| Principal payments received on loans and leases | 414,450 | 1,008,967 | 509,236 |
| Investments in real estate | (81,749) | (28,924) | — |
| Proceeds from sale of real estate | 18,729 | — | — |
| Proceeds from sale of loans or assets previously held for sale | — | 7,915 | 27,745 |
| Purchase of investment securities available-for-sale | — | — | (24,610) |
| Principal payments on investment securities available-for-sale | — | — | 4,733 |
| Proceeds from sale of investment securities available-for-sale | — | 2,958 | 37,764 |
| Purchase of furniture and fixtures | (741) | (61) | (5) |
| Investment in loan - related party | — | — | (12,000) |
| Principal payments received on loan - related party | 300 | 300 | 125 |
| Net cash (used in) provided by investing activities | (232,554) | (390,505) | 244,894 |
| CASH FLOWS FROM FINANCING ACTIVITIES: | | | |
| Repurchase of common stock | (9,128) | (18,401) | (5,365) |
| Proceeds from issuance of preferred shares (net of \$101 and \$4,589 of underwriting discounts and offering costs) | (101) | 110,605 | — |
| Proceeds from exercise of warrants | 2 | — | — |
| Proceeds from borrowings: | | | |
| Securitized | — | 1,242,223 | 639,074 |
| Senior secured financing facility | 101,699 | 173,087 | 128,495 |
| Warehouse financing facilities and repurchase agreements | 405,743 | 862,681 | 288,555 |
| Senior unsecured notes | — | 150,000 | 50,000 |
| Mortgage payable | 18,710 | — | — |

The accompanying notes are an integral part of these statements

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ACRES COMMERCIAL REALTY CORP. AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF CASH FLOWS - (Continued)
(in thousands)

| | Years Ended December 31, | | |
|---|--------------------------|-------------------|------------------|
| | 2022 | 2021 | 2020 |
| CASH FLOWS FROM FINANCING ACTIVITIES - (Continued): | | | |
| Payments on borrowings: | | | |
| Securitizations | (237,189) | (801,622) | (413,023) |
| Senior secured financing facility | (10,150) | (206,447) | (95,135) |
| Warehouse financing facilities and repurchase agreements | (145,972) | (805,119) | (827,684) |
| Convertible senior notes | (88,010) | (55,736) | (21,182) |
| Senior unsecured notes | — | (50,000) | — |
| Payment of debt issuance costs | (1,488) | (20,818) | (16,253) |
| Settlement of derivative instruments | — | — | (11,762) |
| Proceeds received from non-controlling interests | 6,043 | — | — |
| Distributions paid on preferred stock | (19,422) | (14,350) | (10,350) |
| Distributions paid on common stock | — | — | (8,767) |
| Net cash provided by (used in) financing activities | 20,737 | 566,103 | (303,397) |
| NET (DECREASE) INCREASE IN CASH AND CASH EQUIVALENTS AND RESTRICTED CASH | (179,120) | 216,190 | (26,693) |
| CASH AND CASH EQUIVALENTS AND RESTRICTED CASH AT BEGINNING OF YEAR | 283,931 | 67,741 | 94,434 |
| CASH AND CASH EQUIVALENTS AND RESTRICTED CASH AT END OF YEAR | <u>\$ 104,811</u> | <u>\$ 283,931</u> | <u>\$ 67,741</u> |

The accompanying notes are an integral part of these statements

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ACRES COMMERCIAL REALTY CORP. AND SUBSIDIARIES
NOTES TO CONSOLIDATED FINANCIAL STATEMENTS
DECEMBER 31, 2022

NOTE 1 - ORGANIZATION

ACRES Commercial Realty Corp., a Maryland corporation, along with its subsidiaries (collectively, the “Company”), is a REIT that is primarily focused on originating, holding and managing commercial real estate (“CRE”) mortgage loans and equity investments in commercial real estate properties through direct ownership and joint ventures. On July 31, 2020, the Company’s management contract was acquired from Exantas Capital Manager Inc. (the “Prior Manager”), a subsidiary of C-III Capital Partners LLC (“C-III”), by ACRES Capital, LLC (the “Manager”), a subsidiary of ACRES Capital Corp. (collectively, “ACRES”), a private commercial real estate lender exclusively dedicated to nationwide middle market CRE lending with a focus on multifamily, student housing, hospitality, office and industrial property in top United States (“U.S.”) markets (the “ACRES acquisition”).

The Company has qualified, and expects to qualify in the current fiscal year, as a REIT.

The Company conducts its operations through the use of subsidiaries that it consolidates into its financial statements. The Company’s core assets are consolidated through its investment in ACRES Realty Funding, Inc. (“ACRES RF”), a wholly-owned subsidiary that holds CRE loans, CRE-related securities and investments in CRE securitizations, which are consolidated as VIEs as discussed in Note 3, and special purpose entities.

Reverse Stock Split

Effective February 16, 2021, the Company completed a one-for-three reverse stock split of its outstanding common stock. The accompanying financial statements and notes to the financial statements give retroactive effect to the reverse stock split for all periods presented. In addition, the Company adopted articles of amendment to its charter, which provided that the par value of the Company’s common stock remained \$0.001 immediately after effect was given for the reverse stock split. No fractional shares were issued in connection with the reverse stock split. Stockholders who otherwise held fractional shares of the Company’s common stock as a result of the reverse stock split received a cash payment in lieu of such fractional shares.

In May 2021, the Company adopted articles of amendment to its charter to decrease its authorized shares of capital stock from 225,000,000 shares, consisting of 125,000,000 shares of common stock and 100,000,000 shares of preferred stock to 141,666,666 shares consisting of 41,666,666 shares of common stock and 100,000,000 shares of preferred stock.

NOTE 2 - SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

Principles of Consolidation

The accompanying consolidated financial statements have been prepared in conformity with accounting principles generally accepted in the U.S. (“GAAP”). The consolidated financial statements include the accounts of the Company, majority-owned or controlled subsidiaries and VIEs for which the Company is considered the primary beneficiary. All inter-company transactions and balances have been eliminated in consolidation.

Variable Interest Entities

A VIE is defined as an entity in which equity investors (i) do not have a controlling financial interest and/or (ii) do not have sufficient equity at risk for the entity to finance its activities without additional subordinated financial support from other parties. A VIE is required to be consolidated by its primary beneficiary, which is defined as the party that (a) has the power to control the activities that most significantly impact the VIE’s economic performance and (b) has the obligation to absorb losses of the VIE that could potentially be significant to the VIE or the right to receive benefits from the VIE that could potentially be significant to the VIE.

The Company considers the following criteria in determining whether an entity is a VIE:

1. The equity investment at risk is not sufficient to permit the entity to finance its activities without additional subordinated financial support provided by any parties, including the equity holders.
2. The equity investors lack one or more of the following essential characteristics of a controlling financial interest.
 - a. The direct ability to make decisions about the entity’s activities through voting rights or similar rights.

ACRES COMMERCIAL REALTY CORP. AND SUBSIDIARIES
NOTES TO CONSOLIDATED FINANCIAL STATEMENTS - (Continued)
DECEMBER 31, 2022

- b. The obligation to absorb the expected losses of the entity.
- c. The right to receive the expected residual returns of the entity. The equity investors have voting rights that are not proportionate to their economic interests, and the activities of the entity involve or are conducted on behalf of an investor with a disproportionately small voting interest.

In determining whether the Company is the primary beneficiary of a VIE, the Company reviews governing contracts, formation documents and any other contractual arrangements for any relevant terms and determines the activities that have the most significant impact on the VIE and who has the power to direct those activities. The Company also looks for kick-out rights, protective rights and participating rights as well as any financial or other support provided to the VIE and the reason for that support, and the terms of any explicit or implicit arrangements that may require the Company to provide future support. The Company then makes a determination based on its power to direct the most significant activities of the VIE and/or a financial interest that is potentially significant. In instances when a VIE is owned by both the Company and related parties, the Company considers whether there is a single party in the related party group that meets both the power and losses or benefits criteria on its own as though no related party relationship existed. If one party within the related party group meets both these criteria, such reporting entity is the primary beneficiary of the VIE and no further analysis is needed. If no party within the related party group on its own meets both the power and losses or benefits criteria, but the related party group as a whole meets these two criteria, the determination of primary beneficiary within the related party group is based upon an analysis of the facts and circumstances with the objective of determining which party is most closely associated with the VIE. Determining the primary beneficiary requires significant judgment. The Company continuously analyzes entities in which it holds variable interests, including when there is a reconsideration event, to determine whether such entities are VIEs and whether such potential VIEs should be consolidated or deconsolidated.

Voting Interest Entities

A voting interest entity is an entity in which the total equity investment at risk is sufficient to enable it to finance its activities independently and the equity holders have the power to direct the activities of the entity that most significantly impact its economic performance, the obligation to absorb the losses of the entity and the right to receive the residual returns of the entity. The usual condition for a controlling financial interest in a voting interest entity is ownership of a majority voting interest. If the Company has a majority voting interest in a voting interest entity, the entity will generally be consolidated. The Company does not consolidate a voting interest entity if there are substantive participating rights by other parties and/or kick-out rights by a single party or through a simple majority vote.

The Company performs on-going reassessments of whether entities previously evaluated under the voting interest framework have become VIEs, based on certain events, and therefore subject to the VIE consolidation framework.

Use of Estimates

The preparation of financial statements in conformity with GAAP requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities and disclosure of contingent assets and liabilities at the date of the financial statements and within the period of financial results. Actual results could differ from those estimates. Estimates affecting the accompanying consolidated financial statements include but are not limited to the net realizable and fair values of the Company's investments and derivatives, the estimated useful lives used to calculate depreciation, the expected lives over which to amortize premiums and accrete discounts, provisions for or reversals of expected credit losses and the disclosure of contingent liabilities.

Cash and Cash Equivalents

Cash and cash equivalents include cash on hand and all highly liquid investments with original maturities of three months or less at the time of purchase. At December 31, 2022 and 2021, \$63.3 million and \$33.3 million, respectively, of the reported cash balances exceeded the Federal Deposit Insurance Corporation and Securities Investor Protection Corporation deposit insurance limits of \$250,000 per respective depository or brokerage institution. However, all of the Company's cash deposits are held at multiple, established financial institutions, in multiple accounts associated with its parent and respective consolidated subsidiaries, to minimize credit risk exposure.

Restricted cash includes required account balance minimums as well as cash held for primarily for the Company's CRE debt securitizations as well as cash held in the CRE debt securitizations and the syndicated corporate loan collateralized debt obligations ("CDOs").

ACRES COMMERCIAL REALTY CORP. AND SUBSIDIARIES
NOTES TO CONSOLIDATED FINANCIAL STATEMENTS - (Continued)
DECEMBER 31, 2022

The following table provides a reconciliation of cash, cash equivalents and restricted cash on the consolidated balance sheets to the total amount shown on the consolidated statements of cash flows (in thousands):

| | December 31, | |
|---|-------------------|-------------------|
| | 2022 | 2021 |
| Cash and cash equivalents | \$ 66,232 | \$ 35,500 |
| Restricted cash | 38,579 | 248,431 |
| Total cash, cash equivalents and restricted cash shown on the Company's consolidated statements of cash flows | <u>\$ 104,811</u> | <u>\$ 283,931</u> |

Investment in Unconsolidated Entities

The Company's non-controlling investments in unconsolidated entities are included in investments in unconsolidated entities on the consolidated balance sheets and are accounted for under the cost method. Under the cost method, the Company records dividend income when declared to the extent it is not considered a return of capital, which is recorded as a reduction of the cost of the investment.

Loans

The Company acquires loans through direct origination and occasionally through purchases from third-parties and had historically acquired corporate leveraged loans in the secondary market and through syndications of newly originated loans. Loans are held for investment; therefore, the Company initially records loans at the amount funded for originated loans or at the acquisition price for loans purchased, and subsequently, accounts for them based on their outstanding principal plus or minus unamortized premiums or discounts. The Company may sell a loan held for investment where the credit fundamentals underlying a particular loan have changed in such a manner that the Company's expected return on investment may decrease. Once the determination has been made by the Company that it no longer will hold the loan for investment, the Company identifies these loans as loans held for sale. Any credit-related write-off considerations prior to the transfer of the loan to loans held for sale are accounted for through the allowance for credit losses on the Company's consolidated balance sheets.

The Company reports its loans held for sale at the lower of amortized cost or fair value. To determine fair value, the Company primarily uses appraisals of underlying collateral obtained from third-parties as a practical expedient. Key assumptions used in those appraisals are reviewed by the Company. If there is a material difference between the value provided by the appraiser and information used by the Company to validate the appraisal, the Company will evaluate the difference with the appraiser, which could result in an updated appraisal. The Company may also use the present value of estimated cash flows, market price, if available, or other determinants of the fair value of the collateral less estimated disposition costs. Any determined changes in the fair value of loans held for sale are recorded in fair value adjustments on financial assets held for sale on the Company's consolidated statements of operations. Based on a prioritization of inputs used in the valuation of each position, the Company categorizes these investments as either Level 2 or Level 3 in the fair value hierarchy.

Loan Interest Income Recognition

Interest income on loans includes interest at stated rates adjusted for amortization or accretion of premiums and discounts based on the contractual payment terms of the loan. Premiums and discounts are amortized or accreted into income using the effective yield method. If a loan with a premium or discount is prepaid, the Company immediately recognizes the unamortized portion as a decrease or increase to interest income. In addition, the Company defers loan origination and extension fees and loan origination costs and recognizes them over the life of the related loan against interest income using the straight line method, which approximates the effective yield method. Income recognition is suspended for loans at the earlier of the date at which payments become 90 days past due or when, in the opinion of management, a full recovery of principal and income becomes doubtful. When the ultimate collectability of the principal is in doubt, all payments received are applied to principal under the cost recovery method. On the other hand, when the ultimate collectability of the principal is not in doubt, contractual interest is recorded as interest income when received, under the cash method, until an accrual is resumed when the loan becomes contractually current and performance is demonstrated to be resumed. A loan is written off when it is no longer realizable and/or legally discharged.

ACRES COMMERCIAL REALTY CORP. AND SUBSIDIARIES
NOTES TO CONSOLIDATED FINANCIAL STATEMENTS - (Continued)
DECEMBER 31, 2022

The Company records interest receivable on its loans in accrued interest receivable on its consolidated balance sheets. The Company analyzes the interest receivable balances on a timely basis, or at least quarterly, to determine if they are uncollectible. If an interest receivable amount is deemed uncollectible, then the Company writes off that uncollectible amount of the interest receivable through a reversal of interest income.

Preferred Equity Investment

Historically, the Company invested in preferred equity investments. Preferred equity investments, which are subordinate to any loans but senior to common equity, depending on the investment's characteristics, could be accounted for as real estate, joint ventures or as mortgage loans. The Company's preferred equity investments were accounted for as CRE loans held for investment, were carried at cost, net of unamortized loan fees and origination costs, and were included within CRE loans on the Company's consolidated balance sheets. The Company accreted or amortized any discounts or premiums over the life of the related loan utilizing the effective interest method. Interest and fees were recognized as income subject to recoverability, which was substantiated by obtaining annual appraisals on the underlying property.

Allowance for Credit Losses

The Company maintains an allowance for credit loss on its loans held for investment. Effective January 1, 2020, the Company determines its allowance for credit losses by measuring the current expected credit losses ("CECL") on the loan portfolio on a quarterly basis. The Company utilizes a probability of default and loss given default methodology together with collateral-specific data for each loan over a reasonable and supportable forecast period after which it reverts to its historical mean loss ratio, utilizing a blended approach sourced from its own historical losses and the market losses from an engaged third party's database, to be applied for the remaining estimable period. The CECL model requires the Company to make significant judgments, including: (i) the selection of a reasonable and supportable forecast period, (ii) the selection and weighting of appropriate macroeconomic forecast scenarios, (iii) projections for the amounts and timing of future fundings of committed balances and prepayments on CRE investments, (iv) the determination of the risk characteristics in which to pool financial assets, and (v) the appropriate historical loss data to use in the model. Unfunded commitments are not considered in the CECL reserve if they are unconditionally cancellable by the Company.

The Company measures the loan portfolio's credit losses by grouping loans based on similar risk characteristics under CECL, which is typically based on the loan's collateral type. The Company regularly evaluates the risk characteristics of its loan portfolio to determine whether a different pooling methodology is more accurate. Further, if the Company determines that foreclosure of a loan's collateral is probable or repayment of the loan is expected through sale or operation of the collateral and the borrower is experiencing financial difficulty, expected credit losses are measured as the difference between the current fair value of the collateral and the amortized cost of the loan. Fair value may be determined based on (i) the present value of estimated cash flows; (ii) the market price, if available; or (iii) the fair value of the collateral less estimated disposition costs.

While a loan exhibiting credit quality deterioration may remain on accrual status, the loan is placed on non-accrual status at such time as (i) management believes that scheduled debt service payments will not be met within the coming 12 months; (ii) the loan becomes 90 days past due; (iii) management determines the borrower is incapable of, or has ceased efforts toward, curing the cause of the credit deterioration; or (iv) the net realizable value of the loan's underlying collateral approximates the Company's carrying value for such loan. While on non-accrual status, the Company recognizes interest income only when an actual payment is received if a credit analysis supports the borrower's principal repayment capacity. When a loan is placed on non-accrual, previously accrued and uncollected interest is reversed from interest income.

The Company utilizes the contractual life of its loans to estimate the period over which it measures expected credit losses. Estimates for prepayments and extensions are incorporated into the inputs for the Company's CECL model. Modifications to loan terms, such as a modification in connection with a troubled debt restructuring ("TDR"), where a concession is granted to a borrower experiencing financial difficulty, may result in the extension of the loan's life and an increase in the allowance for credit losses. In March 2020, the Financial Accounting Standards Board ("FASB") concurred with a joint statement of federal and state banking regulators that eased the requirements to classify a modification as a TDR if the modification was granted in connection with the effects of the COVID-19 pandemic. If the concession granted on a TDR can only be captured through a discounted cash flow analysis, then the Company will individually assess the loan for expected credit losses using the discounted cash flow method.

ACRES COMMERCIAL REALTY CORP. AND SUBSIDIARIES
NOTES TO CONSOLIDATED FINANCIAL STATEMENTS - (Continued)
DECEMBER 31, 2022

In order to calculate the historical mean loss ratio applied to the loan portfolio, the Company utilizes historical losses from its full underwriting history, along with the market loss history of a selected population of loans from a third party's database that are similar to the Company's loan types, loan sizes, durations, interest rate structure and general loan-to-collateral value ("LTV") profiles. The Company may make adjustments to the historical loss history for qualitative or environmental factors if it believes there is evidence that the estimate for expected credit losses should be increased or decreased.

The Company records write-offs against the allowance for credit losses if it deems that all or a portion of a loan's balance is uncollectible. If the Company receives cash in excess of some or all of the amounts it previously wrote off, it records the recovery by increasing the allowance for credit losses.

As part of the evaluation of the loan portfolio, the Company assesses the performance of each loan and assigns a risk rating based on the collective evaluation of several factors, including but not limited to: collateral performance relative to underwritten plan, time since origination, current implied and/or re-underwritten LTV ratios, risk inherent in the loan structure and exit plan. Loans are rated "1" through "5," from the least risk to the greatest risk, in connection with this review.

Prior to the implementation of CECL, the Company calculated its allowance for credit losses through the calculation of general and specific reserves. The general reserve, established for loans not determined to be impaired individually, was based on the Company's loan risk ratings. The Company recorded a general reserve equal to 1.5% of the aggregate face values of loans with a risk rating of "3," plus 5.0% of the aggregate face values of loans with a risk rating of "4." Loans with a risk rating of "5" were individually measured for impairment to be included in a specific reserve on a quarterly basis.

Operating Revenue at Properties

Through its investments in real estate, the Company earns revenue associated with rental operations and hotel operations, which are presented in real estate income on the consolidated statements of operations.

The Company's rental operating revenue consists of fixed contractual base rent arising from tenant leases at the Company's office and student housing properties under operating leases. Revenue is recognized on a straight-line basis over the non-cancelable terms of the related leases. For leases that have fixed and measurable rent escalations, the difference between such rental income earned and the cash rent due under the provisions of the lease is recorded in the Company's consolidated balance sheets. The Company moves to cash basis operating lease income recognition in the period in which collectability of all lease payments is no longer considered probable. At such time, any uncollectible receivable balance will be written off.

Hotel operating revenue consists of amounts derived from hotel operations, including room sales and other hotel revenues. The Company recognizes hotel operating revenue when guest rooms are occupied, services have been provided or fees have been earned. Revenues are recorded net of any sales, occupancy or other taxes collected from customers on behalf of third parties. The following provides additional detail on room revenue and other operating revenue:

- Room revenue is recognized when the Company's hotel satisfies its performance obligation of providing a hotel room. The hotel reservation defines the terms of the agreement including an agreed-upon rate and length of stay. Payment is typically due and paid in full at the end of the stay with some customers prepaying for their rooms prior to the stay. Payments received from a customer prior to arrival are recorded as an advance deposit and are recognized as revenue at the time of occupancy.
- Other operating revenue is recognized at the time when the goods or services are provided to the customer or when the performance obligation is satisfied. Payment is due at the time that goods or services are rendered or billed.

Investment in Real Estate

The Company acquires investments in real estate through direct equity investments and as a result of its lending activities (i.e. through foreclosure or the receipt of the deed-in-lieu of foreclosure on a property). Acquired investments in real estate assets are recorded initially at fair value in accordance with U.S. GAAP. The Company allocates the purchase price of its acquired assets and assumed liabilities based on the relative fair values of the assets acquired and liabilities assumed. The Company accounts for leases that it acquires as operating leases.

ACRES COMMERCIAL REALTY CORP. AND SUBSIDIARIES
NOTES TO CONSOLIDATED FINANCIAL STATEMENTS - (Continued)
DECEMBER 31, 2022

The Company evaluates whether property obtained as a result of its lending activities should be identified as held for sale. If a property is determined to be held for sale, all of the acquired assets and assumed liabilities will be recorded in property held for sale on the consolidation balance sheet and recorded at the lower of cost or fair value, see the “Assets and Liabilities Held for Sale” section below. Once a property is classified as held for sale, depreciation expense is no longer recorded.

Investments in real estate are carried net of accumulated depreciation. The Company depreciates real property, building and tenant improvements and furniture, fixtures, and equipment using the straight-line method over the estimated useful lives of the assets unless the asset is designated as held for sale. The Company amortizes any acquired intangible assets using the straight-line method over the estimated useful lives of the intangible assets. The Company amortizes the value allocated to lease right of use assets and related in-place lease liabilities, when determined to be operating leases, using the straight-line method over the remaining lease term. The value allocated to any associated above or below market lease intangible asset or liability is amortized to lease expense over the remaining lease term.

Ordinary repairs and maintenance are expensed as incurred. Costs related to the improvement of the real property are capitalized and depreciated over their useful lives. Costs related to the development and construction of real property are capitalized to Construction in Progress during the period beginning with the commencement of development and ending with the completion of construction.

The Company depreciates investments in real estate and amortizes intangible assets over the estimated useful lives of the assets as follows:

| Category | Term |
|-----------------------------------|---|
| Building | 35 to 40 years |
| Building improvements | 8 to 35 years |
| Site improvements | 10 years |
| Tenant improvements | Shorter of lease term or expected useful life |
| Furniture, fixtures and equipment | 3 to 12 years |
| Right of use assets | 7 to 94 years |
| Intangible assets | 90 days to 18 years |
| Lease liabilities | 7 to 94 years |

Leases

The value of the operating leases are determined through the discounted cash flow method and are recognized on the consolidated balance sheets as offsetting right of use assets and lease liabilities. The operating lease for the Company’s office space is amortized over the lease term, or seven years, using the effective-interest method. The Company’s operating lease for office equipment is amortized over the lease term, or three years, using the straight-line method.

Assets and Liabilities Held for Sale

The Company classifies long-lived assets or a disposal group to be sold as held for sale in the period in which all of the following criteria are met:

- management, having the authority to approve the action, commits to a plan to sell the asset or the disposal group;
- the asset or disposal group is available for immediate sale in its present condition subject only to terms that are usual and customary for sales of such assets;
- an active program to locate a buyer and other actions required to complete the plan to sell the asset or disposal group have been initiated;
- the sale of the asset or disposal group is probable, and transfer of the asset or disposal group is expected to qualify for recognition as a completed sale within one year, except if events or circumstances beyond the Company’s control extend the period of time required to sell the asset or disposal group beyond one year;

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- the asset or disposal group is being actively marketed for sale at a price that is reasonable in relation to its current fair value; and
- actions required to complete the plan indicate that it is unlikely that significant changes to the plan will be made or that the plan will be withdrawn.

A long-lived asset or disposal group that is classified as held for sale is initially measured at the lower of its cost or fair value less any costs to sell. Any loss resulting from the transfer of long-lived assets or disposal groups to assets held for sale is recognized in the period in which the held for sale criteria are met.

The fair values of assets held for sale are assessed each reporting period and changes in such fair values are reported as an adjustment to the carrying value of the asset or disposal group with an offset to fair value adjustments on financial assets held for sale on the Company's consolidated statements of operations, to the extent that any subsequent changes in fair value do not exceed the cost basis of the asset or disposal group.

Additionally, upon determining that a long-lived asset or disposal group meets the criteria to be classified as held for sale, the Company reports the assets and liabilities of the disposal group, if material, in the line items assets or liabilities held for sale, respectively, on the consolidated balance sheets.

Discontinued Operations

The results of operations of a component or a group of components of the Company that either has been disposed of or is classified as held for sale is reported in discontinued operations if the disposal represents a strategic shift that has or will have a major effect on the Company's operations and financial results.

Comprehensive Income (Loss)

Comprehensive income (loss) for the Company includes net income and the change in net unrealized gains (losses) on available-for-sale securities and derivative instruments that were used to hedge exposure to interest rate fluctuations.

Income Taxes

The Company operates in such a manner as to qualify as a REIT under the provisions of the Internal Revenue Code of 1986, as amended (the "Code"); therefore, applicable REIT taxable income is included in the taxable income of its shareholders, to the extent distributed by the Company. To maintain REIT status for federal income tax purposes, the Company is generally required to distribute at least 90% of its REIT taxable income to its shareholders as well as comply with certain other qualification requirements as defined under the Code. As a REIT, the Company is not subject to federal corporate income tax to the extent that it distributes 100% of its REIT taxable income each year.

Taxable income, from non-REIT activities managed through the Company's taxable REIT subsidiaries ("TRSs"), is subject to federal, state and local income taxes. The Company's TRS' income taxes are accounted for under the asset and liability method. Under the asset and liability method, deferred income taxes are recognized for the temporary differences between the financial reporting basis and tax basis of assets and liabilities. The Company evaluates the realizability of its deferred tax assets and liabilities and recognizes a valuation allowance if, based on available evidence, it is more likely than not that some or all of its deferred tax assets will not be realized. In evaluating the realizability of the deferred tax asset or liability, the Company will consider the expected future taxable income, existing and projected book to tax differences as well as tax planning strategies. This analysis is inherently subjective, as it is based on forecasted earning and business and economic activity. Changes in estimates of deferred tax asset realizability, if any, are included in income tax (expense) benefit on the consolidated statements of operations.

In addition, several of the Company's foreign TRSs, are organized as exempted companies incorporated with limited liability under the laws of the Cayman Islands. Despite their status as TRSs, they generally will not be subject to corporate tax on their earnings and no provision for income taxes is required. However, because they are either controlled foreign corporations or passive foreign investment companies (in which the Company has made a Qualified Electing Fund election), the Company will generally be required to include its share of current taxable income from the foreign TRSs in its calculation of REIT taxable income.

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The Company accounts for taxes assessed by a governmental authority that is directly imposed on a revenue-producing transaction (e.g., sales, use, value added) on a net (excluded from revenue) basis.

The Company established a full valuation allowance against its net deferred tax asset that was tax effected at \$21.2 million and \$21.4 million, at December 31, 2022 and 2021, respectively, as the Company believed it was more likely than not that all of the deferred tax assets would not be realized. This assessment was based on the Company's cumulative historical losses and uncertainties as to the amount of taxable income that would be generated in future years in its TRSs.

The Company evaluates and recognizes tax positions only if it is more likely than not that the position will be sustained upon examination by the appropriate taxing authority. A tax position that meets this threshold is measured as the largest amount of benefit that is greater than 50% likely of being realized upon ultimate settlement. The Company classifies any tax penalties as other operating expenses and any interest as interest expense. The Company does not have any unrecognized tax benefits that would affect the Company's financial position.

Stock Based Compensation

Issuances of restricted stock and options are initially measured at fair value on the grant date and expensed monthly on a straight-line basis over the service period to equity compensation expense on the consolidated statements of operations, with a corresponding entry to additional paid-in capital on the consolidated balance sheets. In accordance with GAAP, the fair value of all unvested issuances of restricted stock and options is not remeasured after the initial grant date.

Earnings Per Share

The Company presents both basic and diluted earnings per share ("EPS"). Basic EPS excludes dilution and is computed by dividing net income (loss) allocable to common shares by the weighted average number of shares outstanding for the period. Diluted EPS reflects the potential dilution that could occur if securities or other contracts to issue common stock were exercised or converted into common stock, where such exercise or conversion would result in a lower EPS amount.

Fair Value Measurements

In analyzing the fair value of its investments accounted for on a fair value basis, the Company uses the fair value hierarchy, which requires an entity to maximize the use of observable inputs and minimize the use of unobservable inputs when measuring fair value. The Company determines fair value based on quoted prices when available or, if quoted prices are not available, through the use of alternative approaches, such as discounting the expected cash flows using market interest rates commensurate with the credit quality and duration of the investment. The hierarchy defines three levels of inputs that may be used to measure fair value:

Level 1 - Quoted prices for identical instruments in active markets.

Level 2 - Quoted prices for similar instruments in active markets; quoted prices for identical or similar instruments in markets that are not active; and model-derived valuations whose inputs are observable or whose significant value inputs are observable.

Level 3 - Prices are determined using significant unobservable inputs. In situations where quoted prices or observable inputs are unavailable, for example, when there is little or no market activity for an investment at the end of the period, unobservable inputs may be used.

The level in the fair value hierarchy within which a fair value measurement in its entirety falls is based on the lowest level input that is significant to the fair value measurement in its entirety. The determination of where an asset or liability falls in the hierarchy requires significant judgment. The Company evaluates its hierarchy disclosures each quarter; depending on various factors, it is possible that an asset or liability may be classified differently from quarter to quarter. Transfers between levels are determined by the Company at the end of the reporting period. However, the Company expects that changes in classifications between levels will be rare.

Reference Rate Reform

Historically, the Company has used LIBOR as the benchmark interest rate for its floating-rate whole loans and the Company has been exposed to LIBOR through its floating-rate borrowings. Many of its floating-rate whole loans, CRE securitizations and term warehouse financing facilities included one-month LIBOR as the original contractual benchmark interest rate. The Company's unsecured

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junior subordinated debentures use three-month LIBOR as the contractual benchmark rate. In March 2021, the United Kingdom's, or U.K.'s, Financial Conduct Authority ("FCA") announced that it would cease publication of the one-week and the two-month USD LIBOR immediately after December 31, 2021, and cease publication of the remaining tenors immediately after June 30, 2023. In July 2021, the U.S. Federal Reserve, in conjunction with the Alternative Reference Rates Committee, a steering committee comprising large U.S. financial institutions, has identified Secured Overnight Financing Rate ("SOFR") as its preferred alternative rate for LIBOR.

All variable rate loans originated by the Company beginning January 1, 2022 have been benchmarked to SOFR. Additionally, all of its floating-rate whole loans contain provisions that provide for the transition of the contractual benchmark rate to an alternative rate. At December 31, 2022, the Company's loan portfolio had a carrying value of \$2.0 billion of floating rate loans, 68.3% or \$1.4 billion of which have interest rates tied to LIBOR and 31.7% or \$646.2 million of which have interest rates tied to SOFR.

In September 2021 and January 2022, the term warehouse financing facilities with JPMorgan Chase Bank, N.A. ("JPMorgan Chase") and Morgan Stanley Mortgage Capital Holdings LLC ("Morgan Stanley"), respectively, were amended to allow for the transition to alternative rates, including rates tied to SOFR, subject to benchmark transition events. Additionally, during the year ended December 31, 2022, the Company entered into a loan agreement to finance the acquisition of a student housing complex, which uses SOFR as its benchmark interest rate. At December 31, 2022, the Company had \$1.7 billion of floating rate borrowings, 75.8% or \$1.3 billion of which have interest rates tied to LIBOR and 24.2% or \$419.2 million of which have interest rates tied to SOFR.

The Company expects to complete the process of converting its LIBOR-based loans and borrowings to an applicable benchmark interest rate during 2023.

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Recent Accounting Standards

Accounting Standards Adopted in 2022

In August 2020, the FASB issued guidance that removes certain separation models for convertible debt instruments and convertible preferred stock that require the separation into a debt component and an equity or derivative component. Consequently, a convertible debt instrument will be accounted for as a single liability measured at its amortized cost, if no other features require bifurcation and recognition as derivatives and the convertible instrument is not issued with substantial premiums accounted for as paid-in capital. By removing those separation models, the interest rate of convertible debt instruments typically will be closer to the coupon interest rate. The guidance also revises the derivative scope exception for contracts in an entity's own equity and improves the consistency of EPS calculations. Adoption did not have a material impact on the Company's consolidated financial statements.

Accounting Standards to be Adopted in Future Periods

In March 2022, the FASB issued an amendment eliminating certain previously issued accounting guidance for troubled debt restructurings ("TDRs") and enhancing disclosure requirements surrounding refinancings, restructurings, and write-offs. Current GAAP provides an exception to general recognition and measurement guidance for loan restructurings if they meet specific criteria to be considered TDRs. If a modification is a TDR, incremental expected losses are recorded in the allowance for credit losses upon modification and specific disclosures are required. The new amendment eliminates the TDR recognition and measurement guidance and requires the reporting entity to evaluate whether the modification represents a new loan or a continuation of an existing loan, consistent with accounting for other loan modifications. The amendment also requires public business entities to disclose current-period gross write-offs by year of origination for certain financing receivables and net investments in leases. For entities that have adopted the previously issued guidance amended by this update, which the Company did during the year ended December 31, 2020, this update is effective for fiscal years beginning after December 15, 2022, including interim periods within those fiscal years. Early adoption is permitted for entities that have adopted the previously issued guidance amended by this update. The Company is in the process of evaluating the impact of this guidance.

Reclassifications

Certain reclassifications have been made to the 2020 consolidated financial statements to conform to the 2021 presentation. These reclassifications had no effect on net loss reported.

NOTE 3 - VARIABLE INTEREST ENTITIES

The Company has evaluated its loans, investments in unconsolidated entities, liabilities to subsidiary trusts issuing preferred securities (consisting of unsecured junior subordinated notes), securitizations, guarantees and other financial contracts in order to determine if they are variable interests in VIEs. The Company regularly monitors these legal interests and contracts and, to the extent it has determined that it has a variable interest, analyzes the related entity for potential consolidation.

Consolidated VIEs (the Company is the primary beneficiary)

Based on management's analysis, the Company was the primary beneficiary of five and seven VIEs at December 31, 2022 and 2021, respectively (collectively, the "Consolidated VIEs").

The Consolidated VIEs are CRE securitizations and CDOs that were formed on behalf of the Company to invest in real estate-related securities, commercial mortgage-backed securities ("CMBS"), syndicated corporate loans and corporate bonds were financed by the issuance of debt securities. By financing these assets with long-term borrowings through the issuance of debt securities, the Company seeks to generate attractive risk-adjusted equity returns and to match the term of its assets and liabilities. The primary beneficiary determination for each of these VIEs was made at each VIE's inception and is continually assessed.

In April 2022, the Company contributed an initial investment of \$13.0 million for a 72.1% interest in Charles Street-ACRES FSU Student Venture, LLC (the "FSU Student Venture"). The FSU Student Venture, a joint venture between the Company and two unrelated third parties, was formed for the purpose of developing a student housing project. The FSU Student Venture was determined not to be a VIE as there was sufficient equity at risk, it does not have disproportionate voting rights and its members all have the following characteristics: (1) the power to direct activities, (2) the obligation to absorb losses and (3) the right to receive residual returns.

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However, the Company consolidated the FSU Student Venture due to its 72.1% interest that provides the Company with unilateral control over all major decisions of the joint venture. The portion of the joint venture that the Company does not own is presented as non-controlling interest at and for the periods presented in the Company's consolidated financial statements.

The Company has exposure to losses on its securitizations to the extent of its investments in the subordinated debt and preferred equity of each securitization. The Company is entitled to receive payments of principal and interest on the debt securities it holds and, to the extent revenues exceed debt service requirements and other expenses of the securitizations, distributions with respect to its preferred equity interests. As a result of consolidation, the debt and equity interests the Company holds in these securitizations have been eliminated, and the Company's consolidated balance sheets reflect the assets held, debt issued by the securitizations to third parties and any accrued payables to third parties. The Company's operating results and cash flows include the gross amounts related to the securitizations' assets and liabilities as opposed to the Company's net economic interests in the securitizations. Assets and liabilities related to the securitizations are disclosed, in the aggregate, on the Company's consolidated balance sheets. For a discussion of the debt issued through the securitizations see Note 12.

Creditors of the Company's Consolidated VIEs have no recourse to the general credit of the Company, nor to each other. During the years ended December 31, 2022, 2021 and 2020, the Company did not provide any financial support to any of its VIEs nor does it have any requirement to do so, although it may choose to do so in the future to maximize future cash flows on such investments by the Company. There are no explicit arrangements that obligate the Company to provide financial support to any of its Consolidated VIEs.

The following table shows the classification and carrying values of assets and liabilities of the Company's Consolidated VIEs at December 31, 2022 (in thousands):

| | <u>CRE Securitizations</u> | <u>Other</u> | <u>Total</u> |
|---|--------------------------------|---------------|---------------------|
| ASSETS | | | |
| Restricted cash | \$ 37,872 | \$ 308 | \$ 38,180 |
| Accrued interest receivable | 8,184 | — | 8,184 |
| CRE loans, pledged as collateral ⁽¹⁾ | 1,456,649 | — | 1,456,649 |
| Other assets | 63 | 56 | 119 |
| Total assets ⁽²⁾ | <u>\$ 1,502,768</u> | <u>\$ 364</u> | <u>\$ 1,503,132</u> |
| LIABILITIES | | | |
| Accounts payable and other liabilities | \$ 93 | \$ — | \$ 93 |
| Accrued interest payable | 3,083 | — | 3,083 |
| Borrowings | 1,233,556 | — | 1,233,556 |
| Total liabilities | <u>\$ 1,236,732</u> | <u>\$ —</u> | <u>\$ 1,236,732</u> |

(1) Excludes allowance for credit losses.

(2) Assets of each of the Consolidated VIEs may only be used to settle the obligations of each respective VIE.

Unconsolidated VIEs (the Company is not the primary beneficiary, but has a variable interest)

Based on management's analysis, the Company is not the primary beneficiary of the VIEs discussed below since it does not have both (i) the power to direct the activities that most significantly impact the VIE's economic performance and (ii) the obligation to absorb the losses of the VIE or the right to receive the benefits from the VIE, which could be significant to the VIE. Accordingly, the following VIEs are not consolidated in the Company's financial statements at December 31, 2022. The Company continuously reassesses whether it is deemed to be the primary beneficiary of its unconsolidated VIEs. The Company's maximum exposure to risk for each of these unconsolidated VIEs is set forth in the "Maximum Exposure to Loss" column in the table below.

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Unsecured Junior Subordinated Debentures

The Company has a 100% interest in the common shares of Resource Capital Trust I (“RCT I”) and RCC Trust II (“RCT II”), respectively, with a value of \$1.5 million in the aggregate, or 3.0% of each trust, at December 31, 2022. RCT I and RCT II were formed for the purposes of providing debt financing to the Company. The Company completed a qualitative analysis to determine whether it is the primary beneficiary of each of the trusts and determined that it was not the primary beneficiary of either trust because it does not have the power to direct the activities most significant to the trusts, which include the collection of principal and interest through servicing rights. Accordingly, neither trust is consolidated into the Company’s consolidated financial statements.

The Company records its investments in RCT I and RCT II’s common shares of \$774,000 each as investments in unconsolidated entities using the cost method, recording dividend income when declared by RCT I and RCT II. The trusts each hold subordinated debentures, for which the Company is the obligor, in the amount of \$25.8 million for each of RCT I and RCT II. The debentures were funded by the issuance of trust preferred securities of RCT I and RCT II.

The following table shows the classification, carrying value and maximum exposure to loss with respect to the Company’s unconsolidated VIEs at December 31, 2022 (in thousands):

| | Unsecured Junior Subordinated Debentures | Maximum Exposure to Loss |
|--|---|-------------------------------------|
| ASSETS | | |
| Accrued interest receivable | \$ 11 | \$ — |
| Investments in unconsolidated entities | 1,548 | \$ 1,548 |
| Total assets | 1,559 | |
| LIABILITIES | | |
| Accrued interest payable | 378 | N/A |
| Borrowings | 51,548 | N/A |
| Total liabilities | 51,926 | |
| Net (liability) asset | \$ (50,367) | |

At December 31, 2022, there were no explicit arrangements or implicit variable interests that could require the Company to provide financial support to any of its unconsolidated VIEs.

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NOTE 4 - SUPPLEMENTAL CASH FLOW INFORMATION

The following table summarizes the Company's supplemental disclosure of cash flow information (in thousands):

| | Years Ended December 31, | | |
|--|--------------------------|-------------|--------------|
| | 2022 | 2021 | 2020 |
| Supplemental cash flows: | | | |
| Interest expense paid in cash | \$ 70,025 | \$ 42,345 | \$ 44,677 |
| Income taxes paid in cash | 228 | — | — |
| Non-cash operating activities include the following: | | | |
| Acquisition of below-market lease intangible related to the receipt of deed in lieu of foreclosure | \$ — | \$ — | \$ (2,490) |
| Acquisition of right of use asset related to the receipt of deed in lieu of foreclosure | — | — | (3,113) |
| Assumption of operating lease related to the receipt of deed in lieu of foreclosure | — | — | 3,113 |
| Acquisition of other right of use assets | (299) | (479) | — |
| Assumption of other operating lease liabilities | 299 | 479 | — |
| Non-cash investing activities include the following: | | | |
| Investment in property held for sale related to the receipt of deed in lieu of foreclosure | \$ (14,299) | \$ (17,600) | \$ — |
| Proceeds from the relinquishment of investment securities available-for-sale | — | — | 369,873 |
| Proceeds from the receipt of deed in lieu of foreclosure on loan | 14,299 | 17,600 | 39,750 |
| Investment in real estate assets related to the receipt of deed in lieu of foreclosure | — | — | (33,924) |
| Investment in intangible assets related to the receipt of deed in lieu of foreclosure | — | — | (3,336) |
| Non-cash financing activities include the following: | | | |
| Repayment of repurchase agreements from the relinquishment of investment securities available-for-sale | \$ — | \$ — | \$ (369,873) |
| Distributions on preferred stock accrued but not paid | 3,262 | 3,262 | 1,725 |

NOTE 5 - RESTRICTED CASH

The following table summarizes the Company's restricted cash (in thousands):

| | December 31, | |
|---|------------------|-------------------|
| | 2022 | 2021 |
| Restricted cash: | | |
| Cash held by consolidated CRE securitizations, CDOs and CLOs | \$ 38,180 | \$ 248,071 |
| Restricted cash held in escrow for tax payments | 274 | — |
| Restricted cash pledged with minimum reserve balance requirements | 125 | 360 |
| Total | <u>\$ 38,579</u> | <u>\$ 248,431</u> |

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NOTE 6 - LOANS

The following is a summary of the Company's loans (dollars in thousands, except amounts in footnotes):

| Description | Quantity | Principal | Unamortized (Discount) Premium, net ⁽¹⁾ | Amortized Cost | Allowance for Credit Losses | Carrying Value | Contractual Interest Rates ⁽²⁾ | Maturity Dates ⁽³⁾⁽⁴⁾ |
|-------------------------------------|----------|---------------------|---|---------------------|--------------------------------|---------------------|---|-------------------------------------|
| At December 31, 2022: | | | | | | | | |
| CRE loans held for investment: | | | | | | | | |
| Whole loans ⁽⁵⁾⁽⁶⁾ | 81 | \$ 2,065,504 | \$ (12,614) | \$ 2,052,890 | \$ (14,103) | \$ 2,038,787 | 1M BR plus 2.85% to 1M BR plus 8.50% | January 2023 to July 2026 |
| Mezzanine loan ⁽⁵⁾ | 1 | 4,700 | — | 4,700 | (4,700) | — | 10.00% | June 2028 |
| Total CRE loans held for investment | | <u>\$ 2,070,204</u> | <u>\$ (12,614)</u> | <u>\$ 2,057,590</u> | <u>\$ (18,803)</u> | <u>\$ 2,038,787</u> | | |

At December 31, 2021:

CRE loans held for investment:

| | | | | | | | | |
|-------------------------------------|----|---------------------|--------------------|---------------------|-------------------|---------------------|---|---|
| Whole loans ⁽⁵⁾⁽⁶⁾ | 93 | \$ 1,891,795 | \$ (13,944) | \$ 1,877,851 | \$ (8,550) | \$ 1,869,301 | 1M BR plus 2.70% to 1M BR plus 8.50% | January 2022 to September 2025 |
| Mezzanine loan ⁽⁵⁾ | 1 | 4,700 | — | 4,700 | (255) | 4,445 | 10.00% | June 2028 |
| Total CRE loans held for investment | | <u>\$ 1,896,495</u> | <u>\$ (13,944)</u> | <u>\$ 1,882,551</u> | <u>\$ (8,805)</u> | <u>\$ 1,873,746</u> | | |

- Amounts include unamortized loan origination fees of \$12.3 million and \$13.6 million and deferred amendment fees of \$308,000 and \$307,000 at December 31, 2022 and 2021, respectively. Additionally, the amounts include unamortized loan acquisition costs of \$7,300 at December 31, 2021. At December 31, 2022, the Company had no unamortized loan acquisition costs.
- Weighted-average one-month benchmark rate ("BR") floors were 0.68% and 0.75% at December 31, 2022 and 2021, respectively. Benchmark rates comprise one-month LIBOR or one-month Term SOFR. At both December 31, 2022 and 2021, all but one of the Company's floating-rate whole loans had one-month benchmark floors.
- Maturity dates exclude contractual extension options, subject to the satisfaction of certain terms, that may be available to the borrowers.
- Maturity dates exclude three whole loans, with amortized costs of \$51.6 million and \$27.9 million, in maturity default at December 31, 2022 and 2021, respectively.
- Substantially all loans are pledged as collateral under various borrowings at December 31, 2022 and 2021.
- CRE whole loans had \$158.2 million and \$157.6 million in unfunded loan commitments at December 31, 2022 and 2021, respectively. These unfunded loan commitments are advanced as the borrowers formally request additional funding and meet certain benchmarks, as permitted under the applicable loan agreement, and any necessary approvals have been obtained.

The following is a summary of the contractual maturities of the Company's CRE loans held for investment, at amortized cost (in thousands, except amounts in the footnotes):

| Description | 2023 | 2024 | 2025 and Thereafter | Total |
|--------------------------------|-------------------|-------------------|------------------------|---------------------|
| At December 31, 2022: | | | | |
| Whole loans ⁽¹⁾ | \$ 268,120 | \$ 882,175 | \$ 851,031 | \$ 2,001,326 |
| Mezzanine loan | — | — | 4,700 | 4,700 |
| Total CRE loans ⁽²⁾ | <u>\$ 268,120</u> | <u>\$ 882,175</u> | <u>\$ 855,731</u> | <u>\$ 2,006,026</u> |
| At December 31, 2021: | | | | |
| Whole loans ⁽¹⁾ | \$ 377,024 | \$ 230,872 | \$ 1,242,013 | \$ 1,849,909 |
| Mezzanine loan | — | — | 4,700 | 4,700 |
| Total CRE loans ⁽²⁾ | <u>\$ 377,024</u> | <u>\$ 230,872</u> | <u>\$ 1,246,713</u> | <u>\$ 1,854,609</u> |

- Maturity dates exclude three whole loans with amortized costs of \$51.6 million and \$27.9 million in maturity default at December 31, 2022 and 2021, respectively.
- At December 31, 2022, the amortized costs of the CRE whole loans, summarized by contractual maturity assuming full exercise of the extension options, were \$113.8 million, \$68.6 million and \$1.8 billion in 2023, 2024 and 2025 and thereafter, respectively. At December 31, 2021, the amortized costs of the CRE whole loans, summarized by contractual maturity assuming full exercise of the extension options, were \$52.0 million, \$127.6 million and \$1.7 billion in 2022, 2023 and 2024 and thereafter, respectively.

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At December 31, 2022, 23.2%, 21.5% and 16.2% of the Company's CRE loan portfolio was concentrated in the Southwest, Southeast and Mountain regions, respectively, based on carrying value, as defined by the NCREIF. At December 31, 2021, 28.4%, 18.4%, and 15.2% of the Company's CRE loan portfolio was concentrated in the Southeast, Southwest, and Mid-Atlantic regions, respectively, based on carrying value. No single loan or investment represented more than 10% of the Company's total assets and no single investment group generated over 10% of its total revenue.

Principal Paydowns Receivable

Principal paydowns receivable represents loan principal payments that have been received by the Company's servicers and trustees but have not been remitted to the Company. At December 31, 2022, the Company had no loan principal paydowns receivable. At December 31, 2021, the Company had \$14.9 million of loan principal paydowns receivable, all of which was received by the Company during January 2022.

NOTE 7 - FINANCING RECEIVABLES

The following tables show the activity in the allowance for credit losses for the years ended December 31, 2022 and 2021 (in thousands):

| | <u>Years Ended December 31,</u> | |
|--|---------------------------------|-----------------|
| | <u>2022</u> | <u>2021</u> |
| Allowance for credit losses at beginning of year | \$ 8,805 | \$ 34,310 |
| Provision for (reversal of) credit losses | 12,295 | (21,262) |
| Charge offs | (2,297) | (4,243) |
| Allowance for credit losses at end of year | <u>\$ 18,803</u> | <u>\$ 8,805</u> |

During the year ended December 31, 2020, higher expected unemployment and increased volatility in CRE asset pricing and liquidity as a result of the COVID-19 pandemic significantly impacted assumptions in the Company's CECL estimates and resulted in a net provision for credit losses of \$30.8 million. However, the discovery and distribution of vaccines and other treatments for COVID-19 led to a recovery of the global economy and markets worldwide, which resulted in a net reversal of credit losses of \$21.3 million during the year ended December 31, 2021. The ensuing macroeconomic factors, including expected increases in inflation, short-term interest rates that collateralize the Company's loans, energy prices and continued global supply chain dislocation trending negative, compounded by an increase in portfolio credit risk indicated in property-level cash flows, resulted in a net provision of expected credit losses of \$12.3 million during the year ended December 31, 2022.

In addition to the Company's general estimate of credit losses, the Company may also be required to individually evaluate collateral-dependent loans for credit losses if it has determined that foreclosure or sale of the loan or the underlying collateral is probable. At December 31, 2022 and 2021, \$4.7 million and \$2.3 million, respectively, of the Company's allowance for credit losses resulted from collateral-dependent loans that were individually evaluated for credit losses, details of which follow:

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During the year ended December 31, 2022, the Company individually evaluated the following loans:

- One office mezzanine loan in the Northeast region with a principal balance of \$4.7 million. The Company fully reserved this loan in the fourth quarter of 2022.
- One retail loan in the Northeast region and one office loan in the Southwest region with principal balances of \$8.0 million and \$20.7 million, respectively, for which foreclosure was determined to be probable. Each loan had an as-is appraised value in excess of its principal and interest balances, and, as such, had no CECL allowance at December 31, 2022.

During the year ended December 31, 2021, the Company individually evaluated the following loans:

- An office loan in the East North Central region with a \$19.9 million principal balance. The Company recorded a \$2.3 million CECL allowance in the third quarter of 2021 to reflect the as-is appraised value of the property of \$17.6 million. Upon receipt of the property in full satisfaction of the loan in the fourth quarter of 2021, the Company charged off the \$2.3 million CECL allowance and recorded the property as a property held for sale on its consolidated balance sheets at its fair value of \$17.6 million. (see Note 8).
- A hotel loan in the Northeast region with a \$9.3 million principal balance. The Company recorded a \$1.8 million CECL allowance in the third quarter of 2021 that reflected the Company's estimate of fair value less costs of sale of \$7.5 million at September 30, 2021. Upon sale of the loan in November 2021, the Company received proceeds of \$7.6 million, net of costs of sale, and charged off the remaining \$1.7 million CECL allowance.
- A retail loan in the Pacific region with an \$11.5 million principal balance. At December 31, 2021, the Company had a recorded \$2.3 million CECL allowance that reflected the loss taken on the loan as a result of a discounted payoff received on the loan in January 2022 in full satisfaction of the loan.
- A hotel loan in the East North Central region with an \$8.4 million principal balance. The Company received payment in full on this loan in January 2022; and, as such, there was no CECL allowance recorded at December 31, 2021.
- A hotel loan in the Northeast region with a \$14.0 million principal balance. The hotel loan had an as-is appraised value in excess of its principal balance, and, as such, had no CECL allowance at December 31, 2021.

During the year ended December 31, 2020, the Company individually evaluated the following loans:

- A hotel loan in the Northeast region with a \$37.9 million principal balance for which foreclosure was deemed probable. In November 2020, the Company received the deed-in-lieu of foreclosure on the property. In conjunction with the receipt of the deed, the Company obtained an updated appraisal that indicated an as-is appraised value of \$39.8 million (see Note 8) and consequently reversed the then-outstanding \$8.0 million CECL allowance and recorded the property as an investment in real estate on the consolidated balance sheets at its appraised value.
- A office loan in the East North Central region with a \$19.9 million principal balance and a hotel loan in the Northeast region with a \$14.0 million par balance for which foreclosure was determined to be probable. The Company determined that these loans had CECL allowances of \$1.9 million and \$0, respectively, calculated as the difference between the as-is appraised values and the loans' amortized costs. In September 2022, the Company sold the office property for \$19.3 million with selling costs of \$532,000, resulting in a gain on sale of \$1.9 million. In February 2023, the Company sold the hotel property for \$15.1 million (see Note 8).

In June 2020, the Company sold one CRE whole loan note for \$17.4 million, which resulted in a realized loss of \$1.0 million recorded in the provision for credit losses during the year ended December 31, 2020.

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Credit quality indicators

Commercial Real Estate Loans

CRE loans are collateralized by a diversified mix of real estate properties and are assessed for credit quality based on the collective evaluation of several factors, including but not limited to: collateral performance relative to underwritten plan, time since origination, current implied and/or re-underwritten LTV ratios, loan structure and exit plan. Depending on the loan's performance against these various factors, loans are rated on a scale from 1 to 5, with loans rated 1 representing loans with the highest credit quality and loans rated 5 representing loans with the lowest credit quality. The factors evaluated provide general criteria to monitor credit migration in the Company's loan portfolio; as such, a loan's rating may improve or worsen, depending on new information received.

The criteria set forth below should be used as general guidelines and, therefore, not every loan will have all of the characteristics described in each category below.

| Risk Rating | Risk Characteristics |
|--------------------|--|
| 1 | <ul style="list-style-type: none">• Property performance has surpassed underwritten expectations.• Occupancy is stabilized, the property has had a history of consistently high occupancy, and the property has a diverse and high quality tenant mix. |
| 2 | <ul style="list-style-type: none">• Property performance is consistent with underwritten expectations and covenants and performance criteria are being met or exceeded.• Occupancy is stabilized, near stabilized or is on track with underwriting. |
| 3 | <ul style="list-style-type: none">• Property performance lags behind underwritten expectations.• Occupancy is not stabilized and the property has some tenancy rollover. |
| 4 | <ul style="list-style-type: none">• Property performance significantly lags behind underwritten expectations. Performance criteria and loan covenants have required occasional waivers.• Occupancy is not stabilized and the property has a large amount of tenancy rollover. |
| 5 | <ul style="list-style-type: none">• Property performance is significantly worse than underwritten expectations. The loan is not in compliance with loan covenants and performance criteria and may be in default. Expected sale proceeds would not be sufficient to pay off the loan at maturity.• The property has a material vacancy rate and significant rollover of remaining tenants.• An updated appraisal is required upon designation and updated on an as-needed basis. |

All CRE loans are evaluated for any credit deterioration by debt asset management and certain finance personnel on at least a quarterly basis. Mezzanine loans may experience greater credit risks due to their nature as subordinated investments.

For the purpose of calculating the quarterly provision for credit losses under CECL, the Company pools CRE loans based on the underlying collateral property type and utilizes a probability of default and loss given default methodology for approximately one year after which it immediately reverts to a historical mean loss ratio.

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Credit risk profiles of CRE loans at amortized cost were as follows (in thousands, except amounts in the footnote):

| | Rating 1 | Rating 2 | Rating 3 | Rating 4 | Rating 5 | Total ⁽¹⁾ |
|------------------------------|-------------|--------------------|-------------------|-------------------|------------------|----------------------|
| At December 31, 2022: | | | | | | |
| Whole loans, floating-rate | \$ — | \$1,635,376 | 309,491 | \$ 85,226 | \$ 22,797 | \$2,052,890 |
| Mezzanine loan | — | — | — | — | 4,700 | 4,700 |
| Total | <u>\$ —</u> | <u>\$1,635,376</u> | <u>\$309,491</u> | <u>\$ 85,226</u> | <u>\$ 27,497</u> | <u>\$2,057,590</u> |
| At December 31, 2021: | | | | | | |
| Whole loans, floating-rate | \$ — | \$1,456,330 | \$ 273,078 | \$ 123,762 | \$ 24,681 | \$1,877,851 |
| Mezzanine loan | — | — | — | 4,700 | — | 4,700 |
| Total | <u>\$ —</u> | <u>\$1,456,330</u> | <u>\$ 273,078</u> | <u>\$ 128,462</u> | <u>\$ 24,681</u> | <u>\$1,882,551</u> |

(1) The total amortized cost of CRE loans excluded accrued interest receivable of \$11.9 million and \$6.1 million at December 31, 2022 and 2021, respectively.

Credit risk profiles of CRE loans by origination year at amortized cost were as follows (in thousands, except amounts in footnotes):

| | 2022 | 2021 | 2020 | 2019 | 2018 | Prior | Total ⁽¹⁾ |
|--|--------------------|--------------------|-------------------|-------------------|-------------------|------------------|----------------------|
| At December 31, 2022: | | | | | | | |
| Whole loans, floating-rate: ⁽²⁾ | | | | | | | |
| Rating 2 | \$ 526,606 | \$1,003,060 | \$ 64,944 | \$ 26,977 | \$ 13,789 | \$ — | \$1,635,376 |
| Rating 3 | | 192,490 | 44,657 | 27,881 | 44,463 | — | 309,491 |
| Rating 4 | — | — | — | 20,742 | 64,484 | — | 85,226 |
| Rating 5 | — | — | — | 22,797 | — | — | 22,797 |
| Total whole loans, floating-rate | <u>526,606</u> | <u>1,195,550</u> | <u>109,601</u> | <u>98,397</u> | <u>122,736</u> | <u>—</u> | <u>2,052,890</u> |
| Mezzanine loan (rating 5) | — | — | — | — | 4,700 | — | 4,700 |
| Total | <u>\$ 526,606</u> | <u>\$1,195,550</u> | <u>\$ 109,601</u> | <u>\$ 98,397</u> | <u>\$ 127,436</u> | <u>\$ —</u> | <u>\$2,057,590</u> |
| At December 31, 2021: | | | | | | | |
| Whole loans, floating-rate: ⁽²⁾ | | | | | | | |
| Rating 2 | \$1,230,810 | \$ 150,513 | \$ 55,510 | \$ 19,497 | \$ — | \$ — | \$1,456,330 |
| Rating 3 | 33,781 | 24,604 | 136,305 | 60,888 | — | 17,500 | 273,078 |
| Rating 4 | — | — | 28,446 | 86,096 | — | 9,220 | 123,762 |
| Rating 5 | — | — | 22,385 | — | — | 2,296 | 24,681 |
| Total whole loans, floating-rate | <u>1,264,591</u> | <u>175,117</u> | <u>242,646</u> | <u>166,481</u> | <u>—</u> | <u>29,016</u> | <u>1,877,851</u> |
| Mezzanine loan (rating 4) | — | — | — | 4,700 | — | — | 4,700 |
| Total | <u>\$1,264,591</u> | <u>\$ 175,117</u> | <u>\$ 242,646</u> | <u>\$ 171,181</u> | <u>\$ —</u> | <u>\$ 29,016</u> | <u>\$1,882,551</u> |

(1) The total amortized cost of CRE loans excluded accrued interest receivable of \$11.9 million and \$6.1 million at December 31, 2022 and 2021, respectively.

(2) Acquired CRE whole loans are grouped within each loan's year of issuance.

The Company had one additional mezzanine loan that was included in assets held for sale, and that loan had no carrying value at December 31, 2022 and 2021.

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Loan Portfolios Aging Analysis

The following table presents the CRE loan portfolio aging analysis as of the dates indicated for CRE loans at amortized cost (in thousands, except amounts in footnotes):

| | 30-59 Days | 60-89 Days | Greater than 90 Days ⁽¹⁾ | Total Past Due | Current ⁽²⁾ | Total Loans Receivable ⁽³⁾ | Total Loans > 90 Days and Accruing |
|-------------------------------|---------------|---------------|---|-------------------|------------------------|--|--|
| At December 31, 2022: | | | | | | | |
| Whole loans, floating-rate | \$ — | \$ — | \$ 28,767 | \$ 28,767 | \$2,024,123 | \$2,052,890 | \$ — |
| Mezzanine loan ⁽⁴⁾ | — | — | — | — | 4,700 | 4,700 | — |
| Total | <u>\$ —</u> | <u>\$ —</u> | <u>\$ 28,767</u> | <u>\$ 28,767</u> | <u>\$2,028,823</u> | <u>\$2,057,590</u> | <u>\$ —</u> |
| At December 31, 2021: | | | | | | | |
| Whole loans, floating-rate | \$ — | \$ — | \$ 19,916 | \$ 19,916 | \$1,857,935 | \$1,877,851 | \$ 19,916 |
| Mezzanine loan | — | — | — | — | 4,700 | 4,700 | — |
| Total | <u>\$ —</u> | <u>\$ —</u> | <u>\$ 19,916</u> | <u>\$ 19,916</u> | <u>\$1,862,635</u> | <u>\$1,882,551</u> | <u>\$ 19,916</u> |

(1) During the years ended December 31, 2022, 2021 and 2020, the Company recognized interest income of \$1.5 million, \$2.0 million and \$2.0 million, respectively, on two loans with principal payments past due greater than 90 days at December 31, 2022.

(2) Includes one whole loan with total amortized costs of \$22.8 million and \$8.0 million in maturity default at December 31, 2022 and 2021, respectively.

(3) The total amortized cost of CRE loans excluded accrued interest receivable of \$11.9 million and \$6.1 million at December 31, 2022 and 2021, respectively.

(4) Fully reserved at December 31, 2022.

At December 31, 2022 and 2021, the Company had three whole loans in maturity default with total amortized costs of \$51.6 million and \$27.9 million, respectively. In July 2022, the Company received the deed-in-lieu of foreclosure on a hotel property in the Northeast region that collateralized a whole loan with an amortized cost of \$14.0 million and that was in maturity default at June 30, 2022. In February 2023, the Company sold the hotel property in the Northeast region for \$15.1 million (see Note 8).

During the year ended December 31, 2021, the Company received the deed-in-lieu of foreclosure on an office property in the East North Central region that collateralized a whole loan that was in maturity default at December 31, 2020 with an amortized cost of \$19.9 million. In September 2022, the Company sold the office property in the East North Central region for \$19.3 million with selling costs of \$532,000, resulting in a gain on sale of \$1.9 million. (see Note 8).

At December 31, 2022, one whole loan in maturity default, with a total amortized cost of \$8.0 million, was past due on interest payments.

At December 31, 2021, three whole loans, including two loans that had maturity defaults, with a total amortized cost of \$30.4 million were past due on interest payments.

During the year ended December 31, 2022, two whole loans in maturity default at December 31, 2021, including one loan that was past due on interest payments at December 31, 2021, paid off principal of \$17.6 million. The payoff on one loan was the result of a discounted payoff and resulted in a realized loss of \$2.3 million for which a CECL allowance was established as of December 31, 2021.

Troubled-Debt Restructurings

During the year ended December 31, 2022, the Company entered into 12 agreements that extended eight loans by a weighted average period of four months and, in certain cases, modified certain other loan terms. One formerly forbore loan was in maturity default at December 31, 2022.

No loan modifications during the years ended December 31, 2022 or 2021 resulted in TDRs.

NOTE 8 - INVESTMENTS IN REAL ESTATE AND OTHER ACQUIRED ASSETS AND ASSUMED LIABILITIES

At December 31, 2022, the Company held investments in six real estate properties, four of which are included in Investments in Real Estate, and two of which are included in Properties held for Sale on the consolidated balance sheets.

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During the year ended December 31, 2022, the Company acquired two real estate properties through direct equity investments. The Company determined that the acquisition of the two properties should be accounted for as asset acquisitions. The combined acquisition-date fair value of \$51.6 million was determined using third-party valuations.

In September 2022, the Company sold an office property in the East North Central region that it previously designated as a property held for sale. The office property sold for \$19.3 million with selling costs of approximately \$532,000, resulting in a gain on sale of \$1.9 million.

In July 2022, the Company received the deed-in-lieu of foreclosure on a hotel property in the Northeast region. The Company determined that the acquisition of the property should be accounted for as an asset acquisition, and the acquisition-date fair value of \$14.3 million was determined using a third-party valuation. The carrying value of the property was \$13.5 million at December 31, 2022 and was reported as property held for sale on the consolidated balance sheets. There was no gain or loss recognized on conversion of the loan to property held for sale. In February 2023, the property was sold for \$15.1 million and the Company expects to book a modest gain on sale in the first quarter of 2023.

In September 2022, the Company reclassified another hotel property in the Northeast region with a carrying value of \$36.9 million to property held for sale, which the Company had received via deed-in-lieu of foreclosure in November 2020.

The following table summarizes the acquisition date values of acquired assets and assumed liabilities during the year ended December 31, 2022 (in thousands):

| | |
|--|-----------|
| Investments in real estate, equity: | |
| Assets acquired: | |
| Land | \$ 16,327 |
| Building | 65,488 |
| Building and tenant improvements | 577 |
| Personal property | 4,402 |
| Investments in real estate | 86,794 |
| Right of use assets | 19,664 |
| Cash and other assets | 2,117 |
| Intangible assets | 9,748 |
| Total | 118,323 |
| Liabilities assumed: | |
| Mortgage payable | 18,089 |
| Operating leases | 43,260 |
| Other liabilities | 311 |
| Subtotal | 61,660 |
| Fair value of net assets acquired | 56,663 |
| Less: Non-controlling interest | 5,036 |
| Investments in real estate from lending activities: | |
| Property held for sale | 14,299 |
| Total fair value at acquisition of net assets acquired | \$ 65,926 |

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The following table summarizes the book value of the Company's acquired assets and assumed liabilities (in thousands, except amounts in the footnotes):

| | December 31, 2022 | | | December 31, 2021 | | |
|---|-------------------|---|-------------------|-------------------|---|-------------------|
| | Cost Basis | Accumulated Depreciation & Amortization | Carrying Value | Cost Basis | Accumulated Depreciation & Amortization | Carrying Value |
| Assets acquired: | | | | | | |
| <i>Investments in real estate, equity:</i> | | | | | | |
| Investments in real estate ⁽¹⁾ | \$ 123,219 | \$ (2,251) | \$ 120,968 | \$ 27,065 | \$ (191) | \$ 26,874 |
| Right of use assets ⁽²⁾⁽³⁾ | 19,664 | (205) | 19,459 | — | — | — |
| Intangible assets ⁽⁴⁾ | 11,474 | (2,594) | 8,880 | 1,726 | (806) | 920 |
| Subtotal | 154,357 | (5,050) | 149,307 | 28,791 | (997) | 27,794 |
| <i>Investments in real estate from lending activities:</i> | | | | | | |
| Investment in real estate ⁽⁵⁾ | — | — | — | 34,124 | (1,689) | 32,435 |
| Properties held for sale ⁽⁶⁾ | 53,769 | — | 53,769 | 17,846 | — | 17,846 |
| Right of use assets ⁽³⁾⁽⁷⁾ | — | — | — | 5,603 | (95) | 5,508 |
| Intangible assets ⁽⁸⁾ | — | — | — | 3,337 | (380) | 2,957 |
| Subtotal | 53,769 | — | 53,769 | 60,910 | (2,164) | 58,746 |
| Total | 208,126 | (5,050) | 203,076 | 89,701 | (3,161) | 86,540 |
| Liabilities assumed: | | | | | | |
| <i>Investments in real estate, equity:</i> | | | | | | |
| Mortgage payable | 18,089 | 155 | 18,244 | — | — | — |
| Other liabilities | 247 | (183) | 64 | 247 | (78) | 169 |
| Lease liabilities ⁽³⁾⁽⁹⁾ | 43,260 | (393) | 42,867 | — | — | — |
| Subtotal | 61,596 | (421) | 61,175 | 247 | (78) | 169 |
| <i>Investments in real estate from lending activities:</i> | | | | | | |
| Liabilities held for sale | 3,025 | — | 3,025 | 3,113 | (53) | 3,060 |
| Total | 64,621 | (421) | 64,200 | 3,360 | (131) | 3,229 |
| Total net investments in real estate and properties held for sale ⁽¹⁰⁾ | \$ 143,505 | | \$ 138,876 | \$ 86,341 | | \$ 83,311 |

(1) Includes \$38.4 million and \$22.4 million of land, which is not depreciable, at December 31, 2022 and 2021, respectively.

(2) Includes a right of use associated with an acquired ground lease of \$42.4 million accounted for as an operating lease, an above-market lease intangible asset of \$19.0 million and a customer list intangible of \$402,000 at December 31, 2022. Amortization of the above-market lease intangible is booked to real estate expenses on the consolidated statements of operations.

(3) Refer to Note 9 for additional information on the Company's remaining operating leases.

(4) Carrying value includes \$42,000 and \$819,000 of an acquired in-place lease intangible asset and \$39,000 and \$101,000 of an acquired leasing commission intangible asset at December 31, 2022 and 2021, respectively. In 2022, investments in real estate acquired resulted in acquisitions of intangible assets. Carrying value of these assets at December 31, 2022 included a management contract at \$3.1 million, franchise intangible of \$5.3 million and a customer list value of \$427,000.

(5) Includes \$129,000 of building renovations assets at carrying value at December 31, 2021 made subsequent to the date of acquisition of a property.

(6) At December 31, 2022, property held for sale includes two properties originally acquired in November 2020 and July 2022. At December 31, 2021, there was one property held for sale that was acquired in October 2021 and that was subsequently sold in September 2022.

(7) Includes a right of use asset associated with an acquired ground lease of \$3.1 million accounted for as an operating lease and a below-market lease intangible asset of \$2.4 million at December 31, 2021. At December 31, 2022, these were reclassified to properties held for sale on the consolidated balance sheets.

(8) Carrying value includes franchise agreement intangible assets of \$2.6 million and a customer list intangible asset of \$311,000 at December 31, 2021. At December 31, 2022, these intangible assets were reclassified to properties held for sale on the consolidated balance sheets.

(9) Includes one ground lease at a hotel property with a remaining term of 93 years. Lease expenses for this liability for the year ended December 31, 2022 were \$1.1 million.

(10) Excludes items of working capital, either acquired or assumed.

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The right of use assets and respective lease liabilities comprise the following two acquired ground leases determined to be operating leases:

- The first ground lease has an associated below-market lease intangible asset. The payments on the ground lease consist of air rights rent, retail rent and parking rent, the amounts of which are specifically determined in the executed lease agreement and subsequently increased based on the increase of the consumer price index over a specified number of periods. The Company acquired the original 99-year lease with 66 years remaining. At December 31, 2022, 64 years remain in its term. The Company recorded lease expense of \$378,000 for the year ended December 31, 2022. The Company recorded lease expense of \$368,000 for the year ended December 31, 2021. The Company recorded offsetting amortization and accretion on its ground lease right of use assets and lease liabilities of \$35,000 and \$47,000 during the years ended December 31, 2022 and 2021, respectively.
- The second ground lease has an associated above-market lease intangible liability. The ground lease confers the Company the right to use the land on which its hotel operates, and the ground lease payments increase 3.00% per year until 2116. The Company acquired the original 99-year lease with 94 years remaining. At December 31, 2022, 93 years remain in its term. The Company recorded lease payments of \$1.3 million for the year ended December 31, 2022. The Company recorded amortization of \$153,000 during the year ended December 31, 2022 related to the right of use asset and accretion of \$341,000 during the year ended December 31, 2022 related to its ground lease liability.

During the years ended December 31, 2022, 2021 and 2020, the Company recorded amortization expense of \$2.1 million, \$1.2 million and \$47,000, respectively, on its intangible assets. The Company expects to record amortization expense of \$1.3 million, \$1.2 million, \$1.1 million, \$1.0 million and \$1.0 million during the 2023, 2024, 2025, 2026 and 2027 fiscal years, respectively, on its intangible assets.

NOTE 9 - LEASES

In addition to the ground leases discussed in Note 8, the Company has operating leases for office space and office equipment. The leases have terms that expire between January 2024 and September 2029. The leases on the office space and office equipment contain options for early termination granted to the Company and the lessor. Lease payments are determined as follows:

- Office space: payments are made on a fixed schedule, escalating annually, and include the Company's responsibility for a percentage of increases in the building's property taxes and operating expenses over the base year.
- Office equipment: payments are made on a fixed schedule.

The following table summarizes the Company's operating leases (in thousands):

| | December 31, 2022 | | December 31, 2021 | |
|---|-------------------|-----------|-------------------|-----------|
| Operating Leases: | | | | |
| Right of use assets | \$ | 822 | \$ | 443 |
| Lease liabilities | \$ | (828) | \$ | (477) |
| Weighted average remaining lease term: | | 6.7 years | | 6.6 years |
| Weighted average discount rate ⁽¹⁾ : | | 8.71% | | 10.65% |

(1) The market discount rate is used, when readily determinable, in calculating the present value of lease payments for the operating lease liability. Otherwise, the incremental borrowing rate on the commencement date is used.

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The following table summarizes the Company's operating lease costs and cash payments during the periods indicated (in thousands):

| | Year Ended December 31, 2022 | Year Ended December 31, 2021 |
|--|---------------------------------|---------------------------------|
| Lease Cost: | | |
| Operating lease cost | \$ 68 | \$ 75 |
| Other Information: | | |
| Cash paid for amounts included in the measurement of lease liabilities | | |
| Operating cash flows from operating leases | \$ 94 | \$ 39 |

The following table summarizes the Company's operating leases cash flow obligations on an undiscounted, annual basis (in thousands):

| | Operating Leases |
|--------------------------|------------------|
| 2023 | \$ 158 |
| 2024 | 155 |
| 2025 | 159 |
| 2026 | 163 |
| 2027 | 167 |
| Thereafter | 303 |
| Subtotal | 1,105 |
| Less: impact of discount | (277) |
| Total | \$ 828 |

NOTE 10 - INVESTMENT SECURITIES AVAILABLE-FOR-SALE

Beginning in the first quarter of 2020, the COVID-19 pandemic produced material and previously unforeseeable liquidity shocks to credit markets, resulting in significant declines in the pricing of the Company's investment securities available-for-sale. This triggered substantial margin calls by the Company's counterparties and, in certain cases, formal notices of events of default, all of which were withdrawn or rescinded as of April 19, 2020. As a result of these circumstances and the uncertainty caused by the COVID-19 pandemic, substantially all the Company's remaining CMBS available-for-sale were sold as of April 2020.

During the year ended December 31, 2020, the Company incurred losses of \$186.4 million on its CMBS portfolio, including realized losses of \$180.3 million primarily attributable to the sale of 67 CMBS as of April 2020. The remaining unrealized losses of \$6.1 million were recorded on two securities that previously had fair values below the amortized cost bases and which were expected to be sold prior to their recoveries, with an offsetting charge directly to their amortized cost bases. In March 2021, the Company sold these two positions, resulting in cash proceeds of \$3.0 million and gains of \$878,000 during the year ended December 31, 2021.

The Company had no remaining CMBS positions at December 31, 2022 and 2021.

NOTE 11 - INVESTMENTS IN UNCONSOLIDATED ENTITIES

The Company's investments in unconsolidated entities at December 31, 2022 and 2021 comprised a 100% interest in the common shares of RCT I and RCT II with a value of \$1.5 million in the aggregate, or 3.0% of each trust. The Company records its investments in RCT I's and RCT II's common shares as investments in unconsolidated entities using the cost method, recording dividend income when declared by RCT I and RCT II. During the years ended December 31, 2022, 2021 and 2020, the Company recorded dividends from its investments in RCT I's and RCT II's common shares, reported in other revenue on the consolidated statements of operations, of \$91,000, \$65,000, and \$76,000, respectively.

ACRES COMMERCIAL REALTY CORP. AND SUBSIDIARIES
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NOTE 12 - BORROWINGS

The Company historically has financed the acquisition of its investments, including investment securities and loans, through the use of secured and unsecured borrowings in the form of securitized notes, secured term warehouse financing facilities, a senior secured financing facility, a mortgage payable, senior unsecured notes, convertible senior notes and trust preferred securities issuances. Certain information with respect to the Company's borrowings is summarized in the following table (dollars in thousands, except amounts in footnotes):

| | Principal Outstanding | Unamortized Issuance Costs and Discounts | Outstanding Borrowings | Weighted Average Borrowing Rate | Weighted Average Remaining Maturity | Value of Collateral |
|--|---------------------------|--|---------------------------|---------------------------------------|--|---------------------------|
| At December 31, 2022: | | | | | | |
| ACR 2021-FL1 Senior Notes | \$ 675,223 | \$ 3,826 | \$ 671,397 | 5.81% | 13.5 years | 802,643 |
| ACR 2021-FL2 Senior Notes | 567,000 | 4,841 | 562,159 | 6.13% | 14.1 years | 700,000 |
| Senior secured financing facility | 91,549 | 3,659 | 87,890 | 7.94% | 5.0 years | 196,837 |
| CRE - term warehouse financing facilities ⁽¹⁾ | 330,849 | 2,561 | 328,288 | 6.85% | 1.8 years | 453,550 |
| Mortgage payable | 18,710 | 466 | 18,244 | 8.08% | 2.3 years | 25,400 |
| 5.75% Senior Unsecured Notes | 150,000 | 2,493 | 147,507 | 5.75% | 3.6 years | — |
| Unsecured junior subordinated debentures | 51,548 | — | 51,548 | 8.52% | 13.7 years | — |
| Total | <u>\$1,884,879</u> | <u>\$ 17,846</u> | <u>\$1,867,033</u> | <u>6.29%</u> | <u>10.3 years</u> | <u>\$2,178,430</u> |

| | Principal Outstanding | Unamortized Issuance Costs and Discounts | Outstanding Borrowings | Weighted Average Borrowing Rate | Weighted Average Remaining Maturity | Value of Collateral |
|--|---------------------------|--|---------------------------|---------------------------------------|--|---------------------------|
| At December 31, 2021: | | | | | | |
| XAN 2020-RSO8 Senior Notes | \$ 142,375 | \$ 577 | \$ 141,798 | 2.18% | 13.2 years | \$ 229,263 |
| XAN 2020-RSO9 Senior Notes | 94,814 | 489 | 94,325 | 4.25% | 15.3 years | 144,361 |
| ACR 2021-FL1 Senior Notes ⁽²⁾ | 675,223 | 5,410 | 669,813 | 1.60% | 14.5 years | 802,643 |
| ACR 2021-FL2 Senior Notes | 567,000 | 6,437 | 560,563 | 1.90% | 15.1 years | 700,000 |
| Senior secured financing facility | — | 3,432 | (3,432) | 5.75% | 6.2 years | 170,791 |
| CRE - term warehouse financing facilities ⁽¹⁾ | 71,078 | 4,307 | 66,771 | 2.27% | 2.8 years | 102,027 |
| 4.50% Convertible Senior Notes | 88,014 | 1,583 | 86,431 | 4.50% | 227 days | — |
| 5.75% Senior Unsecured Notes ⁽³⁾ | 150,000 | 3,393 | 146,607 | 5.75% | 4.6 years | — |
| Unsecured junior subordinated debentures | 51,548 | — | 51,548 | 4.12% | 14.7 years | — |
| Total | <u>\$1,840,052</u> | <u>\$ 25,628</u> | <u>\$1,814,424</u> | <u>2.44%</u> | <u>12.7 years</u> | <u>\$2,149,085</u> |

(1) Principal outstanding includes accrued interest payable of \$894,000 and \$58,000 at December 31, 2022 and 2021, respectively.

(2) Value of collateral excludes interest income of \$730,000 and exit fees of \$228,000 received as of December 31, 2021.

(3) Includes deferred debt issuance costs of \$306,000 at December 31, 2021 from the unused 12.00% senior unsecured notes due 2027 that had no outstanding balance at December 31, 2021.

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Securitizations

The following table sets forth certain information with respect to the Company's consolidated securitizations at December 31, 2022 (in thousands):

| | Closing Date | Maturity Date | Reinvestment Period End ⁽¹⁾ | Total Note Paydowns from Closing Date through December 31, 2022 |
|--------------|---------------|---------------|---|--|
| ACR 2021-FL1 | May 2021 | June 2036 | May 2023 | \$ — |
| ACR 2021-FL2 | December 2021 | January 2037 | December 2023 | \$ — |

(1) The reinvestment period is the period in which principal proceeds received may be used to acquire CRE loans for reinvestment into the securitization.

The investments held by the Company's securitizations collateralize the securitizations' borrowings and, as a result, are not available to the Company, its creditors, or stockholders. All senior notes of the securitizations held by the Company at December 31, 2022 and 2021 were eliminated in consolidation.

XAN 2019-RSO7

In April 2019, the Company closed Exantas Capital Corp. 2019-RSO7, Ltd. ("XAN 2019-RSO7"), a \$687.2 million CRE debt securitization transaction that provided financing for CRE loans. In May 2021, the Company exercised the optional redemption of XAN 2019-RSO7, and all of the outstanding senior notes were paid off from the sales proceeds of certain of the securitization's assets.

XAN 2020-RSO8

In March 2020, the Company closed XAN 2020-RSO8, a \$522.6 million CRE debt securitization transaction that provided financing for CRE loans. In March 2022, the Company exercised the optional redemption of XAN 2020-RSO8, and all of the outstanding senior notes were paid off from the sales proceeds of certain of the securitization's assets.

XAN 2020-RSO9

In September 2020, the Company closed XAN 2020-RSO9, a \$297.0 million CRE debt securitization transaction that provided financing for CRE loans. In February 2022, the Company exercised the optional redemption of XAN 2020-RSO9, and all of the outstanding senior notes were paid off from the sales proceeds of certain of the securitization's assets.

ACR 2021-FL1

In May 2021, the Company closed ACRES Commercial Realty 2021-FL1 Issuer, Ltd. ("ACR 2021-FL1"), a \$802.6 million CRE debt securitization transaction that provided financing for CRE loans. ACR 2021-FL1 issued a total of \$675.2 million of non-recourse, floating-rate notes to third parties at par. Additionally, ACRES RF retained 100% of the Class F and Class G notes and a subsidiary of ACRES RF retained 100% of the outstanding preference shares. The preference shares are subordinated in right of payment to all other securities issued by ACR 2021-FL1. ACR 2021-F1 includes a reinvestment period, which ends in May 2023, that allows it to acquire CRE loans for reinvestment into the securitization using uninvested principal proceeds.

At closing, the senior notes issued to investors consisted of the following classes: (i) \$431.4 million of Class A notes bearing interest at one-month LIBOR plus 1.20%; (ii) \$100.3 million of Class A-S notes bearing interest at one-month LIBOR plus 1.60%; (iii) \$37.1 million of Class B notes bearing interest at one-month LIBOR plus 1.80%; (iv) \$43.1 million of Class C notes bearing interest at one-month LIBOR plus 2.00%; (v) \$50.2 million of Class D notes bearing interest at one-month LIBOR plus 2.65%; and (vi) \$13.0 million of Class E notes bearing interest at one-month LIBOR plus 3.10%.

All of the notes issued mature in June 2036, although the Company has the right to call the notes beginning on the payment date in May 2023 and thereafter.

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ACR 2021-FL2

In December 2021, the Company closed ACRES Commercial Realty 2021-FL2 Issuer, Ltd. (“ACR 2021-FL2”), a CRE debt securitization transaction that can finance up to \$700.0 million of CRE loans. ACR 2021-FL2 issued a total of \$567.0 million of non-recourse, floating-rate notes to third parties at par. Additionally, ACRES RF retained 100% of the Class F and Class G notes and a subsidiary of ACRES RF retained 100% of the outstanding preference shares. The preference shares are subordinated in right of payment to all other securities issued by ACR 2021-FL2. ACR 2021-FL2 included a 180-day ramp up acquisition period that allowed it to acquire CRE loans using unused proceeds from the issuance of the non-recourse floating-rate notes. Additionally, ACR 2021-FL2 includes a reinvestment period, which ends in December 2023, that allows it to acquire CRE loans for reinvestment into the securitization using uninvested principal proceeds.

At closing, the senior notes issued to investors consisted of the following classes: (i) \$385.0 million of Class A notes bearing interest at one-month LIBOR plus 1.40%; (ii) \$30.6 million of Class A-S notes bearing interest at one-month LIBOR plus 1.75%; (iii) \$38.5 million of Class B notes bearing interest at one-month LIBOR plus 2.25%; (iv) \$47.3 million of Class C notes bearing interest at one-month LIBOR plus 2.65%; (v) \$51.6 million of Class D notes bearing interest at one-month LIBOR plus 3.10%; and (vi) \$14.0 million of Class E notes bearing interest at one-month LIBOR plus 4.00%.

All of the notes issued mature in January 2037, although the Company has the right to call the notes beginning on the payment date in December 2023 and thereafter.

Corporate Debt

Unsecured Junior Subordinated Debentures

During 2006, the Company formed RCT I and RCT II for the sole purpose of issuing and selling capital securities representing preferred beneficial interests. RCT I and RCT II are not consolidated into the Company’s consolidated financial statements because the Company is not deemed to be the primary beneficiary of these entities. In connection with the issuance and sale of the capital securities, the Company issued junior subordinated debentures to RCT I and RCT II of \$25.8 million each, representing the Company’s maximum exposure to loss. The debt issuance costs associated with the junior subordinated debentures for RCT I and RCT II were included in borrowings and were amortized into interest expense on the consolidated statements of operations using the effective yield method over a ten year period.

There were no unamortized debt issuance costs associated with the junior subordinated debentures for RCT I and RCT II outstanding at December 31, 2022 and 2021. The interest rates for RCT I and RCT II, at December 31, 2022, were 8.68% and 8.36%, respectively. The interest rates for RCT I and RCT II, at December 31, 2021, were 4.17% and 4.08%, respectively.

The rights of holders of common securities of RCT I and RCT II are subordinate to the rights of the holders of capital securities only in the event of a default; otherwise, the common securities’ economic and voting rights are pari passu with the capital securities. The capital and common securities of RCT I and RCT II are subject to mandatory redemption upon the maturity or call of the junior subordinated debentures held by each. Unless earlier dissolved, RCT I will dissolve in May 2041 and RCT II will dissolve in September 2041. The junior subordinated debentures are the sole assets of RCT I and RCT II, which mature in June 2036 and October 2036, respectively, and may currently be called at par.

4.50% Convertible Senior Notes

The Company issued \$143.8 million aggregate principal of its 4.50% convertible senior notes due 2022 (“4.50% Convertible Senior Notes”) in August 2017.

During the year ended December 31, 2021, the Company repurchased \$55.7 million of its 4.50% Convertible Senior Notes, resulting in a charge to earnings of \$1.5 million, comprising an extinguishment of debt charge of \$1.2 million in connection with the acceleration of the market discount and interest expense of \$304,000 in connection with the acceleration of deferred debt issuance costs.

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In February 2022, the Company repurchased \$39.8 million of its 4.50% Convertible Senior Notes, resulting in a charge to earnings of \$574,000, comprising an extinguishment of debt charge of \$460,000 in connection with the acceleration of the market discount and interest expense of \$114,000 in connection with the acceleration of deferred debt costs. In August 2022, the remaining \$48.2 million of the 4.50% Convertible Senior Notes were paid off upon maturity at par.

During the years ended December 31, 2022 and 2021, the effective interest rate was 7.43%.

Senior Unsecured Notes

5.75% Senior Unsecured Notes Due 2026

On August 16, 2021, the Company issued \$150.0 million of its 5.75% senior unsecured notes due 2026 (the “5.75% Senior Unsecured Notes”) pursuant to its Indenture, dated August 16, 2021 (the “Base Indenture”), between it and Wells Fargo, now Computershare Trust Company, N.A. (“CTC”), as trustee (the “Trustee”), as supplemented by the First Supplemental Indenture, dated August 16, 2021, between it and Wells Fargo, now CTC, (the “Supplemental Indenture” and, together with the Base Indenture, the “Indenture”). Prior to May 15, 2026, the Company may at its option redeem the 5.75% Senior Unsecured Notes, in whole or in part, at a redemption price equal to the sum of (i) 100% of the principal amount of the notes to be redeemed, plus accrued and unpaid interest to, but not including, the redemption date, and (ii) a make-whole premium. On or after May 15, 2026, the Company may at its option redeem the 5.75% Senior Unsecured Notes, at any time, in whole or in part, on not less than 15 nor more than 60 days’ prior notice, at a redemption price equal to 100% of the principal amount of the 5.75% Senior Unsecured Notes to be redeemed, plus accrued and unpaid interest to, but not including, the redemption date.

The Indenture contains restrictive covenants that, among other things, require the Company to maintain certain financial ratios. The foregoing limitations are subject to exceptions as set forth in the Supplemental Indenture. At December 31, 2022, the Company was in compliance with these covenants. The Indenture provides for customary events of default that include, among other things (subject in certain cases to customary grace and cure periods): (i) non-payment of principal or interest, (ii) breach of certain covenants contained in the Indenture or the 5.75% Senior Unsecured Notes, (iii) an event of default or acceleration of certain other indebtedness of the Company or a subsidiary in which the Company has invested at least \$75 million in capital within the applicable grace period and (iv) certain events of bankruptcy or insolvency. Generally, if an event of default occurs (subject to certain exceptions), CTC or the holders of at least 25% in aggregate principal amount of the then outstanding 5.75% Senior Unsecured Notes may declare all of the notes to be due and payable.

12.00% Senior Unsecured Notes

On July 31, 2020, the Company entered into a Note and Warrant Purchase Agreement (the “Note and Warrant Purchase Agreement”) with Oaktree Capital Management, L.P. (“Oaktree”) and Massachusetts Mutual Life Insurance Company (“MassMutual”) pursuant to which the Company could issue to Oaktree and MassMutual from time to time up to \$125.0 million aggregate principal amount of 12.00% Senior Unsecured Notes. The 12.00% Senior Unsecured Notes had an annual interest rate of 12.00%, payable up to 3.25% (at the election of the Company) as pay-in-kind interest and the remainder as cash interest. On July 31, 2020, the Company issued to Oaktree \$42.0 million aggregate principal amount of the 12.00% Senior Unsecured Notes. In addition, on July 31, 2020, the Company issued to MassMutual \$8.0 million aggregate principal amount of the 12.00% Senior Unsecured Notes.

At December 31, 2021, the Company had a discount of \$3.1 million (the offset of which was recorded in additional paid-in capital) on the 12.00% Senior Unsecured Notes.

On August 18, 2021, the Company entered into an agreement with Oaktree and MassMutual that provided for the redemption in full of the outstanding balance of the 12.00% Senior Unsecured Notes, including a waiver of certain sections of the Note and Warrant Purchase Agreement. On August 20, 2021, the redemption was consummated and a payment to Oaktree and MassMutual was made for an aggregate \$55.3 million, which consisted of (i) principal in the amount of \$50.0 million, (ii) interest in the amount of \$329,000 and (iii) a make-whole amount of \$5.0 million. In connection with the redemption, the Company recorded a charge to earnings of \$8.0 million, comprising an extinguishment of debt charge of \$7.8 million in connection with (i) the \$5.0 million net make-whole amount and (ii) the \$2.8 million acceleration of the remaining market discount; and interest expense of \$218,000 in connection with the acceleration of deferred debt issuance costs.

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In January 2022, the Company entered into an amendment of the Note and Warrant Purchase Agreement that extended the time to July 2022 that the Company could elect to issue to Oaktree and MassMutual up to \$75.0 million of principal of additional notes. The Company did not issue any additional notes under this agreement and it expired as of July 31, 2022.

Senior Secured Financing Facility, Term Warehouse Financing Facilities and Mortgage Payable

Borrowings under the Company's senior secured financing facility, term warehouse facilities and mortgage payable are guaranteed by the Company or one or more of its subsidiaries. The following table sets forth certain information with respect to the Company's senior secured financing facility, term warehouse facilities and mortgage payable (dollars in thousands, except amounts in footnotes):

| | December 31, 2022 | | | | December 31, 2021 | | | |
|---|------------------------|---------------------|-----------------------------------|--------------------------------|------------------------|---------------------|-----------------------------------|--------------------------------|
| | Outstanding Borrowings | Value of Collateral | Number of Positions as Collateral | Weighted Average Interest Rate | Outstanding Borrowings | Value of Collateral | Number of Positions as Collateral | Weighted Average Interest Rate |
| Senior Secured Financing Facility | | | | | | | | |
| Massachusetts Mutual Life Insurance Company ⁽¹⁾ | \$ 87,890 | \$196,837 | 8 | 7.94% | \$ (3,432) | \$170,791 | 9 | 5.75% |
| CRE - Term Warehouse Financing Facilities ⁽²⁾ | | | | | | | | |
| JPMorgan Chase Bank, N.A. ⁽³⁾ | 186,783 | 255,095 | 11 | 6.74% | 18,875 | 37,167 | 3 | 2.85% |
| Morgan Stanley Mortgage Capital Holdings LLC ⁽⁴⁾ | 141,505 | 198,455 | 10 | 7.00% | 47,896 | 64,860 | 3 | 2.03% |
| Mortgage Payable | | | | | | | | |
| ReadyCap Commercial, LLC ⁽⁵⁾ | 18,244 | 25,400 | 1 | 8.08% | — | — | — | — |
| Total | <u>\$ 434,422</u> | <u>\$675,787</u> | | | <u>\$ 63,339</u> | <u>\$272,818</u> | | |

(1) Includes \$3.7 million and \$3.4 million of deferred debt issuance costs at December 31, 2022 and 2021, respectively.

(2) Outstanding borrowings include accrued interest payable.

(3) Includes \$1.1 million and \$1.8 million of deferred debt issuance costs at December 31, 2022 and 2021, respectively, which includes \$356,000 of deferred debt issuance costs at December 31, 2021 from another term warehouse financing facility with no balance that matured in October 2022.

(4) Includes \$1.4 million and \$2.2 million of deferred debt issuance costs at December 31, 2022 and 2021, respectively.

(5) Includes \$466,000 of deferred debt issuance costs at December 31, 2022.

The following table shows information about the amount at risk under the Company's financing arrangements (dollars in thousands):

| | Amount at Risk ⁽¹⁾ | Weighted Average Remaining Maturity | Weighted Average Interest Rate |
|---|-------------------------------|-------------------------------------|--------------------------------|
| At December 31, 2022: | | | |
| Senior Secured Financing Facility ⁽¹⁾ | | | |
| Massachusetts Mutual Life Insurance Company | \$ 105,818 | 5.0 years | 7.94% |
| CRE - Term Warehouse Financing Facilities ⁽¹⁾ | | | |
| JPMorgan Chase Bank, N. A. | \$ 68,768 | 1.8 years | 6.74% |
| Morgan Stanley Mortgage Capital Holdings LLC | \$ 56,817 | 1.8 years | 7.00% |
| Mortgage Payable ⁽²⁾ | | | |
| ReadyCap Commercial, LLC | \$ 6,602 | 2.3 years | 8.08% |

(1) Equal to the total of the estimated fair value of securities or loans sold and accrued interest receivable, minus the total of the warehouse financing agreement liabilities and accrued interest payable.

(2) Equal to the total of the estimated fair value of real estate property investment financed, minus the total of the mortgage payable agreement liability and accrued interest payable.

The Company was in compliance with all financial covenants in each agreement at December 31, 2022.

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Senior Secured Financing Facility

On July 31, 2020, an indirect, wholly owned subsidiary (“Holdings”), along with its direct wholly owned subsidiary (the “Borrower”), of the Company entered into a \$250.0 million Loan and Servicing Agreement (the “MassMutual Loan Agreement”) with MassMutual and the other lenders party thereto (the “Lenders”). The asset-based revolving loan facility (the “MassMutual Facility”) provided under the MassMutual Loan Agreement has been used to finance the Company’s core CRE lending business. The MassMutual Facility initially had an interest rate of 5.75% per annum payable monthly and matured on July 31, 2027. The Company paid a commitment fee as well as other reasonable closing costs. The loans under the MassMutual Facility are available for drawing during the first two years of the MassMutual Facility (the “Availability Period”). During the Availability Period, an unused commitment fee of 0.50% per annum (payable monthly) on unused commitments under the MassMutual Loan Agreement is payable for each day on which less than 75% of the total commitment is drawn.

Pursuant to the MassMutual Loan Agreement, the Borrower’s obligations under the MassMutual Loan Agreement are secured by the Borrower’s assets and Holdings’ equity interests in the Borrower, including all distributions, proceeds and profits from Holdings’ interests in the Borrower.

In September 2020, the MassMutual Loan Agreement was amended pursuant to which (i) the initial portfolio assets were revised and an agreed advance rate for each initial portfolio asset (each, an “Initial Portfolio Asset Advance Rate”) was set, and (ii) the revolving loan facility under the MassMutual Loan Agreement was amended to require the initial lender (currently MassMutual) to provide a specific advance rate for any future eligible portfolio assets and to limit the aggregate total amount of advances outstanding at any time to both the total facility amount and, in lieu of a 55% LTV, a borrowing base as of any required date of determination equal to the sum of, in each case, the product of the advance rate for such eligible portfolio asset (including in respect of the initial portfolio assets, the applicable Initial Portfolio Asset Advance Rate therefor) and the then determined value of such eligible portfolio asset.

In May 2021, the MassMutual Loan Agreement was amended pursuant to which (i) Mass Mutual consented to Borrower’s formation of certain subsidiaries to hold real estate and (ii) such subsidiaries agreed to entered into guaranty agreements in favor of the secured parties under the MassMutual Loan Agreement.

In connection with the MassMutual Loan Agreement, the Company entered into a Guaranty (the “MassMutual Guaranty”) among the Company, Exantas Real Estate Funding 2018-RSO6 Investor, LLC (“RSO6”), Exantas Real Estate Funding 2019-RSO7 Investor, LLC (“RSO7”) and Exantas Real Estate Funding 2020-RSO8 Investor, LLC (“RSO8”), each an indirect, wholly owned subsidiary of the Company, in favor of the secured parties under the MassMutual Loan Agreement. As of December 31, 2021, RSO6, RSO7 and RSO8 no longer exist. Pursuant to the MassMutual Guaranty, the Company fully guaranteed all payments and performance of Holdings and the Borrower under the MassMutual Loan Agreement. Additionally, the Company, and previously RSO6, RSO7 and RSO8, made certain representations and warranties and agreed to not incur debt or liens, each subject to certain exceptions, and agreed to provide the Lenders with certain information.

The MassMutual Loan Agreement contained events of default, subject to certain materiality thresholds and grace periods, customary for this type of financing arrangement. The remedies for such events of default are also customary for this type of transaction.

The MassMutual Loan Agreement was further amended in several instances pursuant to which (i) MassMutual consented to the formation of certain subsidiaries to hold real estate and (ii) such subsidiaries agreed to enter into guaranty agreements in favor of the secured parties under the MassMutual Loan Agreement.

In July 2022, Holdings, the Borrower and the Lenders entered into the Fifth Amendment to the MassMutual Loan Agreement (the “July 2022 Amendment”) to (i) extend the availability period from July 31, 2022 to August 31, 2022 and (ii) amend the interest rate on the outstanding principal amount of the borrowings, with respect to borrowings made in connection with eligible portfolio assets transferred to any borrower after the effective date of the July 2022 Amendment to the rate per annum determined by the initial lender or otherwise 5.75% per annum. In August 2022, Holdings, the Borrower and the Lenders entered into the Sixth Amendment to the MassMutual Loan Agreement to extend the availability period from August 31, 2022 to October 15, 2022.

In December 2022, Holdings, the Borrower and the Lenders entered into an Amended and Restated Loan and Servicing Agreement, which amends and restates the existing loan and servicing agreement, and reflects a senior secured term loan facility, not to exceed \$500.0 million, composed of individual loan series issued upon mutual agreement of the Borrower and Lenders. Each loan series will be available for three months after the closing date agreed upon by the Borrower and Lender (“Commitment Period”), subject to

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the maximum dollar amount agreed upon for that series. The Commitment Period is subject to immediate termination upon the occurrence of an event of default. Each loan series will have a final maturity of five years from the issuance date for the loan series unless an additional time is mutually agreed upon by Lenders and Borrower. The advance rate on portfolio assets will be mutually agreed upon by Lenders and Borrower. Each loan series will have its own mutually agreed upon interest rate equal to one-month Term SOFR plus the applicable spread.

The Amended and Restated Loan and Servicing Agreement contains events of default, subject to certain materiality thresholds and grace periods, customary for this type of financing arrangement. The remedies for such events of default are also customary for this type of transaction and include declaring the final maturity date to have occurred and advances due and liquidation of the assets securing the series.

CRE - Term Warehouse Financing Facilities

In February 2012, a wholly-owned subsidiary entered into a master repurchase and securities agreement (the “2012 Facility”) with Wells Fargo to finance the origination of CRE loans. In July 2018, the subsidiary entered into an amended and restated master repurchase agreement (the “2018 Facility”), in exchange for an extension fee and other reasonable costs, that maintained the \$250.0 million maximum facility amount and extended the term of the facility to July 2020 with three one-year extension options exercisable at the Company’s discretion. In October 2021, the 2018 Facility matured.

In April 2018, the Company’s indirect wholly-owned subsidiary entered into a master repurchase agreement (the “Barclays Facility”) with Barclays to finance the origination of CRE loans. In connection with the Barclays Facility, the Company entered into a guaranty agreement (the “Barclays Guaranty”) pursuant to which the Company fully guaranteed all payments and performance under the Barclays Facility. In March 2021, the Company amended the Barclays Facility to extend the revolving period through October 2021. In October 2021, the Barclays Facility and the Barclays Guaranty were amended to extend the revolving period of the facility to October 2022 and to modify the guaranty to limit financial covenants to be applicable when there are outstanding transactions. The Barclays Facility had a maximum facility amount of \$250.0 million and charged interest of one-month LIBOR plus market spreads. In February 2022, the Company amended the Barclays Facility to add market terms regarding the replacement of LIBOR upon determination of a benchmark transition event. In October 2022, the Barclays Facility matured.

In October 2018, an indirect wholly-owned subsidiary of the Company entered into a master repurchase agreement (the “JPMorgan Chase Facility”) with JPMorgan Chase to finance the origination of CRE loans. In connection with the JPMorgan Chase Facility, the Company entered into a guarantee agreement (the “JPMorgan Chase Guarantee”) pursuant to which the Company fully guaranteed all payments and performance under the JPMorgan Chase Facility. In May 2020, the Company entered into an amendment to the JPMorgan Chase Guarantee that revised its minimum equity financial covenant as of February 29, 2020. In October 2020, the Company entered into an amendment to the JPMorgan Chase Guarantee that revised a covenant definition so that credit losses are determined in accordance with a risk rating-based methodology. In September and October 2021, the JPMorgan Chase Facility was amended twice, resulting in (i) the extension of the JPMorgan Chase Facility’s maturity date to October 2024, (ii) an update to the Company’s tangible net worth requirement and minimum liquidity covenant as set forth in the guarantee agreement and (iii) a modification of market terms regarding the replacement of LIBOR upon determination of a benchmark transition event. In November 2022, the JPMorgan Chase Facility was amended for the following (i) EBITDA to interest expense ratio, (ii) maximum ratio of total indebtedness to its total equity, and (iii) minimum unencumbered liquidity requirement, each through September 2023. The JPMorgan Chase Facility has a maximum facility amount of \$250.0 million, charges interest of one-month benchmark plus market spreads and has an initial maturity date of October 2024.

The JPMorgan Chase Facility contains margin call provisions that provide JPMorgan Chase with certain rights if the value of purchased assets declines. Under these circumstances, JPMorgan Chase may require the Company to transfer cash in an amount necessary to eliminate such margin deficit or repurchase the asset(s) that resulted in the margin call.

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In connection with the JPMorgan Chase Facility, the Company guaranteed the payment and performance under the JPMorgan Chase Facility pursuant to the JPMorgan Chase Guarantee subject to a limit of 25% of the then currently unpaid aggregate repurchase price of all purchased assets. The JPMorgan Chase Guarantee includes certain financial covenants required of the Company, including required liquidity, required capital, ratios of total indebtedness to equity and EBITDA requirements. Also, ACRES RF, the direct owner of the wholly-owned subsidiary borrower, executed a pledge agreement with JPMorgan Chase pursuant to which it pledged and granted to JPMorgan Chase a continuing security interest in any and all of its right, title and interest in and to the wholly-owned subsidiary, including all distributions, proceeds, payments, income and profits from its interests in the wholly-owned subsidiary.

The JPMorgan Chase Facility specifies events of default, subject to certain materiality thresholds and grace periods, customary for this type of financing arrangement. The remedies for such events of default are also customary for this type of financing arrangement and include the acceleration of the principal amount outstanding under the JPMorgan Chase Facility and the liquidation by JPMorgan Chase of purchased assets then subject to the JPMorgan Chase Facility.

In November 2021, an indirect, wholly-owned subsidiary of the Company entered into a \$250.0 million Master Repurchase and Securities Contract Agreement with Morgan Stanley, to be used to finance the Company's commercial real estate lending business (the "Morgan Stanley Facility"). Each repurchase transaction will specify its own terms, such as identification of the assets subject to the transaction, sale price, repurchase price and rate. In January 2022, the Morgan Stanley Facility was amended to add market terms regarding the replacement of LIBOR upon determination of a benchmark transition event. In November 2022, the Morgan Stanley Facility was amended for the following (i) EBITDA to interest expense ratio, (ii) maximum ratio of total indebtedness to its total equity, and (iii) minimum unencumbered liquidity requirement, each through March 2024. The Morgan Stanley Facility has a maximum facility amount of \$250.0 million, charges interest of one-month benchmark plus market spreads and matures in November 2024. The Company also has the right to request a one-year extension.

The Morgan Stanley Facility contains margin call provisions that provide Morgan Stanley with certain rights if the value of purchased assets declines. Under these circumstances, Morgan Stanley may require the subsidiary to transfer cash in an amount necessary to eliminate such margin deficit or repurchase the asset(s) that resulted in the margin call.

The Company guaranteed its subsidiary's payment and performance under the Morgan Stanley Facility pursuant to a guaranty agreement (the "Morgan Stanley Guaranty"), subject to a limit of 25% of the then currently unpaid aggregate repurchase price of all purchased assets. The Morgan Stanley Guaranty includes certain financial covenants required of the Company, including required liquidity, required capital, ratios of total intendedness to equity and EBITDA requirements. Also, the subsidiary's direct parent, ACRES RF, executed a Pledge Agreement with Morgan Stanley pursuant to which ACRES RF pledged and granted to Morgan Stanley a continuing security interest in any and all of ACRES RF's right, title and interest in and to the subsidiary, including all distributions, proceeds, payments, income and profits from ACRES RF's interests in the subsidiary.

The Morgan Stanley Facility specifies events of default, subject to certain materiality thresholds and grace periods, customary for this type of financing arrangement. The remedies for such events of default are also customary for this type of financing arrangement and include acceleration of the principal amount outstanding under the Morgan Stanley Facility and liquidation by Morgan Stanley of purchased assets then subject to the Morgan Stanley Facility.

Mortgage Payable

In April 2022, Chapel Drive West, LLC, a wholly owned subsidiary of the FSU Student Venture, entered into a Loan Agreement (the "Mortgage") with Readycap Commercial, LLC ("Readycap") to finance the acquisition of a student housing complex. The Mortgage is interest only and has a maximum principal balance of \$20.4 million, of which, \$18.7 million was advanced in the initial funding. Initially, the Mortgage charged interest of 30-day average SOFR plus a spread of 3.80%. In October 2022, the Mortgage was amended to charge interest of one-month Term SOFR plus a spread of 3.80%. The Mortgage matures in April 2025, subject to two one-year extension options.

The Mortgage contains events of default, subject to certain materiality thresholds and grace periods, customary for this type of financing arrangement. The remedies for such events of default are also customary for this type of transaction.

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Construction Loan

In January 2023, Chapel Drive East, LLC, a wholly owned subsidiary of the FSU Student Venture, entered into a loan agreement (the "Construction Loan Agreement") with Oceanview Life and Annuity Company ("Oceanview") to finance the construction of a student housing complex (the "Construction Loan"). The Construction Loan is interest only and has a maximum principal balance of \$48.0 million. The Construction Loan charges one-month Term SOFR plus a spread of 6.00% and matures in February 2025, subject to three one-year extension options.

In addition to the Construction Loan, Chapel Drive East, LLC, entered into a financing agreement with Florida Pace Funding Agency to fund energy efficient building improvements and has a maximum principal balance of \$15.5 million. This agreement charges fixed interest of 7.26% and matures in July 2053. The Company does not guarantee this financing agreement.

In connection with the Company's investment in the student housing complex, ACRES RF entered into guarantees related to the Construction Loan. Pursuant to the guarantees, Jason Pollack, Frank Dellaglio and ACRES RF (collectively, the "Guarantors"), for the benefit of Oceanview, provided limited "bad boy" guaranties to Oceanview pursuant to the Construction Loan Agreement until the earlier of the payment in full of the indebtedness or the date of a sale of the property pursuant to a foreclosure of the mortgage or deed or other transfer in lieu of foreclosure is accepted by Oceanview. The Guarantors also entered into a Completion Guaranty Agreement for the benefit of Oceanview to guaranty the timely completion of the project in accordance with the Construction Loan Agreement, as well as a Carry Guaranty Agreement, for the benefit of Oceanview to guaranty and unconditional payment by Chapel Drive East, LLC of all customary or necessary costs and expenses incurred in connection with the operation, maintenance and management of the property and an Environmental Indemnity Agreement jointly and severally in favor of Oceanview whereby the Guarantors serving as Indemnitors provided environmental representations and warranties, covenants and indemnifications (collectively the "Guaranties"). The Guaranties include certain financial covenants required of ACRES RF, including required net worth and liquidity requirements.

Contractual maturity dates of the Company's borrowings' principal outstanding by category and year are presented in the table below (in thousands, except amounts in footnotes):

| | Total | 2023 | 2024 | 2025 | 2026 | 2027 and Thereafter |
|--|--------------------|-------------|-------------------|------------------|-------------------|------------------------|
| At December 31, 2022: | | | | | | |
| CRE securitizations | \$1,242,223 | \$ — | \$ — | \$ — | \$ — | \$1,242,223 |
| Senior Secured Financing Facility | 91,549 | — | — | — | — | 91,549 |
| CRE - term warehouse financing facilities ⁽¹⁾ | 330,849 | — | 330,849 | — | — | — |
| Mortgage payable | 18,710 | — | — | 18,710 | — | — |
| 5.75% Senior Unsecured Notes | 150,000 | — | — | — | 150,000 | — |
| Unsecured junior subordinated debentures | 51,548 | — | — | — | — | 51,548 |
| Total | <u>\$1,884,879</u> | <u>\$ —</u> | <u>\$ 330,849</u> | <u>\$ 18,710</u> | <u>\$ 150,000</u> | <u>\$1,385,320</u> |

(1) Includes accrued interest payable in the balances of principal outstanding.

NOTE 13 - SHARE ISSUANCE AND REPURCHASE

In May 2021, and subsequently in June 2021, the Company issued a total of 4.6 million shares of 7.875% Series D Cumulative Redeemable Preferred Stock ("Series D Preferred Stock") at a public offering price of \$25.00 per share. The Company received net proceeds of \$110.4 million after \$4.6 million of underwriting discounts and other offering expenses. Dividends are payable quarterly in arrears at the end of January, April, July and October. The Series D Preferred Stock has no maturity date and the Company is not required to redeem the Series D Preferred Stock at any time. On or after May 21, 2026, the Company may, at its option, redeem the Series D Preferred Stock, in whole or part, at any time and from time to time, for cash at \$25.00 per share, plus accrued and unpaid dividends, if any, to the redemption date.

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On October 4, 2021, the Company and the Manager entered into an Equity Distribution Agreement with JonesTrading Institutional Services LLC, as placement agent (“JonesTrading”), pursuant to which the Company may issue and sell from time to time up to 2.2 million shares of the Series D Preferred Stock. Sales of the Series D Preferred Stock may be made in transactions that are deemed to be “at the market” offerings, as defined in Rule 415 of the Securities Act of 1933, as amended, including without limitation, sales made directly on the New York Stock Exchange, on any other existing trading market for the shares or to or through a market maker. Subject to the terms of the Company’s notice, JonesTrading may also sell the shares by any other method permitted by law, including but not limited to in privately negotiated transactions. The Company will pay JonesTrading a commission up to 3.0% of the gross proceeds from the sales of the Series D Preferred Stock pursuant to the agreement. The terms and conditions of the agreement include various representations and warranties, conditions to closing, indemnification rights and obligations of the parties and termination provisions. During the year ended December 31, 2022, the Company did not issue any Series D Preferred Stock through this agreement. During the year ended December 31, 2021, the Company received net proceeds of \$194,000 from the issuance of 7,857 shares of Series D Preferred Stock governed by the agreement.

On or after July 30, 2024, the Company may, at its option, redeem its 8.625% Fixed-to-Floating Series C Cumulative Redeemable Preferred Stock (“Series C Preferred Stock”), in whole or in part, at any time and from time to time, for cash at \$25.00 per share, plus accrued and unpaid dividends, if any, to the redemption date. Effective July 30, 2024 and thereafter, the Company will pay cumulative distributions on the Series C Preferred Stock at a floating rate equal to three-month LIBOR plus a spread of 5.927% per annum based on the \$25.00 liquidation preference, provided that such floating rate shall not be less than the initial rate of 8.625% at any date of determination.

At December 31, 2022, the Company had 4.8 million shares of Series C Preferred Stock and 4.6 million shares of Series D Preferred Stock outstanding, with weighted average issuance prices, excluding offering costs, of \$25.00.

In March 2016, the board of directors (the “Board”) approved a securities repurchase plan and in November 2020, the Board reauthorized and approved the continued use of this plan to repurchase up to \$20.0 million of the outstanding shares of the Company’s common stock. Additionally, the Board authorized the Company to enter into written trading plans under Rule 10b5-1 of the Securities Exchange Act of 1934 (“the Exchange Act”). In July 2021, the authorized amount was fully utilized.

In November 2021, the Board authorized and approved the continued use of its existing share repurchase program to repurchase an additional \$20.0 million of the outstanding shares of the Company’s common stock. Under the share repurchase program, the Company intends to repurchase shares through open market purchases, privately-negotiated transactions, block purchases or otherwise in accordance with applicable federal securities laws, including Rule 10b-18 and 10b5-1 of the Exchange Act.

During the years ended December 31, 2022 and 2021, the Company repurchased \$9.1 million and \$18.4 million of its common stock, representing 848,978 and 1,346,424 shares, respectively. At December 31, 2022, \$7.2 million remains available under this repurchase plan.

In connection with the Note and Warrant Purchase Agreement, the 12.00% Senior Unsecured Notes give Oaktree and MassMutual warrants to purchase an aggregate of up to 1,166,653 shares of common stock at an exercise price of \$0.03 per share, subject to certain potential adjustments. On July 31, 2020, concurrently with the issuance of the 12.00% Senior Unsecured Notes, the Company issued to Oaktree warrants to purchase 391,995 shares of common stock for an aggregate purchase price of \$42.0 million and issued to MassMutual warrants to purchase 74,666 shares of common stock for an aggregate purchase price of \$8.0 million. The warrants are recorded in additional paid-in capital on the consolidated balance sheets at their fair value of \$3.1 million at issuance. The warrants are immediately exercisable on issuance and expire seven years from the issuance date. The warrants can be exercised with cash or as a net exercise. In July 2022, MassMutual exercised their warrants to purchase 74,666 shares.

NOTE 14 - SHARE-BASED COMPENSATION

In June 2021, the Company’s shareholders approved the ACRES Commercial Realty Corp. Third Amended and Restated Omnibus Equity Compensation Plan (the “Omnibus Plan”) and the ACRES Commercial Realty Corp. Manager Incentive Plan (the “Manager Plan” and together with the Omnibus Plan, the “Plans”). The Omnibus Plan was amended (i) increase the number of shares authorized for issuance by an additional 1,100,000 shares of common stock less any shares of common stock issued or subject to awards granted under the Manager Plan; and (ii) extend the expiration date of the Omnibus Plan from June 2029 to June 2031. The maximum number of shares that may be subject to awards granted under the Plans, determined on a combined basis, will be 1,700,817 shares of common stock.

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The Company recognized stock-based compensation expense of \$3.6 million, \$1.7 million and \$3.1 million during the years ended December 31, 2022, 2021 and 2020, respectively, related to restricted stock.

The following table summarizes the Company's restricted common stock transactions:

| | Manager | Directors | Total Number of Shares | Weighted-Average Grant-Date Fair Value |
|---|----------------|---------------|---------------------------|---|
| Unvested shares at January 1, 2022 | 299,999 | 33,330 | 333,329 | \$ 17.39 |
| Issued | 299,999 | 33,334 | 333,333 | 11.85 |
| Vested | (74,999) | (8,330) | (83,329) | 17.39 |
| Forfeited | — | — | — | — |
| Unvested shares at December 31, 2022 | <u>524,999</u> | <u>58,334</u> | <u>583,333</u> | <u>\$ 14.22</u> |

The unvested restricted common stock shares are expected to vest during the following years:

| | Shares |
|--------------|----------------|
| 2023 | 166,658 |
| 2024 | 166,658 |
| 2025 | 166,671 |
| 2026 | 83,346 |
| Total | <u>583,333</u> |

The shares issued during the year ended December 31, 2022 will vest in installments over a four-year period, pursuant to the terms of the respective award agreements. At December 31, 2022, total unrecognized compensation costs relating to unvested restricted stock was \$4.5 million based on the grant date fair value of shares granted. The cost is expected to be recognized over a weighted average period of 3.0 years.

Under the Company's Fourth Amended and Restated Management Agreement, as amended ("Management Agreement"), incentive compensation is paid quarterly. Up to 75% of the incentive compensation is paid in cash and at least 25% is paid in the form of an award of common stock recorded in management fees on the consolidated statements of operations. During the year ended December 31, 2022, the Company incurred incentive compensation payable to the Manager of \$340,000, of which \$170,000 was payable in cash and \$170,000, representing 17,780 shares, was payable in common stock. No incentive compensation was paid to the Manager for the years ended December 31, 2021 and 2020.

The Omnibus Plan and the Manager Plan are administered by the compensation committee of the Company's Board (the "Compensation Committee"). In 2020, the Compensation Committee and the Board created parameters for equity awards, whereby they are no longer discretionary but are now based upon the Company's achievement of performance parameters using book value of the common stock as the appropriate benchmark. See Note 18 for a description of awards made under the Manager Plan.

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NOTE 15 - EARNINGS PER SHARE

The following table presents a reconciliation of basic and diluted earnings (losses) per common share for the periods presented (dollars in thousands, except per share amounts):

| | Years Ended December 31, | | |
|--|--------------------------|------------------|---------------------|
| | 2022 | 2021 | 2020 |
| Net income (loss) | \$ 10,426 | \$ 33,923 | \$ (197,713) |
| Net income allocated to preferred shares | (19,422) | (15,887) | (10,350) |
| Net loss allocable to non-controlling interest, net of taxes | 197 | — | — |
| Net (loss) income allocable to common shares | <u>\$ (8,799)</u> | <u>\$ 18,036</u> | <u>\$ (208,063)</u> |
| Weighted average number of common shares outstanding: | | | |
| Weighted average number of common shares outstanding - basic | 8,380,490 | 9,269,607 | 10,566,904 |
| Weighted average number of warrants outstanding ⁽¹⁾ | 431,271 | 466,661 | 196,357 |
| Total weighted average number of common shares outstanding - basic | <u>8,811,761</u> | <u>9,736,268</u> | <u>10,763,261</u> |
| Effect of dilutive securities - unvested restricted stock | — | 26,949 | — |
| Weighted average number of common shares outstanding - diluted | <u>8,811,761</u> | <u>9,763,217</u> | <u>10,763,261</u> |
| Net (loss) income per common share - basic | \$ (1.00) | \$ 1.85 | \$ (19.33) |
| Net (loss) income per common share - diluted | \$ (1.00) | \$ 1.85 | \$ (19.33) |

(1) See Note 13 for further details regarding the warrants.

NOTE 16 - DISTRIBUTIONS

In order to qualify as a REIT, the Company must currently distribute at least 90% of its taxable income. In addition, the Company must distribute 100% of its taxable income in order to not be subject to corporate federal income taxes on retained income. The Company anticipates it will distribute substantially all of its taxable income to its stockholders. Because taxable income differs from cash flow from operations due to non-cash revenues or expenses (such as provisions for loan and lease losses and depreciation) and tax loss carryforwards, in certain circumstances the Company may generate operating cash flow in excess of its distributions or, alternatively, may be required to borrow funds to make sufficient distribution payments.

The Company's 2023 distributions are, and will be, determined by the Company's Board, which will also consider the composition of any distributions declared, including the option of paying a portion in cash and the balance in additional shares of common stock.

For the years ended December 31, 2022, 2021 and 2020, the Company did not pay any common share distributions.

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The following table presents distributions declared (on a per share basis) for the years ended December 31, 2022, 2021 and 2020 with respect to the Company's Series C Preferred Stock and Series D Preferred Stock:

| | Series C Preferred Stock | | | Series D Preferred Stock | | |
|-------------------------------------|--------------------------|---|------------------------|--------------------------|---|------------------------|
| | Date Paid | Total Distribution Paid (in thousands) | Distribution Per Share | Date Paid | Total Distribution Paid (in thousands) | Distribution Per Share |
| 2022 | | | | | | |
| December 31 | January 30, 2023 | \$ 2,587 | \$ 0.5390625 | January 30, 2023 | \$ 2,268 | \$ 0.4921875 |
| September 30 | October 31 | 2,587 | 0.5390625 | October 31 | 2,268 | 0.4921875 |
| June 30 | August 1 | 2,588 | 0.5390625 | August 1 | 2,268 | 0.4921875 |
| March 31 | May 2 | 2,588 | 0.5390625 | May 2 | 2,268 | 0.4921875 |
| 2021 | | | | | | |
| December 31 | January 31, 2022 | \$ 2,588 | \$ 0.5390625 | January 31, 2022 | \$ 2,268 | \$ 0.4921875 |
| September 30 | November 1 | 2,588 | 0.5390625 | November 1 | 2,264 | 0.4921875 |
| June 30 | July 30 | 2,588 | 0.5390625 | July 30 | 1,736 | 0.3773440 |
| March 31 | April 30 | 2,588 | 0.5390625 | N/A | N/A | N/A |
| 2020 | | | | | | |
| December 31 | February 1, 2021 | \$ 2,587 | \$ 0.5390625 | N/A | N/A | N/A |
| March 31, June 30, and September 30 | October 25 | 7,763 | 1.6171875 | N/A | N/A | N/A |

NOTE 17 - ACCUMULATED OTHER COMPREHENSIVE LOSS

The following table presents the changes in net unrealized loss on derivatives, the sole component of accumulated other comprehensive loss, for the year ended December 31, 2022 (in thousands):

| | Accumulated Other Comprehensive Loss - Net Unrealized Gain on Derivatives |
|---|---|
| Balance at January 1, 2022 | \$ (8,127) |
| Amounts reclassified from accumulated other comprehensive loss ⁽¹⁾ | 1,733 |
| Balance at December 31, 2022 | <u>\$ (6,394)</u> |

(1) Amounts reclassified from accumulated other comprehensive loss are reclassified to interest expense on the Company's consolidated statements of operations.

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NOTE 18 - RELATED PARTY TRANSACTIONS

Management Agreement

In March 2005, the Company entered into a Management Agreement, which was last amended on February 16, 2021, with the Manager pursuant to which the Manager provides the day-to-day management of the Company's operations. The Management Agreement requires the Manager to manage the Company's business affairs in conformity with the policies and investment guidelines established by the Company's Board. The Manager provides its services under the supervision and direction of the Company's Board. The Manager is responsible for the selection, purchase and sale of the Company's portfolio investments, its financing activities and providing investment advisory services. The Manager and its affiliates also provide the Company with a Chief Financial Officer and a sufficient number of additional accounting, finance, tax and investor relations professionals. The Manager receives fees and is reimbursed for its expenses as follows:

- A monthly base management fee equal to 1/12th of the amount of the Company's equity multiplied by 1.50%; provided, however, that for each calendar month through July 31, 2022, such fee was equal to a minimum of \$442,000. Under the Management Agreement, "equity" is equal to the net proceeds from issuances of shares of capital stock (or the value of common shares upon the conversion of convertible securities), after deducting any underwriting discounts and commissions and other expenses and costs relating to such issuance, plus or minus the Company's retained earnings (excluding non-cash equity compensation incurred in current or prior periods) less all amounts the Company has paid for common stock and preferred stock repurchases. The calculation is adjusted for one-time events due to changes in GAAP, as well as other non-cash charges, upon approval of the Company's independent directors.
- Incentive compensation, calculated quarterly until the quarter ended December 31, 2022 as follows: (A) 20% of the amount by which the Company's EAD (as defined in the Management Agreement) for a quarter exceeds the product of (i) the weighted average of (x) the book value divided by 10,293,783 and (y) the per share price (including the conversion price, if applicable) paid for the Company's common shares in each offering (or issuance, upon the conversion of convertible securities) by it subsequent to September 30, 2017, multiplied by (ii) the greater of (x) 1.75% and (y) 0.4375% plus one-fourth of the Ten Year Treasury Rate for such quarter; multiplied by (B) the weighted average number of common shares outstanding during such quarter; subject to adjustment (a) to exclude events pursuant to changes in GAAP or the application of GAAP as well as non-recurring or unusual transactions or events, after discussion between the Manager and the independent directors and approval by a majority of the independent directors in the case of non-recurring or unusual transactions or events, and (b) to deduct an amount equal to any fees paid directly by a TRS (or any subsidiary thereof) to employees, agents and/or affiliates of the Manager with respect to profits of such TRS (or subsidiary thereof) generated from the services of such employees, agents and/or affiliates, the fee structure of which shall have been approved by a majority of the independent directors and which fees may not exceed 20% of the net income (before such fees) of such TRS (or subsidiary thereof).

With respect to each fiscal quarter commencing with the quarter ended December 31, 2022, an incentive management fee calculated and payable in arrears in an amount, not less than zero, equal to:

- *for the first full calendar quarter ended December 31, 2022*, the product of (a) 20% and (b) the excess of (i) EAD of the Company for such calendar quarter, over (ii) the product of (A) the Company's book value equity as of the end of such calendar quarter, and (B) 7% per annum;
- *for each of the second, third and fourth full calendar quarters following the calendar quarter ended December 31, 2022*, the excess of (1) the product of (a) 20% and (b) the excess of (i) EAD of the Company for the calendar quarter(s) following September 30, 2022, over (ii) the product of (A) the Company's book value equity in the calendar quarter(s) following September 30, 2022, and (B) 7% per annum, over (2) the sum of any incentive compensation paid to the Manager with respect to the prior calendar quarter(s) following September 30, 2022 (other than the most recent calendar quarter); and

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- *for each calendar quarter thereafter*, the excess of (1) the product of (a) 20% and (b) the excess of (i) EAD of the Company for the previous 12-month period, over (ii) the product of (A) the Company's book value equity in the previous 12-month period, and (B) 7% per annum, over (2) the sum of any incentive compensation paid to the Manager with respect to the first three calendar quarters of such previous 12-month period; *provided*, however, that no incentive compensation shall be payable with respect to any calendar quarter unless EAD for the 12 most recently completed calendar quarters (or such lesser number of completed calendar quarters from September 30, 2022) in the aggregate is greater than zero.
- Per loan underwriting and review fees in connection with valuations of and potential investments in certain subordinate commercial mortgage pass-through certificates, in amounts approved by a majority of the independent directors.
- Reimbursement of expenses for personnel of the Manager or its affiliates for their services in connection with the making of fixed-rate commercial real estate loans by the Company, in an amount equal to one percent of the principal amount of each such loan made.
- Reimbursement of out-of-pocket expenses and certain other costs incurred by the Manager and its affiliates that relate directly to the Company and its operations.
- Reimbursement of the Manager's and its affiliates' expenses for (A) wages, salaries and benefits of the Company's Chief Financial Officer, and (B) a portion of the wages, salaries and benefits of accounting, finance, tax and investor relations professionals, in proportion to such personnel's percentage of time allocated to its operations.

Incentive compensation is calculated and payable quarterly to the Manager to the extent it is earned. Up to 75% of the incentive compensation is payable in cash and at least 25% is payable in the form of an award of common stock. The Manager may elect to receive more than 25% of its incentive compensation in common stock. All shares are fully vested upon issuance, however, the Manager may not sell such shares for one year after the incentive compensation becomes due and payable unless the Management Agreement is terminated. Shares payable as incentive compensation are valued as follows:

- if such shares are traded on a securities exchange, at the average of the closing prices of the shares on such exchange over the 30-day period ending three days prior to the issuance of such shares;
- if such shares are actively traded over-the-counter, at the average of the closing bid or sales price as applicable over the 30-day period ending three days prior to the issuance of such shares; and
- if there is no active market for such shares, at the fair market value as reasonably determined in good faith by the Board of the Company.

The Management Agreement's current contract term ends on July 31, 2023 and the agreement provides for automatic one year renewals on such date and on each July 31 thereafter until terminated. The Company's Board reviews the Manager's performance annually. The Management Agreement may be terminated annually upon the affirmative vote of at least two-thirds of the Company's independent directors, or by the affirmative vote of the holders of at least a majority of the outstanding shares of its common stock, based upon unsatisfactory performance that is materially detrimental to the Company or a determination by its independent directors that the management fees payable to the Manager are not fair, subject to the Manager's right to prevent such a compensation termination by accepting a mutually acceptable reduction of management fees. The Company's Board must provide 180 days' prior notice of any such termination. If the Company terminates the Management Agreement, the Manager is entitled to a termination fee equal to four times the sum of the average annual base management fee and the average annual incentive compensation earned by the Manager during the two 12-month periods immediately preceding the date of termination, calculated as of the end of the most recently completed fiscal quarter before the date of termination.

The Company may also terminate the Management Agreement for cause with 30 days' prior written notice from its Board. No termination fee is payable in the event of a termination for cause. The Management Agreement defines cause as:

- the Manager's continued material breach of any provision of the Management Agreement following a period of 30 days after written notice thereof;

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- the Manager’s fraud, misappropriation of funds, or embezzlement against the Company;
- the Manager’s gross negligence in the performance of its duties under the Management Agreement;
- the dissolution, bankruptcy or insolvency, or the filing of a voluntary bankruptcy petition, by the Manager; or
- a change of control (as defined in the Management Agreement) of the Manager if a majority of the Company’s independent directors determines, at any point during the 18 months following the change of control, that the change of control was detrimental to the ability of the Manager to perform its duties in substantially the same manner conducted before the change of control.

Cause does not include unsatisfactory performance that is materially detrimental to the Company’s business.

The Manager may terminate the Management Agreement at its option, (A) in the event that the Company defaults in the performance or observance of any material term, condition or covenant contained in the Management Agreement and such default continues for a period of 30 days after written notice thereof, or (B) without payment of a termination fee by the Company, if it becomes regulated as an investment company under the Investment Company Act of 1940, with such termination deemed to occur immediately before such event.

Relationship with ACRES Capital Corp. and certain of its Subsidiaries

Relationship with ACRES Capital Corp. and certain of its Subsidiaries. The Manager is a subsidiary of ACRES Capital Corp., of which Andrew Fentress, the Company’s Chairman, serves as Managing Partner and Mark Fogel, the Company’s President, Chief Executive Officer and Director, serves as Chief Executive Officer and President. Mr. Fentress and Mr. Fogel are also shareholders and board members of ACRES Capital Corp.

Effective on July 31, 2020, the Company has a Management Agreement with the Manager pursuant to which the Manager provides the day-to-day management of the Company’s operations and receives management fees. For the years ended December 31, 2022, 2021 and 2020, the Manager earned base management fees of \$6.7 million, \$6.1 million and \$2.2 million, respectively. For the year ended December 31, 2022, the Manager earned incentive management fees of \$340,000, of which \$170,000 was payable at year end in cash and \$170,000 was payable at year end in common stock. No incentive compensation was earned or payable at year end for the years ended December 31, 2021 and 2020. At December 31, 2022 and 2021, \$558,000 and \$561,000, respectively, of base management fees were payable by the Company to the Manager.

The Manager and its affiliates provided the Company with a Chief Financial Officer and a sufficient number of additional accounting, finance, tax and investor relations professionals. The Company reimbursed the Manager’s expenses for (a) the wages, salaries and benefits of the Chief Financial Officer, and (b) a portion of the wages, salaries and benefits of accounting, finance, tax and investor relations professionals, in proportion to such personnel’s percentage of time allocated to the Company’s operations. The Company reimbursed out-of-pocket expenses and certain other costs incurred by the Manager that related directly to the Company’s operations. For the years ended December 31, 2022, 2021 and 2020, the Company reimbursed the Manager \$5.1 million, \$4.7 million and \$1.8 million, respectively, for all such compensation and costs. At December 31, 2022 and 2021, the Company had payables to the Manager pursuant to the Management Agreement totaling \$179,000 and \$1.2 million, respectively, related to such compensation and costs. The Company’s base management fee payable and expense reimbursements payable were recorded in management fee payable and accounts payable and other liabilities on the consolidated balance sheets, respectively.

On July 31, 2020, ACRES RF, a direct, wholly owned subsidiary of the Company, provided a \$12.0 million loan (the “ACRES Loan”) to ACRES Capital Corp. evidenced by the Promissory Note from ACRES Capital Corp.

The ACRES Loan accrues interest at 3.00% per annum payable monthly. The monthly amortization payment is \$25,000. The ACRES Loan matures in July 2026, subject to two one-year extensions (at ACRES Capital Corp.’s option) subject to the payment of a 0.5% extension fee to ACRES RF on the outstanding principal amount of the ACRES Loan.

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During the years ended December 31, 2022, 2021 and 2020, the Company recorded interest income of \$348,000, \$357,000 and \$153,000, respectively, on the ACRES Loan in other income on the consolidated statements of operations. At December 31, 2022 and 2021, the ACRES Loan had a principal balance of \$11.3 million and \$11.6 million recorded in loan receivable - related party on the consolidated balance sheets. At December 31, 2022 and 2021, the ACRES loan had no interest receivable.

During the year ended December 31, 2022, the Company originated one CRE whole loan with a par value of \$38.6 million that was refinanced from a loan originated by affiliates of the Manager. The Company did not originate any loans that were refinanced from loans originated by affiliates of the Manager during the year ended December 31, 2021. During the year ended December 31, 2022, the Company acquired 100% equity in one property for \$38.6 million, that previously served as collateral for a loan held by an affiliate of the Manager prior to the acquisition. During the year ended December 31, 2021, the Company acquired 100% equity in one property for \$14.2 million, which previously served as collateral for a loan held by an affiliate of the Manager prior to the acquisition.

At December 31, 2022, the Company retained equity in two securitization entities that were structured for the Company by the Manager. Under the Management Agreement, the Manager was not separately compensated by the Company for executing this transaction and was not separately compensated for managing the securitization entity and its assets.

During the year ended December 31, 2022, the Company co-originated and entered into joint funding agreements with ACRES Loan Origination, LLC, an affiliate of ACRES Capital Corp. and the Manager, on four loan originations, with total initial fundings of \$97.2 million.

Relationship with ACRES Capital Servicing LLC. Under the MassMutual Loan Agreement, ACRES Capital Servicing LLC (“ACRES Capital Servicing”), an affiliate of ACRES Capital Corp. and the Manager, serves as the portfolio servicer. Additionally, ACRES Capital Servicing served as the special servicer of XAN 2019-RSO7, XAN 2020-RSO8, and XAN 2020-RSO9 and serves as special servicer of ACR 2021-FL1, and ACR 2021-FL2. During the years ended December 31, 2022, 2021 and 2020, ACRES Capital Servicing received no portfolio servicing fees. During the years ended December 31, 2022 and 2021, ACRES Capital Servicing earned \$74,000 and \$14,000, respectively, in special servicing fees, of which \$51,000 and \$14,000 were recorded as a reduction to interest income in the consolidated statements of operations. During the year ended December 31, 2020, ACRES Capital Servicing earned no special servicing fees.

Relationship with ACRES Collateral Manager, LLC. ACRES Collateral Manager, LLC, an affiliate of ACRES Capital Corp. and the Manager, serves as the collateral manager of ACR 2021-FL1 and ACR 2021-FL2, a role for which it waived its fee.

Relationship with ACRES Development Management, LLC. ACRES Development Management, LLC (“DevCo”) is a wholly owned subsidiary of ACRES Capital Corp., the parent of the Manager. DevCo acts in various capacities as a co-developer or owner’s representative for direct equity investments within the Company’s portfolio. In November 2021, December 2021 and April 2022, the joint venture entities of the three CRE equity investments acquired through direct investment entered into development agreements with DevCo (the “Development Agreements”). Pursuant to the Development Agreements, DevCo agreed to manage the development of the projects associated with each equity investment in accordance with a development standard in exchange for fees equal to between 1.25% and 1.5% of all project costs. During the year ended December 31, 2022, \$22,000 in fees were earned by DevCo for services rendered under the Development Agreements. No fees were incurred or paid to DevCo for services rendered under the Development Agreements during the year ended December 31, 2021.

Relationship with ACRES Share Holdings, LLC. In June 2021, the Company’s Manager Plan was approved by its shareholders, which authorized up to 1,100,000 shares of common stock for issuance to the Manager (less shares of common stock issued or subject to awards under the Omnibus Plan). For each of the years ended December 31, 2022 and 2021, ACRES Share Holdings, LLC, an affiliate of ACRES Capital Corp. and the Manager, was granted 299,999 shares. These shares will vest 25% for four years, on each anniversary of the issuance date. Subsequent to year end, the Company issued 17,780 shares that were payable to the Manager under the incentive management fee noted above. See Note 14 for additional details.

Relationship with C-III and certain of its Subsidiaries

Relationship with C-III and certain of its Subsidiaries. Prior to July 31, 2020, the Company had a management agreement with the Prior Manager pursuant to which the Prior Manager provided the day-to-day management of the Company’s operations and received substantial fees. For the year ended December 31, 2020, the Prior Manager earned base management fees of \$3.8 million. The Prior Manager did not earn incentive compensation for the year ended December 31, 2020.

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The Company reimbursed out-of-pocket expenses and certain other costs incurred by the Prior Manager and its affiliates that related directly to the Company's operations. For the year ended December 31, 2020, the Company reimbursed the Prior Manager \$4.1 million for all such compensation and costs.

In May 2019, ACRES RF entered into a Mortgage Loan Sale and Purchase Agreement (the "May 2019 Loan Acquisition Agreement") with C-III Commercial Mortgage LLC ("C-III Commercial Mortgage"), a wholly-owned subsidiary of C-III, that provided for the acquisition by ACRES RF of certain CRE loans on a servicing-released basis at par, plus accrued and unpaid interest on each loan for an aggregate purchase price of \$197.6 million. In accordance with the terms of the May 2019 Loan Acquisition Agreement, C-III Commercial Mortgage retains its title to all exit fees in excess of 0.50% of the outstanding principal balance. During the year ended December 31, 2021 and 2020, C-III Commercial Mortgage earned \$361,000 and \$74,000, respectively, in exit fees. C-III and its subsidiaries ceased being a related party as of July 31, 2020.

Relationship with Resource Real Estate Opportunity REIT

In July 2020, ACRES and the Company entered into agreements with Resource America pursuant to which Resource America provided office space and other office-related services as well as performed an internal audit program. In September 2020, the sublease was assigned from Resource America to Resource Real Estate Opportunity REIT and the internal audit engagement letter was assigned from Resource America to Resource NewCo LLC, a subsidiary of Resource Real Estate Opportunity REIT. A former non-employee director of the Company was an executive at, and a director of, Resource Real Estate Opportunity REIT. During the years ended December 31, 2021 and 2020, the Company incurred \$67,000 and \$45,000, respectively, of expenses in connection with these agreements. The Company had no payables to Resource Real Estate Opportunity REIT at December 31, 2021. These agreements were terminated as of March 31, 2021. Resource America and its subsidiaries ceased being related party as of June 2021.

NOTE 19 - FAIR VALUE OF FINANCIAL INSTRUMENTS

The Company had no financial instruments carried at fair value on a recurring basis at either December 31, 2022 or 2021.

In October 2021, the Company received the deed in lieu of foreclosure on a property that formerly collateralized a CRE whole loan. The property was appraised and determined to have a fair value of \$17.6 million at the time of acquisition.

The Company is required to disclose the fair value of financial instruments for which it is practicable to estimate that value. The fair values of the Company's short-term financial instruments such as cash and cash equivalents, restricted cash, accrued interest receivable, principal paydowns receivable, accrued interest payable and distributions payable approximate their carrying values on the consolidated balance sheets. The fair values of the Company's assets and liabilities are estimated as follows:

CRE whole loans. The fair values of the Company's loans held for investment are measured by discounting the expected future cash flows using the current interest rates at which similar loans would be made to borrowers with similar credit ratings and for the same remaining maturities. Par values of loans with variable interest rates are expected to approximate fair value unless evidence of credit deterioration exists, in which case the fair value approximates the par value less the loan's allowance estimated through individual evaluation. Fair values of loans with fixed rates are calculated using the net present values of future cash flows, discounted at market rates. The Company's floating-rate CRE loans had interest rates from 7.03% to 12.67% and 3.01% to 9.00% at December 31, 2022 and 2021, respectively.

CRE mezzanine loan. Historically, this was measured by discounting the expected remaining cash flows using the current interest rates at which similar instruments would be originated for the same remaining maturity. The Company's mezzanine loan was discounted at a rate of 10.00%. The Company's mezzanine loan had no carrying or fair value at December 31, 2022.

Loan receivable- related party. This is estimated using a discounted cash flow model.

Senior notes in CRE securitizations. These are estimated using a discounted cash flow model with implied yields based on trades for similar securities.

Senior secured financing facility, warehouse financing facilities and mortgage payable. These are variable rate debt instruments indexed to either LIBOR or Term SOFR that reset periodically and, as a result, their carrying value approximates their fair value, excluding deferred debt issuance costs.

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4.50% Convertible Senior Notes. This is determined using a discounted cash flow model that discounts the issuance's contractual future cash flows using the current interest rate on similar debt issuances with similar terms and similar remaining maturities that do not have a conversion option.

5.75% Senior Unsecured Notes and Junior subordinated notes. These are estimated by using a discounted cash flow model.

The fair values of the Company's financial and non-financial instruments that are not reported at fair value on the consolidated balance sheets are reported in the following table (in thousands, except amount in footnotes):

| | Carrying Value | Fair Value | Fair Value Measurements | | |
|---|----------------|--------------|---|---|---|
| | | | Quoted Prices in Active Markets for Identical Assets of Liabilities (Level 1) | Significant Other Observable Inputs (Level 2) | Significant Unobservable Inputs (Level 3) |
| At December 31, 2022: | | | | | |
| Assets: | | | | | |
| CRE whole loans | \$ 2,038,787 | \$ 2,065,504 | \$ — | \$ — | \$ 2,065,504 |
| Loan receivable - related party | 11,275 | 9,672 | — | — | 9,672 |
| Liabilities: | | | | | |
| Senior notes in CRE securitizations | 1,233,556 | 1,179,313 | — | — | 1,179,313 |
| Senior secured financing facility | 87,890 | 91,549 | — | — | 91,549 |
| Warehouse financing facilities | 328,288 | 330,848 | — | — | 330,848 |
| Mortgage payable | 18,244 | 18,710 | — | — | 18,710 |
| 5.75% Senior Unsecured Notes | 147,507 | 138,435 | — | — | 138,435 |
| Junior subordinated notes | 51,548 | 35,821 | — | — | 35,821 |
| At December 31, 2021: | | | | | |
| Assets: | | | | | |
| CRE whole loans | \$ 1,869,301 | \$ 1,889,499 | \$ — | \$ — | \$ 1,889,499 |
| CRE mezzanine loan | 4,445 | 4,700 | — | — | 4,700 |
| Loan receivable - related party | 11,575 | 10,407 | — | — | 10,407 |
| Liabilities: | | | | | |
| Senior notes in CRE securitizations | 1,466,499 | 1,473,893 | — | — | 1,473,893 |
| Warehouse financing facilities | 66,771 | 68,905 | — | — | 68,905 |
| 4.50% Convertible Senior Notes | 86,431 | 87,873 | — | — | 87,873 |
| 5.75% Senior Unsecured Notes ⁽¹⁾ | 146,607 | 148,125 | — | — | 148,125 |
| Junior subordinated notes | 51,548 | 41,424 | — | — | 41,424 |

(1) Carrying value includes deferred debt issuance costs of \$307,000 from the redeemed 12.00% Senior Unsecured Notes.

NOTE 20 - MARKET RISK AND DERIVATIVE INSTRUMENTS

The Company is affected by changes in certain market conditions. These changes in market conditions may adversely impact the Company's financial performance and are referred to as "market risks." When deemed appropriate, the Company used derivatives as a risk management tool to mitigate the potential impact of certain market risks. The primary market risks managed by the Company through the use of derivative instruments were interest rate risk and market price risk.

The Company also historically managed its interest rate risk with interest rate swaps. Interest rate swaps are contracts between two parties to exchange cash flows based on specified underlying notional amounts, assets and/or indices.

The Company seeks to manage the extent to which net income changes as a function of changes in interest rates by matching adjustable-rate assets with variable-rate borrowings.

The Company classified its interest rate swap contracts as cash flow hedges, which are hedges that eliminate the risk of changes in the cash flows of a financial asset or liability.

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The Company terminated all of its interest rate swap positions associated with its financed CMBS portfolio in April 2020. At termination, the Company realized a loss of \$11.8 million. At December 31, 2022 and 2021, the Company had losses of \$6.6 million and \$8.5 million, respectively, recorded in accumulated other comprehensive loss, which will be amortized into earnings over the remaining life of the debt. During the years ended December 31, 2022, 2021 and 2020, the Company recorded amortization expense, reported in interest expense on the consolidated statements of operations, of \$1.8 million, \$1.9 million and \$1.3 million, respectively.

At December 31, 2022 and 2021, the Company had an unrealized gain of \$256,000 and \$347,000, respectively, attributable to two terminated interest rate swaps in accumulated other comprehensive loss on the consolidated balance sheets, to be accreted into earnings over the remaining life of the debt. The Company recorded accretion income, reported in interest expense on the consolidated statements of operations, of \$91,000, \$91,000 and \$92,000 into earnings during the years ended December 31, 2022, 2021 and 2020, respectively.

The Company's prior origination of fixed-rate CRE whole loans exposed it to market pricing risk in connection with the fluctuations of market interest rates. As market interest rates increase or decrease, the fair value of the fixed-rate CRE whole loans will decrease or increase accordingly. In order to mitigate this market price risk, the Company entered into interest rate swap contracts in which it pays a fixed rate of interest in exchange for a variable rate of interest, usually three-month LIBOR. Unrealized gains and losses on the value of these swap contracts were recorded in other income (expense) on the consolidated statements of operations. In December 2020, these interest rate swap contracts were terminated.

The following table presents the effect of the derivative instruments on the consolidated statements of operations during the years ended December 31, 2022, 2021 and 2020:

| | Consolidated Statements of Operations Location | Realized and Unrealized Gain (Loss) ⁽¹⁾ | | |
|---------------------------------------|--|--|------------------------------|------------------------------|
| | | Year Ended December 31, 2022 | Year Ended December 31, 2021 | Year Ended December 31, 2020 |
| Interest rate swap contracts, hedging | Interest expense | \$ (1,733) | \$ (1,851) | \$ (1,562) |
| Interest rate swap contracts | Other (expense) income | \$ — | \$ — | \$ (10) |

(1) Negative values indicate a decrease to the associated consolidated statements of operations line items.

NOTE 21 - OFFSETTING OF FINANCIAL ASSETS AND LIABILITIES

The following table presents a summary of the Company's offsetting of financial liabilities and derivative liabilities (in thousands, except amounts in footnotes):

| | (i) Gross Amounts of Recognized Liabilities | (ii) Gross Amounts Offset on the Consolidated Balance Sheets | (iii) = (i) - (ii) Net Amounts of Liabilities Presented on the Consolidated Balance Sheets | (iv) Gross Amounts Not Offset on the Consolidated Balance Sheets | | (v) = (iii) - (iv) Net Amount |
|---|--|---|---|---|-------------------------|----------------------------------|
| | | | | Financial Instruments ⁽¹⁾ | Cash Collateral Pledged | |
| At December 31, 2022: | | | | | | |
| Warehouse financing facilities ⁽²⁾ | \$ 328,288 | \$ — | \$ 328,288 | \$ 328,288 | \$ — | \$ — |
| At December 31, 2021: | | | | | | |
| Warehouse financing facilities ⁽²⁾ | \$ 66,771 | \$ — | \$ 66,771 | \$ 66,771 | \$ — | \$ — |

(1) Amounts represent financial instruments pledged that are available to be offset against liability balances associated with term warehouse financing facilities, repurchase agreements and derivatives.

(2) The combined fair value of securities and loans pledged against the Company's various warehouse financing facilities and repurchase agreements was \$453.6 million and \$102.0 million at December 31, 2022 and 2021, respectively.

All balances associated with warehouse financing facilities are presented on a gross basis on the Company's consolidated balance sheets.

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Certain of the Company's warehouse financing facilities are governed by underlying agreements that generally provide for a right of offset in the event of default or in the event of a bankruptcy of either party to the transaction.

NOTE 22 - INCOME TAXES

The following table details the components of income taxes at the Company's TRSs (in thousands):

| | Years Ended December 31, | | |
|--------------------------------------|--------------------------|-------------|-------------|
| | 2022 | 2021 | 2020 |
| Income tax (benefit) expense: | | | |
| Current: | | | |
| Federal | \$ — | \$ — | \$ — |
| State | 13 | — | — |
| Total current | <u>13</u> | <u>—</u> | <u>—</u> |
| Deferred: | | | |
| Federal | — | — | — |
| State | — | — | — |
| Total deferred | <u>—</u> | <u>—</u> | <u>—</u> |
| Total | <u>\$ 13</u> | <u>\$ —</u> | <u>\$ —</u> |

A reconciliation of the income tax expense based upon the statutory tax rate to the effective income tax rate was as follows for the Company's TRSs for the years presented (in thousands):

| | Years Ended December 31, | | |
|---|--------------------------|-------------|-------------|
| | 2022 | 2021 | 2020 |
| Income tax (benefit) expense: | | | |
| Statutory tax | \$ (178) | \$ (66) | \$ (37) |
| State and local taxes, net of federal benefit | 313 | (59) | (3,353) |
| True-up of prior period tax expense | — | — | — |
| Valuation allowance | (64) | 125 | 6,407 |
| Discontinued operations adjustment | — | — | — |
| Other items | (58) | — | (3,017) |
| Total | <u>\$ 13</u> | <u>\$ —</u> | <u>\$ —</u> |

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The components of deferred tax assets and liabilities were as follows for the Company's TRSs (in thousands):

| | December 31, | |
|---|--------------|-----------|
| | 2022 | 2021 |
| Deferred tax assets related to: | | |
| Federal, state and local loss carryforwards | \$ 14,018 | \$ 14,362 |
| Charitable contribution carryforward | — | 58 |
| Capital loss carryforward | 309 | 327 |
| Equity investments | 6,657 | 6,728 |
| Interest expense limitation 163(j) | 527 | 202 |
| Total deferred tax assets | 21,511 | 21,677 |
| Valuation allowance | (21,171) | (21,360) |
| Total deferred tax assets, net of valuation allowance | \$ 340 | \$ 317 |
| Deferred tax liabilities related to: | | |
| Amortization of intangibles | \$ (254) | \$ (260) |
| Unrealized gains | (86) | (57) |
| Total deferred tax liabilities | \$ (340) | \$ (317) |
| Deferred tax assets, net | \$ — | \$ — |

At December 31, 2022 and 2021, the Company had \$60.1 million and \$61.1 million, respectively, of gross federal and \$1.8 million and \$1.9 million, respectively, of gross state and local net operating tax loss carryforwards (a collective deferred tax asset of \$14.0 million and \$14.4 million, respectively) reported in other assets in the Company's consolidated balance sheets.

The Company also generated a gross capital loss carryforward of \$1.0 million (tax effected expense of \$309,000 at December 31, 2022) in 2021 and 2020. Due to changes in management's focus regarding the non-core asset classes, the Company determined that it no longer expected to have sufficient forecasted taxable income to completely realize the tax benefits of the deferred tax assets at December 31, 2022 and 2021. Therefore, a full valuation allowance with a tax effected expense of \$21.2 million and \$21.4 million has been recorded against the deferred tax asset at December 31, 2022 and 2021, respectively. Management will continue to assess its estimate of the amount of deferred tax assets that the Company will be able to utilize.

The Company is subject to examination by the Internal Revenue Service for calendar years including and subsequent to 2019, and is subject to examination by state and local jurisdictions for calendar years including and subsequent to 2019.

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NOTE 23 - QUARTERLY RESULTS

The following is a presentation of the quarterly results of operations:

| | <u>March 31</u> (unaudited) | <u>June 30</u> (unaudited) | <u>September 30</u> (unaudited) | <u>December 31</u> (unaudited) |
|--|---------------------------------------|-------------------------------|------------------------------------|-----------------------------------|
| | (in thousands, except per share data) | | | |
| Year ended December 31, 2022: | | | | |
| Interest income | \$ 22,676 | \$ 27,019 | \$ 34,065 | \$ 42,514 |
| Interest expense | 14,907 | 15,745 | 22,939 | 28,733 |
| Net interest income | <u>\$ 7,769</u> | <u>\$ 11,274</u> | <u>\$ 11,126</u> | <u>\$ 13,781</u> |
| Net income (loss) | \$ 2,084 | \$ 5,522 | \$ 5,486 | \$ (2,666) |
| Net income allocated to preferred shares | (4,855) | (4,856) | (4,855) | (4,856) |
| Net loss allocated to non-controlling interest, net of taxes | — | 24 | 82 | 91 |
| Net (loss) income allocable to common shares | <u>\$ (2,771)</u> | <u>\$ 690</u> | <u>\$ 713</u> | <u>\$ (7,431)</u> |
| Net (loss) income per common share - basic | <u>\$ (0.30)</u> | <u>\$ 0.08</u> | <u>\$ 0.08</u> | <u>\$ (0.87)</u> |
| Net (loss) income per common share - diluted | <u>\$ (0.30)</u> | <u>\$ 0.08</u> | <u>\$ 0.08</u> | <u>\$ (0.87)</u> |
| | <u>March 31</u> (unaudited) | <u>June 30</u> (unaudited) | <u>September 30</u> (unaudited) | <u>December 31</u> (unaudited) |
| | (in thousands, except per share data) | | | |
| Year ended December 31, 2021: | | | | |
| Interest income | \$ 24,749 | \$ 25,793 | \$ 23,986 | \$ 26,504 |
| Interest expense | 13,724 | 18,702 | 14,534 | 14,615 |
| Net interest income | <u>\$ 11,025</u> | <u>\$ 7,091</u> | <u>\$ 9,452</u> | <u>\$ 11,889</u> |
| Net income (loss) | \$ 13,056 | \$ 13,639 | \$ (4,928) | \$ 12,156 |
| Net income allocated to preferred shares | (2,588) | (3,568) | (4,877) | (4,854) |
| Net income (loss) allocable to common shares | <u>\$ 10,468</u> | <u>\$ 10,071</u> | <u>\$ (9,805)</u> | <u>\$ 7,302</u> |
| Net income (loss) per common share - basic | <u>\$ 1.03</u> | <u>\$ 1.04</u> | <u>\$ (1.03)</u> | <u>\$ 0.77</u> |
| Net income (loss) per common share - diluted | <u>\$ 1.03</u> | <u>\$ 1.04</u> | <u>\$ (1.03)</u> | <u>\$ 0.76</u> |

NOTE 24 - COMMITMENTS AND CONTINGENCIES

The Company may become involved in litigation on various matters due to the nature of the Company's business activities. The resolution of these matters may result in adverse judgments, fines, penalties, injunctions and other relief against the Company as well as monetary payments or other agreements and obligations. In addition, the Company may enter into settlements on certain matters in order to avoid the additional costs of engaging in litigation. Except as discussed below, the Company is unaware of any contingencies arising from such litigation that would require accrual or disclosure in the consolidated financial statements at December 31, 2022.

Primary Capital Mortgage, LLC ("PCM") is subject to potential litigation related to claims for repurchases or indemnifications on loans that PCM has sold to third parties. At December 31, 2022 and 2021, no such litigation demand was outstanding. Reserves for such potential litigation demands are included in the reserve for mortgage repurchases and indemnifications that totaled \$1.2 million and \$1.3 million at December 31, 2022 and 2021, respectively. The reserves for mortgage repurchases and indemnifications are included in liabilities held for sale on the consolidated balance sheets.

The Company did not have any general litigation reserve at December 31, 2022 or 2021.

Other Contingencies

As part of the May 2017 sale of its equity interest in Pearlmark Mezzanine Realty Partners IV, L.P., the Company entered into an indemnification agreement pursuant to which the Company agreed to indemnify the purchaser against realized losses of up to \$4.3 million on one mezzanine loan until its final maturity date in 2020. As a result of the indemnified party's partial sale of the mezzanine loan, the maximum exposure was reduced to \$536,000 in 2019. In October 2020, the mezzanine loan paid off its balance to the indemnified party, resulting in the extinguishment of the Company's liability.

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PCM is subject to additional claims for repurchases or indemnifications on loans that PCM has sold to investors. At December 31, 2022 and 2021, outstanding demands for indemnification, repurchase or make whole payments totaled \$3.3 million. The Company's estimated exposure for such outstanding claims, as well as unasserted claims, is included in its reserve for mortgage repurchases and indemnifications.

Other Guarantees

In January 2023, Chapel Drive East, LLC, a wholly owned subsidiary of the FSU Student Venture, entered into a loan agreement (the "Construction Loan Agreement") with Oceanview Life and Annuity Company ("Oceanview") to finance the construction of a student housing complex (the "Construction Loan").

In connection with the Company's investment in the student housing complex, ACRES RF entered into guarantees related to the Construction Loan. Pursuant to the guarantees, Jason Pollack, Frank Dellaglio and ACRES RF (collectively, the "Guarantors"), for the benefit of Oceanview, provided limited "bad boy" guaranties to Oceanview pursuant to the Construction Loan Agreement until the earlier of the payment in full of the indebtedness or the date of a sale of the property pursuant to a foreclosure of the mortgage or deed or other transfer in lieu of foreclosure is accepted by Oceanview. The Guarantors also entered into a Completion Guaranty Agreement for the benefit of Oceanview to guaranty the timely completion of the project in accordance with the Construction Loan Agreement, as well as a Carry Guaranty Agreement, for the benefit of Oceanview to guaranty and unconditional payment by Chapel Drive East, LLC of all customary or necessary costs and expenses incurred in connection with the operation, maintenance and management of the property and an Environmental Indemnity Agreement jointly and severally in favor of Oceanview whereby the Guarantors serving as Indemnitors provided environmental representations and warranties, covenants and indemnifications (collectively the "Guaranties"). The Guaranties include certain financial covenants required of ACRES RF, including required net worth and liquidity requirements.

Unfunded Commitments

Unfunded commitments on the Company's originated CRE loans generally fall into two categories: (1) pre-approved capital improvement projects; and (2) new or additional construction costs subject, in each case, to the borrower meeting specified criteria. Upon completion of the improvements or construction, the Company would receive additional interest income on the advanced amount. Whole loans had \$158.2 million and \$157.6 million in unfunded loan commitments at December 31, 2022 and 2021, respectively. Preferred equity investments had \$2.5 million in unfunded investment commitments at December 31, 2020 and were paid off during the year ended December 31, 2021.

NOTE 25 - SUBSEQUENT EVENTS

The Company has evaluated subsequent events through the filing of this report and determined that, except for the subsequent events referred to in Note 7, Note 8, Note 12 and Note 24, there have not been any events that have occurred that would require adjustments to or disclosures in the consolidated financial statements.

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ITEM 9. CHANGES AND DISAGREEMENTS WITH ACCOUNTANTS ON ACCOUNTING AND FINANCIAL DISCLOSURE

None.

ITEM 9A. CONTROLS AND PROCEDURES

Disclosure Controls and Procedures

We maintain disclosure controls and procedures that are designed to ensure that information required to be disclosed in our Securities Exchange Act of 1934, as amended, or the Exchange Act, reports is recorded, processed, summarized and reported within the time periods specified in the Securities and Exchange Commission's rules and forms, and that such information is accumulated and communicated to our management, including our Chief Executive Officer and our Chief Financial Officer, as appropriate, to allow timely decisions regarding required disclosure. In designing and evaluating the disclosure controls and procedures, our management recognized that any controls and procedures, no matter how well designed and operated, can provide only reasonable assurance of achieving the desired control objectives, and our management necessarily was required to apply its judgment in evaluating the cost-benefit relationship of possible controls and procedures.

Under the supervision of our Chief Executive Officer and Chief Financial Officer, we have carried out an evaluation of the effectiveness of our disclosure controls and procedures as of the end of the period covered by this report. Based upon that evaluation, our Chief Executive Officer and Chief Financial Officer concluded that our disclosure controls and procedures are effective at the reasonable assurance level.

Management's Report on Internal Control over Financial Reporting

Our management is responsible for establishing and maintaining adequate internal control over financial reporting as defined in Rules 13a-15(f) and 15d-15(f) under the Exchange Act. Because of its inherent limitations, internal control over financial reporting may not prevent or detect misstatements. Projections of any evaluation of effectiveness to future periods are subject to the risks that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate.

Management assessed the effectiveness of our internal control over financial reporting at December 31, 2022. In making this assessment, management used the criteria set forth in the 2013 version of the *Internal Control-Integrated Framework* issued by the Committee of Sponsoring Organizations of the Treadway Commission. Based upon this assessment, management concluded that our internal control over financial reporting is effective at December 31, 2022.

Our independent registered public accounting firm, Grant Thornton LLP, audited our internal control over financial reporting at December 31, 2022. Their report, dated March 7, 2023, expressed an unqualified opinion on our internal control over financial reporting. This report is included in this Item 9A.

Changes in Internal Control over Financial Reporting

There were no changes in our internal control over financial reporting during the quarter ended December 31, 2022 that have materially affected, or are reasonably likely to materially affect, our internal control over financial reporting.

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REPORT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM

Board of Directors and Shareholders
ACRES Commercial Realty Corp.

Opinion on internal control over financial reporting

We have audited the internal control over financial reporting of ACRES Commercial Realty Corp. (a Maryland corporation) and subsidiaries (the “Company”) as of December 31, 2022, based on criteria established in the 2013 *Internal Control—Integrated Framework* issued by the Committee of Sponsoring Organizations of the Treadway Commission (“COSO”). In our opinion, the Company maintained, in all material respects, effective internal control over financial reporting as of December 31, 2022, based on criteria established in the 2013 *Internal Control—Integrated Framework* issued by COSO.

We also have audited, in accordance with the standards of the Public Company Accounting Oversight Board (United States) (“PCAOB”), the consolidated financial statements of the Company as of and for the year ended December 31, 2022, and our report dated March 7, 2023 expressed an unqualified opinion on those financial statements.

Basis for opinion

The Company’s management is responsible for maintaining effective internal control over financial reporting and for its assessment of the effectiveness of internal control over financial reporting, included in the accompanying Management’s Report on Internal Control over Financial Reporting. Our responsibility is to express an opinion on the Company’s internal control over financial reporting based on our audit. We are a public accounting firm registered with the PCAOB and are required to be independent with respect to the Company in accordance with the U.S. federal securities laws and the applicable rules and regulations of the Securities and Exchange Commission and the PCAOB.

We conducted our audit in accordance with the standards of the PCAOB. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether effective internal control over financial reporting was maintained in all material respects. Our audit included obtaining an understanding of internal control over financial reporting, assessing the risk that a material weakness exists, testing and evaluating the design and operating effectiveness of internal control based on the assessed risk, and performing such other procedures as we considered necessary in the circumstances. We believe that our audit provides a reasonable basis for our opinion.

Definition and limitations of internal control over financial reporting

A company’s internal control over financial reporting is a process designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles. A company’s internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the company are being made only in accordance with authorizations of management and directors of the company; and (3) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use, or disposition of the company’s assets that could have a material effect on the financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent or detect misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate.

/s/ GRANT THORNTON LLP

San Francisco, California
March 7, 2023

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ITEM 9B. OTHER INFORMATION

None.

ITEM 9C. DISCLOSURE REGARDING FOREIGN JURISDICTIONS THAT PREVENT INSPECTIONS

Not applicable.

PART III

ITEM 10. DIRECTORS, EXECUTIVE OFFICERS AND CORPORATE GOVERNANCE

The information required by this item will be set forth in our definitive proxy statement with respect to our 2023 annual meeting of stockholders, to be filed on or before May 1, 2023 (“2023 Proxy Statement”), which is incorporated herein by this reference.

ITEM 11. EXECUTIVE COMPENSATION

The information required by this item will be set forth in our 2023 Proxy Statement, which is incorporated herein by this reference.

ITEM 12. SECURITY OWNERSHIP OF CERTAIN BENEFICIAL OWNERS AND MANAGEMENT AND RELATED STOCKHOLDER MATTERS

The information required by this item will be set forth in our 2023 Proxy Statement, which is incorporated herein by this reference.

ITEM 13. CERTAIN RELATIONSHIPS AND RELATED TRANSACTIONS AND DIRECTOR INDEPENDENCE

The information required by this item will be set forth in our 2023 Proxy Statement, which is incorporated herein by this reference.

ITEM 14. PRINCIPAL ACCOUNTANT FEES AND SERVICES

The information required by this item will be set forth in our 2023 Proxy Statement, which is incorporated herein by this reference.

PART IV

ITEM 15. EXHIBITS AND FINANCIAL STATEMENT SCHEDULES

(a) The following documents are filed as part of this Annual Report on Form 10-K:

1. Financial Statements

See Part II - Item 8 - “Financial Statements and Supplementary Data,” filed herewith, for a list of financial statements.

2. Financial Statement Schedules

3. Exhibits

| Exhibit No. | Description |
|-------------|---|
| 2.1 | Asset Purchase Agreement, dated June 6, 2017, by and among Stearns Lending, LLC, Primary Capital Mortgage, LLC, and Resource Capital Corp. (32) |
| 3.1(a) | Amended and Restated Articles of Incorporation of Resource Capital Corp. (1) |
| 3.1(b) | Articles of Amendment to Restated Certificate of Incorporation of Resource Capital Corp. (27) |
| 3.1(c) | Articles Supplementary 8.625% Fixed-to-Floating Series C Cumulative Redeemable Preferred Stock. (8) |
| 3.1(d) | Articles Supplementary 7.875% Series D Cumulative Redeemable Preferred Stock, as corrected. (59) |
| 3.1(e) | Articles of Amendment, effective May 25, 2018. (39) |
| 3.1(f) | Articles of Amendment, effective February 16, 2021. (56) |
| 3.1(g) | Articles of Amendment, effective May 28, 2021. (60) |
| 3.2 | Fourth Amended and Restated Bylaws of ACRES Commercial Realty Corp. (56) |
| 4.1(a) | Form of Certificate for Common Stock for Resource Capital Corp. (1) |
| 4.1(b) | Form of Certificate for 8.625% Fixed-to-Floating Series C Cumulative Redeemable Preferred Stock. (8) |
| 4.1(c) | Form of Certificate for 7.875% Series D Cumulative Redeemable Preferred Stock. (59) |
| 4.2(a) | Junior Subordinated Indenture between Resource Capital Corp. and Wells Fargo Bank, N.A., dated May 25, 2006. (2) |
| 4.2(b) | Amendment to Junior Subordinated Indenture and Junior Subordinated Note due 2036 between Resource Capital Corp. and Wells Fargo Bank, N.A., dated October 26, 2009 and effective September 30, 2009. (6) |
| 4.3(a) | Amended and Restated Trust Agreement among Resource Capital Corp., Wells Fargo Bank, N.A., Wells Fargo Delaware Trust Company and the Administrative Trustees named therein, dated May 25, 2006. (2) |
| 4.3(b) | Amendment to Amended and Restated Trust Agreement and Preferred Securities Certificate among Resource Capital Corp., Wells Fargo Bank, N.A. and the Administrative Trustees named therein, dated October 26, 2009 and effective September 30, 2009. (6) |
| 4.4 | Junior Subordinated Note due 2036 in the principal amount of \$25,774,000, dated October 26, 2009. (6) |
| 4.5(a) | Junior Subordinated Indenture between Resource Capital Corp. and Wells Fargo Bank, N.A., dated September 29, 2006. (3) |
| 4.5(b) | Amendment to Junior Subordinated Indenture and Junior Subordinated Note due 2036 between Resource Capital Corp. and Wells Fargo Bank, N.A., dated October 26, 2009 and effective September 30, 2009. (6) |
| 4.6(a) | Amended and Restated Trust Agreement among Resource Capital Corp., Wells Fargo Bank, N.A., Wells Fargo Delaware Trust Company and the Administrative Trustees named therein, dated September 29, 2006. (3) |
| 4.6(b) | Amendment to Amended and Restated Trust Agreement and Preferred Securities Certificate among Resource Capital Corp., Wells Fargo Bank, N.A. and the Administrative Trustees named therein, dated October 26, 2009 and effective September 30, 2009. (6) |
| 4.7 | Amended Junior Subordinated Note due 2036 in the principal amount of \$25,774,000, dated October 26, 2009. (6) |
| 4.8 | Description of Registrant’s Securities Registered Pursuant to Section 12 of the Securities Exchange Act of 1934. (70) |
| 4.9(a) | Base Indenture, dated August 16, 2021, between the Company and the Trustee. (63) |
| 4.9(b) | First Supplemental Indenture, dated August 16, 2021, between the Company and the Trustee. (63) |
| 4.9(c) | Form of 5.75% Senior Note due 2026 (included in Exhibit 4.9(b)) |
| 10.1(a) | Fourth Amended and Restated Management Agreement, dated as of July 31, 2020, by and among Exantas Capital Corp., ACRES Capital, LLC and ACRES Capital Corp. (51) |
| 10.1(b) | First Amendment to Fourth Amended and Restated Management Agreement, dated as of February 16, 2021, by and among ACRES Commercial Realty Corp. f/k/a Exantas Capital Corp., ACRES Capital, LLC and ACRES Capital Corp. (57) |
| 10.1(c) | Second Amendment to Fourth Amended and Restated Management Agreement, dated as of May 6, 2022, by and among ACRES Commercial Realty Corp. f/k/a Exantas Capital Corp., ACRES Capital, LLC and ACRES Capital Corp. (71) |
| 10.2(a) | Second Amended and Restated Omnibus Equity Compensation Plan. (45) |
| 10.2(b) | Amendment No. 1 to the Exantas Capital Corp. Second Amended and Restated Omnibus Equity Compensation Plan. (52) |
| 10.2(c) | Third Amended and Restated Omnibus Equity Compensation Plan. (58) |

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|---------|--|
| 10.2(d) | Form of Stock Award Agreement. (25) |
| 10.2(e) | Form of Stock Award Agreement (for employees with Resource America, Inc. employment agreements). (25) |
| 10.3 | Form of Indemnification Agreement. (33) |
| | Loan and Servicing Agreement, dated as of July 31, 2020, among RCC Real Estate SPE Holdings LLC, as Holdings, RCC Real Estate SPE 9 LLC, as the Borrower, Massachusetts Mutual Life Insurance Company and the other Lenders from time to time party thereto, Wells Fargo Bank, National Association, as the Administrative Agent, Massachusetts Mutual Life Insurance Company, as the Facility Servicer, ACRES Capital Servicing LLC, as the Portfolio Asset Servicer, and Wells Fargo Bank, National Association, as the Collateral Custodian. (51) |
| 10.4(a) | First Amendment to Loan and Servicing Agreement, dated as of September 16, 2020, among RCC Real Estate SPE Holdings LLC, RCC Real Estate SPE 9 LLC, Massachusetts Mutual Life Insurance Company and Wells Fargo Bank, National Association, as the Administrative Agent. (53) |
| 10.4(b) | Second Amendment to Loan and Servicing Agreement, dated as of May 25, 2021, among RCC Real Estate SPE Holdings LLC, RCC Real Estate SPE 9 LLC, Massachusetts Mutual Life Insurance Company and Wells Fargo Bank, National Association as the Administrative Agent. (62) |
| 10.4(c) | Third Amendment to Loan and Servicing Agreement, dated as of August 16, 2021, among RCC Real Estate SPE Holdings LLC, RCC Real Estate SPE 9 LLC, the Lenders party thereto and Mutual Life Insurance Company and Wells Fargo Bank, National Association as the Administrative Agent. (68) |
| 10.4(d) | Fourth Amendment to Loan and Servicing Agreement, dated as of April 12, 2022, among RCC Real Estate SPE Holdings LLC, RCC Real Estate SPE 9 LLC, the Lenders party thereto and Massachusetts Mutual Life Insurance Company and Wells Fargo Bank, National Association as the Administrative Agent. (71) |
| 10.4(e) | Fifth Amendment to Loan and Servicing Agreement, dated as of July 26, 2022, among RCC Real Estate SPE Holdings LLC, RCC Real Estate SPE 9 LLC, the Lenders party thereto and Massachusetts Mutual Life Insurance Company and Wells Fargo Bank, National Association as the Administrative Agent. (72) |
| 10.4(f) | Sixth Amendment to Loan and Servicing Agreement, dated as of August 29, 2022, among RCC Real Estate SPE Holdings LLC, RCC Real Estate SPE 9 LLC, the Lenders party thereto and Massachusetts Mutual Life Insurance Company and Wells Fargo Bank, National Association as the Administrative Agent. (74) |
| 10.4(g) | Guaranty, dated as of July 31, 2020, by Exantas Capital Corp., and each of Exantas Real Estate Funding 2018-RSO6 Investor, LLC, Exantas Real Estate Funding 2019-RSO7 Investor, LLC, and Exantas Real Estate Funding 2020-RSO8 Investor, LLC, in favor of the Secured Parties. (51) |
| 10.4(h) | Amended and Restated Loan and Servicing Agreement, dated as of December 22, 2022, among RCC Real Estate SPE Holdings LLC, RCC Real Estate SPE 9 LLC, Plymouth Meeting Holdings, LLC, Exantas Phili Holdings, LLC, ACRES Real Estate TRS 9 LLC, Massachusetts Mutual Life Insurance Company and ACRES Capital Servicing (76) |
| 10.4(i) | Guaranty, dated May 25, 2021 between Exantas Phili Holdings, LLC in favor of the Secured Parties. (71) |
| 10.4(j) | Guaranty, dated May 25, 2021 between 65 E. Wacker Holdings, LLC in favor of the Secured Parties. (71) |
| 10.4(k) | Guaranty, dated May 25, 2021 between Plymouth Meeting Holdings, LLC in favor of the Secured Parties. (71) |
| 10.4(l) | Pledge and Guaranty Agreement, dated August 16, 2021 between ACRES Real Estate TRS 9 LLC in favor of the Secured Parties. (71) |
| 10.4(m) | Guaranty, dated April 12, 2022 between Appleton Hotel Holdings, LLC and Appleton Hotel Leasing, LLC in favor of the Secured Parties. (71) |
| 10.4(n) | Note and Warrant Purchase Agreement, dated as of July 31, 2020, by and among Exantas Capital Corp. and the Purchasers signatory thereto. (51) |
| 10.5(a) | Agreement between the Company, OCM XAN Holdings PT, LLC and the Massachusetts Mutual Life Insurance Company, dated August 18, 2021. (64) |
| 10.5(b) | Amendment No. 1 to Note and Warrant Purchase Agreement, dated January 31, 2022, between ACRES Commercial Realty Corp. and the Purchasers signatory thereto. (69) |
| 10.5(c) | Promissory Note, dated as of July 31, 2020, issued by ACRES Capital Corp. to RCC Real Estate, Inc. (51) |
| 10.6 | Manager Incentive Plan. (58) |
| 10.7(a) | Form of Stock Award Agreement Under the Manager Incentive Plan. (61) |
| 10.7(b) | Equity Distribution Agreement, dated October 4, 2021, by and among ACRES Commercial Realty Corp., ACRES Capital, LLC and JonesTrading Institutional Services LLC. (66) |
| 10.8 | Building Loan Agreement, dated as of January 24, 2023 between Chapel Drive East, LLC and Oceanview Life and Annuity Company |
| 10.9(a) | Guaranty Agreement executed January 24, 2023 by Jason Pollack, Frank Dellaglio and ACRES Realty Funding, Inc. for the benefit of Oceanview Life and Annuity Company. (75) |
| 10.9(b) | Completion Guaranty Agreement executed January 24, 2023 by Jason Pollack, Frank Dellaglio and ACRES Realty Funding, Inc. for the benefit of Oceanview Life and Annuity Company. (75) |
| 10.9(c) | Carry Guaranty Agreement executed January 24, 2023 by Jason Pollack, Frank Dellaglio and ACRES Realty Funding, Inc. for the benefit of Oceanview Life and Annuity Company. (75) |
| 10.9(d) | Environmental Indemnity Agreement executed January 24, 2023 by Jason Pollack, Frank Dellaglio and ACRES Realty Funding, Inc. in favor of Oceanview Life and Annuity Company. (75) |
| 10.9(e) | List of Subsidiaries of ACRES Commercial Realty Corp. |
| 21.1 | |

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|---------|---|
| 23.1 | Consent of Grant Thornton LLP. |
| 31.1 | Rule 13a-14(a)/Rule 15d-14(a) Certification of Chief Executive Officer. |
| 31.2 | Rule 13a-14(a)/Rule 15d-14(a) Certification of Chief Financial Officer. |
| 32.1 | Certification Pursuant to 18 U.S.C. Section 1350. |
| 32.2 | Certification Pursuant to 18 U.S.C. Section 1350. |
| 99.1(a) | Master Repurchase Agreement for \$250,000,000 between RCC Real Estate SPE 8, LLC, as Seller, and JPMorgan Chase Bank, National Association, as Buyer, dated October 26, 2018. (40) |
| 99.1(b) | First Amendment to Uncommitted Master Repurchase Agreement dated as of August 14, 2020 between RCC Real Estate SPE 8, LLC and JPMorgan Chase Bank, National Association. (55) |
| 99.1(c) | Amendment No. 2 to Master Repurchase Agreement, dated September 1, 2021 between RCC Real Estate SPE 8, LLC and JPMorgan Chase Bank, National Association. (65) |
| 99.1(d) | Amendment No. 3 to Master Repurchase Agreement and Guarantee Agreement, dated October 26, 2021 between RCC Real Estate SPE 8, LLC, JPMorgan Chase Bank, National Association and ACRES Commercial Realty Corp., as guarantor (67) |
| 99.1(e) | Guarantee made by Exantas Capital Corp., as guarantor, in favor of JPMorgan Chase Bank, National Association, dated October 26, 2018. (40) |
| 99.1(f) | First Amendment to Guarantee Agreement, dated May 6, 2020, between Exantas Capital Corp. and JPMorgan Chase Bank, National Association. (50) |
| 99.1(g) | Amendment No. 2 To Guarantee Agreement, dated October 2, 2020 between Exantas Capital Corp. and JPMorgan Chase Bank, National Association. (54) |
| 99.1(h) | Amendment No. 4 To Guarantee Agreement, dated November 17, 2022 between ACRES Commercial Realty Corp. and JPMorgan Chase Bank, National Association. (77) |
| 99.2(a) | Master Repurchase and Securities Contract Agreement between ACRES Real Estate SPE 10, LLC, as Seller, and Morgan Stanley Mortgage Capital Holdings LLC, as Administrative Agent, dated November 3, 2021. (68) |
| 99.2(b) | First Amendment to Master Repurchase and Securities Contract Agreement, dated January 28, 2022, between ACRES Real Estate SPE 10, LLC and Morgan Stanley Mortgage Capital Holdings LLC, as Administrative Agent. (69) |
| 99.2(c) | Guaranty made by ACRES Commercial Realty Corp., as Guarantor, in favor of Morgan Stanley Mortgage Capital Holdings LLC, dated November 3, 2021. (68) |
| 99.2(d) | Amendment No. 1 to Guaranty, dated November 18, 2022 between ACRES Commercial Realty Corp. and Morgan Stanley Mortgage Capital Holdings LLC. (77) |
| 99.3 | Federal Income Tax Consequences of our Qualification as a REIT. |
| 101.INS | Inline XBRL Instance Document - the instance document does not appear in the Interactive Data File because its XBRL tags are embedded within the Inline XBRL document. |
| 101.SCH | Inline XBRL Taxonomy Extension Schema Document. |
| 101.CAL | Inline XBRL Taxonomy Extension Calculation Linkbase Document. |
| 101.DEF | Inline XBRL Taxonomy Extension Definition Linkbase Document. |
| 101.LAB | Inline XBRL Taxonomy Extension Label Linkbase Document. |
| 101.PRE | Inline XBRL Taxonomy Extension Presentation Linkbase Document. |
| 104 | Cover Page Interactive Data File. |
| (1) | Filed previously as an exhibit to the Company's Registration Statement on Form S-11, Registration No. 333-126517. |
| (2) | Filed previously as an exhibit to the Company's Quarterly Report on Form 10-Q for the quarter ended June 30, 2006. |
| (3) | Filed previously as an exhibit to the Company's Quarterly Report on Form 10-Q for the quarter ended September 30, 2006. |
| (4) | Filed previously as an exhibit to the Company's Quarterly Report on Form 10-Q for the quarter ended September 30, 2013. |
| (5) | Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on June 26, 2014. |
| (6) | Filed previously as an exhibit to the Company's Quarterly Report on Form 10-Q for the quarter ended September 30, 2009. |
| (7) | RESERVED |
| (8) | Filed previously as an exhibit to the Company's Registration Statement on Form 8-A filed on June 9, 2014. |
| (9) | Filed previously as an exhibit to the Company's Annual Report on Form 10-K for the year ended December 31, 2010. |
| (10) | RESERVED |
| (11) | RESERVED |
| (12) | RESERVED |
| (13) | Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on March 2, 2012. |
| (14) | Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on June 13, 2012. |
| (15) | RESERVED |
| (16) | RESERVED |

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- (17) RESERVED
- (18) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on September 23, 2014.
- (19) RESERVED
- (20) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on October 1, 2012.
- (21) RESERVED
- (22) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on April 8, 2013.
- (23) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on July 25, 2013.
- (24) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on October 21, 2013.
- (25) Filed previously as an exhibit to the Company's Quarterly Report on Form 10-Q for the quarter ended June 30, 2014.
- (26) Filed previously as an exhibit to the Company's Quarterly Report on Form 10-Q for the quarter ended March 31, 2015.
- (27) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on September 1, 2015.
- (28) RESERVED
- (29) Filed previously as an exhibit to the Company's Quarterly Report on Form 10-Q for the quarter ended June 30, 2016.
- (30) RESERVED
- (31) Filed previously as an exhibit to the Company's Annual Report on Form 10-K for the year ended December 31, 2016.
- (32) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on June 8, 2017.
- (33) Filed previously as an exhibit to the Company's Quarterly Report on Form 10-Q for the quarter ended June 30, 2017.
- (34) RESERVED
- (35) Filed previously as an exhibit to the Company's Quarterly Report on Form 10-Q for the quarter ended September 30, 2016.
- (36) RESERVED
- (37) Filed previously as an exhibit to the Company's Quarterly Report on Form 10-Q for the quarter ended September 30, 2017.
- (38) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on April 12, 2018.
- (39) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on May 25, 2018.
- (40) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on October 30, 2018.
- (41) RESERVED
- (42) Filed previously as an exhibit to the Company's Annual Report on Form 10-K for the year ended December 31, 2018.
- (43) RESERVED
- (44) RESERVED
- (45) Filed previously as an exhibit to the Company's Proxy Statement filed on April 18, 2019.
- (46) RESERVED
- (47) RESERVED
- (48) RESERVED
- (49) Filed previously as an exhibit to the Company's Annual Report on Form 10-K for the year ended December 31, 2019.
- (50) Filed previously as an exhibit to the Company's Quarterly Report on Form 10-Q for the quarter ended March 31, 2020.
- (51) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on August 3, 2020.
- (52) Filed previously as an exhibit to the Company's Quarterly Report on Form 10-Q for the quarter ended June 30, 2020.
- (53) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on September 22, 2020.
- (54) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on October 7, 2020.
- (55) Filed previously as an exhibit to the Company's Quarterly Report on Form 10-Q for the quarter ended September 30, 2020.
- (56) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on February 18, 2021.
- (57) Filed previously as an exhibit to the Company's Annual Report on Form 10-K for the year ended December 31, 2020.
- (58) Filed previously as an exhibit to the Company's Proxy Statement filed on April 12, 2021.
- (59) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on May 21, 2021.
- (60) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on June 1, 2021.
- (61) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on June 9, 2021.
- (62) Filed previously as an exhibit to the Company's Quarterly Report on Form 10-Q for the quarter ended June 30, 2021.
- (63) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on August 17, 2021.
- (64) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on August 20, 2021.

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- (65) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on September 2, 2021.
- (66) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on October 7, 2021.
- (67) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on October 29, 2021.
- (68) Filed previously as an exhibit to the Company's Quarterly Report on Form 10-Q for the quarter ended September 30, 2021.
- (69) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on February 3, 2022.
- (70) Filed previously as an exhibit to the Company's Annual Report on Form 10-K for the year ended December 31, 2021.
- (71) Filed previously as an exhibit to the Company's Quarterly Report on Form 10-Q for the quarter ended March 31, 2022.
- (72) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on July 27, 2022.
- (73) Filed previously as an exhibit to the Company's Quarterly Report on Form 10-Q for the quarter ended June 30, 2022.
- (74) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on August 30, 2022.
- (75) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on January 25, 2023.
- (76) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on December 22, 2022.
- (77) Filed previously as an exhibit to the Company's Current Report on Form 8-K filed on November 18, 2022.

ITEM 16. FORM 10-K SUMMARY

None.

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SIGNATURES

Pursuant to the requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, as amended, the registrant has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized.

ACRES COMMERCIAL REALTY CORP.

March 7, 2023

By: /s/ Mark Fogel

Mark Fogel
President & Chief Executive Officer

Pursuant to the requirements of the Securities Exchange Act of 1934, as amended, this report has been signed below by the following persons on behalf of the registrant and in the capacities and on the dates indicated.

| | | |
|---|---|---------------|
| <u>/s/ Andrew Fentress</u> ANDREW FENTRESS | Chairman of the Board | March 7, 2023 |
| <u>/s/ Mark Fogel</u> MARK FOGEL | President, Chief Executive Officer & Director (Principal Executive Officer) | March 7, 2023 |
| <u>/s/ Karen Edwards</u> KAREN EDWARDS | Director | March 7, 2023 |
| <u>/s/ William B. Hart</u> WILLIAM B. HART | Director | March 7, 2023 |
| <u>/s/ Gary Ickowicz</u> GARY ICKOWICZ | Director | March 7, 2023 |
| <u>/s/ Steven J. Kessler</u> STEVEN J. KESSLER | Director | March 7, 2023 |
| <u>/s/ Murray S. Levin</u> MURRAY S. LEVIN | Director | March 7, 2023 |
| <u>/s/ P. Sherrill Neff</u> P. SHERRILL NEFF | Director | March 7, 2023 |
| <u>/s/ Dawanna Williams</u> DAWANNA WILLIAMS | Director | March 7, 2023 |
| <u>/s/ David J. Bryant</u> DAVID J. BRYANT | Senior Vice President Chief Financial Officer and Treasurer (Principal Financial Officer) | March 7, 2023 |
| <u>/s/ Eldron C. Blackwell</u> ELDRON C. BLACKWELL | Vice President Chief Accounting Officer (Principal Accounting Officer) | March 7, 2023 |

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SCHEDULE II
ACRES Commercial Realty Corp.
Valuation and Qualifying Accounts
(in thousands)

| | <u>Balance at Beginning of Period</u> | <u>Adoption of Updated Accounting Guidance</u> | <u>Charge to Expense</u> | <u>Loans Charged off/Recovered</u> | <u>Balance at End of Period</u> |
|-------------------------------------|---|--|------------------------------|--|-------------------------------------|
| Allowance for credit losses: | | | | | |
| Year Ended December 31, 2022 | \$ 8,805 | | \$ 12,295 | \$ (2,297) | \$ 18,803 |
| Year Ended December 31, 2021 | \$ 34,310 | \$ — | \$ (21,262) | \$ (4,243) | \$ 8,805 |
| Year Ended December 31, 2020 | \$ 1,460 | \$ 3,032 | \$ 30,815 | \$ (997) | \$ 34,310 |

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SCHEDULE III
ACRES Commercial Realty Corp.
Real Estate and Accumulated Depreciation
(in thousands)

| | <u>Initial Cost to Company</u> | | | | <u>Gross Amount of Which Carried at Close of Period</u> | | | | Year of Construction | Date Acquired | Life on Which Depreciation in Latest Statements of Comprehensive Income is Computed |
|--|--------------------------------|-----------------|----------------------------|--|---|----------------------------|-------------------|--------------------------|----------------------|---------------|---|
| | Encumbrances | Land | Buildings and Improvements | Costs Capitalized Subsequent to Acquisition - Improvements | Land | Buildings and Improvements | Total | Accumulated Depreciation | | | |
| Hotel property, Northeast region (held for sale) ⁽¹⁾⁽²⁾⁽³⁾ | \$ 19,875 | \$ — | \$ 30,944 | \$ 450 | \$ — | \$ 31,394 | \$ 31,394 | \$ (1,693) | 2000 | November 2020 | 34.8 years |
| Office property, Northeast region ⁽⁴⁾ | N/A | 8,189 | 4,706 | — | 8,189 | 4,706 | 12,895 | (488) | 1999 | October 2021 | 38.6 years |
| Unimproved land, Northeast region | N/A | 14,171 | — | 32 | 14,171 | 32 | 14,203 | — | N/A | November 2021 | N/A |
| Student housing property, Southeast region ⁽⁴⁾ | 18,710 | 15,976 | 19,114 | — | 15,976 | 19,114 | 35,090 | (391) | 2003 | April 2022 | 39.1 years |
| Hotel property, East North Central region ⁽³⁾⁽⁴⁾ | 20,300 | — | 51,353 | 347 | — | 51,700 | 51,700 | (892) | 1982 | April 2022 | 37.2 years |
| Hotel property, Northeast region (held for sale) ⁽¹⁾ | N/A | — | 13,442 | 36 | — | 13,478 | 13,478 | — | 1999 | July 2022 | N/A |
| Total | \$ 58,885 | \$38,336 | \$ 119,559 | \$ 865 | \$38,336 | \$ 120,424 | \$ 158,760 | \$ (3,464) | | | |

(1) The property is being held for sale and is evaluated at the lower of cost or fair value.

(2) The property was acquired through a deed in lieu of foreclosure transaction.

(3) The property is included as collateral on our senior secured financing facility.

(4) The life on which depreciation in latest statements of comprehensive income is computed was calculated as the weighted average of the useful lives of the building, site improvements and tenant improvements, which comprise the investments in the properties.

The following table rolls forward our gross investment in real estate and the related accumulated depreciation (in thousands):

| | <u>Years Ended December 31,</u> | | |
|--|---------------------------------|-------------------|------------------|
| | <u>2022</u> | <u>2021</u> | <u>2020</u> |
| Investments in Real Estate: | | | |
| Balance at beginning of period | \$ 75,989 | \$ 30,944 | \$ — |
| Additions during period: | | | |
| Acquisitions through deed-in-lieu of foreclosure | 13,442 | 17,889 | 30,944 |
| Other acquisitions | 86,444 | 27,065 | — |
| Improvements, etc. | 731 | 134 | — |
| Deductions during period: | | | |
| Other | (17,846) | (43) | — |
| Balance at close of period | <u>\$ 158,760</u> | <u>\$ 75,989</u> | <u>\$ 30,944</u> |
| Accumulated Depreciation: | | | |
| Balance at beginning of period | \$ (1,204) | \$ (112) | \$ — |
| Additions during period: | | | |
| Depreciation expense | (2,260) | (1,092) | (112) |
| Balance at close of period | <u>\$ (3,464)</u> | <u>\$ (1,204)</u> | <u>\$ (112)</u> |

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SCHEDULE IV
ACRES Commercial Realty Corp.
Mortgage Loans on Real Estate
At December 31, 2022
(in thousands, except amounts in footnotes)

| Type of Loan/ Borrower | Description / Location | Interest Payment Rates ⁽¹⁾ | Maturity Date ⁽²⁾ | Periodic Payment Terms ⁽³⁾ | Prior Liens | Face Amount of Loans | Net Carrying Amount of Loans ⁽⁴⁾ | Principal Amount of Loans Subject to Delinquent Principal or Interest |
|---|---------------------------|--|---------------------------------|---|----------------|----------------------------|--|--|
| CRE whole loans: | | | | | | | | |
| <i>CRE whole loans in excess of 3% of the carrying amount of total loans</i> | | | | | | | | |
| Borrower A | Multifamily/Rock Hill, SC | 1M BR + 3.30% FLOOR 0.10% | 2025 | I/O | — | \$ 68,397 | \$ 67,925 | \$ — |
| <i>CRE whole loans less than 3% of the carrying amount of total loans</i> | | | | | | | | |
| CRE whole loan ⁽⁵⁾ | Multifamily/ Various | 1M BR + 2.85% - 5.00% FLOOR 0.05% - 4.32% | 2023-2026 | I/O | — | 1,483,538 | 1,474,330 | — |
| CRE whole loan ⁽⁶⁾⁽⁷⁾ | Office/ Various | 1M BR + 3.09% - 6.00% FLOOR 0.10% - 3.13% | 2023-2026 | I/O | — | 273,357 | 271,738 | 43,539 |
| CRE whole loan | Hotel/ Various | 1M BR + 3.83% - 8.50% FLOOR 0.05% - 3.02% | 2023-2025 | I/O | — | 179,475 | 178,502 | — |
| CRE whole loan | Self-Storage/ Various | 1M BR + 3.85% - 5.50% FLOOR 0.10% - 1.00% | 2024-2025 | I/O | — | 52,712 | 52,370 | — |
| CRE whole loan ⁽⁶⁾ | Retail/ Various | 1M BR + 4.65% FLOOR 2.05% | | I/O | — | 8,025 | 8,025 | 8,025 |
| Total CRE whole loans | | | | | | <u>2,065,504</u> | <u>2,052,890</u> | <u>51,564</u> |
| Mezzanine loans: | | | | | | | | |
| <i>Mezzanine loans less than 3% of the carrying amount of total loans ⁽⁸⁾⁽⁹⁾</i> | | | | | | | | |
| Total mezzanine loans | | | | | | <u>42,772</u> | <u>4,700</u> | <u>38,072</u> |
| Allowance for credit losses | | | | | | | (18,803) | |
| Total loans | | | | | | <u>\$ 2,108,276</u> | <u>\$ 2,038,787</u> | <u>\$ 89,636</u> |

(1) The benchmark rate, “BR” comprises of the London Interbank Offered Rate (“LIBOR”) and the Term Secured Overnight Financing Rate (“SOFR”), which are used as benchmarks on the Company’s CRE whole loans. Effective June 30, 2023, one-month LIBOR will no longer be published.

(2) Maturity dates exclude extension options that may be available to borrower.

(3) I/O = interest only

(4) The net carrying amount of loans includes an individually determined allowance for credit losses of \$4.7 million and a general allowance for credit losses of \$14.1 million at December 31, 2022.

(5) Benchmark rates exclude one interest-only multifamily loan with no benchmark floor.

(6) Maturity dates exclude two office loans and one retail loan in maturity default at December 31, 2022.

(7) Includes three office loans with total par of \$36.2 million that are amortizing loans.

(8) Includes one mezzanine loan with a par of \$4.7 million that had an individually determined reserve of \$4.7 million.

(9) Includes one mezzanine loan with a par of \$38.1 million and a carrying value of zero in default at December 31, 2022.

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The following table reconciles our CRE loans carrying amounts for the periods indicated (in thousands):

| | Years Ended December 31, | | |
|---|--------------------------|---------------------|---------------------|
| | 2022 | 2021 | 2020 |
| Balance at beginning of year | \$ 1,873,746 | \$ 1,507,682 | \$ 1,789,985 |
| Additions during the period: | | | |
| New loans originated or acquired | 523,259 | 1,367,157 | 263,081 |
| Funding of existing loan commitments | 66,296 | 29,855 | 34,981 |
| Amortization of loan origination and extension fees and loan origination costs, net | 8,189 | 8,337 | 5,555 |
| (Provision for) reversal of credit losses, net | (12,295) | 21,262 | (30,815) |
| Loans charged-off | 2,297 | 4,243 | 997 |
| Capitalized interest and loan acquisition costs | — | 228 | 1,126 |
| Deductions during the period: | | | |
| Payoff and paydown of loans | (399,550) | (1,019,616) | (493,968) |
| Deed in lieu of foreclosure | (14,000) | (19,900) | (37,956) |
| Capitalized origination and extension fees | (6,858) | (16,202) | (3,821) |
| Loss on discounted payoff | (2,297) | — | — |
| Cost of loans sold | — | (9,300) | (18,451) |
| Cumulative effect of accounting change for adoption of credit loss guidance | — | — | (3,032) |
| Balance at end of year | <u>\$ 2,038,787</u> | <u>\$ 1,873,746</u> | <u>\$ 1,507,682</u> |

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BUILDING LOAN AGREEMENT

Dated as of January 24, 2023

Between

CHAPEL DRIVE EAST, LLC,

as Borrower

and

OCEANVIEW LIFE AND ANNUITY COMPANY,

as Lender

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BUILDING LOAN AGREEMENT

THIS BUILDING LOAN AGREEMENT, dated as of January 24th, 2023 (as amended, restated, replaced, supplemented or otherwise modified from time to time, this “**Agreement**”), between **OCEANVIEW LIFE AND ANNUITY COMPANY**, an Alabama corporation (together with its successors and assigns, “**Lender**”), having an address at c/o Oceanview Asset Management, 142 West 57th Street, 3rd Floor, New York, New York 10019, and **CHAPEL DRIVE EAST, LLC**, a Delaware limited liability company (“**Borrower**”), having its principal place of business at c/o Charles Street Partners, 1430 Larimer Street, Suite 302, Denver, Colorado 80202.

W I T N E S S E T H:

WHEREAS, Borrower desires to obtain the Loan (as defined herein) from Lender; and

WHEREAS, Lender is willing to make the Loan to Borrower, subject to and in accordance with the terms of this Agreement and the other Loan Documents (as defined herein).

NOW THEREFORE, in consideration of the making of the Loan by Lender and the covenants, agreements, representations and warranties set forth in this Agreement, the parties hereto hereby covenant, agree, represent and warrant as follows:

I. DEFINITIONS; PRINCIPLES OF CONSTRUCTION.

Section 1.1 Definitions. For all purposes of this Agreement, except as otherwise expressly required or unless the context clearly indicates a contrary intent, the following terms shall have the respective meanings indicated:

“**Acceptable LLC**” shall mean a limited liability company formed under Delaware law which (i) has at least one springing member, which, upon the dissolution of all of the members or the withdrawal or the disassociation of all of the members from such limited liability company, shall immediately become the sole member of such limited liability company, and (ii) otherwise is acceptable to Lender.

“**Account Collateral**” shall mean all of Borrower’s right, title and interest in and to (i) the Accounts, and all cash, checks, drafts, certificates and instruments, if any, from time to time deposited or held in the Accounts from time to time; (ii) any and all amounts invested in investments in the Accounts; (iii) all interest, dividends, cash, instruments and other property from time to time received, receivable or otherwise payable in respect of, or in exchange for, any or all of the foregoing; and (iv) to the extent not covered by clauses (i) - (iii) above, all “proceeds” (as defined under the UCC as in effect in the State in which the Accounts are located) of any or all of the foregoing.

“**Accounts**” shall mean the Cash Management Account, the Lockbox Account, the Reserve Accounts and any other account (including any book-entry sub-account) established (or to be established) by this Agreement or the other Loan Documents or into which Reserve Funds are deposited.

“**ACRES Affiliates**” shall mean, so long as ACRES Commercial Realty Corp., a Delaware corporation (the “**REIT**”) is publicly traded on a nationally recognized stock exchange, any Person that is wholly owned (whether directly or indirectly) by the REIT and (a) Controlled by the REIT or (b) under common Control with the REIT.

“**ACRES Change of Control Conditions**” shall mean that (a) Borrower has provided Lender written notice of the occurrence of a Removal Event (as such term is defined in Section 5.2 of the Joint Venture’s operating agreement), which notice shall contain reasonably sufficient detail to enable Lender to determine that ACRES and/or any ACRES Affiliate has been duly appointed as the replacement managing member of the Joint Venture (in such capacity, the “**ACRES Managing Member**”), provided that if an ACRES Affiliate becomes the ACRES Managing Member and customary background and “know your customer” searches were not delivered with respect to such ACRES Affiliate in connection with the closing of the Loan, then such change in Control shall be conditioned upon the delivery of customary searches reasonably requested by Lender in writing (including, but not limited to, credit, judgment, lien, litigation, bankruptcy, criminal and watch list) reasonably acceptable to Lender with respect to such ACRES Affiliate), (b) the ACRES Managing Member shall thereafter (i) have Control of the Borrower and (ii) control the day-to-day management and operations of the Property, (c) (i) if Completion has not yet occurred, ACRES engages a replacement construction manager pursuant to a construction management agreement, each of which must be acceptable to Lender in its sole, but reasonable discretion and delivers such documentation relating to the construction manager and the construction management agreement as may be reasonably required by Lender or (ii) if Completion has occurred, the Property shall be managed by a Qualified Manager, (d) such Transfer does not result in ACRES, together with other ACRES Affiliates and the REIT, owning in the aggregate less than a fifty-one percent (51%) indirect interest in Borrower and (e) Borrower shall pay all of Lender’s reasonable out-of-pocket costs and expenses in connection with the related Transfer.

“**Act**” shall have the meaning set forth in Section 5.1 hereof.

“**Additional Advance**” shall have the meaning set forth in Section 2.1.2 hereof.

“**Advance Request**” shall have the meaning set forth in Section 2.17(h) hereof.

“**Affiliate**” shall mean, as to any Person, any other Person that, directly or indirectly, is in Control of, is Controlled by or is under common Control with such Person or is a director or officer of such Person or of an Affiliate of such Person.

“**Affiliated Manager**” shall mean any Manager that is an Affiliate of Borrower, SPE Party, or any Guarantor.

“**ALTA**” shall mean American Land Title Association, or any successor thereto.

“**Alternate Benchmark Rate**” shall mean the sum of (a) the applicable Benchmark Replacement to the extent that such Benchmark Replacement has replaced such prior benchmark rate pursuant to Section 2.2.2(b) hereof and (b) the Spread. Notwithstanding the foregoing, in no event shall the Alternate Benchmark Rate be less than the sum of (i) the Spread and (ii) the Benchmark Floor.

“Alternate Benchmark Rate Loan” shall mean the Loan at such time as interest thereon accrues at a rate of interest based upon any Benchmark other than Term SOFR or the Federal Funds Rate.

“Alteration Threshold” shall mean an amount equal to two percent (2%) of the Outstanding Principal Balance.

“Alterations Security” shall have the meaning set forth in Section 4.1.20 hereof.

“Annual Budget” shall mean the operating budget, including all planned Capital Expenditures, for the Property prepared by Borrower for the applicable Fiscal Year.

“Anticipated Cost Report” shall mean each anticipated cost report submitted to Lender in connection with an Additional Advance pursuant to Section 2.17(w) hereof.

“Appraisal” means a written statement setting forth an opinion of the market value of the Property that (a) has been independently and impartially prepared by a member of the American Institute of Real Estate Appraisers directly engaged by Lender, (b) meets the minimum appraisal standards for national banks promulgated by the Comptroller of the Currency pursuant to Title XI of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, as amended (FIRREA), and (c) has been reviewed as to form and content and approved by Lender in its sole discretion.

“Approved Accounting Method” shall mean GAAP, cash basis accounting, federal tax basis accounting, or such other method of accounting as may be reasonably acceptable to Lender, in each case consistently applied.

“Approved Annual Budget” shall have the meaning set forth in Section 4.1.11 hereof.

“Approved Extraordinary Expense” shall mean an operating expense of the Property not set forth on the Approved Annual Budget but approved by Lender in writing (which such approval shall not be unreasonably withheld, conditioned or delayed). To the extent that the Deemed Approval Requirements are fully satisfied in connection with any Borrower request to Lender for an Approved Extraordinary Expense that is less than \$100,000.00 and Lender thereafter fails to respond, Lender’s approval shall be deemed given with respect to such operating expense.

“Approved ID Provider” shall mean each of CT Corporation, Corporation Service Company, National Registered Agents, Inc., Wilmington Trust Company, Stewart Management Company and Lord Securities Corporation; provided that (i) the foregoing shall only be deemed Approved ID Providers to the extent acceptable to Lender and (ii) additional national providers of Independent Directors may be deemed added to the foregoing hereunder to the extent approved in writing by Lender.

“Approved Operating Expense” shall mean an operating expense of the Property set forth on the Approved Annual Budget.

“Approved Replacement Guarantor” shall mean a Qualified Transferee (i) whose identity and experience in owning and operating properties comparable to the Property is

acceptable to Lender in accordance with the Prudent Lender Standard, and (ii) who either Controls Borrower, or owns a direct or indirect interest in Borrower, and (iii) who satisfies the requirements of the Guaranty as to liquidity and Net Worth. Notwithstanding anything to the contrary contained herein, Lender hereby acknowledges and agrees that the REIT shall be deemed to be an Approved Replacement Guarantor provided that at the time the REIT is initially provided as an Approved Replacement Guarantor, (a) the REIT is not under investigation by the Securities and Exchange Commission and (b) (i) Net Worth of the REIT is no less than fifty percent (50%) of what exists as of September 30, 2022 and (ii) the Unencumbered Liquid Assets (as defined in the Guaranty) of the REIT is no less than \$10,000,000.00.

“**Architect’s Certificate**” shall have the meaning as set forth in Section 2.17(e) hereof.

“**Architect’s Contract**” shall mean that certain contract for architectural services, dated as of May 26, 2022, between Borrower and Borrower’s Architect.

“**Assignment of Management Agreement**” shall mean an assignment of management agreement and subordination of management fees substantially in the form then used by Lender (or such other assignment of management agreement and subordination of management fees reasonably acceptable to Lender), among Lender, Borrower and Manager and delivered in satisfaction of Borrower’s obligations pursuant to Section 4.1.21 hereof, as the same may thereafter be amended, restated, replaced, supplemented or otherwise modified from time to time in accordance with this Agreement.

“**Award**” shall mean any compensation paid by any Governmental Authority in connection with a Condemnation.

“**Bankruptcy Code**” shall mean Title 11 of the United States Code entitled “Bankruptcy”, and any successor statute or statutes and all rules and regulations from time to time promulgated thereunder, as any of the same may be amended from time to time.

“**Bankruptcy Recourse Event**” shall mean the occurrence of any one or more of the following: (i) Borrower (and/or SPE Party, if any) files a voluntary petition under the Bankruptcy Code or any other Creditors’ Rights Law; (ii) any Restricted Party files, or joins in the filing of, an involuntary petition against Borrower (and/or SPE Party, if any) under the Bankruptcy Code or any other Creditors’ Rights Law, or colludes or cooperates with any creditors to cause, or facilitates or coordinates, such filing, or solicits or causes to be solicited petitioning creditors for such involuntary petition against Borrower (and/or SPE Party, if any) from any Person; (iii) Borrower (and/or SPE Party, if any) files an answer consenting to or otherwise acquiescing in or joining in any involuntary petition filed against it by any other Person under the Bankruptcy Code or any other Creditors’ Rights Law; (iv) any Restricted Party consents to or acquiesces in or joins in an application for the appointment of a custodian, receiver, trustee, or examiner for Borrower or any portion of the Property (and/or SPE Party, if any); (v) Borrower (and/or SPE Party, if any) makes an assignment for the benefit of creditors, or admits, in writing or in any legal proceeding, its insolvency or inability to pay its debts as they become due; (vi) any Restricted Party contesting or opposing any motion made by Lender to obtain relief from the automatic stay or seeking to reinstate the automatic stay in the event of any proceeding under the Bankruptcy Code or any other Federal or state bankruptcy or insolvency law involving Borrower (and/or SPE Party, if any); or

(vii) in the event Lender receives less than the full value of its claim in any proceeding under the Bankruptcy Code or any other Creditors' Rights Law and Guarantor or any of its Affiliates receives a direct or indirect equity interest in Borrower or the Property or other financial benefit of any kind as a result of a "new value" plan or equity contribution.

"Benchmark" shall mean, initially, the Term SOFR Reference Rate for a tenor of one month; provided that if a Benchmark Transition Event and its related Benchmark Replacement Date have occurred with respect to such Term SOFR Reference Rate or the then-current Benchmark, then "Benchmark" shall mean the applicable Benchmark Replacement to the extent that such Benchmark Replacement has replaced such prior benchmark rate pursuant to Section 2.2.2(b). Notwithstanding the foregoing or anything herein to the contrary, in no event shall the Benchmark be less than the Benchmark Floor.

"Benchmark Conversion" shall mean the conversion by Lender of the Loan from a SOFR Loan to a Loan with an Interest Rate using the Benchmark Replacement, in accordance with Section 2.2.2(b) hereof.

"Benchmark Floor" shall mean two percent (2.0%).

"Benchmark Replacement" shall mean the sum of: (a) the alternate benchmark rate that has been selected by Lender as the replacement for the then-current Benchmark giving due consideration to (i) any selection or recommendation of a replacement benchmark rate or the mechanism for determining such a rate by the Relevant Governmental Body or (ii) any evolving or then-prevailing market convention for determining a benchmark rate as a replacement for the then-current Benchmark for U.S. dollar-denominated bilateral credit facilities at such time and (b) the related Benchmark Replacement Adjustment;

provided that, such rate, or the underlying rate components thereof, is displayed on a screen or other information service that publishes such rate from time to time as selected by Lender in its reasonable discretion. If the Benchmark Replacement as determined above would be less than the Benchmark Floor, the Benchmark Replacement will be deemed to be the Benchmark Floor for the purposes of this Agreement and the other Loan Documents.

"Benchmark Replacement Adjustment" shall mean, with respect to any replacement of the then-current Benchmark with an Unadjusted Benchmark Replacement for any applicable Interest Period, the spread adjustment, or method for calculating or determining such spread adjustment, (which may be a positive or negative value or zero) that has been selected by Lender giving due consideration to (i) any selection or recommendation of a spread adjustment, or method for calculating or determining such spread adjustment, for the replacement of such Benchmark with the applicable Unadjusted Benchmark Replacement by the Relevant Governmental Body on the applicable Benchmark Replacement Date or (ii) any evolving or then-prevailing market convention for determining a spread adjustment, or method for calculating or determining such spread adjustment, for the replacement of such Benchmark with the applicable Unadjusted Benchmark Replacement for U.S. dollar-denominated bilateral credit facilities.

"Benchmark Replacement Date" shall mean the earliest to occur of the following events with respect to the then-current Benchmark:

(1) in the case of clause (1) or (2) of the definition of “Benchmark Transition Event,” the later of (a) the date of the public statement or publication of information referenced therein and (b) the date on which the administrator of such Benchmark (or the published component used in the calculation thereof) permanently or indefinitely ceases to provide such Benchmark (or such component thereof); or

(2) in the case of clause (3) of the definition of “Benchmark Transition Event,” the first date on which such Benchmark has been determined and announced by the regulatory supervisor for the administrator of such Benchmark to be non-representative; provided that, such non-representativeness will be determined by reference to the most recent statement or publication referenced in such clause (3) even if such Benchmark continues to be provided on such date.

For the avoidance of doubt, (i) if the event giving rise to the Benchmark Replacement Date occurs on the same day as, but earlier than, the Reference Time in respect of any determination, the Benchmark Replacement Date will be deemed to have occurred prior to the Reference Time for such determination and (ii) the “Benchmark Replacement Date” will be deemed to have occurred in the case of clause (1) or (2) with respect to any Benchmark upon the occurrence of the applicable event or events set forth therein with respect to such Benchmark (or the published component used in the calculation thereof).

“Benchmark Transition Event” shall mean the occurrence of one or more of the following events with respect to the then-current Benchmark:

(1) a public statement or publication of information by or on behalf of the administrator of such Benchmark (or the published component used in the calculation thereof) announcing that such administrator has ceased or will cease to provide such Benchmark (or such component thereof), permanently or indefinitely, provided that, at the time of such statement or publication, there is no successor administrator that will continue to provide such Benchmark (or such component thereof);

(2) a public statement or publication of information by the regulatory supervisor for the administrator of such Benchmark (or the published component used in the calculation thereof), the Board of Governors of the Federal Reserve System, the Federal Reserve Bank of New York, an insolvency official with jurisdiction over the administrator for such Benchmark (or such component), a resolution authority with jurisdiction over the administrator for such Benchmark (or such component) or a court or an entity with similar insolvency or resolution authority over the administrator for such Benchmark (or such component), which states that the administrator of such Benchmark (or such component) has ceased or will cease to provide such Benchmark (or such component thereof) permanently or indefinitely, provided that, at the time of such statement or publication, there is no successor administrator that will continue to provide such Benchmark (or such component thereof); or

(3) a public statement or publication of information by the regulatory supervisor for the administrator of such Benchmark (or the published component used in the calculation thereof) announcing that such Benchmark (or such component thereof) are not, or as a specified future date will not be, representative.

For the avoidance of doubt, a “Benchmark Transition Event” will be deemed to have occurred with respect to any Benchmark if a public statement or publication of information set forth above has occurred with respect to each then-current available tenor of such Benchmark (or the published component used in the calculation thereof).

“**Benchmark Unavailability Period**” shall mean (a) unless and until a Benchmark Replacement is implemented with respect to the then-current Benchmark in accordance with Section 2.2.2(b), the period (if any) during which, for any reason Lender determines (which determination shall be conclusive and binding absent manifest error) that, other than as a result of a Benchmark Transition Event, reasonable and adequate means do not exist for ascertaining such Benchmark for any Interest Period or (b) the period (if any) (x) beginning at the time that a Benchmark Replacement Date pursuant to clauses (1) or (2) of that definition has occurred if, at such time, no Benchmark Replacement has replaced the then-current Benchmark for all purposes hereunder and under any Loan Document in accordance with Section 2.2.2(b) and (y) ending at the time that a Benchmark Replacement has replaced the then-current Benchmark for all purposes hereunder and under any Loan Document in accordance with Section 2.2.2(b).

“**Borrower**” shall have the meaning set forth in the introductory paragraph hereto, together with its successors and permitted assigns.

“**Borrower’s Architect**” shall mean Humphreys & Partners Architects/Florida, L.L.C., a Florida limited liability company.

“**Borrower’s Operating Account**” shall mean the operating account and any other similar bank accounts established by, or on behalf of, Borrower with respect to the operation, leasing and/or management of the Property, as such account or accounts may, except during the continuance of an Event of Default, be replaced from time to time by Borrower upon at least ten (10) Business Days’ prior written notice to Lender, Lockbox Bank (if applicable) and (if applicable) Cash Management Bank.

“**Borrower Party**” and “**Borrower Parties**” shall mean each of Borrower, SPE Party, Sponsor, Guarantor and any Affiliated Manager.

“**Breakage Costs**” shall have the meaning set forth in Section 2.2.2(h) hereof.

“**Budget Line**” shall have the meaning as set forth in Section 2.10 hereof.

“**Building Loan**” shall mean the loan made by Lender to Borrower pursuant to this Agreement in the principal amount of up to the Building Loan Amount.

“**Building Loan Amount**” shall mean an amount of up to \$48,000,000.00.

“**Building Loan Assignment of Leases**” shall mean that certain first priority Assignment of Leases and Rents, dated as of the date hereof, from Borrower, as assignor, to Lender, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

“**Building Loan Contingency (Hard Costs)**” shall mean the amount allocated as contingency reserve in the Project Budget for “Hard Costs” of construction.

“Building Loan Contingency (Soft Costs)” shall mean the amount allocated as contingency reserve in the Project Budget for “Soft Costs” of construction.

“Building Loan Costs” shall mean those Total Project Related Costs that are to be funded from proceeds of the Building Loan, subject to availability and satisfaction of all applicable conditions to Additional Advances hereunder.

“Building Loan Documents” shall mean, collectively, this Agreement, the Building Loan Note, the Building Loan Mortgage, the Building Loan Assignment of Leases, the Environmental Indemnity, the Guaranty, any Interest Rate Cap Agreement to the extent that the same relates to the Building Loan, the Collateral Assignment of Interest Rate Cap Agreement, as applicable, as well as all other documents now or hereafter executed and/or delivered by Borrower or a Guarantor with respect to the Building Loan (including, if and when applicable, the Assignment of Management Agreement, the Cash Management Agreement and the Lockbox Agreement).

“Building Loan Mortgage” shall mean that certain first priority Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing, dated as of the date hereof, executed and delivered by Borrower to Lender as security for the Building Loan and encumbering the Property, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

“Building Loan Note” shall mean that certain Building Loan Promissory Note, dated of even date herewith, in the maximum principal amount of up to the Building Loan Amount, made by Borrower in favor of Lender, as the same may be amended, restated, replaced, supplemented, split or otherwise modified from time to time.

“Business Day” shall mean any day other than a Saturday, Sunday or any other day on which national banks in New York, New York or in the State in which the Property is located are not open for business.

“Buyout Threshold” shall mean a ratio of not less than eighty percent (80%), consisting of the quotient derived by dividing (a) the applicable value of all executed subcontracts and materials purchase contracts entered into by General Contractor with respect to the Improvements, all in form and substance acceptable to Lender by (b) the contract value of the General Contractor’s Agreement.

“Buyout Threshold Condition” shall mean that the Buyout Threshold has been satisfied, as evidenced by the delivery of the General Contractor’s buyout log (the **“Buyout Log”**) and reasonably verified by Lender and its Construction Consultant.

“C-PACE Loan” shall mean that certain loan in the approximate amount of \$15,509,965.92 made by Florida Pace Funding Agency on the date hereof to Borrower, which loan will finance certain capital improvements to enhance the energy efficiency of the Property, and which will be secured by a lien on the Property.

“Capital Expenditures” shall mean, for any period, the amount expended for items capitalized under GAAP (including expenditures for building improvements or major repairs, leasing commissions and tenant improvements).

“**Carry Guaranty**” shall mean that certain Carry Guaranty Agreement, dated as of the date hereof, from Guarantor to Lender, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

“**Cash Management Account**” shall have the meaning set forth in Section 2.7.2 hereof.

“**Cash Management Agreement**” shall mean a cash management agreement in form and substance acceptable to Lender in its sole discretion, which shall be dated on or about the date of Completion by and among Borrower, Lender and Cash Management Bank, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

“**Cash Management Bank**” shall mean the Eligible Institution which maintains the cash management account under the Cash Management Agreement.

“**Cash Management Provisions**” shall mean the representations, covenants and other terms and conditions hereof (including, without limitation, those contained in Section 2.7 hereof) and of the other Loan Documents related to, in each case, the Lockbox Agreement, the Cash Management Agreement and other related matters.

“**Casualty**” shall have the meaning set forth in Section 6.2 hereof.

“**Casualty Consultant**” shall have the meaning set forth in Section 6.4 hereof.

“**Casualty Retainage**” shall have the meaning set forth in Section 6.4 hereof.

“**Cause**” means, with respect to an Independent Director, (i) acts or omissions by such Independent Director that constitute willful disregard of, or bad faith or gross negligence with respect to, such Independent Director’s duties under the LLC Agreement, (ii) that such Independent Director has engaged in or has been charged with, or has been convicted of, fraud or other acts constituting a crime under any law applicable to such Independent Director, (iii) that such Independent Director is unable to perform his or her duties as Independent Director due to death, disability or incapacity, or (iv) that such Independent Director no longer meets the definition of Independent Director.

“**Change in Law**” shall mean the occurrence, after the Closing Date, of any of the following: (i) the adoption or taking effect of any law, rule, regulation or treaty, (ii) any change in any law, rule, regulation or treaty or in the administration, interpretation, implementation or application thereof by any Governmental Authority or (iii) the making or issuance of any request, rule, guideline or directive (whether or not having the force of law) by any Governmental Authority.

“**Change Order Log**” shall mean a change order log from the General Contractor which details all executed changes orders (since the delivery of the most recent Change Order Log) and any pending change orders.

“**Closing Date**” shall mean the date of this Agreement.

“Closing Statement” shall mean the final iteration of that certain closing statement, as prepared by Lender and executed by Borrower, in connection with the initial closing of the Loan and the release of the Building Loan Documents from escrow.

“Collateral Assignment of Interest Rate Cap Agreement” shall mean that certain Collateral Assignment of Interest Rate Cap Agreement, dated as of the date hereof, executed by Borrower for the benefit of Lender, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

“Complete” (and the lower-case version thereof) shall mean, with respect to all of the work constituting the Total Project Related Costs pursuant to the Project Budget, that (i) such work is substantially completed in accordance with the Lender-approved Plans and Specifications and all Legal Requirements, subject only to the completion of Punch List Items, as evidenced to the reasonable satisfaction of Lender and certified by the Construction Consultant, (ii) if required by Legal Requirements, a temporary certificate of occupancy (or similar) has been obtained, (iii) the Property is open for business, (iv) subject to any contest rights contained herein, the Property is free of all mechanics’, materialmen’s, and other similar liens (or such liens have otherwise been bonded over to Lender’s satisfaction), (v) Lender has received copies of all warranties from suppliers covering materials, equipment and appliances included within the applicable component of the work, and (vi) Lender has received final, unconditional lien waivers from the General Contractor and all Trade Contractors who have performed work through the date of substantial completion, which shall exclude any Punch List Items and retainage held back by Borrower prior to the issuance of the final certificate of occupancy, “as-built” drawings, and the Final Survey. The terms “Completed” and “Completion” (and lower-case versions thereof) shall have the same meaning when used in the Loan Documents.

“Completion Date” shall mean December 31, 2024, as the same may be extended for a Force Majeure Event, subject to Lender’s verification that a Force Majeure Event has occurred in the exercise of its commercially reasonable discretion.

“Completion Guaranty” shall mean that certain Completion Guaranty Agreement, dated as of the date hereof, from Guarantor to Lender, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

“Condemnation” shall mean a temporary or permanent taking by any Governmental Authority as the result or in lieu or in anticipation of the exercise of the right of condemnation or eminent domain, of all or any part of the Property, or any interest therein or right accruing thereto, including any right of access thereto or any change of grade affecting the Property or any part thereof.

“Conforming Changes” means, with respect to either the use or administration of Term SOFR or the use, administration, adoption or implementation of any Benchmark Replacement, any technical, administrative or operational changes (including changes to the definition of “Business Day,” “Reference Time”, “Interest Period”, “Payment Date”, and “U.S. Government Securities Business Day”, the timing and frequency of determining rates and making payments of interest, preceding and succeeding business day conventions, the rounding of amounts, timing of borrowing requests or prepayment, conversion or continuation notices, length of lookback periods, the

applicability of breakage provisions and other technical, administrative or operational matters) that Lender decides from time to time may be appropriate to reflect the adoption and implementation of such Benchmark Replacement and to permit the administration thereof by Lender in a manner substantially consistent with market practice (or, if Lender decides that adoption of any portion of such market practice is not administratively feasible or if Lender determines that no market practice for the administration of such Benchmark Replacement exists, in such other manner of administration as Lender decides is reasonably necessary in connection with the administration of this Agreement and the other Loan Documents).

“**Constituent Members**” shall have the meaning set forth in Section 5.2 hereof.

“**Construction Consultant**” shall mean Partner Engineering & Science, Inc. or such other Person as Lender may designate and engage as a replacement to inspect the Improvements and the Property as construction progresses and consult with and to provide advice to and to render reports to Lender, which Person may be, at Lender’s option upon notice to Borrower, either an officer or employee of Lender or consulting architects, engineers or inspectors appointed by Lender.

“**Construction Schedule**” shall mean the schedule, broken down by trade, of the estimated dates of commencement and completion of the Improvements certified by Borrower to Lender dated as of the date of the related Advance Request. The Construction Schedule as of the date hereof is attached hereto as Schedule IV.

“**Control**” shall mean the possession, directly or indirectly, of the power to direct or cause the direction of management, policies or activities of a Person, whether through ownership of voting securities, beneficial interests, by contract or otherwise. The terms “**Controlled**” and “**Controlling**” shall have correlative meanings.

“**Counterparty**” shall mean the counterparty under any Interest Rate Cap Agreement or Replacement Interest Rate Cap Agreement, which counterparty shall satisfy the Minimum Counterparty Rating and otherwise be acceptable to Lender.

“**Covered Rating Agency Information**” shall mean any Provided Information furnished to the Rating Agencies in connection with issuing, monitoring and/or maintaining the Securities.

“**Creditors’ Rights Laws**” shall mean any existing or future law (whether statute or case law) of any jurisdiction, domestic or foreign, relating to bankruptcy, insolvency, reorganization, conservatorship, arrangement, adjustment, winding-up, liquidation, dissolution, composition or other relief with respect to debts or debtors, including, without limitation, the Bankruptcy Code.

“**Crowdfunding**” shall mean any offer or sale of equity or debt securities of Borrower, Sponsor or Guarantor or any Affiliate of any of them, involving or relating to direct or indirect interests, or any combination of direct or indirect interests, in any of the foregoing Persons, that is conducted or proposed to be conducted via the internet or through the use of other general solicitation or advertising of the investment opportunity to prospective investors by the issuer of such securities or an online or other funding portal in a transaction or series of transactions intended to be exempt from the registration requirements of the Securities Act of 1933, as amended, including but not limited to pursuant to the exemptions provided by Section 4(a)(6) thereof or Rule 506(c) promulgated thereunder, any other similar state securities law, or any similar transaction.

“**Debt**” shall mean the Outstanding Principal Balance set forth in, and evidenced by, this Agreement and the Note together with all interest accrued and unpaid thereon and all other sums (including, without limitation, the Minimum Interest Payment Amount, Exit Fee and Breakage Costs, if applicable) due to Lender in respect of the Loan under the Note, this Agreement, the Mortgage and the other Loan Documents.

“**Debt Service**” shall mean, with respect to any particular period of time, scheduled principal (if any) and/or interest payments due under this Agreement and the Note.

“**Debt Service Coverage Ratio**” shall mean, as of any date of calculation, the ratio of (i) the Underwritable Cash Flow for the trailing 12-month period from the date of calculation, to (ii) Debt Service for such period, such Debt Service to be calculated (a) based upon the Monthly Debt Service Payment Amount, (b) assuming that the Loan is in place for the entirety of said period and (c) assuming a 360 month amortization of the Loan, regardless of whether any Interest Only Period was in effect.

“**Debt Service Coverage Ratio (Extension)**” shall mean, as of any date of calculation, the ratio of (i) the Underwritable Cash Flow for the trailing 12-month period from the date of calculation, to (ii) Debt Service for such period, such Debt Service to be calculated assuming (a) an Interest Rate equal to the sum of the Strike Rate plus the Spread, (b) that the Loan is in place for the entirety of said period and (c) a 360-month amortization of the Loan, regardless of whether any Interest Only Period was in effect.

“**Debt Service Coverage Ratio (First Extension)**” shall mean, as of any date of calculation, the ratio of (i) the Underwritable Cash Flow (First Extension) to (ii) Debt Service for the subsequent twelve (12) month period, such Debt Service to be calculated assuming (a) an Interest Rate equal to the sum of the Strike Rate plus the Spread and (b) that the Loan is in place for the entirety of said period.

“**Debt Yield**” shall mean, as of any date of calculation, the percentage obtained by dividing: (i) Underwritable Cash Flow for the trailing 12-month period by (ii) the Outstanding Principal Balance.

“**Debt Yield (Extension)**” shall mean, as of any date of calculation, the percentage obtained by dividing: (i) (x) in connection with the First Extension option, the Underwritable Cash Flow (First Extension) and (y) in connection with the second and third Extension Options, the Underwritable Cash Flow for the trailing 12-month period, by (ii) the Outstanding Principal Balance.

“**Deemed Approval Requirements**” shall mean, with respect to any matter, that (i) no Event of Default shall have occurred and be continuing (either at the date of any notices specified below or as of the effective date of any deemed approval), (ii) Borrower shall have sent Lender a written request for approval with respect to such matter in accordance with the applicable terms and conditions hereof (the “**Initial Notice**”), which such Initial Notice shall have been (A) accompanied by any and all required information and documentation relating thereto as may be reasonably required in order to approve or disapprove such matter (the “**Approval Information**”) and (B) marked in bold lettering with the following language: “LENDER’S RESPONSE IS

REQUIRED WITHIN TEN (10) BUSINESS DAYS OF RECEIPT OF THIS NOTICE PURSUANT TO THE TERMS OF A LOAN AGREEMENT BETWEEN THE UNDERSIGNED AND LENDER” and the envelope containing the Initial Notice shall have been marked “PRIORITY-DEEMED APPROVAL MAY APPLY”; (iii) Lender shall have failed to respond to the Initial Notice within the aforesaid time frame; (iv) Borrower shall have submitted a second request for approval with respect to such matter in accordance with the applicable terms and conditions hereof (the “**Second Notice**”), which such Second Notice shall have been (A) accompanied by the Approval Information and (B) marked in bold lettering with the following language: “LENDER’S RESPONSE IS REQUIRED WITHIN FIVE (5) BUSINESS DAYS OF RECEIPT OF THIS NOTICE PURSUANT TO THE TERMS OF A LOAN AGREEMENT BETWEEN THE UNDERSIGNED AND LENDER” and the envelope containing the Second Notice shall have been marked “PRIORITY-DEEMED APPROVAL MAY APPLY”; and (v) Lender shall have failed to respond to the Second Notice within the aforesaid time frame. For purposes of clarification, Lender requesting additional and/or clarified information, in addition to approving or denying any request (in whole or in part), shall be deemed a response by Lender for purposes of the foregoing.

“**Default**” shall mean the occurrence of any event hereunder or under any other Loan Document which, but for the giving of notice or passage of time, or both, would be an Event of Default.

“**Default Rate**” shall mean a rate per annum equal to the lesser of (i) the Maximum Legal Rate and (ii) five percent (5%) above the Interest Rate.

“**Deposit Period**” shall have the meaning set forth in Section 2.7.2(d) hereof.

“**Disbursement Conditions for Capital Expenditures or Replacements**” shall mean each of the following: (i) Borrower shall have submitted a request for payment to Lender at least ten (10) Business Days prior to the date on which Borrower has requested such payment be made, which request specifies the Capital Expenditures or Replacement, as applicable, to be paid, (ii) on the date such request is received by Lender and on the date such payment is to be made, no Event of Default shall have occurred and be continuing, (iii) Lender shall have received (a) an Officer’s Certificate from Borrower stating that the items to be funded by the requested disbursement are for Capital Expenditures or Replacements, as applicable, and a description thereof, and that such Capital Expenditures or Replacements to be funded by the requested disbursement have been completed in a good and workmanlike manner and in accordance with all applicable Legal Requirements, identifying each Person that supplied materials or labor in connection with the Capital Expenditures or Replacements and stating that each such Person has been paid in full or will be paid in full with such disbursement, and stating that the Capital Expenditures or Replacements to be funded have not been the subject of a previous disbursement, (b) evidence reasonably satisfactory to Lender that such costs have been incurred, (c) a copy of any license, permit or other approval by any Governmental Authority required in connection with the Capital Expenditures or Replacements, and (d) invoices, lien waivers or other evidence of payment satisfactory to Lender (unless direct payment is requested, upon which conditional lien waivers may be delivered, followed by lien waivers upon payment), and (iv) such other evidence as Lender shall reasonably request to demonstrate that the Replacements to be funded by the requested disbursement have been completed and are paid for or will be paid upon such disbursement.

“Disbursement Schedule” shall mean the schedule of the amounts of Additional Advances anticipated to be requisitioned by Borrower each month during the term of the Loan, dated as of the date hereof.

“Disclosure Document” shall mean a prospectus, prospectus supplement, private placement memorandum, or similar offering memorandum or offering circular, or other offering documents or marketing materials, in each case in preliminary or final form, used to offer Securities in connection with a Securitization.

“Dual Obligee and Modification Rider” shall mean a dual obligee and modification rider in the form attached hereto as Exhibit 1.1(a) attached hereto.

“Economic Occupancy” shall mean, (a) with respect to any commercial Tenant, that such Tenant (i) is bound by a valid written Lease for the demised premises and has accepted the space demised to it pursuant to the related Lease, and acknowledged that Borrower has completed all fit-out, work and other conditions required under such Lease, (ii) has taken occupancy of its space, and is using substantially all of such space for the purposes contemplated by such Lease, and (iii) has made the first full unabated monthly payment of base rent under such Lease, provided, however, that a commercial Tenant shall not be deemed to be in “Economic Occupancy” to the extent that any of the following conditions exist with respect to such Tenant or its Lease: (A) a Tenant that is the subject of a proceeding under any Creditors’ Rights Law and has not affirmed its Lease in the applicable proceeding under the Bankruptcy Code pursuant to a final, non-appealable order of a court of competent jurisdiction; (B) the Tenant is in default under its Lease in the payment of rent for a period of more than thirty (30) days or with respect to any other material default for a period beyond any applicable notice and cure periods; (C) a Tenant that has expressed its intention (directly, constructively or otherwise) to not renew, terminate, cancel and/or reject its applicable Lease, (D) a Tenant whose tenancy at the Property is month-to-month, or (E) a Lease which expires within 90 days or less of the applicable date of calculation hereunder and (b) with respect to any residential Tenant, that such Tenant (i) is bound by a valid written Lease for the demised premises, and (ii) has made the first full unabated monthly payment of base rent under such Lease (or the payment of a security deposit in the amount of the first month’s rent under such Lease), provided, however, that a residential Tenant shall not be deemed to be in “Economic Occupancy” to the extent that the Tenant is in default under its Lease in the payment of rent for a period of more than thirty (30) days, provided further, that Lender shall agree to consider residential Tenants to be in “Economic Occupancy” for purposes of this definition that are in default under its Lease in the payment of a rent for a period of not more than forty-five (45) days so long as the portion of Tenants in monetary default for in excess of thirty (30) days does not exceed ten percent (10%) of the aggregate potential rent from the then-current Rent Roll.

“Eligible Account” shall mean a separate and identifiable account from all other funds held by the holding institution that is either (i) an account or accounts maintained with a federal or state-chartered depository institution or trust company which complies with the definition of Eligible Institution or (ii) a segregated trust account or accounts maintained with a federal or state chartered depository institution or trust company acting in its fiduciary capacity which, in the case of a state chartered depository institution or trust company, is subject to regulations substantially similar to 12 C.F.R. §9.10(b), having in either case a combined capital and surplus of at least

\$50,000,000 and subject to supervision or examination by federal and state authority. An Eligible Account will not be evidenced by a certificate of deposit, passbook or other instrument.

“Eligible Institution” shall mean (i) a depository institution or trust company, the short term unsecured debt obligations or commercial paper of which are rated at least “A-1+” by S&P, “P-1” by Moody’s and “F-1+” by Fitch in the case of accounts in which funds are held for thirty (30) days or less (or, in the case of accounts in which funds are held for more than thirty (30) days, the long term unsecured debt obligations of which are rated at least “AA” by Fitch and S&P and “Aa2” by Moody’s), (ii) an institution that satisfies the then current requirements of “Eligible Institution” of the Rating Agency, (iii) Signature Bank, or (iv) Wells Fargo Bank, National Association.

“Embargoed Person” shall have the meaning set forth in Section 3.1.11 hereof.

“Environmental Indemnity” shall mean that certain Environmental Indemnity Agreement, dated as of the date hereof, executed by Borrower and Guarantor in connection with the Loan for the benefit of Lender, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

“Environmental Laws” shall have the meaning set forth in the Environmental Indemnity.

“ERISA” shall mean the Employee Retirement Income Security Act of 1974, as amended, as it may be further amended from time to time, and any successor statutes thereto, and applicable regulations issued pursuant thereto in temporary or final form.

“ERISA Provisions” shall mean the representations, covenants and other terms and conditions hereof and of the other Loan Documents related to, in each case, ERISA and other related matters (including, without limitation, those contained in Sections 3.1.18, 4.1.27 and 10.6.3 hereof)

“Event of Default” shall have the meaning set forth in Section 8.1(a) hereof.

“Excess Cash Flow” shall have the meaning set forth in Section 2.7.2 hereof.

“Excess Cash Flow Account” shall have the meaning set forth in Section 7.7 hereof.

“Excess Cash Flow Funds” shall have the meaning set forth in Section 7.7 hereof.

“Exchange Act” shall mean the Securities and Exchange Act of 1934, as amended.

“Excluded Entity” shall mean, so long as the REIT is publicly traded on a nationally recognized stock exchange, each of (a) the REIT, (b) ACRES Capital, LLC, a Delaware limited liability company, and (c) ACRES Capital Corp., a Delaware corporation.

“Exculpated Parties” shall have the meaning set forth in Section 10.7 hereof.

“Exit Fee” shall mean an amount equal to one percent (1.0%) of the full amount of the Loan.

“**Extension Fee**” shall mean an amount equal to one-half of one percent (0.50%) of the full amount of the Loan.

“**Extension Option**” shall have the meaning set forth in Section 2.9 hereof.

“**Extension Period**” shall have the meaning set forth in Section 2.9 hereof.

“**Federal Funds Rate**” shall mean, for any day, the rate per annum equal to the weighted average of the rates on overnight federal funds transactions with members of the Federal Reserve System, as published by the Federal Reserve Bank of New York on the Business Day next succeeding such day, provided that if such rate is not so published for any day which is a Business Day, the Federal Funds Rate for such day shall be the average of the quotation for such day on such transactions received by Lender from three federal funds brokers of recognized standing selected by Lender. Notwithstanding the foregoing, if the Federal Funds Rate shall be less than zero, such rate shall be deemed to be zero for purposes of this Agreement.

“**Federal Funds Interest Rate**” means the sum of (i) the Federal Funds Rate, (ii) one percent (1.0%) and (iii) the Spread.

“**Federal Funds Interest Rate Loan**” shall mean the Loan at such time as interest thereon accrues at a rate of interest based upon the Federal Funds Interest Rate.

“**15% Capital Requirement**” shall have the meaning as set forth in Section 4.1.39 hereof.

“**Final Survey**” shall mean a final survey, certified (by a land surveyor registered as such in the State) to Lender, and its successors and assigns, and the Title Company, which survey shall comply with Lender’s survey requirements and shall otherwise be acceptable to Lender and the Title Company and show the as-built location of the completed Improvements (all of which shall be within lot lines of the Land and in compliance with all set-back requirements) and all easements appurtenant thereto.

“**First Interest Period**” shall mean (i) if the Closing Date is the first (1st) day of a calendar month through the fourteenth (14th) day of a calendar month, the period from the Closing Date through and including the fourteenth (14th) day of such calendar month, or (ii) if the Closing Date is any other day of a calendar month, the period from the Closing Date through and including the fourteenth (14th) day of the calendar month following the calendar month during which the Closing Date occurs.

“**Final Completion**” shall mean that, in addition to the Completion of the Improvements, all Punch List Items shall have been completed substantially in accordance with the Plans and Specifications, all Legal Requirements and this Agreement, and that a permanent certificate of occupancy shall have been issued (if subject to any conditions, such conditions being acceptable to Lender) for the Improvements and evidence that all other governmental approvals have been issued and all other Legal Requirements have been satisfied so as to allow the Improvements to be used and operated in accordance with the Loan Documents.

“**Fiscal Year**” shall mean each twelve (12) month period commencing on January 1 and ending on December 31 during each year of the term of the Loan.

“**Fitch**” shall mean Fitch Ratings, Inc.

“**Force Majeure Event**” shall mean any event or condition beyond the control of Borrower, including, without limitation, strikes, labor disputes, pandemics, acts of God, the elements, governmental restrictions (including those which prohibit contractors from physically being present at the Property to perform work required pursuant to their trade contracts), regulations or controls, war, enemy action, civil commotion, fire, casualty, accidents, mechanical breakdowns or shortages of, or inability to obtain, labor, utilities or materials, which causes delay; provided, however, that any lack of funds shall not be deemed to be a condition beyond the control of Borrower and provided, further, that any extension therefor shall not exceed ninety (90) days.

“**Foreign Taxes**” shall have the meaning set forth in Section 2.2.2(f) hereof.

“**GAAP**” shall mean generally accepted accounting principles in the United States of America as of the date of the applicable financial report.

“**General Contractor**” shall mean Ruscilli Construction Co. LLC, an Ohio limited liability company.

“**General Contractor’s Agreement**” shall mean that certain AIA Document A133 - 2019, dated August 4, 2022 between Borrower and General Contractor, which General Contractor’s Agreement shall be a guaranteed maximum price contract which provides for the construction of the Improvements on the Land in accordance with the Plans and Specifications.

“**Governmental Authority**” shall mean any court, board, agency, commission, office or other authority of any nature whatsoever for any governmental unit (federal, state, county, district, municipal, city or otherwise) whether now or hereafter in existence.

“**Guarantor**” shall mean (a) Jason Pollack, an individual with a principal place of residence at 4408 West 34th Avenue, Denver, Colorado 80212, (b) Frank Dellaglio, an individual with a principal place of residence at 11 Stoney Brook Road, Sherborn, Massachusetts 01770, and (c) ACRES Realty Funding, Inc., a Delaware corporation (“**ACRES**”), jointly and severally, either individually or collectively as the context indicates, together with their respective successors and permitted assigns.

“**Guaranty**” shall mean, individually or collectively, as the context may require, the Recourse Guaranty, the Carry Guaranty and the Completion Guaranty.

“**Hard Costs**” shall mean those Total Project Related Costs which are for labor, materials, equipment and fixtures.

“**High Volatility Commercial Real Estate Loan**” or “**HVCRE**” shall, together with any correlative thereof applicable at any time, have the meaning given to such term under the Basel Accord and/or any other Risk-Based Capital Guidelines, respectively, as applicable, at any time and as the context may suggest, permit, or require.

“**Hazardous Substances**” shall have the meaning set forth in the Environmental Indemnity.

“Hedge Losses” shall mean all actual losses incurred by Lender or its affiliates in connection with the hedge positions taken by Lender or its affiliates with respect to the Interest Rate. Borrower acknowledges that such hedging transactions may include the sale of U.S. Obligations or other securities and/or the execution of certain derivative transactions, which hedging transactions would have to be “unwound” if all or any portion of the Loan is paid down.

“Improvements” shall mean a five (5) story building (to be built in accordance with the approved Plans and Specifications) consisting of a 605 bed, 153-unit luxury mid-rise student housing facility with 302 parking spaces, shared amenities, and an addition 1,400 square feet of street level retail/commercial space.

“Indebtedness” shall mean, for any Person, any indebtedness or other similar obligation for which such Person is obligated (directly or indirectly, by contract, operation of law or otherwise), including, without limitation, (i) all indebtedness of such Person for borrowed money, for amounts drawn under a letter of credit, or for the deferred purchase price of property for which such Person or its assets is liable, (ii) all unfunded amounts under a loan agreement, letter of credit, or other credit facility for which such Person would be liable if such amounts were advanced thereunder, (iii) all amounts required to be paid by such Person by contract and/or as a guaranteed payment (including, without limitation, any such amounts required to be paid to partners and/or as a preferred or special dividend, including any mandatory redemption of shares or interests), (iv) all indebtedness incurred and/or guaranteed by such Person, directly or indirectly (including, without limitation, contractual obligations of such Person), (v) all obligations under leases that constitute capital leases for which such Person is liable, and (vi) all obligations of such Person under interest rate swaps, caps, floors, collars and other interest hedge agreements, in each case whether such Person is liable contingently or otherwise, as obligor, guarantor or otherwise, or in respect of which obligations such Person otherwise assures a creditor against loss.

“Indemnified Person” shall mean each of Lender, any successor to or assign or Lender, any Affiliate of any Lender that has filed any registration statement relating to the Securitization or has acted as the sponsor or depositor in connection with the Securitization, any Affiliate of Lender that acts as an underwriter, placement agent or initial purchaser of Securities issued in the Securitization, any other co-underwriters, co-placement agents or co-initial purchasers of Securities issued in the Securitization, and each of their respective officers, directors, partners, employees, representatives, agents and Affiliates and each Person or entity who Controls any such Person within the meaning of Section 15 of the Securities Act or Section 20 of the Exchange Act, any Affiliate of Lender who is or will have been involved in the origination of the Loan, any Person who is or will have been involved in the servicing of the Loan, any Person in whose name the encumbrance created by the Mortgage is or will have been recorded, Persons who may hold or acquire or will have held a full or partial interest in the Loan (as well as custodians, trustees and other fiduciaries who hold or have held a full or partial interest in the Loan for the benefit of third parties), as well as the respective directors, officers, shareholders, partners, members, employees, agents, servants, representatives, contractors, subcontractors, Affiliates, subsidiaries, participants, successors and assigns of any and all of the foregoing (including but not limited to any other Person who holds or acquires or will have held a participation or other full or partial interest in the Loan or the Property, whether during the term of the Loan or as a part of or following a foreclosure of the Loan and including, but not limited to, any successors by merger, consolidation or acquisition of all or a substantial portion of Lender’s assets and business).

“Indemnifying Person” shall mean each of Borrower, SPE Party and Guarantor.

“Independent Director” shall have the meaning set forth in Section 5.2 hereof.

“Insurance Premiums” shall have the meaning set forth in Section 6.1 hereof.

“Insurance Proceeds” shall mean all proceeds paid by any insurance company pursuant to the Policies and/or pursuant to any other insurance policy or policies covering the Property (or any portion thereof) and/or Borrower.

“Intangible Assets” shall mean those assets of a Person (whether having determinate or indeterminate lives) that lack physical substance (other than accounts receivable) and that are considered under GAAP to be intangibles but, in any event, shall include, without limitation, goodwill, deferred financing costs, organizational costs and patent, copyright, franchise, trademark, customer contracts and relationships, covenants not to compete, technology and process costs and related amounts and capitalized research and development costs included on a balance sheet of such Person.

“Interest Only Period” shall mean the twenty-four (24) Interest Periods commencing immediately following the First Interest Period and, if the first Extension Option is exercised in accordance with the terms of this Agreement, the twelve (12) Interest Periods during the first Extension Period.

“Interest Period” shall mean each of (a) the First Interest Period and (b) thereafter, for any Payment Date including the Maturity Date, the period beginning on (and including) the fifteenth (15th) day of the calendar month immediately preceding such Payment Date, and ending on (and including) the fourteenth (14th) day of the calendar month in which the applicable Payment Date occurs. Each Interest Period, except for the First Interest Period, shall be a full month and shall not be shortened by reason of any payment of the Loan prior to the expiration of such Interest Period.

“Interest Rate” shall mean (a) at such times that the Loan is a SOFR Loan, the SOFR Rate, (b) at such times that the Loan is a Federal Funds Interest Rate Loan, the Federal Funds Interest Rate, and (c) at such times that the Loan is an Alternate Benchmark Rate Loan, the Alternate Benchmark Rate. Notwithstanding anything else herein to the contrary, in no event shall the Interest Rate be less than eight percent (8.00%).

“Interest Rate Cap Agreement” shall mean, as applicable, any interest rate cap agreement (together with the confirmation and schedules relating thereto) in form and substance satisfactory to Lender between Borrower and Counterparty or any Replacement Interest Rate Cap Agreement, in each case which also satisfies the requirements set forth in Section 2.8.

“Interest Shortfall” shall have the meaning set forth in Section 2.4.1 hereof.

“Investor” shall mean any purchaser, transferee, assignee, servicer, participant or investor in the Loan or any participations of the Loan and/or Securities, or any of their respective successors and assigns.

“**IRS Code**” shall mean the Internal Revenue Code of 1986, as amended from time to time, and any successor statutes thereto, and applicable U.S. Department of Treasury regulations issued pursuant thereto in temporary or final form.

“**ISDA Definitions**” means the 2006 ISDA Definitions published by the International Swaps and Derivatives Association, Inc. or any successor thereto, as amended or supplemented from time to time, or any successor definitional booklet for interest rate derivatives published from time to time by the International Swaps and Derivatives Association, Inc. or such successor thereto.

“**Joint Venture**” shall have the meaning set forth in Section 9.3 hereof.

“**Labor and Materials Charge**” shall have the meaning set forth in Section 4.1.22(b) hereof.

“**Land**” shall have the meaning set forth in the granting clause of the Mortgage.

“**Lease**” shall mean any lease, sublease or subsublease, letting, license, concession or other agreement (whether written or oral and whether now or hereafter in effect) pursuant to which any Person is granted a possessory interest in, or right to use or occupy all or any portion of any space in the Property, and (i) every modification, amendment or other agreement relating to such lease, sublease, subsublease, or other agreement entered into in connection with such lease, sublease, subsublease, or other agreement and (ii) every guarantee of the performance and observance of the covenants, conditions and agreements to be performed and observed by the other party thereto. As used herein, the term “leases” shall not include Permitted Equipment Leases.

“**Lease Taxes**” shall mean all sales and occupancy taxes collected by or on behalf of Borrower that are required to be paid to a state or local taxing authority (or similar taxing authority) that are assessed on Rents collected by Borrower.

“**Legal Requirements**” shall mean all federal, state, county, municipal and other governmental statutes, laws, rules, orders, regulations, ordinances, judgments, decrees and injunctions of Governmental Authorities affecting Borrower, Guarantor, the Debt, the Property or any part thereof, or the construction, use, alteration or operation thereof, or any part thereof, whether now or hereafter enacted and in force, including, without limitation, any applicable laws, rules and regulations relating to the employment of labor, including those relating to wages, hours, collective bargaining and the payment and withholding of taxes and other sums as required by appropriate Governmental Authorities, the Worker Adjustment and Retraining Notification Act (“**WARN Act**”), the Securities Act, the Exchange Act, Regulation AB, the rules and regulations promulgated pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Americans with Disabilities Act of 1990, as amended, and all permits, licenses and authorizations and regulations relating thereto, and all covenants, agreements, restrictions and encumbrances contained in any instruments, either of record or known to Borrower, at any time in force affecting Borrower, the Property or any part thereof, including, without limitation, any which may (i) require repairs, modifications or alterations in or to the Property or any part thereof, or (ii) in any way limit the use and enjoyment thereof. For the avoidance of doubt, to the extent any Legal Requirements conflict, the more restrictive Legal Requirement will control.

“**Lender**” shall have the meaning set forth in the introductory paragraph hereto.

“**Liabilities**” shall have the meaning set forth in Section 10.3.2 hereof.

“**Licenses**” shall have the meaning set forth in Section 3.1.27 hereof.

“**Lien**” shall mean any mortgage, deed of trust, lien, pledge, hypothecation, assignment, security interest, or any other encumbrance, charge or transfer of, on or affecting Borrower, the Property, any portion thereof or any interest therein, including, without limitation, any conditional sale or other title retention agreement, any financing lease having substantially the same economic effect as any of the foregoing, the filing of any financing statement, any lien associated with a PACE Loan, and mechanic’s, materialmen’s and other similar liens and encumbrances.

“**Lien Law**” shall mean Chapter 713 of the Florida Statutes.

“**Line Items**” shall have the meaning as set forth in Section 2.10 hereof.

“**Loan Amount**” shall mean the Building Loan Amount.

“**Loan**” shall mean the Building Loan.

“**Loan Documents**” shall mean the Building Loan Documents.

“**Loan Bifurcation**” shall have the meaning set forth in Section 10.1.2(e) hereof.

“**Loan to Value Ratio**” shall mean the ratio, as of a particular date, in which the numerator is equal to the Outstanding Principal Balance and the denominator is equal to the “as is” value of the Property after Completion of the Property as reasonably determined by Lender based on an updated Appraisal.

“**Lockbox Account**” shall mean an account with an Eligible Institution established pursuant to the Lockbox Agreement in the name of Borrower for the sole and exclusive benefit of Lender.

“**Lockbox Agreement**” shall mean a deposit account control agreement in form and substance acceptable to Lender in its sole discretion, which shall be dated on or about the date of Completion by and among Borrower, Lender and Lockbox Bank, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

“**Lockbox Bank**” shall mean the Eligible Institution which maintains the Lockbox Account under the Lockbox Agreement.

“**Losses**” shall have the meaning set forth in Section 10.6.1.

“**Major Contract**” shall mean (i) any management (other than the Management Agreement), brokerage or leasing agreement or (ii) any cleaning, maintenance, service or other contract or agreement of any kind (other than Leases) of a material nature (materiality for these purposes to include contracts in excess of \$50,000.00 or which extend beyond one year (unless cancelable by Borrower on thirty (30) days or less notice without payment of a termination fee or

other monetary penalty)), in either case relating to the ownership, leasing, management, use, operation, maintenance, repair or restoration of the Property, whether written or oral.

“**Major Lease**” shall mean any Lease which (i) either individually or, together with all other Leases to the same Tenant or its Affiliates, demises five (5) or more dwelling units at the Property, (ii) has a term of two (2) years or longer, or (iii) is not a Lease for a residential unit.

“**Major Trade Contract**” shall mean any Trade Contract with a Major Trade Contractor in which the aggregate contract price is equal to or greater than \$1,000,000.00, whether pursuant to one contract or agreement or multiple contracts or agreements, after taking into account all change orders, or which relates to major project components such as steel, concrete, mechanical systems, exterior wall systems, carpentry, dry wall and other similar items as designated by Lender.

“**Major Trade Contractor**” shall mean the contractor or vendor under a Major Trade Contract.

“**Management Agreement**” shall mean the management agreement to be entered into by and between Borrower and the Manager, pursuant to which the Manager is to provide management and other services with respect to the Property, which management agreement shall be reasonably acceptable to Lender, or, if the context requires, the Replacement Management Agreement. For the avoidance of doubt, the draft management agreement with Asset Living provided to Lender prior to the closing of the Loan shall be deemed reasonably acceptable.

“**Manager**” shall mean Asset Campus USA, LLC, a Texas limited liability company (“**Asset Living**”), or, if the context requires, a Qualified Manager who is managing the Property in accordance with the terms and provisions of this Agreement.

“**Marijuana Business**” shall mean a Marijuana Dispensary; a cash security or other business servicing Marijuana Dispensaries; or any other business involved in the growing, manufacturing, production, administration, distribution (including without limitation, any retail or wholesale sales or delivery), use or consumption of any cannabis, marijuana or cannabinoid product, compound or produce.

“**Marijuana Dispensary**” shall mean a medical or recreational marijuana dispensary.

“**Material Action**” means, with respect to any Person, to file any insolvency or reorganization case or proceeding, to institute proceedings to have such Person be adjudicated bankrupt or insolvent, to institute proceedings under any applicable insolvency law, to seek any relief under any law relating to relief from debts or the protection of debtors, to consent to the filing or institution of bankruptcy or insolvency proceedings against such Person, to file a petition seeking, or consent to, reorganization or relief with respect to such Person under any applicable federal or state law relating to bankruptcy or insolvency, to seek or consent to the appointment of a receiver, liquidator, assignee, trustee, sequestrator, custodian, or any similar official of or for such Person or a substantial part of its property, to make any assignment for the benefit of creditors of such Person, to admit in writing such Person’s inability to pay its debts generally as they become due, or to take action in furtherance of any of the foregoing.

“Material Adverse Change” shall mean any event, development, or circumstance after the date hereof that causes a material adverse change (as reasonably determined by Lender) in (i) the financial condition of Borrower, Guarantor or the Property, (ii) market conditions, generally, in the Tallahassee real estate market, (iii) the construction and development and/or operations of the Property, (iv) the validity or enforceability of any of the Loan Documents or (v) the rights and remedies of Lender under any of the Loan Documents, provided, however, any event, development, or circumstance due (A) to macro-economic circumstances generally applicable to real estate projects (and not particular to the Property or the immediate region in which the Property is located), or (B) disruptions in the capital markets, shall not be deemed to constitute a “Material Adverse Change”.

“Material Adverse Effect” shall mean any material adverse effect upon (i) the business operations, economic performance, assets, condition (financial or otherwise), equity, contingent liabilities, prospects, material agreements or results of operations of Borrower, any SPE Party, any Guarantor or the Property, (ii) the ability of Borrower or any Guarantor to perform their respective obligations under any of the Loan Documents, (iii) the enforceability or validity of any of the Loan Documents, the perfection or priority of any lien created under any of the Loan Documents or the rights, interests or remedies of Lender under any of the Loan Documents, or (iv) the value, use operation of, or cash flows from, the Property, provided, however, any event, development, or circumstance due (A) to macro-economic circumstances generally applicable to real estate projects (and not particular to the Property or the immediate region in which the Property is located), or (B) disruptions in the capital markets, shall not be deemed to constitute a “Material Adverse Effect”.

“Material Alteration” shall have the meaning set forth in Section 4.1.20 hereof.

“Maturity Date” shall mean the Scheduled Maturity Date, as such date may be extended pursuant to and in accordance with Section 2.9 hereof, or such other date on which the final payment of the principal amount of the Note becomes due and payable as therein or herein provided, whether at such stated maturity date, by declaration of acceleration, or otherwise.

“Maximum Legal Rate” shall mean the maximum nonusurious interest rate, if any, that at any time or from time to time may be contracted for, taken, reserved, charged or received on the indebtedness evidenced by the Note and as provided for herein or the other Loan Documents, under the laws of such state or states whose laws are held by any court of competent jurisdiction to govern the interest rate provisions of the Loan.

“Minimum Counterparty Rating” shall mean (a) a long term credit rating from S&P of at least “A-”, and (b) a long term credit rating from Moody’s of at least “A3”.

“Minimum Interest Rate” shall mean, in each instance, as applicable, the Interest Rate calculated as of the date of any Minimum Interest Principal Paydown.

“Minimum Interest Payment Amount” shall mean an amount equal to the greater of (a) \$4,275,000.00, as the same is reduced by the total amount of interest that has been paid to Lender by Borrower from the Closing Date up to, and including, the date of any Minimum Interest Principal Paydown and (b) the interest that would have accrued at the applicable Minimum Interest

Interest Rate calculated on the amount of the applicable Minimum Interest Principal Paydown for a period commencing on the date of such Minimum Interest Principal Paydown and ending on the last day of the twelfth (12th) full Interest Period.

“Minimum Interest Principal Paydown” shall mean repayment or prepayment of the Debt or any portion of the Debt (in whole or in part, and whether by virtue of a voluntary prepayment hereunder, acceleration, or otherwise), but excluding the principal component of any regularly scheduled Monthly Debt Service Payment Amount, if any.

“Monthly Debt Service Payment Amount” shall mean, for any Payment Date, (i) if such Payment Date is for an Interest Period that commenced during the Interest Only Period, interest on the Outstanding Principal Balance at the Interest Rate for the number of days during the Interest Period within which such Payment Date occurs, which shall be applied to accrued and unpaid interest, and (ii) if such Payment Date is for an Interest Period that commenced after the end of the Interest Only Period, an amount equal to (a) interest on the Outstanding Principal Balance at the Interest Rate for the number of days during the Interest Period within which such Payment Date occurs, plus (b) a payment in the monthly amount determined by Lender to be required to fully amortize the Loan over an amortization schedule of thirty (30) years commencing on the first Payment Date after the end of the Interest Only Period calculated using an interest rate equal to the Strike Rate plus the Spread.

“Moody’s” shall mean Moody’s Investors Service, Inc.

“Mortgage” shall mean the Building Loan Mortgage.

“Net Proceeds” shall mean: (i) the net amount of all Insurance Proceeds payable as a result of a Casualty to the Property, after deduction of reasonable costs and expenses (including, but not limited to, reasonable attorneys’ fees), if any, in collecting such Insurance Proceeds, or (ii) the net amount of the Award payable as a result of a Condemnation at the Property, after deduction of reasonable costs and expenses (including, but not limited to, reasonable attorneys’ fees), if any, in collecting such Award.

“Net Proceeds Deficiency” shall have the meaning set forth in Section 6.4 hereof.

“Net Worth” shall, as to any Person, be determined by Lender in its reasonable discretion, at any time and from time to time, and shall (i) be based on market valuations, (ii) not include any Intangible Assets, and (iii) not include any equity attributable to the Property.

“Note” shall mean the Building Loan Note.

“Officer’s Certificate” shall mean a certificate delivered to Lender by Borrower which is signed by Responsible Officer of Borrower.

“Operating Expense Monthly Disbursement” shall mean the aggregate amount of Approved Operating Expenses and Approved Extraordinary Expenses in accordance with the Approved Annual Budget then in effect for the applicable monthly period, subject to Section 4.1.11(a)(ii).

“Operating Expenses” shall mean the total of all expenditures of whatever kind relating to the operation, maintenance and management of the Property that are incurred on a regular monthly or other periodic basis, including without limitation, (and without duplication) (i) utilities, ordinary repairs and maintenance, insurance, license fees, property taxes and assessments, advertising expenses, payroll and related taxes, security, janitorial, landscaping, computer processing charges, management fees equal to the greater of (a) three percent (3%) of Operating Income for the trailing twelve (12) month period, or (b) actual management fees payable under the Management Agreement, operational equipment or other lease payments as approved by Lender, but specifically excluding (1) depreciation, (2) Debt Service, (3) non-recurring or extraordinary expenses, (4) deposits into the Reserve Accounts, and (5) any separate or duplicate amounts for C-PACE assessments (other than those included in property taxes and assessments) or other payments made with respect to the C-PACE loan; and (ii) normalized capital expenditures based on the assessed needs of the Property, in an amount equal to the greater of (A) \$150 per bed per annum plus \$0.20 per square foot of commercial/retail space per annum or (B) such other amount as may be determined by a subsequent property condition report.

“Operating Income” shall mean all income of Borrower, computed in accordance with the Approved Accounting Method, derived from the ownership and operation of the Property from whatever source, including, but not limited to base rents, additional rents (including, without limitation, common area maintenance, real estate tax recoveries, utility recoveries, other miscellaneous expense recoveries and percentage rent, but specifically excluding any lease termination payment by a Tenant), if any, and other miscellaneous income, (including, without limitation, economic stimulus, incentive or other similar payments received by or paid to or for the account or benefit of Borrower and/or attributable to the Property from any Governmental Authority or quasi-Governmental Authority, whether in the form of aide, money, relief or another compensation scheme, including any of the foregoing initiated in connection with the COVID-19 virus or any other pandemic or epidemic), but excluding sales, use and occupancy or other taxes on receipts required to be remitted by Borrower to any Governmental Authority (including, for the avoidance of doubt, Lease Taxes), sales of furniture, fixtures and equipment, interest income from any source, insurance proceeds (other than business interruption or other loss of income insurance applied pursuant to this Agreement), Awards, security deposits, utility and other similar deposits, the proceeds of any borrowing, and any disbursements from the Reserve Accounts. Operating Income shall not be diminished as a result of the Mortgage or the creation of any intervening estate or interest in the Property or any part thereof.

“Organizational Chart” shall mean the organizational chart attached hereto as Schedule III setting forth the direct and, if applicable, indirect ownership of Borrower (as the same may be amended from time to time as required by this Agreement).

“Other Charges” shall mean all ground rents, maintenance charges, impositions other than Taxes, and any other charges, including, without limitation, vault charges and license fees for the use of vaults, chutes and similar areas adjoining the Property, now or hereafter levied or assessed or imposed against the Property or any part thereof.

“Other Design Professionals” shall mean all architects (other than Borrower’s Architect) and engineers engaged by Borrower and/or Borrower’s agent to work on the Improvements.

“Other Design Professionals Agreement(s)” shall mean any agreements between Borrower and each Other Design Professional for the design of the Project or otherwise relating to the Improvements.

“Outstanding Principal Balance” shall mean, as of any date, the outstanding principal balance of the Loan.

“PACE Loan” shall mean any Property-Assessed Clean Energy loan or any similar financing.

“Patriot Act” shall mean the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Public Law 107-56), as amended and renewed from time to time, and all statutes, orders, rules and regulations of the United States government and its various executive departments, agencies and offices related to the subject matter thereof, including Executive Order 13224 effective September 24, 2001.

“Payment Date” shall mean March 9, 2023, and the ninth (9th) day of each succeeding calendar month during the term of the Loan (or, if such day is not a Business Day, the immediately preceding Business Day).

“Payment and Performance Bonds” shall mean unconditional dual-obligee payment and performance bonds relating to the General Contractor, issued by a surety company or companies authorized to do business in the State, and in form and content reasonably acceptable to Lender, in each case in an amount not less than the full contract price; together with a Dual Obligee and Modification Rider.

“Permitted Budget Re-allocations” shall mean any revision of the Project Budget (a) to move Building Loan Contingency (Hard Costs) to other Hard Costs Budget Lines, so long as the Building Loan Contingency (Hard Costs) remaining after such re-allocation is not less than five percent (5%) of the aggregate remaining Hard Costs Budget Line as reasonably determined by Lender, (b) to move Building Loan Contingency (Soft Costs) to other Soft Costs Budget Lines, so long as the Building Loan Contingency (Soft Costs) remaining after such re-allocation is not less than five percent (5%) of the aggregate remaining Soft Costs Budget Line as reasonably determined by Lender, or (c) any re-allocations of a Budget Line made by the General Contractor pursuant to the General Contractor’s Agreement to which Borrower does not have the right to approve pursuant to the General Contractor’s Agreement.

“Permitted Encumbrances” shall mean collectively (i) the Liens and security interests created by the Loan Documents, (ii) all Liens, encumbrances and other matters disclosed in the Title Insurance Policy, (iii) Liens, if any, for Taxes imposed by any Governmental Authority not yet due or payable or which are being contested in accordance with Section 4.1.2(b) (other than liens securing a PACE Loan), (iv) the Liens and security interest securing the C-PACE Loan, (v) liens related to Permitted Equipment Leases and (vi) such other Liens as Lender may hereafter approve in writing in Lender’s sole discretion.

“Permitted Equipment Leases” shall mean equipment leases or other similar instruments entered into with respect to the Personal Property; provided, that, in each case, such equipment leases or similar instruments (i) are entered into on commercially reasonable terms and conditions

in the ordinary course of Borrower's business and (ii) relate to Personal Property which is (A) used in connection with the operation and maintenance of the Property in the ordinary course of Borrower's business and (B) readily replaceable without material interference or interruption to the operation of the Property.

"Permitted Transfer" shall have the meaning set forth in Section 9.3 hereof.

"Person" shall mean any individual, corporation, partnership, joint venture, limited liability company, estate, trust, unincorporated association, any federal, state, county or municipal government or any bureau, department or agency thereof and any fiduciary acting in such capacity on behalf of any of the foregoing.

"Personal Property" shall have the meaning set forth in the granting clause of the Mortgage.

"Physical Conditions Report" shall mean a report prepared by a company satisfactory to Lender regarding the physical condition of the Property, satisfactory in form and substance to Lender in its sole discretion.

"Plans and Specifications" shall mean all plans and specifications, shop drawings, architectural and engineering reports and designs, together with all architectural and engineering agreements, construction contracts and other material agreements entered into by Borrower or prepared by Borrower's Architect and the Other Design Professionals, in connection with the Total Project Related Costs in accordance with the Project Budget.

"Policies" shall have the meaning specified in Section 6.1 hereof.

"Prepaid Rent" shall have the meaning set forth in Section 7.5 hereof.

"Prepaid Rent Reserve Account" shall have the meaning set forth in Section 7.5 hereof.

"Prepaid Rent Reserve Funds" shall have the meaning set forth in Section 7.5 hereof.

"Prepaid Rent Schedule" shall have the meaning set forth in Section 4.1.3(h) hereof.

"Prescribed Laws" shall mean, individually and collectively, (i) the Patriot Act, (ii) Executive Order No. 13224 on Terrorist Financing, effective September 24, 2001, and relating to Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism, (iii) the International Emergency Economic Power Act, 50 U.S.C. §1701 et. seq. and (iv) all other Legal Requirements relating to money laundering or terrorism, in each case as the same may be amended from time to time, together with any regulations issued pursuant thereto and any successor statutes (whether in lieu of, or on comparable topics to, the foregoing) or orders thereto.

"Prohibited Entity/Ownership Structure" shall mean any direct or indirect ownership of either the Property or Borrower by (a) a statutory trust organized under 12 *Del.C.* § 3801 *et seq.*, or any successor statute thereto, or under any similar other state or federal law, (b) any one or more

Persons as tenants in common or any similar ownership structure, or (c) any one or more Persons as a result of any Crowdfunding.

“Prohibited Lease Use” shall mean operation of any of the following: (i) a car wash; (ii) a dry-cleaning business, except for a dry-cleaning business at which no on-site cleaning operations of any sort are undertaken (i.e., a so-called drop-off station); (iii) a gasoline station or automobile service or repair or maintenance facility; (iv) any business other than the foregoing that, in the ordinary course of operation, would be likely to result in the release of Hazardous Substances; (v) a cabaret, dance hall or similar venue; (vi) any adult entertainment or adult products establishment, including, without limitation, for the sale or display of obscene or pornographic material, or the conduct of obscene, nude or semi nude live performances, or similar purposes; or (vii) any use, business, operation or establishment which is not then in compliance with all Legal Requirements (including, as of the date of this Agreement, marijuana dispensaries and comparable or related businesses not permitted under federal law); or (viii) any use, business, operation or establishment which would cause, or result in, a default under, or otherwise conflict with, any REA or Lease then in effect, including any exclusive use rights granted under any Lease.

“Project” shall mean the development and construction of the Improvements at the Property in accordance with the Plans and Specifications and all Legal Requirements.

“Project Budget” shall have the meaning set forth in Section 2.10 hereof.

“Property” shall mean each parcel of real property, the Improvements thereon and all Personal Property owned by Borrower and encumbered by the Mortgage, together with all rights pertaining to such property and Improvements, as more particularly described in granting clause of the Mortgage and referred to therein as the “Property”.

“Property Document” shall mean, individually or collectively (as the context may require), the following: (i) any REA, and (ii) any Permitted Equipment Leases.

“Property Document Event” shall mean any event which would, directly or indirectly, cause a default, termination right, right of first refusal, first offer or any other similar right, cause any termination fees to be due or would cause a Material Adverse Effect to occur under any Property Document (in each case, beyond any applicable notice and cure periods under the applicable Property Document); provided, however, any of the foregoing shall not be deemed a Property Document Event to the extent Lender’s prior written consent is obtained with respect to the same.

“Provided Information” shall mean any and all financial and other information provided at any time by, or on behalf of, any Indemnifying Person with respect to the Property or any Borrower Party.

“Prudent Lender Standard” shall, with respect to any matter, be deemed to have been met if the matter in question (i) prior to a Securitization, is acceptable to Lender in its discretion, and (ii) after a Securitization, (A) would be acceptable to a prudent lender of securitized commercial mortgage loans, and (B) if required by the Servicing Agreement that governs such Securitization, is the subject of a Rating Agency Confirmation.

“**Punch List Items**” shall mean, collectively, minor or insubstantial details of construction, decoration, mechanical adjustment or installation, which do not hinder or impede the use, operation, or maintenance of the Property or the ability to obtain a permanent certificate of occupancy with respect thereto.

“**Qualified Manager**” shall mean either (i) Manager or (ii) a reputable and experienced management organization (which may be an Affiliate of Borrower) possessing experience in managing properties similar in size, scope, use and value as the Property, as determined in accordance with the Prudent Lender Standard.

“**Qualified Transferee**” shall mean a transferee for whom, prior to the Transfer, Lender shall have received: (i) evidence that the proposed transferee (and the Person(s) that Control such transferee) (a) has never been indicted or convicted of, or plead guilty or no contest to a felony, (b) has never been indicted or convicted of, or plead guilty or no contest to, violation of the Patriot Act, and is not an Embargoed Person, (c) will not cause any of the representations set forth in Section 3.1.11 hereof not to be true, correct and complete, (d) has never been the subject of a voluntary or involuntary (to the extent the same has not been discharged) action under the Bankruptcy Code or any other Creditors’ Rights Law (except for any matter acceptable to Lender in accordance with the Prudent Lender Standard), and (e) has no material outstanding judgments against such proposed transferee; (ii) if the proposed transferee will obtain Control of or obtain a direct or indirect interest of twenty percent (20%) (or, to the extent such Person is domiciled in a country other than the United States, ten percent (10%)) or more in Borrower as a result of such proposed transfer, a credit check against such proposed transferee that is reasonably acceptable to Lender; and (iii) evidence that the proposed transferee (and the Person(s) that Control such transferee) has adequate relevant experience in the ownership and operation of properties comparable in size, use, quality and value to the Property. Furthermore, prior to including the entire Loan in one or more Securitizations, it shall be an additional requirement of a Qualified Transferee that Lender shall have also received evidence satisfactory to Lender that (1) the proposed transferee (and the Person(s) that Control such transferee) has not defaulted under its debt obligations in connection with other commercial real estate assets owned or Controlled by such Persons, and (2) there shall be no material litigation or regulatory action pending or threatened in writing against such proposed transferee (and the Person(s) that Control such transferee).

“**Rating Agencies**” shall mean each of S&P, Moody’s, Fitch, DBRS, Kroll and Morningstar, or any other NRSRO, which has been approved by Lender or that has been retained to issue a rating with respect to a Securitization that includes all or any portion of the Loan.

“**Rating Agency Confirmation**” shall mean a written affirmation from each of the Rating Agencies that the credit rating of the Securities given by such Rating Agency immediately prior to the occurrence of the event with respect to which such Rating Agency Confirmation is sought will not be qualified, downgraded or withdrawn as a result of the occurrence of such event, which affirmation may be granted or withheld in such Rating Agency’s sole and absolute discretion; provided, however, (i) if a Securitization has occurred and either (a) any Rating Agency fails to respond to any request for a Rating Agency Confirmation with respect to such event or otherwise elects (orally or in writing) not to consider such event or (b) Lender (or Servicer) is not required to and has elected not to obtain (or cause to be obtained) a Rating Agency Confirmation with respect to such event, in each case, pursuant to and in compliance with the Securitization’s pooling

and servicing agreement (or similar agreement), then, notwithstanding anything contained in this Agreement to the contrary, Lender's written approval of such event shall be required in lieu of a Rating Agency Confirmation, in the case of clause (i)(a) above, from such Rating Agency or Rating Agencies (only) or, in the case of clause (i)(b) above, from each of the Rating Agencies or (ii) if a Securitization has not occurred, then, notwithstanding anything contained in this Agreement to the contrary, the term "Rating Agency Confirmation" shall be deemed instead to require Lender's written approval of such event. In the event that either of clause (i) or (ii) of the foregoing proviso applies, Lender's approval shall be based on Lender's good faith determination of applicable Rating Agency standards and criteria, unless Lender has an independent approval right in respect of such event pursuant to the other terms of this Agreement or the other Loan Documents, in which case the discretion afforded to Lender in connection with such independent approval right shall apply.

"REA" shall mean, individually or collectively (as the context requires), each reciprocal easement or similar agreement affecting the Property as more particularly described in the Title Insurance Policy (if any), any amendment, restatement, replacement or other modification thereof, any future reciprocal easement or similar agreement affecting the Property entered into in accordance with the applicable terms and conditions hereof and any amendment, restatement, replacement or other modification thereof.

"Recourse Guaranty" shall mean that certain Guaranty Agreement, dated as of the date hereof, from Guarantor to Lender, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

"Reference Time" with respect to any setting of the then-current Benchmark means (1) with respect to any determination of Term SOFR applicable to an Interest Period, the date that is two (2) U.S. Government Securities Business Days preceding the first day of the applicable Interest Period or (2) if such Benchmark is not Term SOFR, the time determined by Lender in accordance with the Conforming Changes.

"Registrar" shall have the meaning set forth in Section 10.5 hereof.

"Regulation AB" shall mean Regulation AB under the Securities Act and the Exchange Act, as such Regulation may be amended from time to time.

"Relevant Governmental Body" shall mean the Board of Governors of the Federal Reserve System or the Federal Reserve Bank of New York, or a committee officially endorsed or convened by the Board of Governors of the Federal Reserve System or the Federal Reserve Bank of New York, or any successor thereto.

"Rent Loss Proceeds" shall have the meaning set forth in Section 6.1 hereof.

"Rent Roll" shall have the meaning set forth in Section 3.1.25(a) hereof.

"Rents" shall have the meaning set forth in the Mortgage.

"Replacement Interest Rate Cap Agreement" shall mean an Interest Rate Cap Agreement in form and substance reasonably satisfactory to Lender (and meeting the requirements

set forth in Section 2.8 hereof) from a Counterparty reasonably acceptable to Lender having a Minimum Counterparty Rating.

“Replacement Management Agreement” shall mean, collectively, (a) either (i) a management agreement with a Qualified Manager substantially the same in form and substance as the Management Agreement, or (ii) a management agreement with a Qualified Manager, which management agreement shall be acceptable to Lender in form and substance, as determined in accordance with the Prudent Lender Standard, provided however, with respect to either subclause (i) or (ii), that without Lender’s prior consent, in its discretion, the management fee for such Qualified Manager shall not exceed the fee provided for in the Management Agreement in effect on the Closing Date, and provided, further, with respect to subclause (ii), Lender, at its option, may require that Borrower obtain a Rating Agency Confirmation; and (b) an assignment of management agreement and subordination of management fees substantially in the form then used by Lender (or of such other form and substance reasonably acceptable to Lender), executed and delivered to Lender by Borrower and such Qualified Manager at Borrower’s sole cost and expense.

“Replacement Reserve Account” shall have the meaning set forth in Section 7.4.1 hereof.

“Replacement Reserve Funds” shall have the meaning set forth in Section 7.4.1 hereof.

“Replacement Reserve Monthly Deposit” shall have the meaning set forth in Section 7.4.1 hereof.

“Replacements” shall have the meaning set forth in Section 7.4.1 hereof.

“Reporting Failure” shall have the meaning set forth in Section 4.1.11 hereof.

“Required Equity” shall mean the greater of (a) \$31,117,395.32 and (b) the amount by which the estimated Total Project-Related Costs, as reasonably determined by Lender and the Construction Consultant, exceeds the Building Loan Amount. The Required Equity shall be expended by Borrower and invested in the Property for approved costs set forth on the Project Budget prior to the making of any Additional Advance hereunder.

“Required Financial Items” shall have the meaning set forth in Section 4.1.11 hereof.

“Reserve Accounts” shall mean, collectively, the Tax and Insurance Escrow Account, the Replacement Reserve Account, the Prepaid Rent Reserve Account, the Shortfall Reserve Account, the Excess Cash Flow Account and any other reserve fund account established pursuant to the Loan Documents.

“Reserve Funds” shall mean, collectively, the Tax and Insurance Escrow Funds, the Replacement Reserve Funds, the Prepaid Rent Reserve Funds, the Shortfall Reserve Funds, the Excess Cash Flow Funds and amounts deposited into any other Reserve Account established pursuant to the Loan Documents.

“Responsible Officer” shall mean with respect to a Person, the chairman of the board, president, chief operating officer, chief financial officer, treasurer or vice president of such Person or such other similar officer of such Person reasonably acceptable to Lender.

“Restoration” shall mean the repair and restoration of the Property after a Casualty or Condemnation as nearly as possible to the condition the Property was in immediately prior to such Casualty or Condemnation, with such alterations as may be reasonably approved by Lender.

“Restoration Threshold” shall mean an amount equal to the lesser of \$1,000,000 and five percent (5%) of the Outstanding Principal Balance.

“Restricted Party” shall mean, individually and collectively (i) Borrower, SPE Party, Guarantor and any Affiliated Manager and (ii) other than any Excluded Entity, any party that (a) is in Control of any Person identified in clause (i) above, and/or (b) as of the time of such determination, owns a twenty percent (20%) (or, to the extent such Person is domiciled in a country other than the United States, ten percent (10%)) interest or more of any Person identified in clause (i) above.

“Retainage” shall mean, for each construction contract and subcontract, the greater of (a) ten percent (10%) of all costs funded to the contractor or subcontractor under the contract or subcontract until such time as the labor or materials provided under such contract or subcontract is fifty percent (50%) complete as certified by the Construction Consultant at which time the retainage shall be reduced to five percent (5%) of all costs funded to the contractor or subcontractor under the contract or subcontract, and (b) the actual retainage required under such contract or subcontract.

“Risk-Based Capital Guidelines” shall mean (a) the risk-based capital guidelines in effect in the United States regardless of the date enacted, adopted or issued, including transition rules, and (b) the corresponding capital regulations promulgated by regulatory authorities outside the United States, including transition rules, and, in each case, any amendments to such regulations, and, without limiting the foregoing, including all requests, rules, guidelines, or directives promulgated by the Bank for International Settlements, the Basel Committee on Banking Supervision (or any successor or similar authority), or the United States or foreign regulatory authorities, in each case pursuant to the Basel Accord.

“S&P” shall mean Standard & Poor’s Ratings Group, a division of the McGraw-Hill Companies.

“Sale or Pledge” shall mean a voluntary or involuntary sale, conveyance, assignment, transfer, encumbrance, mortgage, grant of a trust deed or security deed, lien, security interest, pledge, grant of option or other disposal of a legal or beneficial interest, or creation or issuance of new membership interest or any division of membership interest, merger, consolidation, recapitalization or reorganization, whether direct or indirect, including if Borrower enters into, or the Property is subjected to, any PACE Loan.

“Scheduled Maturity Date” shall mean February 9, 2025.

“Secondary Market Transactions” shall have the meaning set forth in Section 10.1.1 hereof.

“Securities” shall have the meaning set forth in Section 10.1.1 hereof.

“**Securities Act**” shall mean the Securities Act of 1933, as amended.

“**Securitization**” shall have the meaning set forth in Section 10.1.1 hereof.

“**Servicer**” shall have the meaning set forth in Section 10.8 hereof.

“**Servicing Agreement**” shall have the meaning set forth in Section 10.8 hereof.

“**Servicing Fee**” shall have the meaning set forth in Section 4.1.28 hereof.

“**Shortfall**” shall have the meaning as set forth in Section 2.14 hereof.

“**SOFR**” shall mean, with respect to any Business Day, a rate per annum equal to the secured overnight financing rate for such Business Day published by the SOFR Administrator on the SOFR Administrator’s Website on the immediately succeeding Business Day.

“**SOFR Administrator**” shall mean the Federal Reserve Bank of New York (or a successor administrator of the secured overnight financing rate).

“**SOFR Administrator’s Website**” shall mean the website of the Federal Reserve Bank of New York, currently at <http://www.newyorkfed.org>, or any successor source for the secured overnight financing rate identified as such by the SOFR Administrator from time to time.

“**SOFR Loan**” means the Loan at such time as interest thereon accrues at a rate of interest based upon Term SOFR.

“**SOFR Rate**” means the sum of (a) Term SOFR and (b) the Spread.

“**Soft Costs**” shall mean those Total Project Related Costs which are not Hard Costs, including but not limited to, architect’s, engineer’s and general contractor’s fees, interest on the Building Loan, recording taxes and title charges in respect of the Building Loan Mortgage, Taxes and Other Charges, Insurance Premiums.

“**SPE Party**” shall mean: (i) if Borrower is a limited partnership, any Special Purpose Entity that is a general partner of Borrower, and (ii) if Borrower is a limited liability company other than an Acceptable LLC, the Special Purpose Entity that is the managing member of Borrower, and, in each case, that satisfies the requirements of Section 5.1(b) hereof. Notwithstanding the foregoing, to the extent Borrower is and remains an Acceptable LLC, there shall be deemed to be no “SPE Party” hereunder.

“**SPE Provisions**” shall mean the representations, covenants and other terms and conditions hereof and of the other Loan Documents, in each case, relating to single purpose, bankruptcy remote entities (including, without limitation, those contained in Article V hereof).

“**Special Purpose Entity**” shall mean a Person, other than a natural person, whose structure and organizational and governing documents are in form and substance that comply with the provisions of Article V hereof and otherwise meet the Prudent Lender Standard.

“**Sponsor**” shall mean Guarantor.

“**Spread**” shall mean six percent (6.00%).

“**Stabilization**” shall mean (a) Completion has occurred, (b) the Property has an occupancy rate of not less than ninety percent (90%), (c) the Debt Service Coverage Ratio is not less than 1.20:1.00 for two (2) consecutive calendar quarters and (d) the Debt Yield is not less than nine and two tenths of one percent (9.20%) for two (2) consecutive calendar quarters.

“**State**” shall mean the State or Commonwealth in which the Land or any part thereof is located.

“**Stored Materials**” shall have the meaning as set forth in Section 2.12 hereof.

“**Strike Rate**” shall mean four and twenty-five hundredths of one percent (4.25%).

“**Subguard Insurance**” shall have the meaning as set forth in Section 2.17(i) hereof.

“**Substitution**” shall have the meaning set forth in Section 9.6 hereof.

“**Survey**” shall mean the survey of the Property certified to and accepted by Lender in connection with the closing of the Loan.

“**Tax and Insurance Escrow Account**” shall have the meaning set forth in Section 7.3 hereof.

“**Tax and Insurance Escrow Funds**” shall have the meaning set forth in Section 7.3 hereof.

“**Taxes**” shall mean all real estate and personal property taxes, assessments (including, without limitation, any regular assessments made for repayment of the C-PACE Loan, but not the balloon principal amount of such C-PACE Loan), water rates or sewer rents, now or hereafter levied or assessed or imposed against the Property or part thereof.

“**TC Cap**” shall have the meaning set forth in Section 6.1(h) hereof.

“**Tenant**” shall mean any Person leasing, subleasing or otherwise occupying any portion of the Property under a Lease or other occupancy agreement.

“**Tenant Direction Notice**” shall mean a notice, substantially in the form of Exhibit A attached hereto, directing the recipient to pay all Rent and other sums due under the Lease to which such Person is a party into the Lockbox Account.

“**Term SOFR**” shall mean, the Term SOFR Reference Rate for a tenor of one month as of the Reference Time, as such rate is published by the Term SOFR Administrator and rounded up to the nearest 1/100th of one percent (1.0%); provided, however, that if as of 5:00 p.m. (New York City time) as of any Reference Time the Term SOFR Reference Rate for a tenor of one month has not been published by the Term SOFR Administrator and a Benchmark Replacement Date with

respect to the Term SOFR Reference Rate has not occurred, then Term SOFR will be the Term SOFR Reference Rate for such tenor as published by the Term SOFR Administrator on the first preceding U.S. Government Securities Business Day for which such Term SOFR Reference Rate for such tenor was published by the Term SOFR Administrator so long as such first preceding U.S. Government Securities Business Day is not more than three (3) U.S. Government Securities Business Days prior to such Reference Time. Notwithstanding the foregoing or anything herein to the contrary, in no event shall Term SOFR be less than the Benchmark Floor.

“**Term SOFR Administrator**” shall mean CME Group Benchmark Administration Limited (CBA) (or a successor administrator of the Term SOFR Reference Rate selected by Lender in its sole discretion).

“**Term SOFR Reference Rate**” shall mean the forward-looking term rate based on SOFR.

“**Title Company**” shall mean the title insurance company which has issued the Title Insurance Policy.

“**Title Insurance Policy**” shall mean an ALTA loan policy of title insurance acceptable to Lender (or, if the Property is in a State which does not permit the issuance of an ALTA policy, such title policy shall be in a form permitted in such State and acceptable to Lender) issued with respect to the Property and insuring the lien of the Mortgage.

“**Total Debt**” shall mean the Debt.

“**Total Project-Related Costs**” shall mean all direct and indirect costs and expenses of constructing and developing the Improvements (including Hard Costs and, Soft Costs and operating the same through the Maturity Date of the Loan.

“**Trade Contract**” shall mean any agreement (other than the Architect’s Contract and the General Contractor’s Agreement entered into by the Borrower or by the General Contractor, in which the Trade Contractor thereunder agrees to provide labor and/or materials in connection with the construction of the Improvements.

“**Trade Contractor**” shall mean the contractor or vendor under any Trade Contract.

“**Trades List**” shall have the meaning set forth in Section 2.17 hereof.

“**Transfer**” shall have the meaning set forth in Section 9.1 hereof.

“**Transfer Provisions**” shall mean the representations, covenants and other terms and conditions hereof and of the other Loan Documents related to, in each case, any Sale or Pledge of any direct or indirect interest in any Restricted Party and/or the Property and other related matters (including, without limitation, those contained in Article IX hereof).

“**Trigger Debt Yield**” shall mean (a) during the first Extension Period, eight percent (8.0%) and (b) during the second and third Extension Periods, eight and one-half of one percent (8.5%).

“**Trigger DSCR**” shall mean (a) during the first Extension Period a ratio of 1.05 to 1.0 and (b) during the second and third Extension Periods, 1.10 to 1.0.

“**Trigger Period**” shall mean any period (i) commencing upon an Event of Default, and expiring upon a payment in full of the Loan or Lender’s waiver or acceptance of a cure of such Event of Default in its sole and absolute discretion; or (ii) commencing after the commencement of the first Extension Period, (X) the Lender’s determination that the Debt Service Coverage Ratio for the prior calendar quarter was less than the Trigger DSCR, and expiring at such time as the Debt Service Coverage Ratio for each of the prior two (2) calendar quarters was equal to or greater than the Trigger DSCR; or (Y) the Lender’s determination that the Debt Yield for the prior calendar quarter each of the prior two (2) calendar quarters was less than the Trigger Debt Yield and expiring at such time as the Debt Yield for each of the prior two (2) calendar quarters was equal to or greater than the Trigger Debt Yield.

Notwithstanding the foregoing, a Trigger Period shall not be deemed to expire (A) in the event that a Trigger Period has commenced, but not expired, for any other reason, or (B) after the date that is one (1) year prior to the Scheduled Maturity Date.

“**Trigger Period Notice Date**” shall have the meaning set forth in Section 2.7.2 hereof.

“**Trigger Period True Up Deposit**” shall have the meaning set forth in Section 2.7.2 hereof.

“**TRIPRA**” shall have the meaning set forth in Section 6.1(h) hereof.

“**True Up Payment**” shall mean a payment into the applicable Reserve Account of a sum which, together with any applicable monthly deposits into the applicable Reserve Account, will be sufficient to discharge the obligations and liabilities for which such Reserve Account was established as and when reasonably appropriate. The amount of the True Up Payment shall be determined by Lender in accordance with the Prudent Lender Standard, and shall be final and binding absent manifest error.

“**UCC**” or “**Uniform Commercial Code**” shall mean the Uniform Commercial Code as in effect in the State in which the Property is located.

“**Unadjusted Benchmark Replacement**” shall mean the applicable Benchmark Replacement excluding the related Benchmark Replacement Adjustment.

“**Underwritable Cash Flow**” shall mean, for any period, an amount equal to the excess (if any) of Operating Income for such period over Operating Expenses for such period, subject to adjustments (i) for (a) items of a non-recurring nature, (b) a credit loss/vacancy allowance equal to the greatest of five percent (5%) of Operating Income, actual vacancy and market vacancy, (c) imminent liabilities and/or other expense increases (including, without limitation, imminent increases to Taxes and Insurance Premiums) and (d) above-market Rents; and (ii) to exclude rental income attributable to any Tenant not in Economic Occupancy; and (iii) to exclude items that are not properly included as Operating Income or Operating Expenses. Lender’s calculation of Underwritable Cash Flow and related determinations by Lender shall be final absent manifest error. If Underwritable Cash Flow is being determined based on Operating Income and/or

Operating Expenses for a period of less than twelve (12) months, or utilized with respect to a period of less than twelve (12) months, the computation shall be done based on a full twelve (12) month period and adjusted pro rata, in order to incorporate non-recurring seasonal items if applicable.

“Underwritable Cash Flow (First Extension)” shall mean an amount equal to the excess (if any) of (a) Operating Income to be calculated for purposes of this definition on an annualized basis based on Tenants in Economic Occupancy pursuant to the then-current Rent Roll at the time of the calculation over (b) Operating Expenses to be calculated for purposes of this definition based on the current Annual Budget, subject to adjustments (i) for (A) items of a non-recurring nature, (B) a credit loss/vacancy allowance equal to the greatest of five percent (5%) of Operating Income, actual vacancy and market vacancy, (C) imminent liabilities and/or other expense increases (including, without limitation, imminent increases to Taxes and Insurance Premiums), (D) above-market Rents, and (E) based on the current operating history of the Property at the time of the related calculation; and (ii) to exclude rental income attributable to any Tenant not in Economic Occupancy; and (iii) to exclude items that are not properly included as Operating Income or Operating Expenses. Lender’s calculation of Underwritable Cash Flow (First Extension) and related determinations by Lender shall be final absent manifest error. For purposes of this definition only, if a Tenant does not qualify as being in “Economic Occupancy” solely due to a failure to satisfy the condition set forth in clause (b)(ii) of the definition of “Economic Occupancy”, such Tenant shall be deemed to be in Economic Occupancy subject to an additional ten percent (10%) adjustment to the Operating Income for such Tenant for a credit loss/vacancy allowance. For the avoidance of doubt, this ten percent (10%) adjustment will be in addition to the credit loss/vacancy allowance set forth in clause (B) above.

“Updated Information” shall have the meaning set forth in Section 10.1.2(a) hereof.

“U.S. Government Securities Business Day” means any day except for a Saturday, Sunday or a day on which the Securities Industry and Financial Markets Association, or any successor thereto, recommends that the fixed income departments of its members be closed for the entire day for purposes of trading in United States government securities.

“U.S. Obligations” shall mean direct full faith and credit obligations of the United States of America that are not subject to prepayment, call or early redemption.

Section 1.2 Principles of Construction. All references to sections and schedules are to sections and schedules in or to this Agreement unless otherwise specified. All uses of the word “including” shall mean “including, without limitation” unless the context shall indicate otherwise. Unless otherwise specified, the words “hereof”, “herein” and “hereunder” and words of similar import when used in this Agreement shall refer to this Agreement as a whole and not to any particular provision of this Agreement. Unless otherwise specified, all meanings attributed to defined terms herein shall be equally applicable to both the singular and plural forms of the terms so defined. As to any matters requiring mathematical computations, Lender’s calculation shall be deemed conclusive absent manifest error.

Section 1.3 Notification Regarding Benchmark Conversion. Section 2.2.2(b) of this Agreement provides a mechanism for determining an alternative rate of interest in the event Term

SOFR, or another Benchmark, is no longer available or in certain other circumstances. Lender does not warrant or accept any responsibility for and shall not have any liability with respect to, the administration, implementation, calculation, submission or any other matter related to Term SOFR or other rates in the definition of Benchmark Replacement, or any Benchmark Replacement Adjustment.

II. GENERAL TERMS.

Section 2.1 Loan Commitment; Disbursement to Borrower.

2.1.1 **Agreement to Lend and Borrow.** Subject to and upon the terms and conditions set forth herein, Lender hereby agrees to make and Borrower hereby agrees to accept the Loan on the Closing Date.

2.1.2 **The Loan.** Lender agrees to fund additional advances of the Loan requested by Borrower from time to time (each, an “**Additional Advance**”), up to the Building Loan Amount, subject to satisfaction of the terms and conditions set forth in Sections 2.17 through 2.20 below. Any amount borrowed and repaid hereunder in respect of the Loan may not be re-borrowed.

2.1.3 **The Note, Mortgage and Loan Documents.** The Loan shall be evidenced by the Note and secured by the Mortgage, the Assignment of Leases and the other Loan Documents.

2.1.4 **Use of Proceeds.** Borrower shall use the proceeds of the Loan to (a) pay or reimburse itself for Building Loan Costs actually incurred in connection with the construction of the Improvements if and to the extent that such Building Loan Costs are reflected in the Project Budget, subject to reallocation pursuant to Sections 2.11 and 2.14 (or other reallocations approved by Lender in the exercise of its commercially reasonable discretion).

Section 2.2 Interest Rate.

2.2.1 **Interest Rate.** Interest on the Outstanding Principal Balance of the Loan shall accrue from the Closing Date at the Interest Rate until repaid in accordance with the applicable terms and conditions hereof.

2.2.2 Interest Calculation.

(a) Interest on the Outstanding Principal Balance shall be calculated by multiplying (i) the actual number of days elapsed in the period for which the calculation is being made by (ii) a daily rate based on a three hundred sixty (360) day year (that is, the Interest Rate or the Default Rate, as then applicable, expressed as an annual rate divided by 360) by (iii) the Outstanding Principal Balance. The accrual period for calculating interest due on each Payment Date shall be the Interest Period in which such Payment Date falls. Borrower understands and acknowledges that such interest accrual requirement results in more interest accruing on the Loan than if either a thirty (30) day month and a three hundred sixty (360) day year or the actual number of days and a three hundred sixty-five (365) day year were used to compute the accrual of interest on the Loan. The following additional provisions shall apply and, subject to Section 2.2.3 hereof, the Interest Rate shall be determined in accordance with this Section 2.2.2. Subject to a replacement of Term

SOFR pursuant to Section 2.2.2(b) or a replacement of the Interest Rate with the Federal Funds Interest Rate during any Benchmark Unavailability Period pursuant to Section 2.2.2(f) below, the Interest Rate with respect to the Loan shall be the SOFR Rate with respect to the applicable Interest Period for a SOFR Loan. Any change in the rate of interest hereunder due to a change in the Interest Rate shall become effective as of the opening of business on the first day on which such change in the Interest Rate shall become effective.

(b) Benchmark Replacement. Notwithstanding anything to the contrary herein or in any other Loan, if a Benchmark Transition Event and its related Benchmark Replacement Date have occurred prior to the Reference Time in respect of any setting of the then-current Benchmark, then, such Benchmark Replacement will replace such Benchmark for all purposes hereunder and under any Loan Document in respect of such Benchmark setting and subsequent Benchmark settings without any amendment to, or further action or consent of any other party to, this Agreement or any other Loan Document and the Loan shall be converted from and after the applicable Benchmark Replacement Date to an Alternate Benchmark Rate Loan accruing interest at the Alternate Benchmark Rate. Notwithstanding any provision of this Agreement to the contrary, in no event shall Borrower have the right to convert (x) a SOFR Loan to an Alternate Benchmark Rate Loan or a Federal Funds Interest Rate Loan or (y) an Alternate Benchmark Rate Loan accruing interest at a rate based upon the then-current Benchmark to a Federal Funds Interest Rate Loan or an Alternate Benchmark Rate Loan accruing interest at a rate based upon the applicable Benchmark Replacement for the then-current Benchmark.

(c) Conforming Changes. In connection with the use or administration of Term SOFR, Lender will have the right to make Conforming Changes from time to time and, notwithstanding anything to the contrary herein or in any other Loan Document, any amendments implementing such Conforming Changes will become effective without any further action or consent of Borrower. In connection with the use, administration, adoption or implementation of a Benchmark Replacement, Lender will have the right to make Conforming Changes from time to time and, notwithstanding anything to the contrary herein or in any other Loan Document, any amendments implementing such Conforming Changes will become effective without any further action or consent of Borrower.

(d) Notices; Standards for Decisions and Determinations. Lender will promptly notify Borrower of (i) any occurrence of a Benchmark Transition Event and its related Benchmark Replacement Date, (ii) the implementation of any Benchmark Replacement, (iii) the effectiveness of any Conforming Changes, (iv) the necessity and amount of any spread adjustment and (v) the commencement or conclusion of any Benchmark Unavailability Period. Any determination, decision or election that may be made by Lender pursuant to Section 2.2.2, including any determination with respect to a tenor, rate or adjustment or of the occurrence or non-occurrence of an event, circumstance or date and any decision to take or refrain from taking any action or any selection, will be conclusive and binding absent manifest error and may be made in its sole discretion and without consent from Borrower.

(e) Intentionally Omitted.

(f) Benchmark Unavailability Period. During any Benchmark Unavailability Period, the Interest Rate with respect to the Loan shall be the Federal Funds Interest Rate and the Loan shall be a Federal Funds Interest Rate Loan.

(g) All payments made by Borrower hereunder shall, provided that Lender complies with the requirements of Section 2.2.2(i) below, be made free and clear of, and without reduction for or on account of, any and all present or future income, stamp or other taxes, levies, imposts, duties, charges, fees, deductions, reserves or withholdings imposed, levied, collected, withheld or assessed by any Governmental Authority, excluding income and franchise taxes of the United States of America imposed by the jurisdiction under the laws of which Lender is organized or any political subdivision or taxing authority thereof or therein or imposed by the jurisdiction of Lender's applicable lending office where Lender is resident or engaged in business or any political subdivision or taxing authority thereof or therein (such non-excluded taxes being referred to collectively as "**Foreign Taxes**"). If any Foreign Taxes are required to be withheld from any amounts payable to Lender hereunder, the amounts so payable to Lender shall be increased to the extent necessary to yield to Lender (after payment of all Foreign Taxes) interest or any such other amounts payable hereunder at the rate or in the amounts specified hereunder. Whenever any Foreign Tax is payable pursuant to applicable law by Borrower, as promptly as possible thereafter, Borrower shall send to Lender an original official receipt, if available, or certified copy thereof showing payment of such Foreign Tax. Borrower hereby indemnifies Lender for any incremental taxes, interest or penalties that may become payable by Lender which may result from any failure by Borrower to pay any such Foreign Tax when due to the appropriate taxing authority or any failure by Borrower to remit to Lender the required receipts or other required documentary evidence. All amounts payable under this Section 2.2.2(f) shall constitute additional interest hereunder and shall be secured by the Mortgage and the other Loan Documents. The provisions of this Section 2.2.2(f) shall survive any payment or prepayment of the Loan and any foreclosure or satisfaction of the Mortgage. Any reference under this Section 2.2.2(f) to "Lender" shall be deemed to include any participant, and any assignees.

(h) If any Change in Law:

(i) shall hereafter impose, modify or hold applicable any reserve, capital adequacy, tax, special deposit, compulsory loan or similar requirement against assets held by, or deposits or other liabilities in or for the account of, advances or loans by, or other credit extended by, or any other acquisition of funds by, any office of Lender which is not otherwise included in the determination of the Interest Rate hereunder;

(ii) shall hereafter have the effect of reducing the rate of return on Lender's capital as a consequence of its obligations hereunder to a level below that which Lender could have achieved but for such adoption, change or compliance (taking into consideration Lender's policies with respect to capital adequacy) by any amount deemed by Lender to be material; or

(iii) shall hereafter impose on Lender any other condition, and the result of any of the foregoing is to increase the cost to Lender of making, renewing or maintaining loans or extensions of credit or to reduce any amount receivable hereunder;

then, in any such case, Borrower shall promptly pay Lender, upon demand, any additional amounts necessary to compensate Lender for such additional cost or reduced amount receivable as reasonably determined by Lender. If Lender becomes entitled to claim any additional amounts pursuant to this subsection, Lender shall provide Borrower with not less than thirty (30) days' notice specifying in reasonable detail the event by reason of which it has become so entitled and the additional amount required to fully compensate Lender for such additional cost or reduced amount. A certificate as to any additional costs or amounts payable pursuant to the foregoing sentence submitted by Lender to Borrower shall be conclusive in the absence of manifest error. This provision shall survive payment of the Note and the satisfaction of all other obligations of Borrower under this Agreement and the other Loan Documents.

(i) Borrower agrees to indemnify Lender and to hold Lender harmless from any loss or expense which Lender sustains or incurs as a consequence of (A) any default by Borrower in payment of the principal of or interest on a SOFR Loan or an Alternate Benchmark Rate Loan, including, without limitation, any such loss or expense arising from interest or fees payable by Lender to lenders of funds obtained by it in order to maintain a SOFR Loan or an Alternate Benchmark Rate Loan hereunder, (B) any prepayment (whether voluntary or mandatory) of a SOFR Loan or an Alternate Benchmark Rate Loan which does not include interest through the last day of an Interest Period, including, without limitation, such loss or expense arising from interest or fees payable by Lender to lenders of funds obtained by it in order to maintain a SOFR Loan or an Alternate Benchmark Rate Loan hereunder and (C) any Benchmark Conversion, including, without limitation, any loss or expenses arising from interest or fees payable by Lender to lenders of funds obtained by it in order to maintain a SOFR Loan, a Federal Funds Interest Rate Loan or an Alternate Benchmark Rate Loan hereunder or, if no such funds were actually obtained from such lenders, an amount equal to the interest or fees which would have been payable by Lender if it had obtained funds from lenders in order to maintain a SOFR Loan, a Federal Funds Interest Rate Loan or an Alternate Benchmark Rate Loan hereunder (the amounts referred to in clauses (A), (B) and (C) are herein referred to collectively as the “**Breakage Costs**”); provided, however, Borrower shall not indemnify Lender from any loss or expense arising from Lender's willful misconduct or gross negligence. This provision shall survive payment of the Note in full and the satisfaction of all other obligations of Borrower under this Agreement and the other Loan Documents.

(j) If Lender is a U.S. Person (other than the lender originally named herein), Lender shall deliver to Borrower, upon request, a Form W-9 (unless it establishes to the reasonable satisfaction of Borrower that it is otherwise eligible for an exemption from backup withholding tax or other withholding tax). If Lender is not a U.S. Person, Lender shall deliver to Borrower, upon request, either (A) an applicable Form W-8BEN or W-8BEN-E establishing an exemption from U.S. federal withholding tax or (B) a Form W-8ECI. If Lender is not a U.S. Person, Lender further undertakes to deliver to Borrower additional Forms W-8, 1001, 4224 (or any successor forms) or other manner of

certification, as the case may be, (x) on or before the date that any such form expires or becomes obsolete, (y) after the occurrence of any event requiring a change in the most recent form previously delivered by it to Borrower, and (z) such extensions or renewals thereof as may reasonably be requested by Borrower, certifying that Lender is entitled to receive payments hereunder without deduction or withholding of any Foreign Taxes. However, in the event that any Change in Law has occurred prior to the date on which any delivery pursuant to the preceding sentence would otherwise be required which renders such form inapplicable, or which would prevent Lender from duly completing and delivering any such form, or if such Change in Law results in Lender being unable to deliver a Form W-9 (or other satisfactory evidence that it is not subject to U.S. federal backup withholding tax), Lender shall not be obligated to deliver such forms but shall, promptly following such Change in Law, but in any event prior to the time the next payment hereunder is due following such Change in Law, advise Borrower in writing whether it is capable of receiving payments without any deduction or withholding of Foreign Taxes. In the event of such Change in Law, Borrower shall have the obligation to make Lender whole and to “gross-up” under Section 2.2.2(e) hereof, despite the failure by Lender to deliver such forms. Any reference under this Section 2.2.2(i) to “Lender” shall be deemed to include any participant, co-lender and any assignees.

2.2.3 Default Rate. In the event that, and for so long as, any Event of Default shall have occurred and be continuing, the Outstanding Principal Balance and, to the extent permitted by law, all accrued and unpaid interest in respect of the Loan and any other amounts due pursuant to the Loan Documents shall accrue interest at the Default Rate, calculated from the date such payment was due without regard to any grace or cure periods contained herein and shall (to the extent not already paid and/or due and payable hereunder) be due and payable on each Payment Date. Borrower acknowledges that it would be extremely difficult or impracticable to determine Lender’s actual damages resulting from any Event of Default and that the Default Rate is a reasonable estimate of those damages and does not constitute a penalty.

2.2.4 Usury Savings. This Agreement, the Note and the other Loan Documents are subject to the express condition that at no time shall Borrower be obligated or required to pay interest on the principal balance of the Loan at a rate which could subject Lender to either civil or criminal liability as a result of being in excess of the Maximum Legal Rate. If, by the terms of this Agreement or the other Loan Documents, Borrower is at any time required or obligated to pay interest on the principal balance due hereunder at a rate in excess of the Maximum Legal Rate, the Interest Rate or the Default Rate, as the case may be, shall be deemed to be immediately reduced to the Maximum Legal Rate and all previous payments in excess of the Maximum Legal Rate shall be deemed to have been payments in reduction of principal and not on account of the interest due hereunder. All sums paid or agreed to be paid to Lender for the use, forbearance, or detention of the sums due under the Loan, shall, to the extent permitted by applicable law, be amortized, prorated, allocated, and spread throughout the full stated term of the Loan until payment in full so that the rate or amount of interest on account of the Loan does not exceed the Maximum Legal Rate of interest from time to time in effect and applicable to the Loan for so long as the Loan is outstanding.

Section 2.3 Loan Payment.

2.3.1 **Payments Before the Maturity Date.** Borrower shall make a payment to Lender of interest only on the Closing Date for the First Interest Period. On each Payment Date thereafter, up to and including the Maturity Date, Borrower shall make a payment to Lender of an amount equal to the Monthly Debt Service Payment Amount for the Interest Period within which such Payment Date occurs, which payments shall be applied first to accrued and unpaid interest and the balance to principal. No Interest Period shall be shortened by reason of any payment of the Loan prior to the expiration of such Interest Period. Lender shall have the right from time to time, in its sole discretion, upon not less than thirty (30) days' prior written notice to Borrower, to change the Payment Date to a different calendar day of each month which is not earlier than the first (1st) of the calendar month and is not more than ten (10) days later than the originally scheduled Payment Date of each calendar month; *provided, however*, that if Lender shall have elected to change the Payment Date as aforesaid, Lender shall have the option, but not the obligation, to adjust the Interest Period correspondingly.

2.3.2 **Payment on Maturity Date.** Borrower shall pay to Lender on the Maturity Date the Outstanding Principal Balance, all accrued and unpaid interest and all other amounts due hereunder and under the Note, the Mortgage and the other Loan Documents. If Borrower shall not pay to Lender the full Outstanding Principal Balance on the Maturity Date, then (in addition to all other rights and remedies of Lender) from and after the Maturity Date the Loan shall bear interest at the Default Rate.

2.3.3 **Payments Generally.** For purposes of making payments hereunder, but not for purposes of calculating Interest Periods, if the day on which such payment is due is not a Business Day, then amounts due on such date shall be due on the immediately preceding Business Day. All amounts due pursuant to this Agreement and the other Loan Documents shall be payable without setoff, counterclaim, defense (other than the defense of prior payment) or any other deduction whatsoever.

2.3.4 **Late Payment Charge.** If any principal, interest or any other sums due under the Loan Documents is not paid by Borrower by the date on which it is due, Borrower shall pay to Lender upon demand an amount equal to the lesser of five percent (5%) of such unpaid sum or the maximum amount permitted by applicable law in order to defray the expense incurred by Lender in handling and processing such delinquent payment and to compensate Lender for the loss of the use of such delinquent payment, *provided, however* that no such late payment charge shall be due with respect to the principal amount of the Loan due on the Maturity Date. Any such amount shall be secured by the Mortgage and the other Loan Documents to the extent permitted by applicable law.

2.3.5 **Method and Place of Payment.** Except as otherwise specifically provided herein, all payments and prepayments under this Agreement and the Note shall be made to Lender not later than 3:00 P.M., New York City time, on the date when due and shall be made in lawful money of the United States of America in immediately available funds at Lender's office or as otherwise directed by Lender, and any funds received by Lender after such time shall, for all purposes hereof, be deemed to have been paid on the next succeeding Business Day.

Section 2.4 Prepayments.

2.4.1 Voluntary Prepayments. Except as otherwise provided in this Section 2.4, Borrower shall not have the right to prepay the Loan (either in whole or in part). Borrower may elect, at its option and upon thirty (30) days prior written notice to Lender (or such shorter period of time as may be permitted by Lender in its sole discretion), which election shall be irrevocable, to prepay the Debt in whole (but not in part) on any Payment Date so long as the Exit Fee and the Minimum Interest Payment Amount, in each case to the extent applicable, is paid in accordance with this Section 2.4; provided, however, if for any reason Borrower prepays the Loan on a date other than a Payment Date, Borrower shall also pay Lender (i) all interest which would have accrued on the amount of the Loan had the Loan actually been repaid on the Payment Date next occurring following the date of such prepayment (such amount, the “**Interest Shortfall**”) and (ii) the Breakage Costs. As a condition to any voluntary prepayment, the notice of prepayment may not be given to Lender more than ninety (90) days prior to the Payment Date upon which prepayment is to be made and Borrower hereby agrees that, in the event Borrower delivers a notice and fails to prepay the Loan in accordance with such notice and the terms of this Section 2.4, Borrower shall pay Lender all reasonable out-of-pocket costs and expenses incurred by Lender, including, without limitation, any Breakage Costs or similar expenses, as a result of such failure.

2.4.2 Mandatory Prepayments. On the next occurring Payment Date following the date on which Lender actually receives any Net Proceeds, if Lender is not obligated to make such Net Proceeds available to Borrower for Restoration in accordance with the applicable terms and conditions hereof, Borrower shall prepay, or authorize Lender to apply Net Proceeds as a prepayment of, the Outstanding Principal Balance in an amount equal to one hundred percent (100%) of such Net Proceeds together with any applicable Interest Shortfall and such payment shall be accompanied by the applicable portion of the Exit Fee, and any Breakage Costs. Furthermore, Borrower shall make any payments required pursuant to Section 6.5 hereof as and to the extent required thereunder. Other than, in each case, following an Event of Default, no prepayment premium or penalty (which shall not be deemed to include the Exit Fee, which shall be owed as provided for in this Agreement, if applicable) shall be due in connection with any prepayment made pursuant to this Section 2.4.2 or in connection with any payment pursuant to Section 6.4. Any partial prepayment under this Section 2.4.2 shall be applied to the last payments of principal due under the Loan.

2.4.3 Prepayments After Default. If concurrently with or during the existence of an Event of Default, payment of all or any part of the principal of the Loan is tendered (which tender may be rejected by Lender to the extent permitted by applicable Legal Requirements) by Borrower, a purchaser at foreclosure, or any other Person, or otherwise recovered by Lender (including through application of any Reserve Funds or any other cash collateral for the Loan pursuant to the Loan Documents), (i) such tender or recovery shall be deemed to be a voluntary prepayment in an attempt to circumvent the prohibition against prepayment set forth in Section 2.4.1 herein and (ii) Borrower, such purchaser at foreclosure or other Person shall pay the Minimum Interest Payment Amount, the Exit Fee and the Breakage Costs, in addition to the Outstanding Principal Balance, all accrued and unpaid interest and other amounts payable under the Loan Documents (including the Interest Shortfall), all out-of-pocket costs and expenses incurred by Lender in connection with such prepayment and if such prepayment occurs prior to the final sale of the Loan in a Secondary Market Transaction, Hedge Losses. Notwithstanding anything to the contrary contained herein or in any other Loan Document, any prepayment of the Debt shall be applied to the Debt in such order and priority as may be determined by Lender in its sole discretion.

2.4.4 Minimum Interest. In all events and under all circumstances and notwithstanding anything to the contrary contained in this Agreement, but subject to Section 2.2.4, in connection with each and every Minimum Interest Principal Paydown, Borrower shall be obligated to pay to Lender the applicable Minimum Interest Payment Amount. In furtherance of the foregoing, Borrower expressly acknowledges and agrees that (x) Lender shall have no obligation to accept any prepayment or repayment of the Loan unless and until Borrower shall have complied with this Section 2.4.4 and Borrower has deposited with Lender all Interest Shortfall and Breakage Costs, as applicable in accordance with Section 2.4.1, (y) Lender shall have no obligation to release or, if requested by Borrower, assign the Note and Mortgage upon payment of the Debt unless and until Lender shall have received each and every Minimum Interest Payment Amount due under this Section 2.4.4, together with all Interest Shortfall and Breakage Costs, as applicable in accordance with Section 2.4.1, and (z) each and every prepayment of the Debt is subject to the terms of this Loan Agreement and nothing in this Section 2.4.4 gives Borrower any right to prepay any portion of the Debt. In the event that any Minimum Interest Payment Amount is due hereunder, Lender shall deliver to Borrower a statement setting forth the amount and determination of the Minimum Interest Payment Amount. Lender's computation of the Minimum Interest Payment Amount shall be conclusive and binding on Borrower for all purposes, absent manifest error, and Lender's calculation may be made by Lender on any day during the fifteen (15) day period preceding the date of such prepayment. Lender shall not be obligated or required to have actually reinvested the prepaid principal balance at the Benchmark or otherwise as a condition to receiving the Minimum Interest Payment Amount. Borrower expressly acknowledges and agrees that the Minimum Interest Payment Amount shall constitute (i) additional consideration for the Loan and (ii) a portion of the Debt, and shall, upon payment, be the sole and exclusive property of Lender. Notwithstanding the foregoing or anything else herein to the contrary, payment of the Minimum Interest Payment shall be waived in connection with (i) prior to Completion, prepayment in full of the Loan in connection with a bona fide "arms-length" sale of the Property to a third party, which shall be no sooner than fifteen (15) days prior to the receipt by the Borrower of all temporary certificates of occupancy for the Project and the Property required under applicable Legal Requirements and (ii) after the Project is Complete, prepayment in full of the Loan.

Section 2.5 Payment of Exit Fee.

2.5.1 Borrower shall be obligated to pay the Exit Fee to Lender as follows: (i) upon any (and each) partial prepayment of the Loan in accordance with the terms hereof (other than as to payments of principal in connection with each Monthly Debt Service Payment, which in each event shall be deferred until payment in full of the Debt or the acceleration thereof in accordance with the terms of the Loan Documents), in addition to all other amounts payable to Lender under Section 2.4 hereof, Borrower shall pay to Lender, on account of the Exit Fee, an amount equal to one percent (1%) of the amount so prepaid; (ii) upon any (and each) application of any condemnation awards or Net Proceeds to the Debt in accordance with the terms of this Agreement and the Mortgage, one percent (1%) of the amount thereof shall be retained by Lender on account of the Exit Fee and the balance thereof shall be applied to the Debt; and (iii) upon repayment in full of the Debt or the acceleration thereof in accordance with the terms of any of the Loan Documents, Borrower shall pay to Lender the entire Exit Fee which would be due on such date, less any amounts on account thereof previously paid to Lender under the foregoing clauses (i) and (ii) of this Section 2.5.1. Notwithstanding the foregoing, payment of the Exit Fee shall be waived (or, if elected by Borrower, credited against the closing costs in connection with the refinancing

of the Loan) in the event Borrower refinances the Loan with a new permanent loan from Oceanview Life and Annuity Company (or its Affiliates) (which may be provided by Oceanview Life and Annuity Company (or its Affiliates) in their sole discretion).

2.5.2 In furtherance of the foregoing, Borrower expressly acknowledges and agrees that (i) Lender shall have no obligation to accept any prepayment of the Loan unless and until Borrower shall have complied with this Section 2.5, and (ii) Lender shall have no obligation to release or assign any Loan Document upon payment of the Debt unless and until Lender shall have received the Exit Fee then due and payable.

2.5.3 Borrower expressly acknowledges and agrees that the Exit Fee shall constitute (i) additional consideration for the Loan and (ii) a portion of the Debt.

Section 2.6 Release of Property. Except as set forth in this Section 2.6, no repayment, prepayment of all or any portion of the Note shall cause, give rise to a right to require, or otherwise result in, the release of the Lien of the Mortgage. Lender shall, upon the written request and at the expense of Borrower, upon payment in full of all principal and interest due on the Loan and all other amounts due and payable under the Loan Documents in accordance with the terms and provisions of the Note and this Agreement, release the Lien of the Mortgage.

Section 2.7 Cash Management.

2.7.1 Lockbox Account.

(a) Simultaneously with the occurrence of Completion of the Project, Borrower shall enter into a Lockbox Agreement with a Lockbox Bank selected by Borrower and acceptable to Lender. Thereafter, Borrower shall maintain the Lockbox Account for the term of the Loan, which Lockbox Account shall be under the sole dominion and control of Lender (subject to the terms hereof and of the Lockbox Agreement). Pursuant to the terms of the Lockbox Agreement, the Lockbox Bank shall, at the direction of Lender (which may not be given until the first commencement of a Trigger Period hereunder), establish the Lockbox Account, which Lockbox Account shall be under the sole dominion and control of Lender (subject to the terms hereof and of the Lockbox Agreement); once established, Borrower shall maintain the Lockbox Account for the term of the Loan. The Lockbox Account shall have a title evidencing the foregoing in a manner acceptable to Lender. Borrower hereby grants to Lender a first-priority security interest in the Lockbox Account and all deposits at any time contained therein and the proceeds thereof and will take all actions necessary to maintain in favor of Lender a perfected first priority security interest in the Lockbox Account. Borrower hereby authorizes Lender to file UCC Financing Statements and continuations thereof to perfect Lender's security interest in the Lockbox Account and all deposits at any time contained therein and the proceeds thereof. All costs and expenses for establishing and maintaining the Lockbox Account (or any successor thereto) shall be paid by Borrower. All monies now or hereafter deposited into the Lockbox Account shall be deemed additional security for the Debt. Borrower shall not alter or modify either the Lockbox Account or the Lockbox Agreement, in each case without the prior written consent of Lender. The Lockbox Agreement shall provide (and Borrower shall provide) Lender online access to bank and other financial statements relating to the

Lockbox Account (including, without limitation, a listing of the receipts being collected therein). In connection with any change of the Servicer for the Loan, Lender shall have the right to cause the Lockbox Account to be entitled with such other designation as Lender may select to reflect an assignment or transfer of Lender's rights and/or interests with respect to the Lockbox Account or the appointment of a new Servicer, as applicable. Lender shall provide Borrower with prompt written notice of any such renaming of the Lockbox Account. Borrower shall not further pledge, assign or grant any security interest in the Lockbox Account or the monies deposited therein or permit any lien or encumbrance to attach thereto, or any levy to be made thereon, or any UCC Financing Statements, except those naming Lender as the secured party, to be filed with respect thereto. The Lockbox Account (i) shall be an Eligible Account and (ii) shall not be commingled with other monies held by Borrower or Lockbox Bank.

(b) Upon (i) Lockbox Bank ceasing to be an institution acceptable to Lender, (ii) any resignation by Lockbox Bank or termination of the Lockbox Agreement by Lockbox Bank or Lender and/or (iii) the occurrence and continuance of an Event of Default, Borrower shall, within fifteen (15) days of Lender's request, (1) appoint a new Lockbox Bank (which such Lockbox Bank shall (I) be an institution acceptable to Lender, (II) other than during the continuance of an Event of Default, be selected by Borrower and approved by Lender, and (III) during the continuance of an Event of Default, be selected by Lender), (2) cause such Lockbox Bank to open a new Lockbox Account and enter into a new Lockbox Agreement with Lender on substantially the same terms and conditions as the previous Lockbox Agreement and (3) send new Tenant Direction Notices and the other notices required pursuant to the terms hereof relating to such new Lockbox Agreement and Lockbox Account. Borrower constitutes and appoints Lender its true and lawful attorney-in-fact with full power of substitution to complete or undertake any action required of Borrower under this Section 2.7 in the name of Borrower in the event Borrower fails to do the same. Such power of attorney shall be deemed to be a power coupled with an interest and cannot be revoked but may only be exercisable by the Lender during the continuance of an Event of Default. Upon the completion of items (1) - (3) above, Borrower and Lender shall cooperate to terminate the previous Lockbox Account and Lockbox Agreement.

(c) On or prior to the date of Completion, Borrower shall deliver to Lender a partially-completed Tenant Direction Notice to each commercial Tenant set forth on the Rent Roll, together with authorization for Lender or its agent to complete and deliver such Tenant Direction Notices upon the occurrence of the first Trigger Period. Borrower represents, warrants and covenants that, from and after the first occurrence of a Trigger Period and thereafter for so long as the Debt remains outstanding, Borrower shall (i) deliver and cooperate with Lender to cause delivery to each commercial Tenant a Tenant Direction Notice, and (ii) within three (3) Business Days of receipt, deposit or cause to be deposited into the Lockbox Account (1) all revenue derived from the Property (including without limitation all Operating Income) and received by Borrower or Manager, as the case may be, and (2) all funds otherwise payable to Borrower by Manager pursuant to the Management Agreement (or otherwise in connection with the Property), (iii) not maintain any other accounts by Borrower or any other Person into which revenues from the ownership and operation of the Property are directly deposited and (iv) provide additional or newly executed Tenant Direction Notices as directed by Lender and further cooperate

to direct each commercial Tenant to pay rent directly to the Lockbox Account. Until deposited into the Lockbox Account, any Rents and other revenues from the Property held by or on behalf of Borrower shall be deemed to be held in trust by Borrower for the benefit of Lender and shall not be commingled with any other funds or property of Borrower. If following receipt of a Tenant Direction Notice, the recipient fails to remit payments as directed thereby for sixty (60) days, Borrower shall use all commercially reasonable efforts to cause such recipient to comply with the terms thereof. If the recipient fails to remit payments as directed thereby for ninety (90) days after receipt of such Tenant Direction Notice, then in addition to continuing such efforts, Borrower shall give notice thereof to Lender. Borrower warrants and covenants that it shall not rescind, withdraw or change any notices or instructions required to be sent by it pursuant to this Section (including, without limitation, any Tenant Direction Notice) in each case without Lender's prior written consent.

(d) Upon request of Borrower, following payment in full of the Loan, Lender shall (i) give written notice to the Lockbox Bank releasing all of Lender's right, title and interest in, to and under the Lockbox Account, and (ii) provide to Borrower a letter authorizing all Tenants to pay all future rents as may thereafter be directed by Borrower.

2.7.2 Cash Management Account.

(a) Simultaneously with the occurrence of Completion of the Project, Borrower shall enter into a Cash Management Agreement with a Cash Management Bank. Borrower acknowledges and agrees that the Cash Management Agreement shall provide, among other things, that upon the commencement of the first Trigger Period (if any) hereunder, a cash collateral account shall be established at the Cash Management Bank (such account, the "**Cash Management Account**") in accordance with the terms of the Cash Management Agreement. Borrower hereby grants to Lender a first priority security interest in the Cash Management Account and all deposits at any time contained therein and the proceeds thereof and will take all actions necessary to maintain in favor of Lender a perfected first priority security interest. Borrower hereby agrees that the Cash Management Agreement shall constitute an account control agreement with Cash Management Bank for the purposes of the UCC, and authorizes Lender to file UCC Financing Statements and continuations thereof to perfect Lender's security interest in the Cash Management Account if reasonably necessary. Lender and Servicer shall have the sole right to make withdrawals from the Cash Management Account, and neither Borrower or any other Person claiming on behalf of or through Borrower shall have any right or authority, whether express or implied, to make use of, or withdraw any funds, investments or other properties from, the Cash Management Account, or to give any instructions with respect to the Cash Management Account. All costs and expenses for establishing and maintaining the Cash Management Account shall be paid by Borrower from time to time in accordance with the Cash Management Agreement. The Cash Management Account shall be assigned the federal tax identification number of the Borrower. Borrower shall provide Lender or Cash Management Bank, at any time upon request of Lender, with a Form W-8 or W-9 to evidence that Borrower is not subject to any back-up withholding under the IRS Code. If Borrower has not completed the process of opening the Cash Management Account with the Cash Management Bank prior to the first Payment Date during a Trigger Period, then

(without limiting Lender's rights to exercise its remedies under this Agreement by reason of any breach by Borrower) until establishment of the Cash Management Account (i) references to the Cash Management Account shall mean a Reserve Account established and held by Lender, and (ii) references to the Cash Management Bank shall mean Lender and/or its Servicer and/or the bank at which such Reserve Account is established.

(b) Lender shall not require the Lockbox Bank to transfer funds from the Lockbox Account to the Cash Management Account other than during a Trigger Period; during a Trigger Period, Lender may require transfers from the Lockbox Account to the Cash Management Account on a daily basis. At any time that a Trigger Period is not continuing, the funds from the Lockbox Account shall be deposited into the Borrower's Operating Account. While a Trigger Period is continuing, Lockbox Bank shall be directed to transfer funds available in the Lockbox Account (in accordance with the terms of the Lockbox Agreement) to the Cash Management Account at the frequency (not less than weekly) specified in the Lockbox Agreement. Furthermore, in its sole discretion, Borrower may, from time to time deposit amounts into the Cash Management Account from sources of Borrower other than those received by the Lockbox Bank; provided, that if Borrower deposits such amounts, the amounts deposited shall be subject to all of the terms hereof as if not separately deposited by Borrower, and may not be withdrawn or applied other than as provided for in this Section 2.7.2(b). Lender shall give disposition instructions from time to time directing Cash Management Bank that funds, if any, on deposit in the Cash Management Account shall on each Payment Date be disbursed by the Cash Management Bank or Servicer in the following amounts and order of priority:

(i) First, to the payments to the Tax and Insurance Escrow Account in an amount sufficient to pay the monthly deposit required to be made for Taxes and Insurance Premiums in accordance with the terms and conditions of Section 7.3;

(ii) Next, to Lender in the amount of the Monthly Debt Service Payment Amount, for application in accordance with the terms and conditions of Section 2.3.1 hereof;

(iii) Next, to the Replacement Reserve Account in the amount of the Replacement Reserve Monthly Deposit, for application in accordance with the terms and conditions of Section 7.4 hereof;

(iv) Next, funds sufficient to pay any other amounts due and owing to Lender and/or Servicer pursuant to the terms hereof and/or of the other Loan Documents, if any, shall be deposited with or as directed by Lender;

(v) Next, an amount equal to the Operating Expense Monthly Disbursement shall be disbursed to Borrower's Operating Account; and

(vi) Last, any amounts remaining in the Cash Management Account after application in accordance with the foregoing (such remaining amounts, "**Excess Cash Flow**") shall be deposited into the Excess Cash Flow Account and applied in accordance with Section 7.7(b) hereof.

Notwithstanding anything to the contrary in this Agreement or the Loan Documents, Borrower hereby agrees and acknowledges that Lender may direct Cash Management Bank that all funds held in the Cash Management Account during the continuance of any Event of Default are to be administered and applied by Lender or Servicer as permitted by Section 7.1(c) and Section 8.2 of this Agreement, or otherwise in accordance with applicable law (other than, with respect to amounts collected for the payment of Lease Taxes, which shall be disbursed by Lender or Servicer directly to the Governmental Authority to whom they are owed).

(c) The insufficiency of funds on deposit in the Cash Management Account shall not relieve Borrower from the obligation to make any payments, as and when due pursuant to this Agreement and the other Loan Documents, and such obligations shall be separate and independent, and not conditioned on any event or circumstance whatsoever.

(d) If at any time Lender or Servicer notifies Borrower (the date such notice is given, the “**Trigger Period Notice Date**”) that, notwithstanding that no notice thereof had previously been delivered, a Trigger Period commenced on a date prior to the Trigger Period Notice Date (such date, the “**Trigger Period Commencement Date**”), Borrower shall, within two (2) Business Days of the Trigger Period Notice Date, deposit cash into the Lockbox Account in an amount equal to the difference between (1) all Operating Income during the Deposit Period less (2) the sum of (A) all Monthly Debt Service Payment Amounts actually made during the Deposit Period, (B) all deposits actually made into the Reserve Accounts during the Deposit Period and (C) all Operating Expenses actually expended by Borrower during the Deposit Period, such amount (the “**Trigger Period True Up Deposit**”) to be reasonably calculated by Lender in its discretion, which shall be final and binding absent manifest error. As used herein, “**Deposit Period**” shall mean the period of time commencing on the Trigger Period Commencement Date and ending on the Trigger Period Notice Date.

2.7.3 Payments Received In the Cash Management Account. Notwithstanding anything to the contrary contained in this Agreement and the other Loan Documents, and provided no Event of Default has occurred and is continuing, Borrower’s obligations with respect to the payment of the Monthly Debt Service Payment Amount and amounts due for the Reserve Funds and any other reserves established pursuant to this Agreement or any other Loan Document shall be deemed satisfied to the extent sufficient amounts are deposited in the Cash Management Account to satisfy such obligations on the dates each such payment is required, regardless of whether any of such amounts are so applied by the Cash Management Bank, so long as Lender’s access to such funds is not obstructed or interfered with in any way by the activities of any Restricted Party or their Affiliates, or the Cash Management Bank, or by any action or proceeding affecting any of them or the Property.

Section 2.8 Interest Rate Cap Agreement.

2.8.1 Prior to or contemporaneously with the Closing Date, Borrower shall enter into an Interest Rate Cap Agreement that (i) shall be in a form and substance acceptable to Lender, (ii) shall at all times be with a Counterparty, (iii) shall be for a period equal to the term of the Loan, (iv) shall, for each applicable period set forth on Schedule 2.8 attached hereto, have a notional amount equal to or greater than the notional amount corresponding to such period and set forth on

Schedule 2.8 attached hereto, and (v) shall at all times have a strike rate equal to the Strike Rate. Borrower shall direct such Counterparty to deposit directly into the Cash Management Account (or, if the Cash Management Account is not then activated, into such other Account as Lender may designate) any amounts due Borrower under such Interest Rate Cap Agreement so long as any portion of the Debt is outstanding, provided that the Debt shall be deemed to be outstanding if the Property is transferred by judicial or non-judicial foreclosure or deed-in-lieu thereof. Additionally, Borrower shall collaterally assign to Lender, pursuant to the Collateral Assignment of Interest Rate Cap Agreement, all of its right, title and interest in and to the Interest Rate Cap Agreement (and any replacements thereof), including, without limitation, its right to receive any and all payments under the Interest Rate Cap Agreement (and any replacements thereof), and Borrower shall, and shall cause Counterparty to, deliver to Lender a fully executed Interest Rate Cap Agreement (which shall, by its terms, authorize the assignment to Lender and require that payments be deposited directly into the Cash Management Account (or, if the Cash Management Account is not then activated, into such other Account as Lender may designate)).

2.8.2 Borrower shall comply with all of its obligations under the terms and provisions of the Interest Rate Cap Agreement. All amounts paid by the Counterparty under the Interest Rate Cap Agreement to Borrower or Lender shall be deposited immediately into the Cash Management Account (or, if the Cash Management Account is not then activated, into such other Account as Lender may designate). Borrower shall take all actions reasonably requested by Lender to enforce Lender's rights under the Interest Rate Cap Agreement in the event of a default by the Counterparty and shall not waive, amend or otherwise modify any of its rights thereunder.

2.8.3 In the event of any downgrade, withdrawal or qualification of the rating of the Counterparty by any Rating Agency below the Minimum Counterparty Rating or in the event of a Benchmark Conversion, Borrower shall either (x) replace the Interest Rate Cap Agreement not later than ten (10) Business Days following receipt of notice of such Benchmark Conversion or downgrade, withdrawal or qualification with a Replacement Interest Rate Cap Agreement or (y) if provided for in such Interest Rate Cap Agreement, cause the Counterparty to deliver collateral to secure Borrower's exposure under the Interest Rate Cap Agreement in such amount and pursuant to such terms as are acceptable to the Rating Agencies; provided that, notwithstanding such a downgrade, withdrawal or qualification, unless and until the Counterparty transfers the Interest Rate Cap Agreement to a replacement Counterparty pursuant to the foregoing, the Counterparty will continue to perform its obligations under the Interest Rate Cap Agreement.

(a) If the Replacement Interest Rate Cap Agreement is required as a result of a Benchmark Conversion, such Replacement Interest Rate Cap Agreement must:

(i) provide to Lender and Borrower a hedge against rising interest rates that is no less beneficial to Borrower and Lender than the Interest Rate Cap Agreement required pursuant to Section 2.8.1 above. Failure to satisfy the foregoing shall constitute an "Additional Termination Event" as defined by Section 5(b)(v) of the ISDA Master Agreement, with the Counterparty as the "Affected Party." In the event that a Counterparty is required pursuant to the terms of an Interest Rate Cap Agreement to (i) deliver collateral as specified in the applicable Interest Rate Cap Agreement, or (ii) find a replacement Counterparty, Borrower covenants and agrees that Borrower shall seek Lender's approval with respect

thereto and shall not approve or consent to the foregoing unless and until Borrower receives Lender's prior written approval and shall approve or consent to the foregoing upon receipt of Lender's prior written approval. Borrower's failure to comply with the requirements of this Section 2.8.3 shall constitute, at Lender's option, an immediate Event of Default.

(ii) refer to the Benchmark Replacement instead of Term SOFR (or any other Benchmark that has been replaced by the Benchmark Replacement) and (B) have a strike rate equal to the Strike Rate increased by the difference between the Benchmark Replacement and Term SOFR if the Benchmark Replacement is higher than Term SOFR or decreased by the difference between the Benchmark Replacement and Term SOFR if the Benchmark Replacement is lower than Term SOFR, in each case, on the date that the Interest Rate is first calculated at the Benchmark Replacement.

(b) Such Replacement Interest Rate Cap Agreement shall thereafter be subject to the terms and conditions of the Loan Documents regarding Interest Rate Cap Agreements and, concurrently with the replacement of the Interest Rate Cap Agreement based on Term SOFR or any other then-applicable Benchmark, Borrower shall be entitled to terminate, sell, or liquidate such Interest Rate Cap Agreement based on Term SOFR or such other Benchmark. Borrower shall be entitled to effectuate the foregoing by amending the Interest Rate Cap Agreement based on Term SOFR or any other then-applicable Benchmark to comply with the foregoing requirements. Notwithstanding the foregoing, in the event that the relevant Benchmark Replacement is not publicly recognized by ISDA as an alternative to Term SOFR and/or ISDA has not approved an amendment to hedge agreements generally providing such Benchmark Replacement as a standard alternative to Term SOFR, Borrower shall purchase such other hedging product as reasonably determined by Lender or, in the event such product is not commercially available, Borrower and Lender shall cooperate to find a mutually agreeable alternative to an Interest Rate Cap Agreement that would afford Lender substantially equivalent protection from increases in the Interest Rate.

2.8.4 In the event that Borrower fails to purchase and deliver to Lender the Interest Rate Cap Agreement as required herein or fails to maintain the Interest Rate Cap Agreement in accordance with the terms and provisions of this Agreement, Lender may purchase the Interest Rate Cap Agreement and the cost incurred by Lender in purchasing such Interest Rate Cap Agreement shall be paid by Borrower to Lender with interest thereon at the Default Rate from the date such cost was incurred by Lender until such cost is reimbursed by Borrower to Lender.

2.8.5 Borrower shall obtain and deliver to Lender an opinion from counsel (which counsel may be in house counsel for the Counterparty) for the Counterparty (upon which Lender and its successors and assigns may rely) which shall provide, in relevant part, that:

(a) the Counterparty is duly organized, validly existing, and in good standing under the laws of its jurisdiction of incorporation and has the organizational power and authority to execute and deliver, and to perform its obligations under, the Interest Rate Cap Agreement;

(b) the execution and delivery of the Interest Rate Cap Agreement by the Counterparty, and any other agreement which the Counterparty has executed and delivered pursuant thereto, and the performance of its obligations thereunder have been and remain duly authorized by all necessary action and do not contravene any provision of its certificate of incorporation or by-laws (or equivalent organizational documents) or any law, regulation or contractual restriction binding on or affecting it or its property;

(c) all consents, authorizations and approvals required for the execution and delivery by the Counterparty of the Interest Rate Cap Agreement, and any other agreement which the Counterparty has executed and delivered pursuant thereto, and the performance of its obligations thereunder have been obtained and remain in full force and effect, all conditions thereof have been duly complied with, and no other action by, and no notice to or filing with any governmental authority or regulatory body is required for such execution, delivery or performance; and

(d) the Interest Rate Cap Agreement, and any other agreement which the Counterparty has executed and delivered pursuant thereto, has been duly executed and delivered by the Counterparty and constitutes the legal, valid and binding obligation of the Counterparty, enforceable against the Counterparty in accordance with its terms, subject to applicable bankruptcy, insolvency and similar laws affecting creditors' rights generally, and subject, as to enforceability, to general principles of equity (regardless of whether enforcement is sought in a proceeding in equity or at law).

2.8.6 Borrower shall deliver to Lender a new Collateral Assignment of Interest Rate Cap Agreement acceptable to Lender in connection with each Replacement Interest Rate Cap Agreement.

Section 2.9 Extension of the Maturity Date. Borrower shall have the option to extend the term of the Loan beyond the initial Scheduled Maturity Date for three (3) successive terms (each, an "Extension Option") of twelve (12) months each (each, an "Extension Period") to (i) February 9, 2026, if the first Extension Option is exercised, (ii) February 9, 2027, if the second Extension Option is exercised, and (iii) February 9, 2028, if the third Extension Option is exercised upon satisfaction (in each case as reasonably determined by Lender) of the following terms and conditions, each of which shall be satisfied prior to the commencement of the applicable Extension Period unless otherwise specified:

(a) no Default or Event of Default shall have occurred and be continuing at the time an Extension Option is exercised and on the date that the applicable Extension Period is commenced;

(b) Borrower shall notify Lender of its irrevocable election to exercise an Extension Option not earlier than sixty (60) days and no later than thirty (30) days prior to the applicable then current Maturity Date; provided, however, that Borrower shall be permitted to revoke such notice at any time up to five (5) Business Days before the applicable then current Maturity Date provided that Borrower pays to Lender all actual out of pocket costs incurred by Lender in connection with such notice, including, without limitation, any Breakage Costs;

(c) Borrower shall have paid to Lender the Extension Fee no later than the date the related Extension Period is commenced;

(d) the Reserve Accounts shall contain the amounts required under this Agreement as of the date of commencement of the Extension Period, and Borrower shall deposit such additional reserve funds with Lender as Lender may require;

(e) each Guarantor shall execute and deliver a reaffirmation, in form and substance satisfactory to Lender, of such Guarantor's obligations under each of the Loan Documents executed and delivered by such Guarantor;

(f) Borrower shall deliver to Lender such other certificates, documents or instruments as Lender may reasonably require, including, without limitation, an Officer's Certificate stating that all representations and warranties of Borrower set forth in Article III hereof remain true and correct in all material respects, subject to any changes in facts or circumstances permitted to have occurred, or not prohibited from having occurred, pursuant to the terms of the Loan Documents (in which case such change of facts and circumstances shall be set forth in such Officer's Certificate with reference to the applicable representations and warranties) or setting forth any exceptions to such representations and warranties, which exceptions shall be satisfactory to Lender;

(g) if required by Lender, Lender shall have received, at Borrower's expense, a title continuation or endorsement to Lender's Title Insurance Policy, evidencing that there are no liens against the Property other than Permitted Encumbrances;

(h) Borrower shall deliver to Lender updated rent rolls, occupancy reports, financial statements of Borrower and Guarantor, and such other information as Lender may reasonably require;

(i) The Loan to Value Ratio shall be no greater than sixty-five percent (65%);

(j) intentionally omitted;

(k) in connection with the first Extension Option, the Debt Service Coverage Ratio (First Extension) shall not be less than 1.10 to 1.00 and the Debt Yield (Extension) shall be not less than nine percent (9.0%) at the time such Extension Option is exercised and on the date that such Extension Period is commenced; provided however, that if the foregoing condition is not satisfied at the time such Extension Option is exercised and on the date that such Extension Period is commenced, Borrower may either (i) prepay a portion of the Outstanding Principal Balance as may be necessary such that a Debt Service Coverage Ratio (First Extension) of 1.10 to 1.00 and a Debt Yield (Extension) of nine percent (9.0%) is satisfied, provided that any such prepayment shall be treated as a voluntary prepayment under Section 2.4.1 hereof (and the applicable amounts due in connection with such prepayment shall be payable by Borrower) (the "**First Extension Prepayment Amount**") or (ii) deposit cash in an amount equal to the greater of (A) the First Extension Prepayment Amount, (B) the amount by which the Underwritable Cash Flow (First Extension) would need to increase in order to achieve a Debt Service Coverage Ratio (First Extension) of 1.10 to 1.00, and (C) the amount by which the Underwritable

Cash Flow (First Extension) would need to increase in order to achieve a Debt Yield (Extension) of nine percent (9.0%) into the Shortfall Reserve Account;

(l) in connection with the second Extension Option, the Debt Service Coverage Ratio (Extension) shall not be less than 1.20 to 1.00 and the Debt Yield (Extension) shall not be less than nine and one-half of one percent (9.5%) at the time such Extension Option is exercised and on the date that such Extension Period is commenced; provided, however, that if the foregoing condition is not satisfied, Borrower may prepay a portion of the Outstanding Principal Balance as may be necessary so that such condition is satisfied, provided that any such prepayment shall be treated as a voluntary prepayment under Section 2.4.1 hereof (and the applicable amounts due in connection with such prepayment shall be payable by Borrower);

(m) in connection with the third Extension Option, the Debt Service Coverage Ratio (Extension) shall not be less than 1.25 to 1.00 and the Debt Yield (Extension) shall not be less than ten percent (10.0%) at the time such Extension Option is exercised and on the date that such Extension Period is commenced; provided, however, that if the foregoing condition is not satisfied, Borrower may prepay a portion of the Outstanding Principal Balance as may be necessary so that such condition is satisfied, provided that any such prepayment shall be treated as a voluntary prepayment under Section 2.4.1 hereof (and the applicable amounts due in connection with such prepayment shall be payable by Borrower);

(n) Lender shall have received such other documentation and information (and Borrower shall have satisfied such additional requirements) as may be reasonably requested by Lender in connection with such Extension Option;

(o) no Material Adverse Change shall have occurred;

(p) Borrower shall obtain and deliver to Lender prior to exercise of such Extension Option, pursuant to the applicable terms and conditions of Section 2.8 hereof, an extension of the Interest Rate Cap Agreement or a Replacement Interest Rate Cap Agreement, which extension or Replacement Interest Rate Cap Agreement shall be effective commencing on the first day of the Interest Period within which the related Extension Period commences and shall have a maturity date not earlier than the last day of the Interest Period within which the related Extension Period expires; and

(q) Completion shall have occurred, provided that for purposes of this Section 2.9(q) only, Completion shall not require the delivery of the “as built” drawings and the Final Survey.

Section 2.10 Preliminary Project Report and Budget. The project budget which details the direct and indirect costs estimated to be incurred by Borrower until the Property achieves stabilized occupancy which has been approved by Lender and the Construction Consultant on, or prior to, the date hereof, is attached hereto as Schedule 2.10 (the “Project Budget”). Each category of direct and indirect cost (the “Line Items” or “Budget Line”) are delineated in the Project Budget with those that are approved as Building Loan Costs to be disbursed out of Building Loan proceeds

subject to availability and satisfaction of all applicable conditions to Additional Advances hereunder, being so indicated.

Section 2.11 Budget Reallocations.

(a) Other than Permitted Budget Re-allocations, subject to the prior approval of Lender, which shall not be unreasonably withheld, conditioned or delayed, the Borrower may revise the Project Budget from time to time to move Building Loan Contingency (Hard Costs) to other Hard Costs Budget Lines, and/or to move Building Loan Contingency (Soft Costs) to other Soft Costs Budget Lines. Any Permitted Budget Re-allocations shall not require the prior approval of Lender, but Borrower shall provide prompt written notice of same to Lender.

(b) If there is a savings in a particular Budget Line, and if such savings is substantiated by evidence reasonably satisfactory to Lender, the Borrower shall have the right, upon prior approval of Lender, which approval shall not be unreasonably withheld or delayed, to reallocate such savings to another Budget Line with respect to which additional costs have been or may be incurred; provided, however, that the Borrower shall in no event or under any circumstances have the right (i) to reallocate any portion of the Interest Reserve Budget Line prior to Completion of the Improvements, or (ii) reallocate any savings in a Hard Costs Budget Line to other than another Hard Costs Budget Line, without in each instance obtaining the prior approval of Lender, which approval may be withheld in the sole and absolute discretion of Lender, or to cause a reallocation to occur that in the opinion of the Lender, its counsel or the Title Company will be in contravention of the Lien Law, or that in the opinion of the Lender, its counsel or the Title Company will adversely affect or impair in any manner whatsoever the Lien or the priority of Lien of the Mortgage.

(c) If Borrower becomes aware of any change in Total Project Related Costs which will increase a Line Item of Total Project Related Costs reflected on the Project Budget, Borrower shall immediately notify Lender in writing and promptly submit to Lender for its approval a revised Project Budget. Any reallocation of any Line Item in the Project Budget in connection with cost overruns shall be subject to Lender's approval in Lender's reasonable discretion except as set forth in Section 2.11(a) and (b) above and Section 2.14. Lender shall have no obligation to make any further Additional Advances unless and until the revised Project Budget so submitted by Borrower is approved by Lender, and Lender reserves the right to approve or disapprove any revised Project Budget in its sole and absolute discretion (except with respect to reallocations in accordance with Section 2.11(a) and (b) above and Section 2.14).

Section 2.12 Stored Materials and Deposits. Lender shall not be required to disburse any funds for any materials, machinery or other personal property not yet incorporated into the Improvements (the "Stored Materials"), unless the following conditions are satisfied:

(a) Borrower shall deliver to Lender bills of sale or other evidence reasonably satisfactory to Lender of the cost of, and, subject to the payment therefor, Borrower's title in and to such Stored Materials;

(b) The Stored Materials are identified to the Property and Borrower, are segregated so as to adequately give notice to all third parties of Borrower's title in and to such materials, and are components in substantially final form ready for incorporation into the Improvements;

(c) The Stored Materials are stored at the Property or at such other third-party owned and operated site as Lender shall reasonably approve, and are protected against theft and damage in a manner satisfactory to Lender, including, if requested by Lender, storage in a bonded warehouse in the county in which the Property is located;

(d) The Stored Materials will be paid for in full with the funds to be disbursed, and all lien rights or claims of the supplier will be released upon full payment;

(e) Lender has or will have upon payment with disbursed funds a perfected, first priority security interest in the Stored Materials;

(f) The Stored Materials are insured for an amount equal to their replacement costs in accordance with Section 6.1 of this Agreement;

(g) The aggregate cost of Stored Materials stored at the Property is approved by the Construction Consultant and, if required by Lender, the Construction Consultant shall certify that it has inspected such Stored Materials and they are in good condition and suitable for use in connection with the Project; and

(h) At any one time, in the aggregate: (i) the cost of Stored Materials (excluding the pre-cast garage) not stored at the Property is not more than \$2,000,000 and (ii) the aggregate cost of Stored Materials (excluding the pre-cast garage) stored off and on the Property at any one time shall not exceed \$2,000,000.00.

(i) Notwithstanding the foregoing, the Lender shall have no obligation to make Additional Advances with respect to Stored Materials which are located in a country other than the United States.

(j) In addition to Additional Advances for Stored Materials, Lender shall approve Additional Advances for the payment of a deposit with respect to any materials to be included in the Project for which a deposit is required; provided that Borrower shall have otherwise satisfied all conditions to the applicable Additional Advance, the requested deposit is not in excess of fifty percent (50%) of the cost of such materials, and Lender shall be satisfied that the aggregate amount of outstanding deposits for materials that have not yet been delivered to the Project shall not at any one time exceed \$1,000,000.

Section 2.13 Amount of Advances.

(a) In no event shall any Additional Advance exceed the full amount of Building Loan Costs theretofore paid or to be paid with the proceeds of such Additional Advance plus any Building Loan Costs incurred by Borrower through the date of the Advance Request for such Additional Advance minus (i) with respect to any such Building Loan Costs that are Hard Costs of construction, the applicable Retainage for each contract and

subcontract and (ii) the aggregate amount of any Additional Advances previously made by Lender. It is further understood that the Retainage described above is intended to provide a contingency fund protecting Lender against failure of Borrower or Guarantor to fulfill any Obligations under the Building Loan Documents, and that Lender may charge amounts against such Retainage in the event that the Lender are required or elect to expend funds to cure any Default or Event of Default.

(b) The Retainage shall be advanced on a contract-by-contract basis prior to Completion of the Improvements but after final completion of all construction work provided for under such Trade Contract, subject to approval thereof by the Construction Consultant and receipt by Lender of final, unconditional lien waiver(s) for said contract.

(c) No Additional Advance of the Building Loan by the Lender shall be deemed to be an approval or acceptance by the Lender of any work performed thereon or the materials furnished with respect thereto.

Section 2.14 Loan Balancing. At any time and from time to time during the term of the Loan, Lender shall have the right (but not the obligation) to notify Borrower that, in Lender's sole but reasonable judgment, (a) the cost of all Total Project-Related Costs that remain unpaid at the time in question exceeds the undisbursed proceeds of the Loan plus any sums deposited with Lender pursuant to this Section 2.14 and not previously disbursed or (b) the cost of completing any Line Item in the Project Budget exceeds the remaining undisbursed portion of the Building Loan allocated to such Line Item in the Project Budget plus any sums deposited with Lender pursuant to this Section 2.14 to pay for such deficiency and not previously disbursed (the amount of any such deficiency under clauses (a) or (b) being herein referred to as the "**Shortfall**"). If Lender at any time shall so notify Borrower, Borrower shall, at its option, either individually or in combination (i) within ten (10) days of Lender's notification as aforesaid, deposit with Lender an amount equal to such Shortfall, which Lender may from time to time apply, or allow Borrower to apply, to such costs; (ii) pay for such costs, as incurred, in the amount of such Shortfall so that the amount of the Building Loan which remains to be disbursed shall be sufficient to pay all of the remaining Total Project-Related Costs, and Borrower shall furnish Lender with such evidence thereof as Lender shall require; (iii) with respect to any Shortfall arising pursuant to clause (b) above, to the extent permitted under Section 2.11(a), allocate the Building Loan Contingency (Hard Costs) or Building Loan Contingency (Soft Costs), to the extent applicable, to the Shortfall and (iv) with respect to any Shortfall arising pursuant to clause (b) above, to the extent permitted under Section 2.11(b), reallocate cost savings from the Project Budget in respect of the Building Loan (or other reallocations which are approved by Lender, in its reasonable discretion) in accordance with the terms of this Agreement. Borrower hereby agrees that Lender shall have a lien on and security interest in any sums deposited pursuant to clause (i) above and that Borrower shall have no right to withdraw any such sums except for the payment of the aforesaid costs as approved by Lender. Lender shall have no obligation to make any further advances of proceeds of the Loan until the sums required to be deposited pursuant to clause (i) above have been exhausted, Borrower has actually paid such Total Project-Related Costs pursuant to clause (ii) above and, in any such case, the Building Loan is back "in balance". Any such sums not used as provided in said clause (i) shall be released to Borrower when and to the extent that Lender reasonably determines that the amount thereof is more than the excess, if any, of the remaining Total Project-Related Costs over the undisbursed balance of the Loan, provided, however, that should

an Event of Default exist, Lender shall, at Lender's election, apply such amounts either to the remaining Total Project-Related Costs or to the immediate reduction of outstanding principal and/or interest under the Note.

Section 2.15 Quality of Work. No Additional Advance or any portion thereof shall be made with respect to defective work or to any contractor that has performed work that is defective and that has not been cured, as confirmed by the report of the Construction Consultant, but Lender may disburse all or part of any Additional Advance before the sum shall become due if Lender believes it advisable to do so, and all such Additional Advances or parts thereof shall be deemed to have been made pursuant to this Agreement.

Section 2.16 Required Equity. All Required Equity shall be contributed (i.e., expended by Borrower and invested in the Property for costs set forth on the approved Project Budget before any Additional Advances of the Building Loan shall be made).

Section 2.17 Initial Additional Advance. Lender shall not be obligated to make the first Additional Advance of the Building Loan (the "**Initial Additional Advance**") until all of the conditions precedent set forth in this Section 2.17 have been satisfied:

(a) Payment by Borrower of all fees and expenses required by this Agreement or the other Loan Documents, to the extent due and payable, including, without limitation, Lender's reasonable attorneys' fees and expenses, a draw fee equal to the then current draw fee of Servicer, all origination fees, and brokerage commissions, and all other out-of-pocket fees, costs and expenses (including the out-of-pocket fees and costs of the Construction Consultant).

(b) No Additional Advance, including the Initial Additional Advance, shall be requested or advanced for an amount less than \$100,000.00 other than the last requested Additional Advance.

(c) Except as expressly permitted herein, such Additional Advance shall be requested no later than the Completion Date (and Lender shall have no obligation to make any further Additional Advances in the event that all applicable conditions precedent to the making of such Additional Advance are not satisfied as of the Completion Date).

(d) No Material Adverse Change shall have occurred.

(e) If the Interest Rate Cap Agreement then in effect does not have a notional amount at least equal to the sum of (A) the principal balance of the Loan, plus (B) the requested Additional Advance, then on or prior to the date on which an Additional Advance is made, Borrower shall have either amended the Interest Rate Cap Agreement(s) then-in effect or obtained a new Interest Rate Cap Agreement (and assigned the same to Lender pursuant to such documents as Lender may reasonably require, and delivers to Lender such opinions of counsel with respect thereto as Lender may reasonably require), such that the notional amount of the Interest Rate Cap Agreements then in effect with respect to the Loan provide for a notional amount at least equal to the above required sum, and otherwise comply with the requirements of this Agreement.

(f) Borrower shall furnish Lender with evidence in form and content satisfactory to Lender that Borrower has contributed the Required Equity and Borrower shall otherwise be in compliance with Section 2.14.

(g) The Loan Documents shall be in full force and effect.

(h) At least ten (10) Business Days (but not more than sixty (60) days) prior to the date on which Borrower requests that the Initial Additional Advance be made, Borrower shall have delivered to Lender a written request on Lender's form of request indicating the requested amount of the Initial Additional Advance, together with all other information and items required to evidence the satisfaction of the conditions precedent to such advance set forth in this Section 2.17 and as may otherwise be requested by Lender (an "**Advance Request**"). Without limiting the foregoing, each Advance Request shall be accompanied by: (i) a completed Application and Certificate for Payment (AIA Document G702) that is executed by the General Contractor and Architect; (ii) a Borrowing Certificate in the form set forth on Exhibit 2.17(h); (iii) at the request of Lender, current requisitions for payment from Trade Contractors and/or any of their subcontractors allocable to the Project; (iv) such other information and documents as may be reasonably requested or required by Lender or the Construction Consultant with respect to the Hard Costs covered by such Advance Request; (v) to the extent such Advance Request includes a request to pay for, or reimburse the costs of, any Stored Materials, such Advance Request shall include a description of such Stored Materials and where such Stored Materials are proposed to be stored, including, without limitation, reasonable detail as to the security measures in place at any off-site location storing such Stored Materials; (vi) an updated Construction Schedule substantially in the form attached hereto as Schedule IV; (vii) the Change Order Log; and (viii) invoices, statements or such other information and documentation as Lender shall reasonably request or require with respect to any Soft Costs covered by such Advance Request, together with a general ledger or other acceptable format which details, for each Advance Request relating to Soft Costs, the invoice, the invoice number, invoice amount, purpose of such Soft Costs, and the Line Item in the Project Budget to which such Soft Costs relate. All such requests and requisitions for payment shall have been approved by the Lender and, with respect to Hard Costs, recommended for payment by the Construction Consultant. Borrower shall submit an Advance Request in accordance with the provisions of this Agreement.

(i) Construction Documents.

(i) General Contractor. Borrower shall deliver to Lender a fully executed copy of the General Contractor's Agreement, in the form that has been approved by Lender. General Contractor shall have executed and delivered to Lender an original certificate, consenting to the assignment of the General Contractor's Agreement, substantially in the form of Exhibit 2.17(i)(i).

(ii) Trade Contracts/Major Trade Contracts. Borrower shall have delivered to Lender, and Lender shall have approved, a list, certified by Borrower, of Trade Contractors who have been or, to the extent identified by Borrower, will be supplying labor or materials for the Property (the "**Trades List**"). In addition,

Borrower shall deliver to Lender and the Construction Consultant correct and complete copies of: (A) all executed Trade Contracts, each such Trade Contract may be entered into without the prior consent of the Lender and the Construction Consultant; and (B) all executed Major Trade Contracts, each such Major Trade Contract shall be approved by Lender and the Construction Consultant in their reasonable discretion.

(iii) Architect and Other Design Professionals. Borrower shall deliver to Lender fully executed copies of the Architect's Contract and Other Design Professional's Agreements, which agreements shall be approved by Lender in its reasonable discretion for the design of the Project. Borrower's Architect and Other Design Professionals shall have executed and delivered to Lender an original certificate, consenting to the assignment of the Architect's Contract and the Other Design Professional's Agreements, substantially in the form of Exhibit 2.17(i)(iii).

(iv) Standard Form of Trade Contract. Borrower shall deliver to Lender a copy of the standard form of contract and/or subcontract to be used by General Contractor, which standard form shall be approved by Lender in its reasonable discretion, which approval shall not be unreasonably withheld.

(v) Other Bids. If in the reasonable judgment of the Lender and the Construction Consultant all Trade Contracts, Major Trade Contracts, and the General Contractor's Agreement do not cover all of the work necessary for Completion of the Improvements, Borrower shall cause to be furnished firm bids from responsible parties, or estimates and other information reasonably satisfactory to Lender, for the work not so covered, to enable Lender to ascertain the total estimated cost of all work done and to be done.

(vi) Construction Consultant Certificate. Each Advance Request relating to Hard Costs shall be accompanied by a certificate or report of the Construction Consultant to the Lender based upon a site observation of the Project made by the Construction Consultant not more than thirty (30) days prior to the date of such draw, in which the Construction Consultant shall in substance: (A) for the Initial Additional Advance only, indicate its review and acceptance of the Plans and Specifications; (B) verify that the portion of the Improvements completed as of the date of such site observation has been completed substantially in accordance with the Plans and Specifications; and (C) state its estimate of (1) the percentages of the construction of the Improvements completed as of the date of such site observation on the basis of work in place as part of the Improvements and the Project Budget, (2) the Hard Costs actually incurred for work in place as part of the Improvements as of the date of such site observation, (3) the sum necessary to complete construction of the Improvements in accordance with the Plans and Specifications; and (4) the amount of time from the date of such inspection that will be required to achieve Completion of the Improvements.

(vii) Payment and Performance Bonds. The Borrower shall cause Payment and Performance Bonds, in form and substance satisfactory to the Lender

and the Construction Consultant and issued by sureties satisfactory to the Lender and the Construction Consultant (and with a rating of not less than A.M. Best Company, Inc. of A-:VIII), to be maintained with respect to the obligations of the General Contractor. The Payment and Performance Bonds shall be in an amount not less than the full contract price for the General Contractor's Agreement. In the alternative, Borrower may provide to Lender and the Construction Consultant evidence of subguard insurance coverage covering the Project and no other projects (against defaults by the subcontractors and material suppliers of General Contractor in connection with the Project) in form and substance acceptable to Lender (and in the amount of not less than \$30,000,000.00 on an aggregate basis and \$15,000,000.00 on a per occurrence (per year) basis), and including a "Financial Interest Endorsement" for the benefit of Lender in form and substance reasonably acceptable to Lender and the Construction Consultant, fully paid for coverage throughout the term of the Loan (including as the term may be extended) ("**Subguard Insurance**"). In the event that the Lender and Construction Consultant approve such Subguard Insurance, any costs previously budgeted for the Payment and Performance Bond shall be re-allocated in the Project Budget to the Building Loan Contingency (Hard Costs).

(viii) Plans and Specifications. Borrower shall deliver to the Construction Consultant a set of the Plans and Specifications sufficient to enable Borrower to obtain a building permit and any and all modifications and amendments made thereto. Borrower shall deliver to the Lender a list identifying the Plans and Specifications and any and all modifications and amendments made thereto.

(ix) Architect's Certificate. Borrower shall cause to be delivered to Lender certificates from the Borrower's Architect (the "**Architect's Certificate**") substantially in the form attached hereto as Exhibit 2.17(i)(ix) (unless Borrower's Architect signs the Application for Payment (AIA Form G702) for such Additional Advance).

(x) Intentionally Omitted.

(xi) Lien Waivers. Borrower shall deliver (A) duly executed unconditional Lien waivers, from all Trade Contractors for all work performed, and all labor or material supplied for which payment thereof has been made prior to the date of the Initial Additional Advance and (B) duly executed conditional Lien waivers, from all Trade Contractors for all work performed, and all labor or material supplied for which payment thereof will be made from proceeds of the Initial Additional Advance.

(j) Buyout Threshold. The Buyout Threshold Condition shall have been satisfied.

(k) Title Insurance Policy. The Building Loan Mortgage shall constitute a valid first Lien on the Property for the full amount of the Building Loan advanced to and

including the date of the applicable Additional Advance, free and clear of all Liens except for Permitted Encumbrances. Lender shall have been furnished with a notice of title continuation or an endorsement to the Title Insurance Policy issued to Lender on the Closing Date, which continuation or endorsement shall increase the coverage of the Title Insurance Policy by the amount of the Initial Additional Advance through the pending disbursement clause (but not the overall policy amount which shall be for the full amount of the Building Loan), amend the effective date of the Title Insurance Policy to the date of the Initial Additional Advance, continue to insure the Lien of the Building Loan Mortgage subject to no Liens or encumbrances other than the Permitted Encumbrances and which shall state that since the last disbursement of the Loan there have been no changes in the state of title to the Property (other than Permitted Encumbrances) and that there are no additional survey exceptions not previously approved by Lender. If the foundations of the Improvements have been set as of the date of the Initial Additional Advance, the Borrower shall also cause to be delivered to Lender a boundary line Survey and inspection report of the Property dated within thirty (30) days after the foundations to the Improvements are set and prior to the date of the first advance of the Building Loan proceeds after the foundations are set, prepared in accordance with Lender's survey requirements, certified by a land surveyor registered as such in the State in which the Property is located, which Survey shall be in form and substance satisfactory to Lender.

(l) Other Insurance. Borrower shall cause to be delivered to Lender Policies of all insurance required by Section 6.1 of this Agreement or any other Building Loan Document, and the same shall be in form and substance satisfactory to Lender.

(m) Evidence of Sufficiency of Funds. Lender shall have received evidence satisfactory to Lender that the proceeds of the Loan plus the Required Equity will be sufficient to cover all Total Project-Related Costs reasonably anticipated to be incurred, to satisfy the obligations of Borrower to Lender and under this Agreement.

(n) Environmental Report. Borrower shall cause to be delivered to Lender an environmental assessment report or reports of one or more qualified environmental engineering or similar inspection firms approved by Lender in form, scope and substance satisfactory to Lender, which report or reports shall indicate a condition of the Property in all respects satisfactory to Lender in its sole discretion and upon which report or reports Lender are expressly entitled to rely.

(o) Geotechnical Report. Borrower shall cause to be delivered to Lender a geotechnical report of one or more qualified engineers approved by Lender and the Construction Consultant in form, scope and substance satisfactory to Lender and the Construction Consultant, which report shall indicate a condition of the soil at the Property in all respects satisfactory to Lender in its sole discretion and upon which report or reports Lender are expressly entitled to rely.

(p) Site Plan and Survey. Borrower shall deliver to Lender a site plan depicting the placement of the Improvements verifying that all of the Improvements will be within the lot lines of the Property and in compliance with all set-back requirements and a Survey prepared in accordance with Lender's survey requirements, certified by a land surveyor

registered as such in the State, which Survey shall be in form and substance satisfactory to Lender.

(q) Government Approvals and Legal Requirements. Borrower shall deliver to Lender and the Construction Consultant satisfactory evidence that all Government Approvals necessary for the construction of the Improvements as contemplated by the Plans and Specifications (including, for the avoidance of doubt, for the specific use identified in the Plans and Specifications and for not less than the total number of units, together with the unit mix and the leaseable square footage of the commercial space identified in the Plans and Specifications, have been obtained, including, without limitation, a building permit, and that Borrower shall have complied with all Legal Requirements, including all land use, building, subdivision, zoning and similar ordinances and regulations promulgated by any Governmental Authority and applicable to the commencement of the construction of the Improvements and to permit the construction to continue to progress to the stage of completion at which work in then proceeding at the Project and in order to achieve Completion of the Improvements by not later than the Completion Date.

(r) C-PACE Loan. The C-PACE Loan shall have been funded to Wilmington Trust, as bond trustee.

(s) Evidence of Utilities. Borrower shall cause to be delivered to Lender letters from those local utility companies whose services are necessary to complete the Improvements in accordance with the Plans and Specifications and to operate the Improvements thereafter or the appropriate local Governmental Authority stating that sufficient electric, steam, gas, storm and sanitary sewer, telephone, cable and water facilities will be available to the Property upon the Completion of the Improvements.

(t) Legal Opinions. Lender shall have received opinions in form, substance and scope satisfactory to Lender and Lender's counsel from counsel satisfactory to Lender as to such matters (including, without limitation, land use and zoning matters) as Lender shall reasonably request.

(u) Searches Regarding Personal Property. Lender shall have received a certification from the Title Company or other service satisfactory to Lender or counsel satisfactory to Lender (which shall be updated from time to time at Borrower's expense upon request by Lender in connection with future Additional Advances) that a search of the public records disclosed no judgment, UCC or tax liens affecting Borrower or Guarantor, the Property or the Personal Property, and no conditional sales contracts, chattel mortgages, leases of personalty, financing statements or title retention agreements which affect the Personal Property.

(v) Notices. All notices required by any Governmental Authority or by any applicable Legal Requirement to be filed prior to commencement of construction of the Improvements shall have been filed.

(w) Anticipated Cost Report. The Borrower shall submit to the Lender an Anticipated Cost Report in the form set forth in Exhibit 2.17(w) hereof provided by the General Contractor, which indicates the costs anticipated to complete the construction of the Improvements, after giving effect to costs incurred during the previous month and projected costs.

(x) Performance; No Default. Borrower shall have performed and complied with all terms and conditions herein required to be performed or complied with by it at or prior to the date of the Initial Additional Advance, and on the date of the Initial Additional Advance, there shall exist no Default or Event of Default.

(y) Representations and Warranties. The representations and warranties made by Borrower and Guarantor in the Loan Documents or otherwise made by or on behalf of Borrower or Guarantor in connection therewith or after the date thereof shall have been true and correct in all material respects on the date on which made and shall continue to be true and correct in all material respects on the date of the Initial Additional Advance.

(z) No Damage. The Improvements shall not have been injured or damaged by fire, explosion, accident, flood or other casualty, unless Lender shall have received insurance proceeds or other monies sufficient in the reasonable judgment of Lender to effect the satisfactory restoration of the Improvements and to permit the Completion of the Improvements prior to the Completion Date.

(aa) Other Documents. Borrower shall have delivered such other documents and certificates as Lender or its counsel may reasonably require.

Section 2.18 Conditions to Subsequent Advances. The obligations of the Lender to make any Additional Advance after the Initial Additional Advance shall be subject to the following:

(a) Prior Conditions Satisfied. All conditions precedent to the Initial Additional Advance set forth in Section 2.17 (in the same manner in which they were satisfied for the Initial Additional Advance and without reimposing any one-time requirement) shall continue to be satisfied as of the date of such subsequent Additional Advance. For the avoidance of doubt, to the extent there have been any changes to the Trades List since the making of any prior Additional Advance, Borrower shall deliver an updated and certified Trades List in connection with any Advance Request.

(b) Balancing. Borrower is in compliance with the provisions of Section 2.14.

(c) Advance Request. Borrower shall submit an Advance Request in accordance with Section 2.17(d), provided that in no event shall Borrower submit an Advance Request more than once in any thirty (30) day period (and, for the avoidance of doubt, each Advance Request shall contain a request for all items requested by Borrower for such thirty (30) day period).

(d) Anticipated Cost Report. The Borrower shall submit to the Lender an updated Anticipated Cost Report.

(e) Satisfactory Title; Survey Update. The Building Loan Mortgage shall constitute a valid first Lien on the Property for the full amount of the Building Loan advanced to and including the date of the applicable Additional Advance, free and clear of all Liens except for Permitted Encumbrances. Lender shall have been furnished with a notice of title continuation or an endorsement to the Title Insurance Policy issued to Lender in connection with the Initial Additional Advance of the Loan, which continuation or endorsement shall increase the coverage of the Title Insurance Policy by the amount of the Additional Advance through the pending disbursement clause (but not the overall policy amount which shall be for the full amount of the Building Loan), amend the effective date of the Title Insurance Policy to the date of such Additional Advance, continue to insure the Lien of the Building Loan Mortgage subject to no Liens or encumbrances other than the Permitted Encumbrances and which shall state that since the last disbursement of the Loan there have been no changes in the state of title to the Property (other than Permitted Encumbrances) and that there are no additional survey exceptions not previously approved by Lender. Borrower shall also cause to be delivered to Lender a boundary line Survey (if not previously delivered in connection with the Initial Additional Advance) and inspection report of the Property dated within thirty (30) days after the foundations to the Improvements are set and prior to the date of the first advance of the Building Loan proceeds after the foundations are set, prepared in accordance with Lender's survey requirements, certified by a land surveyor registered as such in the State in which the Property is located, which Survey shall be in form and substance satisfactory to Lender.

(f) No Other Security Interests. Except as otherwise permitted herein, all materials and fixtures incorporated in the construction of the Improvements shall have been purchased so that their absolute ownership shall have vested in Borrower immediately upon delivery to the Land and Borrower shall have produced and furnished, if required by Lender, the contracts, bills of sale or other agreements under which title to such materials and fixtures is claimed.

(g) Performance; No Default. Borrower shall have performed and complied with all terms and conditions herein required to be performed or complied with by it at or prior to the date of such Additional Advance, and on the date of such Additional Advance there shall exist no Default or Event of Default.

(h) Representations and Warranties. The representations and warranties made by Borrower and Guarantor in the Loan Documents or otherwise made by or on behalf of Borrower or Guarantor in connection therewith after the date thereof shall have been true and correct in all material respects on the date on which made and shall also be true and correct in all material respects on the date of such Additional Advance.

(i) No Damage. The Improvements shall not have been injured or damaged by fire, explosion, accident, flood or other casualty, unless Lender shall have received insurance proceeds or other monies sufficient in the reasonable judgment of Lender to effect the satisfactory restoration of the Improvements and to permit the Completion of the Improvements prior to the Completion Date.

(j) Subcontracts. No Additional Advance shall be made by Lender with regard to work done by or on behalf of any Major Trade Contractor unless Borrower shall have delivered to Lender originals of the following documents as to such Major Trade Contractor, each in form and substance reasonably satisfactory to Lender:

(i) a fully executed contract reasonably acceptable to Lender; and

(ii) if requested by Lender, a performance letter from each Major Trade Contractor substantially in the form attached hereto as Exhibit 2.18(j)(iii).

(k) Government Approvals and Legal Requirements. Borrower shall have delivered to Lender evidence reasonably satisfactory to Lender and the Construction Consultant that all Government Approvals necessary for the construction of the Improvements as contemplated by the Plans and Specifications have been obtained and that Borrower shall have complied with all Legal Requirements, including all land use, building, subdivision, zoning and similar ordinances and regulations promulgated by any Governmental Authority and applicable to the construction of the Improvements and to permit construction to continue to progress to the stage of completion at which work is then proceeding at the Project and to permit the Completion of the Improvements prior to the Completion Date.

(l) Construction Consultant Approval. Lender has received advice from the Construction Consultant, satisfactory to Lender, as to Construction Consultant's determination based on on-site inspections of the Improvements and the data submitted to and reviewed by it as part of Borrower's Advance Request of the value of the labor and materials in place, that the construction of the Improvements is proceeding satisfactorily and according to schedule and that the work on account of which the Additional Advance is sought has been completed in a good and workmanlike manner to such Construction Consultant's satisfaction within cost estimates approved by Lender and substantially in accordance with the Plans and Specifications.

(m) Other Documents. Lender shall have received such other documents and certificates as Lender or its counsel may reasonably require.

(n) Lien Waivers. To the extent not previously delivered, Borrower shall deliver (A) duly executed unconditional Lien waivers from all Trade Contractors for all work performed, and all labor or material supplied for which payment thereof has been made prior to the date of the related Additional Advance and (B) duly executed conditional Lien waivers, from all Trade Contractors for all work performed, and all labor or material supplied for which payment thereof will be made from proceeds of the related Additional Advance.

(o) Buyout Log. Borrower shall deliver an updated copy of the Buyout Log to the Lender.

(p) Architect's Certificates. Borrower shall cause to be delivered to Lender an Architect's Certificate (unless Borrower's Architect signs the Application for Payment

(AIA Form G702) or Continuation Sheet (AIA Form G703) for the applicable Additional Advance).

Section 2.19 Conditions to Final Construction Advance. In addition to the conditions set forth in Section 2.18, the Lender's obligation to make the final Additional Advance of proceeds of the Building Loan pursuant to this Agreement shall be subject to the following conditions precedent:

- (a) Balancing. Borrower is in compliance with the provisions of Section 2.14.
- (b) Advance Request. Borrower shall submit an Advance Request in accordance with Section 2.17(d).
- (c) Completion of Improvements. Lender shall have received evidence satisfactory to Lender of the Completion of the Improvements.
- (d) Approval by Construction Consultant. Lender shall have received notification from the Construction Consultant that Completion of the Improvements has occurred and that all utilities necessary to service the Property have been connected and are in operation.
- (e) Certificates. Borrower shall have furnished to Lender a certificate of the Borrower's Architect substantially in the form attached hereto as Exhibit 2.19(e) which is countersigned by the General Contractor with respect to the certification regarding the cost of the Punch List Items.
- (f) Final Unconditional Lien Waivers. Borrower shall have furnished to Lender duly executed final, unconditional lien waivers, in the form acceptable to Lender from the General Contractor and all Trade Contractors who have performed work in connection with the Project, for the work so performed, and/or who have supplied labor and/or materials in connection with the Project, for the labor and/or materials so supplied.
- (g) Final Survey. Borrower shall have furnished to Lender a Final Survey.
- (h) Payment of Costs. Lender shall have received evidence satisfactory to Lender that all sums due in connection with the construction of the Improvements have been paid in full (or will be paid out of the funds requested to be advanced) and that no party claims or has a right to claim any statutory or common law lien arising out of the construction of the Improvements or the supplying of labor, material, and/or services in connection therewith.
- (i) Construction Consultant Approval. Lender shall have received advice from the Construction Consultant, satisfactory to Lender, as to Construction Consultant's determination based on on-site inspections of the Improvements and the data submitted to and reviewed by it as part of Borrower's Advance Request of the value of the labor and materials in place, that the construction of the Improvements is proceeding satisfactorily and according to schedule and that the work on account of which the Additional Advance is sought has been completed in a good and workmanlike manner to such Construction

Consultant's satisfaction within cost estimates approved by Lender and substantially in accordance with the Plans and Specifications.

(j) "As-Built" Plans and Specifications. Borrower shall furnish to Lender a full and complete set of "as built" Plans and Specifications certified to by Borrower's Architect.

(k) Notice of Completion. Lender shall have received evidence that Borrower has filed any notice of Completion of the Improvements necessary to establish commencement of the shortest statutory period for the filing of mechanic's and materialmen's liens, if any.

(l) Insurance Review. Lender shall have received evidence, reasonably satisfactory to Lender, that Borrower has obtained and is then maintaining the Policies required pursuant to Section 6.1, which Policies shall be subject to review by an independent insurance consultant chosen by Lender; provided, that the reasonable fees payable to such independent insurance consultant in connection therewith shall be payable by Borrower.

(m) Intentionally Omitted.

(n) Other Documents. Lender shall have received such documents, letters, affidavits, reports and assurances, as Lender, Lender's counsel and the Construction Consultant may reasonably require, including, without limitation, completed AIA Form G704 (Certificate of Substantial Completion) and completed AIA Form G707 (Consent of Surety to Final Payments).

Section 2.20 Miscellaneous Advance Provisions.

(a) Advancing on the Completion Date. Notwithstanding anything to the contrary contained in this Agreement, except as provided in subparagraph (d) below, if the maximum amount of the Note has not been fully disbursed to Borrower in accordance with this Agreement by the Completion Date, on the Completion Date, Lender shall not be required to advance any further Additional Advances and Borrower shall not be entitled to and shall forfeit its rights to any further Additional Advances.

(b) Advances to Pay Interest, Fees, Expenses, Taxes and Insurance. Subject to the provisions of this Section 2.20(b), Borrower hereby requests that Lender make an advance on each Payment Date (or prior to the date that payment of the same shall become delinquent hereunder) of: (i) interest due at such time; (ii) fees under the Building Loan Documents that are then due to Lender, as applicable; (iii) to pay Taxes and Insurance Premiums that are then due and payable (provided that, Taxes shall not include any assessments for the C-PACE Loan until the Payment Date occurring in August, 2024), and (iv) expenses and other reimbursables under the Building Loan Documents that are then due and payable. Notwithstanding anything to the contrary contained in this Agreement, (A) all positive net cash flow from the Property, to the extent that Lender, in its sole judgment, determines that it is sufficient to pay for such interest, fees, expenses, Taxes and Insurance Premiums shall be used for the same before proceeds of the Building Loan are disbursed for such purposes, (B) the amounts otherwise to be funded by Lender pursuant

to this Section 2.20(b) for interest on the Building Loan shall be reduced by any payments received under the Interest Rate Cap Agreement purchased with respect to the Building Loan, and (C) Lender shall have no obligation to make any such disbursement for interest, fees, expenses, Taxes or Insurance Premiums unless all conditions to an Additional Advance of the Loan pursuant to Section 2.18 have been satisfied. The provisions of this Section 2.20(b) are not intended to limit or derogate from Borrower's and Guarantor's absolute and unconditional obligation to pay such interest, fees, expenses, Taxes and Insurance Premiums regardless of whether Loan proceeds are available or advanced therefor to the extent (if any) provided in the applicable Guaranty.

(c) Direct Advances to Third Parties. At Lender's option, but subject to the provisions of Section 4.1.22(c), Lender may make any or all Additional Advances directly or through the Title Company to (i) General Contractor or any Major Trade Contractor for construction expenses which shall theretofore have been approved by Lender and for which Borrower shall have failed to make payment, (ii) Borrower's Architect to pay its fees to the extent funds are allocated thereto in the Project Budget, (iii) the Construction Consultant to pay its fees and disbursements, (iv) Lender's counsel to pay its fees and disbursements, (v) to itself to pay (A) any installment of interest due under the Building Loan Note, (B) any expenses incurred by Lender which are reimbursable by Borrower under the Building Loan Documents (including, without limiting the generality of the foregoing, reasonable attorneys' fees and expenses and other fees and expenses incurred by such Lender), provided that Borrower shall theretofore have received notice from Lender that such expenses have been incurred and Borrower shall have failed to reimburse Lender for said expenses beyond any grace periods provided for said reimbursement under the Building Loan Note, this Agreement or any of the other Building Loan Documents, or (C) following an Event of Default, any other sums due to any Lender under the Building Loan Note, this Agreement or any of the other Building Loan Documents, all to the extent that the same are not paid by the respective due dates thereof, (vi) to pay Taxes and/or Insurance Premiums, and (vii) any other Person to whom Lender in good faith determines payment is due and any portion of the Building Loan so disbursed by Lender shall be deemed disbursed as of the date on which the Person to whom payment is made receives the same. The execution of this Agreement by Borrower shall, and hereby does, constitute an irrevocable authorization so to advance the proceeds of the Building Loan directly or through the Title Company to such Persons in accordance with this Section 2.20(c) as amounts become due and payable to them hereunder and any portion of the Building Loan so disbursed by Lender shall be deemed disbursed as of the date on which the Person to whom payment is made receives the same. No further authorization from Borrower shall be necessary to warrant such direct Additional Advances to such relevant Person, and all such Additional Advances shall satisfy the obligation of Lender hereunder and shall be secured by the Building Loan Mortgage and the other Building Loan Documents as fully as if made directly to Borrower.

(d) Advances After Completion Date. Notwithstanding anything contained herein to the contrary, Lender shall have no obligation to make any Additional Advance after the Completion Date (except for Retainage not yet disbursed, other Building Loan Costs associated with usual and customary Punch List Items and Soft Costs if funds

allocated in the Project Budget remain available to be advanced under this Agreement for such purposes and subject to all the conditions to Additional Advances therefor).

(e) Interest Advance. A portion of the Loan specified in the Project Budget (the “**Interest Advance**”) has been reserved for payments of interest as it accrues and becomes due and payable on the Loan. The Interest Advance shall not be disbursed for any purpose other than the payment of interest on the Loan unless otherwise agreed to by Lender in its sole and absolute discretion. Subject to the provisions of Section 2.20(b), Lender shall advance portions of the Interest Advance directly to itself to satisfy obligations for the payment of interest under the Note from time to time as the same become due and payable.

(f) Loan In Balance. Notwithstanding anything else herein to the contrary, Lender shall not be required to make any Additional Advance if any Shortfall exists.

(g) The making of an Additional Advance by Lender shall not constitute Lender’s approval or acceptance of the construction theretofore completed. Lender’s inspection and approval of the Plans and Specifications, the construction of the Improvements, or the workmanship and materials used therein, shall impose no liability of any kind on Lender, the sole obligation of Lender as the result of such inspection and approval being to make the Additional Advances if and to the extent, required by this Agreement.

(h) Developer Fees. Notwithstanding anything else herein to the contrary, fifty percent (50%) of the fees due to any developer of the Project in connection with each draw shall be deferred until Completion of the Project and, for the avoidance of doubt, in no event shall any Additional Advance be made available to fund (nor shall Borrower make any disbursement to pay), more than fifty percent (50%) of the fees due to any developer of the Project in connection with any draw until Completion has occurred.

(i) Additional Advances for Operating Expenses. During any calendar quarter during which Lender has made an Additional Advance to pay for, or reimburse Borrower for, Operating Expenses, Borrower will deliver a schedule (together with supporting detail reasonably satisfactory to Lender) reconciling (A) the aggregate amount of Additional Advances made to Borrower for Operating Expenses pursuant to the Project Budget during such calendar quarter and (B) the actual Operating Expenses incurred during such calendar quarter, and to the extent Lender determines in its reasonable discretion that Operating Expenses actually incurred in such quarter were less than the amount of Additional Advances made to Borrower for Operating Expenses pursuant to the Project Budget during such calendar quarter, then Lender may in its discretion either (x) decrease the amount to be disbursed for payment of Operating Expenses pursuant to the Project Budget for the following month (or, if necessary, months) in an amount necessary to reflect such difference or (y) require that Borrower, within ten (10) days following written request, deposit with Lender an amount equal to such difference. For the avoidance of doubt, Lender shall not make any Additional Advances for Taxes and Insurance Premiums pursuant to this Section 2.20(i) in duplication of any Additional Advance made pursuant to Section 2.20(b).

III. REPRESENTATIONS AND WARRANTIES.

Section 3.1 Borrower Representations. Borrower represents and warrants as of the date hereof and as of the Closing Date that:

3.1.1 **Organization.** Borrower has been duly organized and is validly existing and in good standing with requisite power and authority to own its properties and to transact the businesses in which it is now engaged. If Borrower is not organized in the State in which the Land is located, Borrower is duly qualified to do business in such jurisdiction, and in each other jurisdiction where it is required to be so qualified in connection with its properties, businesses and operations. The ownership interests of Borrower as of the Closing Date are as set forth on the Organizational Chart attached hereto as Schedule III, and the direct and indirect ownership interests in Borrower or the Property do not include any Prohibited Entity/Ownership Structure.

3.1.2 **Place of Business; Organizational Identification.** Borrower's principal place of business as of the date hereof is the address set forth in the introductory paragraph of this Agreement. Borrower is organized under the laws of the State set forth in such paragraph, as the type of entity set forth in such paragraph. Borrower's taxpayer identification number (or employer identification number) is 88-1021615.

3.1.3 **Authority.** Borrower has the power and authority to execute and deliver this Agreement and the other Loan Documents, and to perform the obligations imposed on it hereunder and thereunder and to consummate the transactions contemplated hereby and thereby, and has taken all necessary actions in furtherance thereof including, without limitation, that those partners or members of Borrower whose approval is required by the terms of Borrower's organizational documents have duly approved the transactions contemplated by the Loan Documents and have authorized execution and delivery thereof by the respective signatories. Borrower possesses all rights, licenses, permits and authorizations, governmental or otherwise, necessary to entitle it to own its properties and to transact the businesses in which it is now engaged, and the sole business of Borrower is the ownership, management and operation of the Property.

3.1.4 **Execution and Delivery.** This Agreement and all other Loan Documents to which Borrower is a party have been duly executed and delivered by or on behalf of Borrower, and constitute legal, valid and binding obligations of Borrower enforceable against Borrower in accordance with their respective terms, subject only to Creditors' Rights Laws generally, and subject, as to enforceability, to general principles of equity (regardless of whether enforcement is sought in a proceeding in equity or at law).

3.1.5 **No Defenses.** This Agreement, the Note, the Mortgage and the other Loan Documents are not subject to any right of rescission, set-off, counterclaim or defense, nor would the operation of any of the terms of this Agreement, the Note, the Mortgage or any of the other Loan Documents, or the exercise of any right thereunder, render this Agreement, the Note, the Mortgage or any of the other Loan Documents unenforceable, in whole or in part, or subject to any right of rescission, set-off, counterclaim or defense, including the defense of usury. Neither Borrower nor any Person claiming through Borrower has asserted any right of rescission, set-off, counterclaim or defense. Borrower knows of no facts that would support a claim of usury to defeat

or avoid its obligation to repay the principal of, interest on, and other sums or amounts due and payable under, the Loan Documents.

3.1.6 **No Conflicts**. The execution, delivery and performance of this Agreement and the other Loan Documents by Borrower will not conflict with or result in a breach of any of the terms or provisions of, or constitute a default under, or result in the creation or imposition of any Lien, charge or encumbrance (other than pursuant to the Loan Documents) upon any of the property or assets of Borrower or any SPE Party, or any member, partner or stockholder of Borrower or any SPE Party, pursuant to the terms of any indenture, mortgage, deed of trust, loan agreement, partnership agreement, management agreement or other agreement or instrument to which any such Person is a party or by which any of its property or assets is subject, nor will such action result in any violation of the provisions of any statute or any order, rule or regulation of any Governmental Authority having jurisdiction over Borrower or any of Borrower's properties or assets. Any consent, approval, authorization, order, registration or qualification of or with any such Governmental Authority required for the execution, delivery and performance by Borrower of this Agreement or any other Loan Documents has been obtained and is in full force and effect.

3.1.7 **Litigation**. There are no actions, suits or proceedings at law or in equity or as arbitration or mediation proceedings, whether by or before any Governmental Authority or other agency, now pending or (to Borrower's knowledge) threatened in writing against or affecting Borrower, any Borrower Party or the Property, which actions, suits or proceedings, if determined against such Person or the Property, could reasonably be expected to materially adversely affect (a) Borrower's title to the Property, (b) the validity or enforceability of the Loan Documents, (c) Borrower's ability to perform under the Loan Documents, (d) Guarantor's ability to perform under the Guaranty and Environmental Indemnity, (e) the principal benefit of the security intended to be provided by the Loan Documents, (f) the condition, operation, value, ownership or use of the Property, or (g) the current ability of the Property to generate net cash flow sufficient to service the Loan or (h) the condition (financial or otherwise) or business of Borrower or any Borrower Party.

3.1.8 **Agreements**. Except for Permitted Encumbrances, neither Borrower nor any Borrower Party is party to any agreement or instrument (including any Major Contract), or subject to any restriction, which could reasonably be expected to materially adversely affect Borrower or the Property, or Borrower's business, properties or assets, operations or condition, financial or otherwise. Borrower has not entered into any Major Contract other than those disclosed to Lender in writing prior to the Closing Date. Borrower has delivered to Lender true, correct and complete copies of all Major Contracts. Each of the Major Contracts is in full force and effect. Neither Borrower nor any Borrower Party, nor (to Borrower's knowledge, any prior owner of the Property) is in default in any material respect in the performance, observance or fulfillment of any of the obligations, covenants or conditions contained in any Major Contract or any other agreement or instrument to which it is a party or by which Borrower or the Property are bound. Borrower has no material financial obligation under any indenture, mortgage, deed of trust, loan agreement or other agreement or instrument to which Borrower is a party or by which Borrower or the Property is otherwise bound, other than (a) obligations incurred in the ordinary course of the operation of the Property as permitted pursuant to Section 5.1 hereof, and (b) obligations under the Loan Documents. The Loan Documents contain provisions that render the rights and remedies of Lender adequate for the practical realization against the Property of the principal benefits of the security

intended to be provided thereby, including realization by judicial or, if applicable, nonjudicial foreclosure.

3.1.9 **Not a Foreign Person.** Borrower is not a “foreign person” within the meaning of §1445(f)(3) of the IRS Code.

3.1.10 **Investment Company Act.** Borrower is not (a) an “investment company” or a company “controlled” by an “investment company”, within the meaning of the Investment Company Act of 1940, as amended; (b) a “holding company” or a “subsidiary company” of a “holding company” or an “affiliate” of either a “holding company” or a “subsidiary company” within the meaning of the Public Utility Holding Company Act of 1935, as amended; or (c) subject to any other federal or state law or regulation which purports to restrict or regulate its ability to borrow money.

3.1.11 **Embargoed Person; Patriot Act.**

(a) At all times throughout the term of the Loan, including after giving effect to any transfers permitted pursuant to the Loan Documents, (i) none of the funds or other assets of any Borrower Party constitute property of, or are beneficially owned, directly or indirectly, by any person, entity or government subject to trade restrictions under U.S. law, including, but not limited to, the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 et seq., The Trading with the Enemy Act, 50 U.S.C. App. 1 et seq., and any Executive Orders or regulations promulgated thereunder with the result that the investment in such Borrower Party (whether directly or indirectly), is prohibited by law or the Loan made by the Lender is in violation of law (“**Embargoed Person**”); (ii) no Embargoed Person has any interest of any nature whatsoever in any Borrower Party with the result that the investment in any Borrower Party (whether directly or indirectly), is prohibited by law or the Loan is in violation of law; and (iii) none of the funds of any Borrower Party have been derived from any unlawful activity with the result that the investment in any Borrower Party (whether directly or indirectly), is prohibited by law or the Loan is in violation of law.

(b) Each Borrower Party and each and every Person Affiliated with any Borrower Party or that to Borrower’s knowledge has an economic interest in any Borrower Party or, to Borrower’s knowledge, that has or will have an interest in the transaction contemplated by this Agreement or in the Property or will participate, in any manner whatsoever, in the Loan, is: (i) not a “blocked” Person listed in the Annex to Executive Order Nos. 12947, 13099 and 13224 and all modifications thereto or thereof (as used in this Section only, the “**Annex**”); (ii) in full compliance with the requirements of the Patriot Act and all other requirements contained in the rules and regulations of the Office of Foreign Assets Control, Department of the Treasury (“**OFAC**”); (iii) operated under policies, procedures and practices, if any, that are in compliance with the Patriot Act and available to Lender for Lender’s review and inspection during normal business hours and upon reasonable prior notice; (iv) not in receipt of any notice from the Secretary of State or the Attorney General of the United States or any other department, agency or office of the United States claiming a violation or possible violation of the Patriot Act; (v) not listed as a Specially Designated Terrorist or as a “blocked” Person on any lists maintained by the OFAC pursuant to the

Patriot Act or any other list of terrorists or terrorist organizations maintained pursuant to any of the rules and regulations of the OFAC issued pursuant to the Patriot Act or on any other list of terrorists or terrorist organizations maintained pursuant to the Patriot Act; (vi) not a Person who has been determined by competent authority to be subject to any of the prohibitions contained in the Patriot Act; and (vii) not owned or controlled by or now acting and or will in the future act for or on behalf of any Person named in the Annex or any other list promulgated under the Patriot Act or any other Person who has been determined to be subject to the prohibitions contained in the Patriot Act. Borrower covenants and agrees that in the event any Borrower Party (or any of their respective beneficial owners, Affiliates or participants) becomes listed on the Annex or any other list promulgated under the Patriot Act or is indicted, arraigned, or custodially detained on charges involving money laundering or predicate crimes to money laundering, Borrower shall immediately notify Lender. Capitalized words and phrases used without definition in this Section shall have the meanings attributed thereto in the Patriot Act.

3.1.12 **No Preferred Equity or Mezzanine Financing.** Neither Borrower nor any partner, member or stockholder of Borrower (nor, if applicable, any SPE Party or any partner, member or stockholder of any SPE Party) has any Indebtedness in the form of mezzanine debt or preferred equity.

3.1.13 **Federal Reserve Regulations.** No part of the proceeds of the Loan will be used for the purpose of purchasing or acquiring any “margin stock” within the meaning of Regulation T, U or X of the Board of Governors of the Federal Reserve System or for any other purpose which would be inconsistent with such Regulation T, U or X, or any other Regulations of such Board of Governors, or for any purposes prohibited by Legal Requirements or by the terms and conditions of this Agreement or the other Loan Documents.

3.1.14 **Illegal Activity.** No portion of the Property has been or will be purchased with proceeds of any illegal activity.

3.1.15 **Criminal Acts; Prior Litigation.** Neither Borrower nor any Restricted Party has ever been convicted of a felony or misdemeanor (or crime of similar severity under other name), and is not currently the subject of any pending or to such party’s knowledge threatened criminal investigation or proceeding. Borrower has disclosed to Lender in writing any civil action (whether or not such action resulted in a judgment) and regulatory or enforcement proceeding to which Borrower and any Restricted Party was a defendant or respondent within the 20-year period prior to the date of this Agreement (i) that was under the Bankruptcy Code or other Creditors’ Rights Law, or (ii) in which it was alleged that Borrower or such Restricted Party engaged in fraud, deception or misrepresentation, or (iii) with respect to which Borrower or any Restricted Party was ordered or agreed not to engage in the banking or securities industry.

3.1.16 **Third Party Representations.** Each of the representations and the warranties made by Guarantor in the Environmental Indemnity, the Guaranty and (if applicable) any other Loan Documents to which Guarantor is a party are true, complete and correct in all material respects.

3.1.17 **Solvency.** Borrower has (a) not entered into the Loan or executed this Agreement or any other Loan Documents with the actual intent to hinder, delay or defraud any creditor, and (b) received reasonably equivalent value in exchange for its obligations under such Loan Documents. The fair saleable value of Borrower's assets exceeds and will, immediately following the making of the Loan, exceed Borrower's total liabilities, including, without limitation, subordinated, unliquidated, disputed and contingent liabilities. The fair saleable value of Borrower's assets is and will, immediately following the making of the Loan, be greater than Borrower's probable liabilities, including the maximum amount of its contingent liabilities on its debts as such debts become absolute and matured. Borrower's assets do not and, immediately following the making of the Loan will not, constitute unreasonably small capital to carry out its business as conducted or as proposed to be conducted. Borrower does not intend to, and does not believe that it will, incur debt and liabilities (including contingent liabilities and other commitments) beyond its ability to pay such debt and liabilities as they mature (taking into account the timing and amounts of cash to be received by Borrower from ownership and operation of the Property, and the amounts to be payable on or in respect of obligations of Borrower). No petition under the Bankruptcy Code, or similar action under any Creditors' Rights Law, has been filed against Borrower or any Restricted Party. Neither Borrower nor any Restricted Party is contemplating either the filing of a petition by it under the Bankruptcy Code or similar action under any Creditors' Rights Law, or the liquidation of all or a major portion of Borrower's assets or properties, and Borrower has no knowledge of any Person contemplating the filing of any such petition or similar action against it or any Restricted Party. With respect to any loan or financing in which any Restricted Party or any Affiliate thereof has been directly or indirectly obligated for or has, in connection therewith, otherwise provided any guaranty, indemnity or similar surety (including, without limitation and to the extent applicable, any loan which is being refinanced by the Loan), none of such loans or financings has ever been (i) more than thirty (30) days in default or (ii) transferred to special servicing. With respect to Lender's rights in the Leases and Rents, Borrower acknowledges that this Agreement, the Mortgage and the Assignment of Leases, individually and collectively, are intended to give Lender the benefit of Section 214 of the Bankruptcy Reform Act of 1994 and the provisions of the Bankruptcy Code referenced therein, as the same may hereafter be amended from time to time.

3.1.18 **No Plan Assets.** Each of the following representations is true, correct and complete with respect to Borrower, any SPE Party and Guarantor: it does not sponsor, is not obligated to contribute to, and is not itself an "employee benefit plan", as defined in Section 3(3) of ERISA, subject to Title I of ERISA or Section 4975 of the IRS Code, and none of the assets of such Person constitutes or will constitute "plan assets" of one or more such plans within the meaning of 29 C.F.R. Section 2510.3-101. In addition, (a) such Person is not a "governmental plan" within the meaning of Section 3(32) of ERISA and (b) transactions by or with such Person are not subject to any state or other statute, regulation or other restriction regulating investments of, or fiduciary obligations with respect to, governmental plans within the meaning of Section 3(32) of ERISA which is similar to the provisions of Section 406 of ERISA or Section 4975 of the IRS Code and which prohibit or otherwise restrict the transactions contemplated by this Agreement including, but not limited to, the exercise by Lender of any of its rights under the Loan Documents.

3.1.19 **Title.** Borrower has good, marketable and insurable fee simple title to the Land and good title to the balance of the Property, free and clear of all Liens whatsoever except the Permitted Encumbrances and the Liens created by the Loan Documents. The Permitted

Encumbrances in the aggregate do not materially affect the value, operation or use of the Property (as currently used) or Borrower's ability to repay the Loan or the security intended to be provided by the Mortgage or with the current ability of the Property to generate net cash flow sufficient to service the Loan or Borrower's ability to pay and perform the obligations under the Loan Documents when they become due. The Mortgage, when properly recorded in the appropriate records, together with the Assignment of Leases and any Uniform Commercial Code financing statements required to be filed in connection therewith, will create (a) a valid, perfected first priority lien on the Property, subject only to Permitted Encumbrances and the Liens created by the Loan Documents, and (b) perfected security interests in and to, and perfected collateral assignments of, all personalty (including the Leases), all in accordance with the terms thereof, in each case subject only to any applicable Permitted Encumbrances and the Liens created by the Loan Documents.

3.1.20 **Lien Claims**. All parties furnishing labor and materials to Borrower (or any predecessor-in-title) or the Property have been paid in full. Except for such Liens expressly disclosed in, and insured against by the Title Insurance Policy, there are no claims for payment for work, labor or materials affecting the Property which are or may become a Lien prior to, or of equal priority with, the Liens created by the Loan Documents.

3.1.21 **Condemnation**. No Condemnation or other similar proceeding has been commenced, are pending or, to Borrower's best knowledge, is threatened or contemplated with respect to all or any portion of the Property or for the relocation of roadways providing access to the Property.

3.1.22 **Utilities and Public Access**. The Property has rights of access to public ways and is served by water, sewer, sanitary sewer and storm drain facilities adequate to service the Property for its intended uses. All public utilities necessary or convenient to the full use and enjoyment of the Property are located either in the public right-of-way abutting the Property (which are connected so as to serve the Property without passing over other property) or in recorded easements serving the Property and such easements are set forth in and insured by the Title Insurance Policy. All roads necessary for the use of the Property for its current purpose have been completed and dedicated to public use and accepted by all Governmental Authorities.

3.1.23 **Separate Lots**. The Property is comprised of one (1) or more parcels which constitute a separate tax lot or lots and does not constitute a portion of any other tax lot not a part of the Property.

3.1.24 **Assessments**. There are no pending or proposed special or other assessments for public improvements or otherwise affecting the Property, nor are there any contemplated improvements to the Property that may result in such special or other assessments.

3.1.25 **Leases**.

(a) The Property is not subject to any Leases other than the Leases listed on the Rent Roll attached hereto as Schedule I and made a part hereof (the "**Rent Roll**"), which Rent Roll is true, correct and complete in all respects as of the Closing Date. Borrower is the owner and lessor of landlord's interest in the Leases. No Person has any possessory

interest in the Property or right to occupy the same except under and pursuant to the provisions of the Leases. There are no prior assignments of the Leases, or any portion of the Rents due and payable or to become due and payable, which are presently outstanding. There has been no prior sale, transfer or assignment, hypothecation or pledge of any Lease or of the Rents received therein which is still in effect. All security deposits under Leases are held in accordance with all Legal Requirements applicable thereto.

(b) Intentionally omitted.

(c) (i) each Lease set forth on the Rent Roll is in full force and effect and constitutes the legal, valid and binding obligation of Borrower and the Tenant thereunder; (ii) there are no defaults by either party to any Lease, and there are no conditions that, with the passage of time or the giving of notice, or both, would constitute a default thereunder; (iii) no Rent has been paid more than one (1) month in advance of its due date; (iv) no Tenant has any offset or defense to the payment of rent under its Lease; and (v) all work to be performed by Borrower under each Lease has been performed as required and has been accepted by the applicable Tenant, and any payments, free rent, partial rent, rebate of rent or other payments, credits, allowances or abatements required to be given by Borrower to any Tenant has already been received by such Tenant.

(d) No Tenant listed on the Rent Roll has assigned its Lease or sublet all or any portion of the premises demised thereby (except as set forth thereon), no such Tenant holds its leased premises under assignment or sublease, nor does any Person (other than such Tenant and its employees and invitees) occupy such leased premises.

(e) No Tenant under any Lease has a right or option pursuant to such Lease or otherwise to purchase all or any part of the leased premises or the building of which the leased premises are a part.

(f) No Tenant under any Lease is operating a Marijuana Business.

3.1.26 **Use of Property.** The Property is to be used exclusively as a student housing facility with parking, shared amenities and ancillary retail space and other appurtenant and related uses and such use and configuration shall not be changed without the prior written consent of Lender, which consent may be withheld in Lender's sole discretion. Borrower has paid in full for, and is the owner of, all furnishings, fixtures and equipment used in connection with the operation of the Property (other than Tenants' property), free and clear of any and all security interests, liens or encumbrances, except the lien and security interest created by this Agreement, the Note, the Mortgage and the other Loan Documents.

3.1.27 **Certificate of Occupancy; Licenses.** All certifications, permits, licenses and approvals, including without limitation, certificates of completion and occupancy permits required for the legal use, occupancy and operation of the Property as set forth in Section 3.1.26 of this Agreement (collectively, the "**Licenses**"), have been obtained and are in full force and effect. Borrower shall keep and maintain all Licenses necessary for such operation of the Property (including those issued upon Completion of the Project).

3.1.28 **Compliance**. Borrower and the Property (including the use thereof) comply in all material respects with all applicable Legal Requirements, including, without limitation, building and zoning ordinances and codes and Prescribed Laws. Borrower is not (and Borrower has not received any notice that it is) in default or violation of any order, writ, injunction, decree or demand of any Governmental Authority. There has not been committed by Borrower or any other Person in occupancy of or involved with the operation or use of the Property any act or omission affording the federal government or any other Governmental Authority the right of forfeiture as against the Property or any part thereof or any monies paid in performance of Borrower's obligations under any of the Loan Documents. The land use and zoning regulations which are in effect for the Land permit the construction of the Improvements thereon on an as-of-right basis and no variance, conditional use permit, special use permit or other similar approval is required for such construction or (subject to obtaining a certificate of occupancy for the Improvements) the use of the Improvements as currently used and as described in the definition of "Improvements" and contemplated by the Plans and Specifications.

3.1.29 **Financial Information**. All financial data, including, without limitation, the statements of cash flow and income and operating expense, that have been delivered to Lender in connection with the Loan (i) are true, complete and correct in all material respects, (ii) accurately represent the financial condition of the Property (or, if as to a Person, such Person) as of the date of such reports, and (iii) to the extent prepared or audited by an independent certified public accounting firm, have been prepared in accordance with the Approved Accounting Method throughout the periods covered, except as disclosed therein. Except for Permitted Encumbrances, Borrower does not have any contingent liabilities, liabilities for taxes, unusual forward or long-term commitments or unrealized or anticipated losses from any unfavorable commitments that are known to Borrower and reasonably likely to have a materially adverse effect on the Property or the operation thereof for the purpose(s) set forth in Section 3.1.26 hereof, except as referred to or reflected in said financial statements. Since the date of such financial statements, there has been no material adverse change in the financial condition, operation or business of Borrower from that set forth in said financial statements.

3.1.30 **Insurance**. Borrower has obtained and has delivered to Lender certificates or certified copies of all Policies reflecting the insurance coverages, amounts and other requirements set forth in this Agreement. No claims have been made or are currently pending, outstanding or otherwise, under any such Policies, and no Person, including Borrower, has done, by act or omission, anything which would impair the coverage of any such Policies.

3.1.31 **Flood Zone**. To the knowledge of Borrower, none of the Improvements on the Property are, or will be once constructed in accordance with the Plans and Specifications, located in an area as identified by the Federal Emergency Management Agency as an area having special flood hazards or, if so located, the flood insurance required pursuant to Section 6.1(a)(2)(vii) is in full force and effect with respect to the Property.

3.1.32 **Seismic Exposure**. To the knowledge of Borrower, the Land is not located in Zone 3 or Zone 4 of the "Seismic Zone Map of the U.S."

3.1.33 **Intentionally Omitted**.

3.1.34 **Survey**. To the knowledge of Borrower, the Survey for the Property delivered to Lender in connection with this Agreement does not fail to reflect any material matter affecting the Property or the title thereto.

3.1.35 **Boundaries**. To the knowledge of Borrower, except as shown on the Survey and insured against by the Title Insurance Policy, (a) all of the improvements which were included in determining the appraised value of the Property lie wholly within the boundaries and building restriction lines of the Property, (b) no improvements on adjoining properties encroach upon the Property, and (c) no easements or other encumbrances upon the Property encroach upon any of the improvements, in each case so as to affect the value, current use or marketability of the Property.

3.1.36 **Mortgage Taxes**. Borrower has paid or will pay simultaneously with the execution hereof, all state, county and municipal mortgage recording taxes, intangibles taxes, and all other and similar taxes imposed upon the execution and recordation of the Mortgage and/or the Assignment of Leases, or the indebtedness secured thereby, or as a condition precedent to the enforcement thereof by judicial or non-judicial foreclosure.

3.1.37 **Filing and Recording Taxes**. All transfer taxes, deed stamps, intangible taxes or other amounts in the nature of transfer taxes required to be paid by any Person under applicable Legal Requirements currently in effect in connection with the transfer of the Property to Borrower have been paid.

3.1.38 **Intentionally Omitted**.

3.1.39 **Collective Bargaining**. Except for any incentive compensation systems designed to promote increased customer use of the Property, there are no: (i) collective bargaining agreements and/or other labor agreements to which Borrower or the Property, or any portion thereof, is a party or by which either is or may be bound; (ii) employment, profit sharing, deferred compensation, bonus, stock option, stock purchase, pension, retainer, consulting, retirement, health, welfare, or incentive plans and/or contracts to which Borrower or the Property, or any portion thereof is a party, or by which either is or may be bound or (iii) plans and/or agreements under which "fringe benefits" (including, but not limited to, vacation plans or programs, and related or similar dental or medical plans or programs, and related or similar benefits) are afforded to employees of Borrower or the Property, or any portion thereof. Borrower has not violated in any material respects any applicable laws, rules and regulations relating to the employment of labor, including those relating to wages, hours, collective bargaining and the payment and withholding of taxes and other sums as required by appropriate Governmental Authorities.

3.1.40 **Security Interest in Accounts**.

(a) This Agreement, together with the other Loan Documents, creates a valid and continuing security interest (as defined in the Uniform Commercial Code) in the Lockbox Account and Cash Management Account and each Reserve Account in favor of Lender, which security interest is prior to all other Liens and is enforceable as such against creditors of and purchasers from Borrower. Other than in connection with the Loan Documents, Borrower has not sold or otherwise conveyed or granted any Lien or other security interest

(or entered into any control agreement) in or with respect to the Lockbox Account or the Cash Management Account or any Reserve Account.

(b) Each of the Lockbox Account and Cash Management Account constitute “deposit accounts” within the meaning of the Uniform Commercial Code.

(c) Pursuant and subject to the terms hereof and the other applicable Loan Documents, the Lockbox Bank has agreed to comply with all instructions originated by Lender, without further consent by Borrower, directing disposition of the Lockbox Account and all sums at any time held, deposited or invested therein, together with any interest or other earnings thereon, and all proceeds thereof (including proceeds of sales and other dispositions), whether accounts, general intangibles, chattel paper, deposit accounts, instruments, documents or securities.

(d) The Lockbox Account and Cash Management Account are not in the name of any Person other than Borrower, as pledgor, or Lender. Borrower has not consented to the Lockbox Bank or the Cash Management Bank complying with (or directed either the Lockbox Bank and/or the Cash Management Bank to comply with) instructions from any Person other than Lender with respect to the Lockbox Account or the Cash Management Account.

(e) The Property is not subject to any cash management system other than as required by the Loan Documents. Any previous instructions to Tenants as to payment of Rent under Leases (including, without limitation, in connection with any previous financing of the Property) have been duly terminated not later than as of the Closing Date.

3.1.41 **Homestead**. The Property forms no part of any property owned, used or claimed by Borrower as a residence or business homestead and is not exempt from forced sale under the laws of the State in which the Land is located. Borrower hereby disclaims and renounces each and every claim to all or any portion of the Property as a homestead.

3.1.42 **Full and Accurate Disclosure; No Change in Facts or Circumstances**. No statement of fact, or other representation or warranty, made by Borrower in this Agreement or in any of the other Loan Documents, or in any Provided Information, contains any untrue statement of a material fact or omits to state any material fact necessary to make statements contained herein or therein not materially misleading. All information submitted by (or on behalf of) Borrower to Lender and in all financial statements, rent rolls, reports, certificates and other documents submitted in connection with the Loan or in satisfaction of the terms thereof and all statements of fact made by Borrower in this Agreement or in any other Loan Document, are accurate, complete and correct in all material respects. There is no material fact presently known to Borrower or any Restricted Party which has not been disclosed to Lender which adversely affects, nor as far as Borrower can foresee, might adversely affect, the Property or the business, operations or condition (financial or otherwise) of Borrower or any Restricted Party. There has been no material adverse change in any condition, fact, circumstance or event that would make any such information inaccurate, incomplete or otherwise misleading in any material respect or that otherwise materially and adversely affects or could reasonably be expected to materially adversely affect the use, operation or value of the Property or the business operations or the financial condition of Borrower.

3.1.43 **Property Document Representations.** With respect to each Property Document: (a) each Property Document is in full force and effect and has not been amended, restated, replaced or otherwise modified (except, in each case, as expressly set forth herein) and Borrower's interest therein has not been assigned pursuant to any assignment which survives the Closing Date, except the assignment to the Lender pursuant to the Loan Documents, (b) there are no defaults under any Property Document by any party thereto and, to Borrower's knowledge, no event has occurred which, but for the passage of time, the giving of notice, or both, would constitute a default under any Property Document, (c) all rents, additional rents, common maintenance charges and other sums due and payable under the Property Documents have been paid in full, (d) no party to any Property Document has commenced any action or given or received any notice for the purpose of terminating any Property Document, and (e) the representations made in any estoppel or similar document delivered with respect to any Property Document in connection with the Loan are true, complete and correct and are hereby incorporated by reference as if fully set forth herein.

3.1.44 **Student-Housing Representations.** All dwelling units in the Property will be, upon completion of the Project in accordance with the Plans and Specifications, self-contained living units, each of which includes a kitchen and a bathroom.

3.1.45 **General Contractor's Agreement.** The General Contractor's Agreement is in full force and effect; (b) Borrower and General Contractor are in full compliance with their respective obligations under the General Contractor's Agreement; (c) the work to be performed by the General Contractor under the General Contractor's Agreement is the work called for by the Plans and Specifications; and (d) all work on the Improvements shall be completed in accordance with the Plans and Specifications in a good and workmanlike manner and shall be free of any defects. Borrower shall from time to time, upon request by Lender, use reasonable efforts to cause General Contractor to provide Lender with reports in regard to the status of construction of the Improvements, in such form and detail as reasonably requested by Lender.

3.1.46 **Access.** All curb cuts and driveway permits shown on the Plans and Specifications or otherwise necessary for access to the Property are existing or have been fully approved by the appropriate Governmental Authority.

3.1.47 **Architect's Contract.** (a) The Architect's Contract is in full force and effect; (b) both Borrower and Borrower's Architect are in compliance in all material respects with their respective obligations under the Architect's Contract; (c) the work to be performed by the Architect under the Architect's Contract is the architectural services required to design the Improvements to be built in accordance with the Plans and Specifications and all architectural services required to complete the Improvements in accordance with the Plans and Specifications is provided for under the Architect's Contract; (d) each Other Design Professionals Agreement, if any, is in full force and effect; (e) both Borrower and the Other Design Professionals thereunder are in compliance in all material respects with their respective obligations under such Other Design Professionals Agreements, if any; (f) intentionally omitted; and (g) all work on the Improvements shall be completed in accordance with the Plans and Specifications in a good and workmanlike manner and shall be free of any defects. Borrower shall from time to time, upon request by Lender, cause Borrower's Architect to provide Lender with reports in regard to the status of construction of the Improvements, in such form and detail as reasonably requested by Lender.

3.1.48 **Plans and Specifications.** Borrower has furnished Lender true and complete sets of the Plans and Specifications which comply with all applicable Legal Requirements, all Governmental Approvals, and all restrictions, covenants and easements affecting the Property, and which have been approved by Lender, General Contractor, Guarantor, Borrower's Architect and by each such Governmental Authority as is required for construction of the Improvements.

3.1.49 **Budget.** The Project Budget accurately reflects all Total Project Related Costs. Upon the making of the Additional Advances requested in Borrower's Advance Request in the manner set forth therein, all materials and labor theretofore supplied or performed in connection with the Property will have been paid for in full (subject to the Retainage).

3.1.50 **Lien Waivers.** To the extent permitted by law, every contract or agreement providing for services, goods or materials entered into between Borrower and a third party in connection with the construction of the Improvements, contains a provision waiving and releasing any and all liens or rights of liens which may arise in any manner on the Property or any part thereof, and a provision which subordinates any liens or any rights of lien of such third party to the lien of the Building Loan Mortgage and the rights of Lender under the Mortgage.

3.1.51 **Multi-Family Representations.** All dwelling units in the Property are self-contained living units, each of which includes a kitchen and a bathroom. Borrower has substantially complied with all laws and regulations applicable to (1) each Tenant's application for a Lease, (2) the advertising, making and servicing of each Lease, (3) the development, ownership and operation of the Property, including but not limited to the Equal Credit Opportunity Act and all rules and regulations promulgated thereunder; the Fair Housing Act and all rules and regulations promulgated thereunder; the Real Estate Settlement Procedure Act, and all other applicable federal, state and local laws, regulations, rules and ordinances relating thereto, as any of the foregoing from time to time may be amended.

Section 3.2 Survival of Representations. Borrower agrees that all of the representations and warranties of Borrower set forth in Section 3.1 and elsewhere in this Agreement and in the other Loan Documents shall survive for so long as any amount remains owing to Lender under this Agreement or any of the other Loan Documents by Borrower. All representations, warranties, covenants and agreements made in this Agreement or in the other Loan Documents by Borrower shall be deemed to have been relied upon by Lender notwithstanding any investigation heretofore or hereafter made by Lender or on its behalf.

IV. BORROWER COVENANTS.

Section 4.1 Covenants. From the date hereof and until payment and performance in full of all obligations of Borrower under the Loan Documents or the earlier release of the Lien of the Mortgage (and all related obligations) in accordance with the terms of this Agreement and the other Loan Documents, Borrower hereby covenants and agrees with Lender that:

4.1.1 **Compliance With Legal Requirements.**

(a) Borrower shall do or cause to be done all things necessary to preserve, renew and keep in full force and effect all certificates of occupancy (or similar authorizations) and other rights, licenses, permits, franchises and trade names now or hereafter in effect

with respect to the Property. Borrower shall comply with all Legal Requirements applicable to Borrower and the Property, including, without limitation, Prescribed Laws. There shall never be committed by Borrower and Borrower shall use commercially reasonable efforts to not permit any other Person in occupancy of or involved with the operation or use of the Property to commit any act or omission affording any Governmental Authority the right of forfeiture or seizure against the Property or any part thereof, or against any monies paid in performance of Borrower's obligations under any of the Loan Documents. Borrower covenants and agrees, provided there is sufficient cash flow from the Property, not to commit, permit or suffer to exist any act or omission affording such right of forfeiture, it being understood that nothing in this Section 4.1.1(a) shall obligate members of Borrower to make a capital contribution to the Borrower.

(b) Borrower shall at all times keep the Property in good working order and repair, and from time to time make, or cause to be made, all reasonably necessary repairs, renewals, replacements, betterments and improvements thereto, including, without limitation, as required by Article VII of this Agreement.

(c) After prior notice to Lender, Borrower, at its own expense, may contest by appropriate legal proceeding promptly initiated and conducted in good faith and with due diligence, the validity of any Legal Requirement, the applicability of any Legal Requirement to Borrower or the Property or any alleged violation of any Legal Requirement, provided that (i) no Event of Default is continuing; (ii) Borrower is permitted to do so under the provisions of any mortgage or deed of trust superior in lien to the Mortgage; (iii) such proceeding shall be permitted under and be conducted in accordance with the provisions of any instrument to which Borrower is subject and shall not constitute a default thereunder and such proceeding shall be conducted in accordance with all applicable statutes, laws and ordinances; (iv) neither the Property nor any part thereof or interest therein will be in danger of being sold, forfeited, terminated, cancelled or lost; (v) Borrower shall promptly upon final determination thereof comply with any such Legal Requirement determined to be valid or applicable or cure any violation of any Legal Requirement; (vi) such proceeding shall suspend the enforcement of the contested Legal Requirement against Borrower and the Property; and (vii) Borrower shall furnish such security as may be required in the proceeding to insure compliance with such Legal Requirement, together with all interest and penalties payable in connection therewith. Lender may apply any such security, as necessary to cause compliance with such Legal Requirement at any time when, in the reasonable judgment of Lender, the validity, applicability or violation of such Legal Requirement is finally established or the Property (or any part thereof or interest therein) shall be in danger of being sold, forfeited, terminated, cancelled or lost.

(d) Borrower shall comply with all Legal Requirements relating to wages, hours, collective bargaining and the payment and withholding of taxes and other sums as required by appropriate Governmental Authorities and the WARN Act, and provide all statutory notices required thereunder. For the avoidance of doubt, nothing in this Agreement shall be construed or interpreted to create an obligation for Lender to provide any notices under the WARN Act or to suggest that any individuals working at the Property are employees of Lender under the WARN Act or any other statute or regulation. Borrower agrees and

acknowledges that to the extent that any WARN Act notice obligations arise during the term of this Agreement with respect to any individuals working at the Property, such obligations shall be the responsibility of Borrower as the employer of such individuals.

4.1.2 **Taxes and Other Charges.**

(a) Borrower shall pay all Taxes and Other Charges now or hereafter levied or assessed or imposed against the Property or any part thereof as the same become due and payable. Borrower will deliver to Lender receipts for payment or other evidence satisfactory to Lender that the Taxes and Other Charges have been so paid or are not then delinquent no later than ten (10) days prior to the date on which the Taxes and/or Other Charges would otherwise be delinquent if not paid. Notwithstanding the foregoing, however, Borrower's obligations pursuant to the foregoing provisions of this Section 4.1.2 shall be suspended for so long as Borrower complies with the terms and provisions of Section 7.3 hereof.

(b) Subject to the terms and conditions of this Section 4.1.2(b), Borrower shall not suffer and shall promptly cause to be paid and discharged any Lien or charge whatsoever which may be or become a Lien or charge against the Property, and shall promptly pay for all utility services provided to the Property. After prior notice to Lender, Borrower, at its own expense, may contest by appropriate legal proceeding, promptly initiated and conducted in good faith and with due diligence, the amount or validity or application in whole or in part of any Taxes or Other Charges, provided that (i) no Event of Default is continuing; (ii) Borrower is permitted to do so under the provisions of any mortgage or deed of trust superior in lien to the Mortgage; (iii) such proceeding shall be permitted under and be conducted in accordance with the provisions of any other instrument to which Borrower is subject and shall not constitute a default thereunder and such proceeding shall be conducted in accordance with all applicable statutes, laws and ordinances; (iv) neither the Property nor any part thereof or interest therein will be in danger of being sold, forfeited, terminated, cancelled or lost; (v) Borrower shall promptly upon final determination thereof pay the amount of any such Taxes or Other Charges, together with all costs, interest and penalties which may be payable in connection therewith; (vi) such proceeding shall suspend the collection of such contested Taxes or Other Charges from the Property; and (vii) Borrower shall furnish such security as may be required in the proceeding to insure the payment of any such Taxes or Other Charges, together with all interest and penalties thereon. Lender may pay over any such cash deposit or part thereof held by Lender to the claimant entitled thereto at any time when, in the reasonable judgment of Lender, the entitlement of such claimant is established or the Property (or part thereof or interest therein) shall be in danger of being sold, forfeited, terminated, cancelled or lost or there shall be any danger of the Lien of the Mortgage being primed by any related Lien.

4.1.3 **Leases.**

(a) General Covenants. Borrower (i) shall observe and perform the obligations imposed upon the lessor under the Leases in a commercially reasonable manner; (ii) shall enforce the terms, covenants and conditions contained in the Leases upon the part of the

Tenants thereunder to be observed or performed in a commercially reasonable manner, provided, however, Borrower shall not terminate or accept a surrender of a Major Lease without Lender's prior approval and provided, further, that nothing herein shall require Borrower to commence litigation with respect to any Lease; (iii) shall not collect any of the Rents more than one (1) month in advance (other than security deposits); (iv) shall not execute any assignment of lessor's interest in the Leases or the Rents (except as contemplated by the Loan Documents); and (v) shall not alter, modify or change any Lease so as to change the amount of or payment date for rent, change the expiration date, grant any option for additional space or term, materially reduce the obligations of the Tenant or increase the obligations of the lessor, in each case except as permitted by this Section 4.1.3. Upon request, Borrower shall furnish Lender with executed copies of all Leases. For all purposes of the Loan Documents, it shall not constitute a renewal, amendment or modification of a Lease if a Tenant, through its unilateral action, exercises an option to renew or terminate such Lease (or reduce or expand the premises demised thereby), without requiring any discretionary act on the part of Borrower. Borrower shall promptly send copies to Lender of (1) all written notices of material default which Borrower shall receive under any commercial Lease, and (2) all written notices of default that Borrower shall give under any Lease. Borrower shall not permit any Tenant to operate a Marijuana Business at the Property.

(b) Security Deposits. All security deposits of Tenants, whether held in cash or any other form, (i) shall be held in compliance with all Legal Requirements, (ii) shall be held in a separate account than Borrower's Operating Account and (iii) shall not be commingled with any other funds of Borrower. During the continuance of an Event of Default, Borrower shall, upon Lender's request, if permitted by applicable Legal Requirements, cause all such security deposits (and any interest theretofore earned thereon) to be paid over to Lender, to be held (in a separate Account) subject to the terms of the Leases until no Event of Default is continuing. Any bond or other instrument which Borrower is permitted to hold in lieu of cash security deposits under any applicable Legal Requirements (i) shall be maintained in full force and effect in the full amount of such deposits unless replaced by cash deposits as herein above described, (ii) shall be issued by an institution reasonably satisfactory to Lender, (iii) shall, if permitted pursuant to any Legal Requirements, name Lender as payee or mortgagee thereunder (or at Lender's option, be fully assignable to Lender), and (iv) shall in all respects comply with any applicable Legal Requirements and otherwise be satisfactory to Lender. Borrower shall, upon request, provide Lender with evidence satisfactory to Lender of Borrower's compliance with the foregoing.

(c) New Leases; Renewals and Modifications. Any Lease and any renewals, amendments or modification of a Lease (provided such Lease or Lease renewal, amendment or modification is not a Major Lease (or a renewal, amendment or modification to a Major Lease)) that meets the following requirements may be entered into by Borrower without Lender's prior consent: (i) provides for economic terms, including rental rates, comparable to existing local market rates for similar properties and is otherwise on commercially reasonable terms, (ii) has a term (together with all extension and renewal options) of not less than (A) one (1) year for residential Leases and (B) three (3) years or more than ten (10) years for commercial Leases, (iii) provides that such Lease is

subordinate to the Mortgage and the Assignment of Leases and that the Tenant thereunder will attorn to Lender and any purchaser at a foreclosure sale, (iv) is with a Tenant that is creditworthy, due regard being given to the nature of the Lease and the premises demised thereby, (v) is written substantially in accordance with the standard form of Lease (or, for a renewal, amendment or modification of a Lease, does not conflict with the terms and conditions of such standard form of Lease) which shall have been approved by Lender (subject to any commercially reasonable changes made in the course of negotiations with the applicable Tenant), (vi) is an arms-length transaction with a bona fide, independent third-party Tenant that is not an Affiliate of Borrower, for a purpose that is not a Prohibited Lease Use (and such Lease does not permit the Tenant to conduct its business in a manner that would violate a Prohibited Lease Use), and (vii) does not contain any option to purchase, any right of first refusal to purchase, any right to terminate (except if such termination right is triggered by the destruction or condemnation of substantially all of the Property), or any other terms which could reasonably be expected to materially adversely affect Lender's rights under the Loan Documents. All other Leases (including Major Leases) and all renewals, amendments and modifications thereof executed after the date hereof shall be subject to Lender's prior approval, which approval shall not unreasonably be withheld, conditioned or delayed. Any Lease with an Affiliate of Borrower shall be accompanied by (i) a guaranty from each Sponsor of such Lease acceptable to Lender and (ii) a subordination and attornment agreement acceptable to Lender.

(d) Assignment and Subletting. Borrower shall not permit or consent to any assignment or sublease of any Major Lease without Lender's prior written approval (other than assignments or subleases expressly permitted under any Major Lease pursuant to a unilateral right of the Tenant thereunder not requiring the consent of Borrower), which approval shall not unreasonably be withheld, conditioned or delayed. With respect to any Lease other than a Major Lease, provided that no Trigger Period is continuing, Borrower may consent to any assignment or sublease without Lender's prior written approval if such proposed assignee or sublessee is of comparable creditworthiness to the then-existing Tenant and such assignment or sublease is in good faith and would not materially adversely affect Lender's rights under the Loan Documents.

(e) Remedies. Borrower shall have the right, without the consent or approval of Lender, to terminate or accept a surrender of any Lease that is not a Major Lease so long as such termination or surrender is (i) by reason of a legitimate default by the Tenant thereunder, and (ii) in a commercially reasonable manner to preserve and protect the Property.

(f) Future SNDAs. Lender, at Borrower's sole cost and expense, shall execute and deliver its then-current standard form of subordination, non-disturbance and attornment agreement to the Tenant under any future Major Lease approved by Lender upon request, with such commercially reasonable changes as may be requested by such Tenants and which are acceptable to Lender.

(g) Copies of Leases. Upon request, Borrower shall furnish Lender with executed copies of all Leases then in effect. Within ten (10) days after the execution of a Lease, or any renewals, amendments or modification of a Lease, entered into without the prior

written approval of Lender, Borrower shall deliver to Lender a copy thereof, together with an Officer's Certificate that such Lease (or such renewal, amendment or modification) was entered into in accordance with the terms of this Agreement.

(h) **Prepaid Rent.** Upon commencement of leasing activities at the Property, Borrower shall (i) separately hold (or track by separate ledger entry) all Prepaid Rent in connection with the Property, (ii) maintain a disbursement schedule for all Prepaid Rent, which disbursement schedule shall list the Tenant(s) and calendar month(s) for which the Prepaid Rent applies (the "**Prepaid Rent Schedule**"), and (iii) deliver to Lender an Officer's Certificate attaching the then current Prepaid Rent Schedule and certifying that the same is true, correct and complete in all material respects.

4.1.4 **Litigation.** Borrower shall give prompt notice to Lender of any litigation or governmental proceedings pending or threatened in writing against Borrower or any Borrower Party, or with respect to the Property, which could reasonably be expected to materially adversely affect the condition (financial or otherwise) or business of Borrower or any Borrower Party, or the Property.

4.1.5 **Access to Property.** Borrower shall permit agents, representatives and employees of Lender to inspect the Property or any part thereof (subject to rights of Tenants, if any) at reasonable hours upon reasonable advance notice.

4.1.6 **Notice of Change or Default.** Borrower shall promptly advise Lender of any material adverse change in the condition, financial or otherwise, or business of Borrower or any Borrower Party, and of the occurrence of any Default of which Borrower has knowledge.

4.1.7 **Cooperate in Legal Proceedings.** Borrower shall reasonably cooperate with Lender with respect to any proceedings before any court, board or other Governmental Authority which may in any way affect the rights of Lender hereunder or any rights obtained by Lender under any of the other Loan Documents and, in connection therewith, permit Lender, at its election, to participate in any such proceedings.

4.1.8 **Perform Loan Documents.** Borrower shall observe, perform and satisfy all the terms, provisions, covenants and conditions of, and shall pay when due all costs, fees and expenses to the extent required under the Loan Documents executed and delivered by, or applicable to, Borrower.

4.1.9 **Award and Insurance Benefits.** Borrower shall cooperate with Lender in obtaining for Lender the benefits of any Awards or Insurance Proceeds lawfully or equitably payable in connection with the Property, and Lender shall be reimbursed for any expenses incurred in connection therewith (including reasonable attorneys' fees and disbursements, and the payment by Borrower of the expense of an appraisal on behalf of Lender in case of Casualty or Condemnation affecting the Property or any part thereof, if the value of the Property is relevant to such Award or Insurance Proceeds) out of such Award or Insurance Proceeds.

4.1.10 **Further Assurances.** Borrower shall, at Borrower's sole cost and expense:

(a) pay all recording charges, mortgage taxes, intangibles taxes and other taxes imposed by any Governmental Authority on the making of the Loan, the execution and/or recordation of the Mortgage (or as a condition to the enforcement thereof), and/or the indebtedness of the Loan, as and when due;

(b) furnish to Lender all instruments, documents, boundary surveys, footing or foundation surveys, certificates, plans and specifications, appraisals, title and other insurance reports and agreements reasonably requested by Lender with respect to the Property, and each and every other document, certificate, agreement and instrument required to be furnished by Borrower pursuant to the terms of the Loan Documents or which are reasonably requested by Lender in connection therewith, *provided, however*, that Borrower shall not be required to pay the costs of any appraisal of the Property if no Event of Default is continuing hereunder;

(c) execute and deliver to Lender such documents, instruments, certificates, assignments and other writings, and do such other acts reasonably necessary, to evidence, preserve and/or protect the collateral at any time securing or intended to secure the obligations of Borrower under the Loan Documents, as Lender may reasonably require; and

(d) do and execute all and such further lawful and reasonable acts, conveyances and assurances for the better and more effective carrying out of the intents and purposes of this Agreement and the other Loan Documents, as Lender shall reasonably require from time to time.

Lender may decline to make further Additional Advances hereunder until Lender has received such assurances.

4.1.11 **Financial Reporting.**

(a) Borrower shall furnish to Lender the following, in each case together with an Officer's Certificate certifying that the materials delivered pursuant thereto are true, correct and complete in all material respects:

(i) From and after Completion, within twenty (20) days after the end of each calendar month or thirty (30) days after the end of each calendar quarter, as applicable, (A) monthly and quarterly operating statements of the Property detailing the income and expense items (including, without limitation, Debt Service and expenditures for capital improvements, but not including any contributions to the Replacement Reserve Account, and other information necessary and sufficient to fairly represent the financial position and results of operation of the Property during such calendar month or quarter, as applicable), a collections report for such month or quarter to the extent not already included in such operating statement, and a comparison of budgeted income and expenses and the actual income and expenses, together with a Rent Roll and, with respect to any commercial Leases, a supporting schedule therefor setting forth (x) whether, to Borrower's knowledge, any portion of the Property subject to a commercial Lease has been sublet (and, if

so, the name of the sublessee), and (y) whether, since the prior such periodic statement (or, as to the first such statement, since the date of this Agreement), any notice of default has been issued with respect to any commercial Lease which has not been cured (and, if so, the nature of such default and the response of the related Tenant, if any), (B) on a monthly basis until Stabilization occurs, bank account statements for the Borrower's operating account, together with a certification from a Responsible Officer of Borrower that such operating account contains all excess cash flow from the Property and no distributions from such account have been made by Borrower in contravention of Section 4.1.41 hereof, and (C) on a quarterly basis, (1) a calculation reflecting the Debt Service Coverage Ratio for the immediately preceding three (3), six (6), and twelve (12) month periods as of the last day of such quarter and a calculation reflecting the Debt Yield as of the last day of such calendar quarter, in each event subject to Lender verification and (2) an Officer's Certificate setting forth, with respect to each of the commercial Leases only, (x) aggregate sales by tenants under commercial Leases or other occupants of the Property, both on an actual (or to the extent such information is not provided by such tenants or occupants, Borrower's good faith estimate) and on a comparable store basis, (y) rent per square foot payable by each such Tenant or occupant, and (z) a vacancy report for the Property;

(ii) From and after Completion, within thirty (30) days after the end of each calendar quarter during the continuance of a Trigger Period, a schedule (together with supporting detail reasonably satisfactory to Lender) reconciling (A) the aggregate amount of Operating Expense Monthly Disbursements during such calendar quarter and (B) the actual Operating Expenses incurred during such calendar quarter, and to the extent Lender determines in its reasonable discretion that Operating Expenses actually incurred in such quarter were less than the amount of Operating Expense Monthly Disbursements disbursed to Borrower for such quarter, then Lender may in its reasonable discretion either (x) decrease the amount to be disbursed for payment of Operating Expense Monthly Disbursements for the following month (or, if necessary, months) in an amount necessary to reflect such difference or (y) require that Borrower, within ten (10) days following written request, deposit into the Lockbox Account an amount equal to such difference;

(iii) a complete copy of Borrower's annual financial statements, which shall include amounts representing annual net operating income, net cash flow, gross income and operating expenses, to be set forth on and include a balance sheet, profit and loss statement, statement of cash flow, statement of net worth and contingent liabilities, statement of change in financial position of Borrower and an annual operating statement of the Property (containing the items set forth in paragraph (i) above on a full year basis), in each case, within ninety (90) days after the close of each Fiscal Year of Borrower. Borrower's annual financial statements shall be prepared and reviewed by an independent certified public accountant acceptable to Lender (provided, however, that at any time an Event of Default exists or Lender has a reasonable basis to believe any such financial statements are inaccurate in any material respect or do not fairly represent the financial condition

of Borrower or the Property, the same shall, upon Lender's written request, be audited by such independent certified public accountant). ;

(iv) for the partial year commencing on the date hereof and for each Fiscal Year thereafter, by no later than forty-five (45) days prior to the commencement of such period or Fiscal Year, an annual operating budget presented on a monthly basis consistent with the annual operating statement described above for the Property, including cash flow projections for such Fiscal Year and all proposed capital replacements and improvements, which such budget shall (A) until the occurrence and continuance of a Trigger Period, be provided to Lender for informational purposes and (B) after the occurrence and during the continuance of a Trigger Period not take effect until approved by Lender (after such approval has been given in writing, such approved budget shall be referred to herein as the "**Approved Annual Budget**"). Until such time that Lender approves a proposed Annual Budget, the most recent Approved Annual Budget shall apply (or, if none, the prior year's annual operating statement shall be deemed the Approved Annual Budget for up to 45 days, during which Borrower shall prepare a budget for Lender's approval), adjusted to reflect actual increases in Taxes, Insurance Premiums and utilities expenses; and

(v) from and after Completion, by no later than ten (10) days after and as of the end of each calendar month during any Trigger Period, and by no later than thirty (30) days after and as of the end of each calendar quarter at all other times, all information required for the calculation of the then current Debt Service Coverage Ratio (for the trailing 12-month period), together with such back-up information as Lender shall require and, during the continuance of a Trigger Period, a calculation of the amount of Excess Cash Flow generated by the Property for such period together with such back-up information to support such calculation as Lender shall require.

(b) Upon request from Lender (which, absent due cause, may be made not more frequently than quarterly), Borrower shall furnish in a timely manner to Lender (i) a property management report for the Property, showing the number of inquiries made and/or rental applications received from tenants or prospective tenants and deposits received from tenants and any other related information requested by Lender; and (ii) an accounting of all security deposits held in connection with any Lease of any part of the Property, including the name and identification number of the accounts in which such security deposits are held, the name and address of the financial institutions in which such security deposits are held and the name of the Person to contact at such financial institution, along with any authority or release necessary for Lender to obtain information regarding such accounts directly from such financial institutions.

(c) Borrower shall, within ten (10) days of request, furnish Lender (and shall cause each Borrower Party to furnish to Lender) with such other additional financial or management information (including State and Federal tax returns) as may, from time to time, be reasonably required by Lender in form and substance satisfactory to Lender; provided, however, in no event shall Lender request or ACRES be required to furnish or

cause to be furnished any audited financial statements or tax returns of ACRES. Lender shall have the right from time to time during normal business hours upon reasonable notice to Borrower to examine the books and records related to the Property, at the office of Borrower or other Person maintaining such books and records, and to make such copies or extracts thereof as Lender shall desire. During the existence of an Event of Default, Borrower shall pay any costs incurred by Lender to examine such books, records and accounts, as Lender shall determine to be necessary or appropriate in the protection of Lender's interest. Borrower shall furnish to Lender and its agents convenient facilities for the examination and audit of any such books and records. Borrower shall furnish to Lender, within ten (10) Business Days after Lender's request (or as soon thereafter as may be reasonably possible), financial and sales information from any commercial Tenant designated by Lender (to the extent such financial and sales information is required to be provided under the applicable Lease and same is received by Borrower after request therefor).

(d) Borrower agrees that (i) Borrower shall keep adequate books and records of account and (ii) all Required Financial Items (defined below) to be delivered to Lender pursuant to Section 4.1.11 shall: (A) be complete and correct; (B) present fairly the financial condition of the applicable Person; (C) disclose all liabilities that are required to be reflected or reserved against; (D) be prepared (1) in the form required by Lender and certified by a Responsible Officer of Borrower, (2) in hardcopy and electronic formats and (3) in accordance with the Approved Accounting Method; and (E) upon request of Lender, be audited by an independent certified public accountant acceptable to Lender. Borrower shall be deemed to warrant and represent that, as of the date of delivery of any such financial statement, there has been no material adverse change in financial condition, nor have any assets or properties been sold, transferred, assigned, mortgaged, pledged or encumbered since the date of such financial statement except as disclosed by Borrower in a writing delivered to Lender. Borrower agrees that all Required Financial Items shall not contain any misrepresentation or omission of a material fact.

(e) Borrower acknowledges the importance to Lender of the timely delivery of each of the items required by this Section 4.1.11 and the other financial reporting items required by this Agreement (each, a "**Required Financial Item**" and, collectively, the "**Required Financial Items**"). In the event Borrower fails to deliver to Lender any of the Required Financial Items within the time frame specified herein (each such event, a "**Reporting Failure**"), the same shall, at Lender's option, constitute an immediate Event of Default hereunder and, without limiting Lender's other rights and remedies with respect to the occurrence of such an Event of Default, Borrower shall, if not cured within five (5) Business Days after receipt of written notice of same from Lender, pay to Lender the sum of \$1,250.00 per occurrence for the first Reporting Failure and \$2,500.00 for each subsequent Reporting Failure. It shall constitute a further Event of Default hereunder if any such payment is not received by Lender within thirty (30) days of the date on which such payment is due, and Lender shall be entitled to the exercise of all of its rights and remedies provided hereunder.

4.1.12 **Use of Property.** The use of the Property as set forth in Section 3.1.26 of this Agreement shall not be changed without the prior written consent of Lender, which consent may be withheld in Lender's sole discretion.

4.1.13 **Title to the Property.** Borrower will warrant and defend (a) the title to the Property and every part thereof, subject only to Liens permitted hereunder (including Permitted Encumbrances) and (b) the validity and priority of the Lien of the Mortgage and the Assignment of Leases, subject only to Liens permitted hereunder (including Permitted Encumbrances), in each case against the claims of all Persons whomsoever. Borrower shall reimburse Lender for any Losses incurred by Lender if an interest in the Property, other than as permitted hereunder, is claimed by another Person.

4.1.14 **Costs of Enforcement.** In the event (a) that the Mortgage is foreclosed in whole or in part or that the Mortgage is put into the hands of an attorney for collection, suit, action or foreclosure, (b) of the foreclosure of any mortgage prior to or subsequent to the Mortgage in which proceeding Lender is made a party, or (c) of a proceeding under the Bankruptcy Code or other Creditors' Rights Law in respect of Borrower or any Restricted Party, Borrower, its successors or assigns, shall be chargeable with and agrees to pay all costs of collection and defense, including reasonable attorneys' fees and costs, incurred by Lender or Borrower in connection therewith and in connection with any appellate proceeding or post-judgment action involved therein, together with all required service or use taxes.

4.1.15 **Estoppel Statement.**

(a) After written request by Lender, which request following a Securitization shall, provided no Event of Default then exists, not be made more than twice each calendar year, Borrower shall within ten (10) Business Days furnish Lender with a statement, duly acknowledged and certified, setting forth (i) the original principal amount of the Loan, (ii) the unpaid principal amount of the Loan, (iii) the Interest Rate of the Loan, (iv) the date installments of interest and/or principal were last paid, (v) any offsets or defenses to the payment of the Debt and/or any claims against Lender then known to Borrower, if any, (vi) that the Note, this Agreement, the Mortgage and the other Loan Documents are valid, legal and binding obligations and have not been modified or if modified, giving particulars of such modification, and (vii) whether, to Borrower's knowledge, there is any Default or Event of Default then continuing.

(b) Upon request by Lender, Borrower shall promptly (and in any event within ten (10) days after such request), give notice under each Property Document exercising any right thereunder to obtain an estoppel certificate with respect to Borrower's obligations under such Property Document, which certificate shall be in form and substance reasonably satisfactory to Lender given the terms of such Property Document, *provided* that Borrower shall not be required to demand such certificates more frequently than two (2) times in any calendar year so long as no Trigger Period is continuing.

(c) Upon request by Lender, Borrower shall promptly (and in any event within ten (10) days after such request), give notice to each commercial Tenant demanding that such Tenant execute and deliver an estoppel certificate in form and substance reasonably

satisfactory to Lender (but in no event shall a Tenant be required to deliver an estoppel certificate in form not required by its Lease), *provided* that Borrower shall not be required to demand such certificates more frequently than two (2) times in any calendar year so long as no Trigger Period is continuing. Borrower shall deliver to Lender each such estoppel certificate promptly upon Borrower's receipt thereof, and shall use commercially reasonable efforts promptly to obtain same.

4.1.16 **Loan Proceeds.** Borrower shall use the proceeds of the Loan received by it hereunder for the purposes set forth in Section 2.1.4.

4.1.17 **Performance by Borrower.** Borrower shall in a timely manner observe, perform and fulfill each and every covenant, term and provision of each Loan Document executed and delivered by, or applicable to, Borrower, and shall not enter into or otherwise suffer or permit any amendment, waiver, supplement, termination or other modification of any Loan Document executed and delivered by, or applicable to, Borrower without the prior consent of Lender. Borrower may enter into any contract without Lender's consent so long as such contract (a) contains terms that are commercially reasonable and comparable to existing local market terms for similar contractual agreements with respect to commercial properties similar to the Property as would be available from unaffiliated third parties and (b) does not contain any terms which would have a Material Adverse Effect. Notwithstanding anything to the contrary contained herein, Borrower shall be required to obtain Lender's prior written approval of any and all Major Contracts affecting the Property (including any renewals or extensions thereof, or any amendments or modifications thereto), which approval shall not be unreasonably withheld, conditioned or delayed. Borrower shall (i) diligently perform and observe all of the terms, covenants and conditions to be performed and observed by it under each contract to which it is a party, and do all things necessary to preserve and keep unimpaired its rights thereunder, (ii) promptly notify Lender of any notice of default given by any party under any Major Contract and deliver to Lender a true copy of each such notice, and (iii) enforce the performance and observance of all of the material terms, covenants and conditions required to be performed and/or observed by the other party to each contract and to which Borrower is a party in a commercially reasonable manner.

4.1.18 **Confirmation of Representations.** Borrower shall deliver, in connection with any Secondary Market Transaction, (a) one or more Officer's Certificates certifying as to the accuracy of all representations made by Borrower in the Loan Documents as of the date of the closing of such Secondary Market Transaction, and (b) certificates of the relevant Governmental Authorities in all relevant jurisdictions indicating the good standing and qualification of Borrower and SPE Party as of the date of the Secondary Market Transaction.

4.1.19 **Property Document Covenants.** Borrower shall (i) promptly perform and/or observe, in all material respects, all of the covenants and agreements required to be performed and observed by it under the Property Documents and do all things necessary to preserve and to keep unimpaired its material rights thereunder; (ii) promptly notify Lender of any material default under the Property Documents of which it is aware; (iii) promptly deliver to Lender a copy of each financial statement, business plan, capital expenditures plan, notice, report and estimate received by it under the Property Documents; (iv) enforce the performance and observance of all of the covenants and agreements required to be performed and/or observed under the Property Documents in a commercially reasonable manner; (v) cause the Property to be operated, in all

material respects, in accordance with the Property Documents; and (vi) not, in each case if such action have, or be reasonably likely to have, a Material Adverse Effect, without the prior written consent of Lender, (A) enter into any new Property Document or execute modifications to any existing Property Documents, (B) surrender, terminate or cancel the Property Documents, (C) reduce or consent to the reduction of the term of the Property Documents, (D) increase or consent to the increase of the amount of any charges under the Property Documents, (E) otherwise modify, change, supplement, alter or amend, or waive or release any of its rights and remedies under, the Property Documents in any material respect or (F) following the occurrence and during the continuance of an Event of Default, exercise any rights, make any decisions, grant any approvals or otherwise take any action under the Property Documents.

4.1.20 **Alterations**. Other than any alterations which constitute the Project, Lender's prior approval shall be required in connection with any alterations to any Improvements (a) that could reasonably be expected to have a Material Adverse Effect, (b) the cost of which (including any related alteration, improvement or replacement) is reasonably anticipated to exceed the Alteration Threshold, (c) that are structural in nature, which approval may be granted or withheld in Lender's reasonable discretion, or (d) made during the continuance of an Event of Default (any of the foregoing, a "**Material Alteration**"). If the total unpaid amounts incurred and to be incurred with respect to any alterations to the Improvements from and after Completion of the Project shall at any time exceed the Alteration Threshold (unless the cost of such Material Alteration is eligible for disbursement from the Replacement Reserve Account, in which case Borrower shall be given a credit for amounts on deposit in the Replacement Reserve Account), Borrower shall promptly deliver to Lender as security for the payment of such amounts and as additional security for Borrower's obligations under the Loan Documents any of the following: (i) cash, (ii) a Letter of Credit acceptable to Lender, (iii) securities acceptable to Lender, or (iv) a completion bond acceptable to Lender. Such security shall be in an amount equal to one hundred twenty-five percent (125%) of the excess of the total unpaid amounts incurred and to be incurred with respect to such alterations to the Improvements over the Alteration Threshold (such security, the "**Alterations Security**"). Upon substantial completion of any Material Alteration, (x) Borrower shall provide evidence satisfactory to Lender that (i) the Material Alteration was constructed in accordance with applicable Legal Requirements, (ii) all contractors, subcontractors, materialmen and professionals who provided work, materials or services in connection with the Material Alteration have been paid in full and have delivered unconditional releases of liens, and (iii) all material licenses and permits necessary for the use, operation and occupancy of the Material Alteration (other than those which depend on the performance of tenant improvement work) have been issued and (y) provided no Event of Default is then continuing, any remaining Alterations Security shall be promptly returned to Borrower. Prior to substantial completion of any Material Alteration, to the extent the Alterations Security shall exceed one hundred twenty-five percent (125%) of the excess of the total unpaid amounts incurred and to be incurred with respect to any such Material Alteration, Borrower shall be entitled to a release of such excess Alterations Security (e.g., the amount by which such Alterations Security exceeds one hundred twenty-five percent (125%) of the excess of the total unpaid amounts incurred and to be incurred with respect to any such Material Alteration) in accordance with Section 7.4.2 hereof, applied *mutatis mutandis*.

4.1.21 **Operation of Property**.

(a) No later than the date that is thirty (30) days prior to the anticipated Completion of the Project, Borrower shall deliver to Lender a fully executed Management Agreement with the Manager, together with the Assignment of Management Agreement. Borrower shall be responsible for all of the reasonable out-of-pocket costs and expenses (including reasonable out-of-pocket legal fees and expenses) incurred by Lender in connection with Lender's review of the Management Agreement and the Assignment of Management Agreement.

(b) From and after the date that Borrower enters into the Management Agreement, Borrower shall cause the Property to be operated, in all material respects, in accordance with the Management Agreement or Replacement Management Agreement, as applicable. In the event that the Management Agreement expires or is terminated (without limiting any obligation of Borrower to obtain Lender's consent to any termination or modification of the Management Agreement in accordance with the terms and provisions of this Agreement), Borrower shall, commensurately with such expiration or termination, enter into a Replacement Management Agreement with Manager or another Qualified Manager, as applicable. Borrower hereby agrees that the fee paid to Manager in compensation for Manager's services conducted in connection with the management of the Property shall not exceed three percent (3.0%) of Operating Income.

(c) From and after the date that Borrower enters into the Management Agreement, Borrower shall: (i) promptly perform and/or observe, in all material respects, all of the covenants and agreements required to be performed and observed by it under the Management Agreement and do all things necessary to preserve and to keep unimpaired its material rights thereunder; (ii) promptly notify Lender of any material default under the Management Agreement of which it is aware; (iii) promptly deliver to Lender a copy of each financial statement, business plan, capital expenditures plan, notice, report and estimate received by it under the Management Agreement; and (iv) enforce the performance and observance of all of the covenants and agreements required to be performed and/or observed by Manager under the Management Agreement, in a commercially reasonable manner.

(d) From and after the date that Borrower enters into the Management Agreement, Borrower shall not, without Lender's prior consent (which consent shall not be unreasonably withheld): (i) surrender, terminate or cancel the Management Agreement; provided, that Borrower may replace the Manager so long as the replacement manager is a Qualified Manager pursuant to a Replacement Management Agreement; (ii) reduce or consent to the reduction of the term of the Management Agreement; (iii) increase or consent to the increase of the amount of any charges under the Management Agreement; or (iv) otherwise modify, change, supplement, alter or amend, or waive or release any of its rights and remedies under, the Management Agreement in any material respect.

(e) From and after the date that Borrower enters into the Management Agreement, and following the occurrence and during the continuance of an Event of Default, Borrower shall not exercise any rights, make any decisions, grant any approvals or otherwise take any action under the Management Agreement without the prior consent of Lender, which consent may be withheld in Lender's sole discretion. If (i) a Trigger Period is continuing

and the Manager is an Affiliate of the Borrower, (ii) an Event of Default occurs and is continuing, (iii) the Manager shall become bankrupt or insolvent (or seek similar status under any Creditors' Rights Law), (iv) a material default by Manager occurs under the Management Agreement beyond any applicable grace and cure periods, or (v) Manager commits any action constituting gross negligence, malfeasance or willful misconduct, Borrower shall, at the request of Lender, terminate the Management Agreement and replace the Manager with a Qualified Manager pursuant to a Replacement Management Agreement.

(f) Borrower shall not commit or suffer any intentional physical waste of the Property or make any change in the use of the Property which will in any way materially increase the risk of fire or other hazard arising out of the operation of the Property, or take any action that might invalidate or give cause for cancellation of any Policy, or do or permit to be done thereon anything that may in any way impair the value of the Property or the security for the Loan. Borrower will not, without the prior written consent of Lender, permit any drilling or exploration for or extraction, removal, or production of any minerals from the surface or the subsurface of the Property, regardless of the depth thereof or the method of mining or extraction thereof.

4.1.22 Liens.

(a) Borrower shall not create, incur, assume or suffer to exist any Lien on any portion of the Property or permit any such action to be taken, except for (i) Permitted Encumbrances; and (ii) Liens for Taxes or Other Charges, in each case not yet due and payable; and (iii) the Liens created by the Loan Documents.

(b) Subject to Section 4.1.22(c) below, Borrower will promptly pay (or cause to be paid) when due all bills and costs for labor, materials, and specifically fabricated materials incurred in connection with the Property (any such bills and costs, a "**Labor and Materials Charge**") and never permit to exist in respect of the Property or any part thereof any lien or security interest, even though inferior to the liens and the security interests hereof, and in any event never permit to be created or exist in respect of the Property or any part thereof any other or additional lien or security interest other than the liens or security interests created hereby and by the Mortgage, except for the Permitted Encumbrances.

(c) After prior written notice to Lender, Borrower, at its own expense, may contest by appropriate legal proceeding, promptly initiated and conducted in good faith and with due diligence, the validity of any Labor and Materials Charge, the applicability of any Labor and Materials Charge to Borrower or to the Property or any alleged non-payment of any Labor and Materials Charge and defer paying the same, provided that (i) no Event of Default has occurred and is continuing; (ii) such proceeding shall be permitted under and be conducted in accordance with the provisions of any instrument to which Borrower is subject and shall not constitute a default thereunder and such proceeding shall be conducted in accordance with all applicable Legal Requirements; (iii) neither the Property nor any part thereof or interest therein will be in imminent danger of being sold, forfeited, terminated, cancelled or lost; (iv) Borrower shall promptly upon final determination thereof

pay (or cause to be paid) any such contested Labor and Materials Charge determined to be valid, applicable or unpaid; (v) such proceeding shall suspend the collection of such contested Labor and Materials Charge from the Property or Borrower shall have paid the same (or shall have caused the same to be paid) under protest; and (vi) Borrower shall furnish (or cause to be furnished) such security as may be required in the proceeding, or as may be reasonably requested by Lender, to insure payment of such Labor and Materials Charge, together with all interest and penalties payable in connection therewith. Lender may apply any such security or part thereof, as necessary to pay for such Labor and Materials Charge at any time when, in the reasonable judgment of Lender, the validity, applicability or non-payment of such Labor and Materials Charge is finally established or the Property (or any part thereof or interest therein) shall be in present danger of being sold, forfeited, terminated, cancelled or lost.

4.1.23 **Entity Status; Dissolution.** Borrower shall maintain its valid legal existence and (if Borrower is not organized in the State in which the Land is located) its qualification to do business in such jurisdiction. Furthermore, without limiting the provisions of Article V of this Agreement, Borrower shall not (a) engage in any division, dissolution, liquidation or consolidation or merger with or into any other business entity, (b) engage in any business activity not related to the ownership and operation of the Property, (c) transfer, lease or sell, in one transaction or any combination of transactions, all or substantially all of the properties or assets of Borrower except to the extent permitted by the Loan Documents, (d) modify, amend, waive or terminate its organizational documents or its qualification and good standing in any jurisdiction or (e) cause or permit the SPE Party to (i) divide into two (2) or more separate entities, dissolve, wind up or liquidate or take any action, or omit to take an action, as a result of which the SPE Party would be divided, dissolved, wound up or liquidated in whole or in part, or (ii) amend, modify, waive or terminate the certificate of incorporation or bylaws of the SPE Party, in each case, without obtaining the prior consent of Lender.

4.1.24 **Debt Cancellation.** Borrower shall not cancel or otherwise forgive or release any claim or debt (other than termination of Leases, and then only to the extent permitted in accordance herewith) owed to Borrower by any Person, except for adequate consideration and in the ordinary course of Borrower's business.

4.1.25 **Zoning.** Borrower shall not initiate or consent to any zoning reclassification of any portion of the Property or seek any variance under any existing zoning ordinance or use or permit the use of any portion of the Property in any manner that could result in such use becoming a non-conforming use under any zoning ordinance or any other applicable land use law, rule or regulation, without the prior consent of Lender. If the Property, or any portion thereof, is (or shall become) legal non-conforming in any respect at any time, Borrower shall not take or permit any action (including, without limitation, any change of use, alteration of structures or reconfiguration of parking and landscaping) that would cause any nonconformity with current Legal Requirements to cease to be permitted (or "grandfathered") thereunder.

4.1.26 **No Joint Assessment.** Borrower shall not suffer, permit or initiate the joint assessment of the Property (a) with any other real property constituting a tax lot separate from the Property, and (b) which constitutes real property with any portion of the Property which may be deemed to constitute personal property, or any other procedure whereby the lien of any taxes which

may be levied against such personal property shall be assessed or levied or charged to such real property portion of the Property.

4.1.27 **ERISA.**

(a) Borrower shall not engage in any transaction which would cause any obligation, or action taken or to be taken, hereunder (or the exercise by Lender of any of its rights under the Note, this Agreement or the other Loan Documents) to be a non-exempt (under a statutory or administrative class exemption) prohibited transaction under ERISA.

(b) Borrower further covenants and agrees to deliver to Lender such certifications or other evidence from time to time throughout the term of the Loan, as requested by Lender in its sole discretion, that (i) Borrower is not an “employee benefit plan” as defined in Section 3(3) of ERISA, which is subject to Title I of ERISA, or a “governmental plan” within the meaning of Section 3(32) of ERISA; (ii) Borrower is not subject to any state statute regulating investments of, or fiduciary obligations with respect to, governmental plans; and (iii) one or more of the following circumstances is true:

(A) Equity interests in Borrower are publicly offered securities, within the meaning of 29 C.F.R. §2510.3-101(b)(2);

(B) Less than twenty-five percent (25%) of each outstanding class of equity interests in Borrower is held by “benefit plan investors” within the meaning of 29 C.F.R. §2510.3-101(f)(2); or

(C) Borrower qualifies as an “operating company” or a “real estate operating company” within the meaning of 29 C.F.R. §2510.3-101(c) or (e).

4.1.28 **Servicing Fee.** Borrower shall pay to Lender a servicing fee (the “**Servicing Fee**”) in the amount of \$18,000 per annum, payable monthly in advance and prorated for partial years. The first installment of the Servicing Fee shall be paid on the date hereof and subsequent installments shall be paid monthly in advance during each year of the term of the Loan.

4.1.29 **General Contractor’s Agreement.** (a) Borrower shall enforce the General Contractor’s Agreement in the best interests of Borrower consistent with the construction of the Improvements using sound business judgment, (b) waive none of the material obligations of any of the parties thereunder, (c) do no act which would relieve General Contractor from its material obligations to construct the Improvements according to the Plans and Specifications and (d) make no amendments to or change orders under the General Contractor’s Agreement, except as permitted under Section 4.1.40 hereof, without the prior approval of Lender.

4.1.30 **Architect’s Contract.** Borrower shall (a) enforce the Architect’s Contract in the best interests of Borrower consistent with the construction of the Improvements using sound business judgment, (b) waive none of the material obligations of Borrower’s Architect thereunder, (c) do no act which would relieve Borrower’s Architect from its material obligations under the Architect’s Contract and (d) make no amendments to the Architect’s Contract without the prior approval of Lender. Borrower shall, from time to time, upon request by Lender, cause Borrower’s

Architect to provide Lender with reports in regard to the status of construction of the Improvements, in such form and detail as reasonably requested by Lender.

4.1.31 **Completion of Construction.** Borrower shall diligently pursue the Completion of the Improvements and obtain a temporary or permanent certificate of occupancy (and to the extent the same are conditional or require performance by Borrower, satisfy all conditions to the issuance of and/or performed all obligations required for the continued validity of the same) for the Property on or prior to the Completion Date in accordance with the Plans and Specifications (except for changes in accordance with Section 4.1.40 hereof) and in compliance with all restrictions, covenants and easements affecting the Property, all applicable Legal Requirements, and all Governmental Approvals, and with all terms and conditions of the Building Loan Documents; to pay all sums and to perform such duties as may be necessary to complete such construction of the Improvements substantially in accordance with the Plans and Specifications (except for changes in accordance with Section 4.1.40 hereof) and in compliance with all restrictions, covenants and easements affecting the Property, all Legal Requirements and all Governmental Approvals, and with all terms and conditions of the Building Loan Documents, all of which shall be accomplished on or before the Completion Date, free from any liens, claims or assessments (actual or contingent) asserted against the Property for any material, labor or other items furnished in connection therewith. Evidence of satisfactory compliance with the foregoing shall be furnished by Borrower to Lender on or before the Completion Date. In addition, if such certificate of occupancy or other Governmental Approvals are temporary in nature, Borrower shall diligently pursue procuring final Governmental Approvals. In addition, Borrower shall diligently pursue construction of the entire Improvements to Final Completion after the Completion Date.

4.1.32 **Inspection of Property.** Borrower shall permit Lender, the Construction Consultant and their respective representatives, to enter upon the Property, inspect the Improvements and all materials to be used in the construction thereof and to examine the Plans and Specifications which are or may be kept at the construction site at all reasonable times and with reasonable advance notice and will cooperate, and use reasonable efforts to cause the General Contractor and the Major Trade Contractors to cooperate with the Construction Consultant to enable him or her to perform his or her functions hereunder.

4.1.33 **Construction Consultant.** Borrower acknowledges that (a) the Construction Consultant has been retained by Lender to act as a consultant and only as a consultant to Lender in connection with the construction of the Improvements and has no duty to Borrower, (b) the Construction Consultant shall in no event have any power or authority to give any approval or consent or to do any other act or thing which is binding upon Lender, (c) Lender reserves the right to make any and all decisions required to be made by Lender under this Agreement and to give or refrain from giving any and all consents or approvals required to be given by Lender under this Agreement and to accept or not accept any matter or thing required to be accepted by Lender under this Agreement, and without being bound or limited in any manner or under any circumstance whatsoever by any opinion expressed or not expressed, or advice given or not given, or information, certificate or report provided or not provided, by the Construction Consultant with respect thereto, (d) Lender reserves the right in its sole and absolute discretion to disregard or disagree, in whole or in part, with any opinion expressed, advice given or information, certificate or report furnished or provided by the Construction Consultant to Lender or any other person or

party, and (e) Lender reserves the right to replace the Construction Consultant with another construction consultant at any time and without prior notice to or approval by Borrower.

4.1.34 **Construction Consultant/Duties and Access**. Borrower shall permit Lender to retain the Construction Consultant at the reasonable cost of Borrower to perform the following services on behalf of Lender:

- (i) To review and advise Lender whether, in the opinion of the Construction Consultant, the Plans and Specifications are satisfactory;
- (ii) To review Advance Requests and change orders; and
- (iii) To make periodic inspections (approximately at the date of each Advance Request) for the purpose of assuring that construction of the Improvements to date is in accordance with the Plans and Specifications and to approve Borrower's then current Advance Request as being consistent with Borrower's obligations under this Agreement.

The fees of the Construction Consultant shall be paid by Borrower within twenty (20) days after billing therefor and expenses incurred by Lender on account thereof shall be reimbursed to Lender within twenty (20) days after request therefor, but neither Lender nor the Construction Consultant shall have any liability to Borrower on account of (i) the services performed by the Construction Consultant, (ii) any neglect or failure on the part of the Construction Consultant to properly perform its services or (iii) any approval by the Construction Consultant of construction of the Improvements. Neither Lender nor the Construction Consultant assumes any obligation to Borrower or any other Person concerning the quality of construction of the Improvements or the absence therefrom of defects.

4.1.35 **Bonds**. Borrower shall furnish to Lender and maintain such Payment and Performance Bonds with respect to the obligations of General Contractor or Subguard Insurance to the extent required hereunder. In the event that any payments under any such Payment and Performance Bonds or Subguard Insurance are issued jointly to Borrower and Lender, Borrower shall endorse any such jointly issued payments to the order of Lender, promptly upon Lender's demand.

4.1.36 **Laborers, Subcontractors and Materialmen**. Borrower shall notify Lender immediately, and in writing, if Borrower receives any default notice, notice of lien or demand for past due payment, written or oral, from any laborer, subcontractor or materialmen. Borrower will also furnish to Lender at any time and from time to time upon reasonable demand by Lender, Lien waivers in form reasonably satisfactory to Lender bearing a then current date from each Major Trade Contractor covering work performed which was the basis of the immediately prior Additional Advance.

4.1.37 **Ownership of Personalty**. Borrower shall furnish to Lender, if Lender so requests, photocopies of the fully executed contracts, bills of sale, receipted vouchers and agreements, or any of them, under which Borrower claims title to the materials, articles, fixtures and other Personal Property used or to be used in the construction or operation of the Improvements.

4.1.38 **Purchase of Material Under Conditional Sale Contract.** Borrower shall not permit any materials, equipment, fixtures or any other part of the Improvements to be purchased or installed under any security agreement or other arrangements wherein the seller reserves or purports to reserve the right to remove or to repossess any such items or to consider them personal property after their incorporation in the Improvements, unless authorized by Lender in writing and in advance.

4.1.39 **HVCRE.** Borrower shall invest and thereafter maintain (and shall be contractually obligated to maintain during the entire term of the Loan) the 15% Capital Requirement (as defined below) at all times that Borrower is required to maintain such 15% Capital Requirement pursuant to the Basel Accord and/or any other Risk-Based Capital Guidelines, as applicable, in order to avoid the Loan being classified as a High Volatility Commercial Real Estate Loan. The “**15% Capital Requirement**” means capital equal to at least fifteen percent (15%) of the “as complete” appraised value of the Property and Improvements as determined by the appraisal obtained by Lender in connection with the closing of the Loan, the amount of which must be contributed (including on account of actual costs incurred in connection with the acquisition of land contributed as part of the Property as approved by Lender) before any disbursement is made under the Loan. Borrower expressly covenants and agrees that, notwithstanding any provision herein to the contrary, no distributions of any kind or nature (including, without limitation, with respect to (a) contributed capital, (b) internally generated capital, and/or (c) any other proceeds or amounts received on account of any sale or refinancing of the Property or any portion thereof) shall be made or otherwise paid by Borrower to any Person, including, without limitation, the respective members or direct or indirect owners thereof, if, after giving effect to any such distribution, such distribution would cause the Loan to be classified as a High Volatility Commercial Real Estate Loan, as reasonably determined by Lender at any time.

4.1.40 **Change Orders.**

(a) Borrower shall not directly or indirectly, without the prior written consent of Lender and all Governmental Authorities (to the extent required by law):

(i) modify or supplement the Plans and Specifications (except as provided in paragraph (iii) below) or any permits granted to construct the Improvements in any respect;

(ii) amend, supplement or otherwise modify the Architect’s Contract, or the General Contractor’s Agreement or any Major Trade Contract, except as provided in paragraph (iii) below, (A) to increase the amount payable by Borrower thereunder, (B) to lengthen the time for performance of any party thereto other than Borrower or (C) in any other way that could adversely affect Lender; or

(iii) direct or permit the performance of any work pursuant to any revision (of whatever nature or form) of the Plans and Specifications, or any change order or change bulletin or other instrument or understanding relating to the construction of the Improvements unless:

(A) such change order will not materially change the gross square feet or the net rentable square feet of commercial space to be contained in the Improvements or the net rentable square feet of space to be contained in the Improvements, or the basic layout of the Improvements, or involve the use of materials, furniture, fixtures and equipment that will not be at least equal in quality to the materials, furniture, fixtures and equipment originally specified in or required by the approved Plans and Specifications; and

(B) such change order shall, in a single instance, result in an increase or decrease in the cost of Improvements of less than \$200,000.00, however, if the aggregate cost of all such change orders (not previously approved by Lender and Construction Consultant) at any given time, result in an increase or decrease in the cost of the Improvements of more than \$3,000,000.00 then any and all subsequent change orders, regardless of amount, must be previously approved by Lender and Construction Consultant; provided that, in the event that Borrower proposes a change order which in Borrower's reasonable opinion results in an upgrade to the Project and Borrower shall deposit with Lender cash in the amount of the increase in cost from such change order to be disbursed by Lender in accordance with the provisions of Section 2.18, Lender shall approve such change order.

(b) Borrower shall submit to Lender and Construction Consultant copies of all change orders entered into with respect to the Improvements within fifteen (15) days after the same are entered into, irrespective of whether the same require the prior approval of Lender and Construction Consultant pursuant to this Agreement.

4.1.41 **No Distributions.** Other than distributions of Additional Advances made with respect to the developer's fees in accordance with this Agreement, prior to the date after which the Property has achieved a Debt Service Coverage Ratio of not less than 1.20:1.00 for two (2) consecutive calendar quarters, Borrower will not make any distributions or other disbursements to its shareholders, partners or members or Persons owned by or related to any of its shareholders, partners or members (including any non-member managers of such Persons).

V. ENTITY COVENANTS.

Section 5.1 Special Purpose Entity.

(a) Borrower has not since the date of its formation and will not:

(i) engage in any business or activity other than the ownership, operation and maintenance of the Property, and activities incidental thereto;

(ii) acquire or own any assets other than (A) the Property, and (B) such incidental Personal Property as may be necessary for the ownership, leasing, maintenance and operation of the Property;

(iii) incur any Indebtedness, secured or unsecured, direct or contingent (including guaranteeing any obligation), other than (A) the Debt, (B) trade and operational indebtedness incurred in the ordinary course of business with trade

creditors, provided such indebtedness is (1) unsecured, (2) not evidenced by a note, (3) on commercially reasonable terms and conditions, and (4) due not more than sixty (60) days past the date incurred and paid on or prior to such date, (C) Permitted Equipment Leases; provided however, the aggregate amount of the indebtedness described in (B) and (C) shall not exceed at any time two percent (2%) of the Outstanding Principal Balance; and/or (D) the C-PACE Loan. No Indebtedness other than the Debt and the C-PACE Loan may be secured (subordinate or pari passu) by the Property;

(iv) merge into or consolidate with any Person, or divide into two or more limited liability companies or other legal entities, dissolve, terminate, liquidate in whole or in part, transfer or otherwise dispose of all or substantially all of its assets or change its legal structure;

(v) fail to observe all material organizational formalities, or fail to preserve its existence as an entity duly formed or organized, validly existing and in good standing (if applicable) under the applicable Legal Requirements of the jurisdiction of its organization or formation, or amend or, modify the provisions of its organizational documents without the prior written consent of Lender, or terminate or fail to comply with the provisions of its organizational documents;

(vi) own any subsidiary, or make any investment in, any Person;

(vii) commingle its funds or assets with the funds or assets of any other Person;

(viii) fail to maintain all of its books, records, financial statements and bank accounts separate from those of any other Person (including, without limitation, any Affiliates). Borrower's assets have not and will not be listed as assets on the financial statement of any other Person; provided, however, that Borrower's assets may have been and may be included in a consolidated financial statement of its Affiliates provided that (A) appropriate notation shall be made on such consolidated financial statements to indicate the separateness of Borrower and such Affiliates and to indicate that Borrower's assets and credit are not available to satisfy the debts and other obligations of such Affiliates or any other Person and (B) such assets shall be listed on Borrower's own separate balance sheet. Borrower has maintained and will maintain its books, records, resolutions and agreements as official records;

(ix) except for capital contributions or capital distributions permitted under the terms of its organizational documents and properly reflected on its books and records, enter into any transaction, contract or agreement with any general partner, member, principal or Affiliate, except upon terms and conditions that are commercially reasonable and substantially similar to those that would be available on an arm's-length basis with unaffiliated third parties;

(x) maintain its assets in such a manner that it will be costly or difficult to segregate, ascertain or identify its individual assets from those of any other Person;

(xi) assume or guaranty the debts of any other Person, hold itself out to be responsible for the debts of any other Person, or otherwise pledge its assets to secure the obligations of any other Person or hold out its credit as being available to satisfy the obligations of any other Person;

(xii) make any loans or advances to any Person;

(xiii) fail to file its own tax returns (unless Borrower is treated as a “disregarded entity” for tax purposes and is not required to file tax returns under applicable law or unless Borrower is prohibited by applicable Legal Requirements from doing so);

(xiv) fail to (A) hold itself out to the public and identify itself, in each case, as a legal entity separate and distinct from any other Person and not as a division or part of any other Person, (B) conduct its business solely in its own name, (C) hold its assets in its own name or (D) correct any known misunderstanding regarding its separate identity;

(xv) fail to intend to remain solvent or fail to intend to maintain adequate capital for the normal obligations reasonably foreseeable in a business of its size and character and in light of its contemplated business operations, *provided, however*, that the foregoing shall not be deemed to require any member or partner to make any capital contribution to Borrower;

(xvi) take any Material Action and shall not cause or permit the members, partners or managers to take any Material Action with respect to Borrower unless (A) there is at least one (1) Independent Director then serving at Borrower (or, if Borrower is not an Acceptable LLC, then serving at the SPE Party) and (B) such Independent Director has consented in writing to such Material Action;

(xvii) fail to allocate shared expenses (including, without limitation, shared office space) or fail to use separate stationery, invoices and checks;

(xviii) fail to pay its own liabilities (including, without limitation, salaries of its own employees (if any)) from its own funds or fail to maintain a sufficient number of employees (if any) in light of its contemplated business operations (in each case to the extent there exists sufficient cash flow from the Property to do so), *provided, however*, that the foregoing shall not be deemed to require any direct or indirect member, partner or stockholder to make any capital contribution or other equity investment;

(xix) acquire obligations or securities of its partners, members or other Affiliates, as applicable;

(xx) identify its partners, members or other Affiliates, as applicable, as a division or part of it;

(xxi) have any direct or indirect ownership interests in Borrower or the Property that include any Prohibited Entity/Ownership Structure; or

(xxii) have any of its obligations guaranteed by any Affiliate, except as contemplated by the Loan Documents.

(b) The provisions of this Section 5.1(b) shall apply only if Borrower is a partnership or limited liability company (other than an Acceptable LLC). Each general partner (in the case of a partnership) and at least one member (in the case of a limited liability company) of Borrower, as applicable, shall be an Acceptable LLC constituting an SPE Party, the sole asset of which is its interest in Borrower. Each such SPE Party (i) will at all times comply with each of the covenants, terms and provisions contained in Section 5.1(a) hereof (excluding paragraphs (i) - (iii) (inclusive) and paragraph (vi) thereof) and Section 5.1(c) and (d) hereof, as if such representation, warranty or covenant was made directly by such SPE Party; (ii) will not engage in any business or activity other than owning an interest in Borrower; (iii) will not acquire or own any assets other than its partnership or membership interest in Borrower; (iv) will at all times continue to own no less than a 0.5% direct equity ownership interest in Borrower; (v) will not incur any debt, secured or unsecured, direct or contingent (including guaranteeing any obligation); (vi) will not own any subsidiary, or make any investment in, any Person, other than Borrower; and (vii) will cause Borrower to comply with the provisions of this Section 5.1.

(c) The provisions of this Section 5.1(c) and Section 5.1(d) below shall apply only if Borrower or any SPE Party is an Acceptable LLC. The limited liability company agreement of such company (the “**LLC Agreement**”) shall provide that (i) upon the occurrence of any event that causes the last remaining member of such company (“**Member**”) to cease to be the member thereof (other than (A) upon an assignment by Member of all of its membership interest therein and the admission of the transferee as Member in accordance with the Loan Documents and the LLC Agreement, or (B) the resignation of Member and the admission of an additional member of such company in accordance with the terms of the Loan Documents and the LLC Agreement), a natural person who is then serving as Independent Director of such company shall, without any action of any other Person and simultaneously with the Member ceasing to be the member of such company automatically be admitted to such company as a member with a 0% economic interest (“**Special Member**”) and shall continue such company without dissolution and (ii) Special Member may not resign from such company or transfer its rights as Special Member unless a successor Special Member has been admitted to such company as a Special Member in accordance with requirements of Delaware law (as applicable) and the LLC Agreement, and after giving effect to such resignation or transfer, the requirements of Section 5.2 below (if any) are satisfied. The LLC Agreement shall further provide that (i) Special Member shall automatically cease to be a member of such company upon the admission to such company of the first substitute member, (ii) Special Member shall be a member of such company that has no interest in the profits, losses and capital of such company and has no right to receive any distributions of the assets of such

company, (iii) pursuant to the applicable provisions of the limited liability company act of the State of Delaware (as applicable, the “Act”), Special Member shall not be required to make any capital contributions to such company and shall not receive a limited liability company interest in such company, (iv) Special Member, in its capacity as Special Member, may not bind such company and (v) except as required by any mandatory provision of the Act, Special Member, in its capacity as Special Member, shall have no right to vote on, approve or otherwise consent to any action by, or matter relating to, such company (including, without limitation, the division, merger, consolidation or conversion of such company) except as expressly required by Section 5.1(a)(xvi) and Section 5.2 hereof. Prior to its admission to such company as Special Member, Special Member shall not be a member of such company, but may serve as an Independent Director of such company.

(d) The provisions of Section 5.1(c) above and this Section 5.1(d) shall apply only if Borrower or any SPE Party is an Acceptable LLC. The LLC Agreement shall further provide that (i) upon the occurrence of any event that causes the Member to cease to be a member of such company, to the fullest extent permitted by law, the personal representative of Member shall, within ninety (90) days after the occurrence of the event that terminated the continued membership of Member in such company agree in writing (A) to continue such company, and (B) to the admission of the personal representative or its nominee or designee, as the case may be, as a substitute member of such company effective as of the occurrence of the event that terminated the continued membership of Member in such company, (ii) any action initiated by or brought against Member or Special Member under any Creditors’ Rights Laws shall not cause Member or Special Member to cease to be a member of such company and upon the occurrence of such an event, the business of such company shall continue without dissolution and (iii) each of Member and Special Member waives any right it might have to agree in writing to dissolve such company upon the occurrence of any action initiated by or brought against Member or Special Member under any Creditors’ Rights Laws, or the occurrence of an event that causes Member or Special Member to cease to be a member of such company.

Section 5.2 Independent Director. The organizational documents of Borrower (to the extent Borrower is an Acceptable LLC) or SPE Party, as applicable, shall provide that at all times there shall be at least one (1) duly appointed independent director or manager of such entity (each, an “**Independent Director**”) who shall (I) not have been at the time of each such individual’s initial appointment, and shall not have been at any time during the preceding five years, and shall not be at any time while serving as Independent Director, either (i) a shareholder (or other equity owner) of, or an officer, manager, director (other than in its capacity as Independent Director of the Borrower or SPE Party or an Affiliate of Borrower or SPE Party that does not own a direct or indirect ownership interest in Borrower or SPE Party and that is required by a creditor to be a “special purpose entity”); provided that the fees that such individual earns from serving as an Independent Director of Affiliates of Borrower or SPE Party in any given year constitute in the aggregate less than five percent (5%) of such individual’s annual income for that year), partner, member or employee of, Borrower, SPE Party or any of their respective shareholders, partners, members, subsidiaries or Affiliates, (ii) a customer of, or supplier to, or other Person who derives any of its purchases or revenues from its activities with, Borrower, SPE Party or any of their respective shareholders, partners, members, subsidiaries or Affiliates (other than an Approved ID

Provider), (iii) a Person who Controls or is under common Control with any such shareholder, officer, manager, director, partner, member, employee supplier, customer or other Person, or (iv) a member of the immediate family of any such shareholder, officer, manager, director, partner, member, employee, supplier, customer or other Person, and (II) be employed by, in good standing with and engaged by Borrower or SPE Party in connection with, in each case, an Approved ID Provider, and (III) shall have at the time of their appointment at least three (3) years' experience in serving as an independent director or manager. The organizational documents of Borrower and SPE Party shall further provide that (I) the board of directors or managers of Borrower and SPE Party and the constituent equity owners of such entities (such constituent equity owners, the "**Constituent Members**") shall not take any Material Action unless at the time of such action there shall be at least one (1) Independent Director engaged as provided by the terms hereof and each Independent Director affirmatively votes in favor of such Material Action; (II) an Independent Director may be removed only for Cause and any resignation, removal or replacement of any Independent Director shall not be effective without (1) prior written notice to Lender (which such prior written notice must be given on the earlier of five (5) days or three (3) Business Days prior to the applicable resignation, removal or replacement) and (2) evidence that the replacement Independent Director satisfies the applicable terms and conditions hereof and of the applicable organizational documents (which such evidence must accompany the aforementioned notice); (III) to the fullest extent permitted by applicable law, including Section 18-1101(c) of the Act and notwithstanding any duty otherwise existing at law or in equity, the Independent Director shall consider only the interests of the Borrower and any SPE Party (including Borrower's and any SPE Party's respective creditors) in acting or otherwise voting on the matters provided for herein and in Borrower's and SPE Party's organizational documents (IV) except for duties to the Company as set forth in the immediately preceding subsection (III) (including duties to Borrower's and any SPE Party's respective Constituent Members and creditors solely to the extent of their respective economic interests in Borrower or SPE Party (as applicable) exclusive of (x) all other interests of the Constituent Members), (y) the interests of other Affiliates of the Constituent Members, Borrower and SPE Party and (z) the interests of any group of Affiliates of which the Constituent Members, Borrower or SPE Party is a part), the Independent Director shall not have any fiduciary duties to any Constituent Members, any directors of Borrower or SPE Party or any other Person; (V) the foregoing shall not eliminate the implied contractual covenant of good faith and fair dealing under applicable law; and (VI) to the fullest extent permitted by applicable law, including Section 18-1101(e) of the Act, an Independent Director shall not be liable to Borrower, SPE Party, any Constituent Member or any other Person for breach of contract or breach of duties (including fiduciary duties), unless the Independent Director acted in bad faith or engaged in willful misconduct.

Section 5.3 Change of Name, Identity or Structure. Borrower shall not change (or permit to be changed) Borrower's or its SPE Party's (a) name, (b) identity (including its trade name or names), (c) principal place of business set forth on the first page of this Agreement or, (d) if not an individual, Borrower's or its SPE Party's corporate, partnership or other structure, without notifying Lender of such change in writing at least thirty (30) days prior to the effective date of such change and, in the case of a change in Borrower's or its SPE Party's structure, without first obtaining the prior written consent of Lender. Contemporaneously with the effective date of any such change, Borrower hereby authorizes Lender to file UCC Financing Statements, amendments and continuations thereof required by Lender to establish or maintain the validity, perfection and priority of the security interest granted herein. At the request of Lender, Borrower shall execute a

certificate in form satisfactory to Lender listing the trade names under which Borrower or its SPE Party intends to operate the Property, and representing and warranting that Borrower or its SPE Party does business under no other trade name with respect to the Property. Without limitation of the foregoing, Borrower's principal place of business and chief executive office, and the place where Borrower keeps its books and records, including recorded data of any kind or nature, regardless of the medium or recording, including software, writings, plans, specifications and schematics, has been for the preceding four months (or, if less, the entire period of the existence of Borrower) and will continue to be the address of Borrower set forth at the introductory paragraph of this Agreement (unless Borrower notifies Lender in writing at least thirty (30) days prior to the date of such change).

Section 5.4 Business and Operations. Borrower will continue to engage in the businesses presently conducted by it as and to the extent the same are necessary for the ownership, maintenance, management and operation of the Property. Borrower will qualify to do business and will remain in good standing under the laws of each jurisdiction as and to the extent the same are required for the ownership, maintenance, management and operation of the Property. Borrower shall not acquire any real property other than the Property.

Section 5.5 Representations for Underwriting Pre-Existing SPE Borrower. As of the Closing Date, Borrower hereby represents and warrants to Lender that, since Borrower's formation and at all times thereafter:

- (a) Borrower has not owned any real property other than the Property and personal property necessary or incidental to its ownership and operation of the Property;
- (b) Borrower has not engaged in any business unrelated to the ownership and operation of the Property;
- (c) except as expressly disclosed to Lender in connection with the closing of the Loan, Borrower has not amended, modified, supplemented, restated, replaced or terminated its organizational documents (or consented to any of the foregoing);
- (d) Borrower is and always has been duly formed, validly existing, and in good standing in the state of its incorporation and in all other jurisdictions where it is qualified to do business;
- (e) Borrower has not had any judgments or liens of any nature against it (except for tax liens not yet due and liens contested and resolved in good faith in accordance with applicable Legal Requirements);
- (f) Borrower has not failed to be in compliance with in all material respects with all laws, regulations and orders applicable to it and Borrower has received all necessary permits for it to operate;
- (g) Borrower has not been involved in any unresolved dispute with any taxing authority and has paid all taxes owed;

(h) Borrower has not been party to any lawsuit, arbitration, summons or legal proceeding that is still pending or that resulted in a judgment against it that has not been paid in full;

(i) Borrower has not failed to provide Lender with complete financial statements that reflect a fair and accurate view of its financial condition;

(j) Borrower has not had any material contingent or actual obligation unrelated to the Property;

(k) Each representation set forth in Section 1 of the Environmental Indemnity is true, correct and complete in all material respects; and

(l) Borrower has not incurred any Indebtedness, secured or unsecured, direct or contingent (including guaranteeing any obligation), other than liabilities in the ordinary course of its business that are related to the ownership and operation of the Property and no other Indebtedness has been secured (senior, subordinate or *pari passu*) by the Property.

VI. INSURANCE; CASUALTY; CONDEMNATION.

Section 6.1 Insurance.

(a) Borrower shall obtain and maintain, or cause to be maintained, insurance for Borrower and the Property providing at least the following (capitalized terms used in this Article VI without definition shall have the meanings commonly used in the insurance of commercial properties comparable to the Property as of the date hereof):

1) At all times after the commencement of construction and prior to Final Completion and at any time thereafter during which construction work is being performed at the Property:

(i) Builder's Risk "All Risk" or "Special Form" insurance (which shall not exclude fire, lightning, windstorm (including named storms), hail, explosion, riot, civil commotion, aircraft, vehicles and smoke) in such amount as Lender shall require but in no event less than one hundred percent (100%) of the replacement cost of the existing building, plus one hundred percent (100%) of the recurring Hard Costs as identified in the current project budget on a replacement cost basis (but excluding foundations and any other improvements not subject to physical damage) and recurring Soft Costs as required by Lender (which may have a period of indemnity of not less than twelve (12) months), providing for no deductible in excess of \$50,000, except as otherwise provided herein this Section 6.1 and, with respect to windstorm and earthquake, which may provide for no deductible in excess of 5% of the total insurable value of the Property. Such policy shall include Borrower as Named Insureds, with Lender as Mortgagee and as Loss Payee and be written on a Builder's Risk Completed Value Form (100% non-reporting) or its equivalent, with agreed value waiving all co-insurance provisions (or written on a no co-insurance form), and shall include permission to occupy (notwithstanding the foregoing, Lender has agreed to accept 30 days occupancy limitation, per building, provided that Borrower does not put any part of the Property to its

intended use until acceptable evidence of commercial property insurance as required in Section 6.1(a)(2)(i) has been reviewed and approved by Lender), coverage for loss by testing, collapse, theft, terrorism, earthquake, and, if any portion of the Improvements is at any time located in an area identified by the Federal Emergency Management Agency or any successor thereto as an area having special flood hazards pursuant to the National Flood Insurance Act of 1968, the Flood Disaster Protection Act of 1973 or the National Flood Insurance Reform Act of 1994, as each may be amended, or any successor law (the “**Flood Insurance Acts**”), flood hazard insurance in an amount equal to the maximum limit of coverage available for the Property under the Flood Insurance Acts through the National Flood Insurance Program and, if required by Lender, excess flood limits in amounts acceptable to Lender in its reasonable discretion, in each case having deductibles acceptable to Lender. Such insurance Policy shall also include coverage for:

(A) Loss suffered with respect to materials, equipment, heating and air conditioning machinery, machinery, and supplies, in each case owned by Borrower or required to be insured by Borrower, whether on-site, in transit, or stored offsite and with respect to temporary structures, hoists, sidewalks, retaining walls and underground property in each case owned by Borrower or required to be insured by Borrower;

(B) Soft costs that are recurring costs, which shall include delayed opening loss of income/revenue coverage, real estate taxes, additional interest on the loan, insurance costs as well as costs to reproduce plans, specifications, blueprints and models in connection with any restoration following a casualty with coverage in an amount of no less than one hundred percent (100%) of such Soft Costs as identified in the most recent approved project budget, or as otherwise agreed to by Lender in its reasonable discretion;

(C) Demolition, debris removal and increased cost of construction, including increased costs arising out of changes in applicable Legal Requirements and codes; and

(D) Operation of building laws.

(ii) Borrower shall cause Architect and Engineer to obtain and maintain Architect’s or Professional Liability insurance, as well as General Liability, Umbrella/Excess Liability, Commercial Auto Liability, Worker’s Compensation/Employer’s Liability with limits, terms, conditions and limits acceptable to Lender.

(iii) Workers Compensation, Employer’s Liability coverage and Disability insurance as required by law covering employees, if any, of Borrower or any Affiliate and the General Contractor.

(iv) Prior to or simultaneously with its entering into the General Contractor Agreement, Borrower shall cause General Contractor to obtain and maintain, and Borrower shall maintain, Commercial General Liability coverage, including products and completed operations and containing no “X”, “C”, “U” exclusion if excavation and/or demolition is to be provided (and, with regard to Borrower’s and General Contractor’s products and completed operations insurance, shall be without exclusion for construction defects), with no less than \$20,000,000 in limits per occurrence and in the aggregate per project through primary and umbrella liability coverages, with extended completed operations “tail” coverage through the statute of repose in the local jurisdiction (which, for General Contractor “tail” coverage, may be maintained through annual renewals) and, if applicable, Automobile Liability insurance with a combined single limit of no less than \$1,000,000. Such insurance shall include Borrower and General Contractor as Named Insureds and Lender as additional insured. All Persons engaged in work on the improvements at the Property shall maintain statutory Workers Compensation and Disability insurance in force for all workers on the job. Notwithstanding the foregoing, Borrower may use an Owner Controlled Insurance Program (“OCIP”) to satisfy the Borrower’s and General Contractor’s requirements herein, including General Liability and Umbrella/Excess Liability, provided the coverages are in form and substance acceptable to Lender, contain a deductible not to exceed \$25,000, and otherwise meet the requirements as set forth herein. Certificates of insurance and endorsements reasonably acceptable to Lender must be provided prior to any work being performed on the Property.

(v) Borrower shall cause General Contractor to obtain and maintain Subcontractor Default Insurance (an “SDI Policy”) covering all subcontractors under trade contracts in excess of \$2,000,000. Lender and Borrower shall each be named as a scheduled entity and a loss payee on a Financial Interest Endorsement (or equivalent) and otherwise be in form and substance reasonably acceptable to Lender.

2) At all times after Completion:

(i) commercial property insurance with respect to the Improvements and the Personal Property insuring against any peril now or hereafter included within the classification All Risk or Special Form (including, without limitation, fire, lightning, windstorm, hail, explosion, riot, civil commotion, vandalism, aircraft, vehicles and smoke), including damage caused by the acts of Terrorists, including nuclear, biological and/or chemical acts of Terrorists, including acts of foreign and domestic Terrorists, in each case (A) in an amount equal to 100% of the “Full Replacement Cost”, which for purposes of this Agreement shall mean actual replacement value exclusive of costs of excavations, foundations, underground utilities and footings, with a waiver of depreciation; (B) in an amount sufficient so that no co-insurance penalties shall apply; (C) providing for no deductible in excess of \$10,000, except as otherwise provided herein this Section 6.1 and, with respect to windstorm, which may provide for no deductible in excess of 5% of the total insurable value of the Property; (D) at all times insuring against

at least those hazards that are commonly insured against under a “Special Causes of Loss” Form policy, as the same shall exist on the date hereof, and together with any increase in the scope of coverage provided under such form after the date hereof; and (E) providing Law & Ordinance coverage, including coverage for Loss to the Undamaged Portion of the Building, Demolition Costs and Increased Cost of Construction in amounts acceptable to Lender, in the event any of the Improvements constitute legal non-conforming structures. The Full Replacement Cost shall be re-determined from time to time (but not more frequently than once in any twelve (12) calendar months) at the request of Lender by an appraiser or contractor designated and paid by Borrower and approved by Lender, or by an engineer or appraiser in the regular employ of the insurer. After the first appraisal, additional appraisals may be based on construction cost indices customarily employed in the trade. No omission on the part of Lender to request any such ascertainment shall relieve Borrower of any of its obligations under this Subsection;

(ii) commercial general liability insurance against all claims for personal injury, bodily injury, death or property damage occurring upon, in or about the Property, including “Dram Shop” or other liquor liability coverage if alcoholic beverages are sold, manufactured or distributed from the Property, such insurance (A) to be on the so-called “occurrence” form with a general aggregate limit of not less than \$2,000,000 and a per occurrence limit of not less than \$1,000,000, with no deductible or self-insured retention unless otherwise agreed to by Lender; (B) to continue at not less than the aforesaid limit until required to be changed by Lender in writing by reason of changed economic conditions making such protection inadequate; and (C) to cover at least the following hazards: (1) premises and operations; (2) products and completed operations on an “if any” basis; (3) independent contractors; (4) contractual liability for all insured contracts; (5) contractual liability covering the indemnities contained in Article X hereof to the extent the same is available; and (6) acts of terrorism and similar acts of sabotage;

(iii) loss of rents and/or business interruption insurance (A) with loss payable to Lender; (B) covering all risks required to be covered by the insurance provided for in Subsection 6.1(a)(2)(i), (iv) and (vi) through (viii); (C) in an amount equal to 100% of the projected net operating income plus fixed expenses from the Property (on an actual loss sustained basis) for a period continuing until the Restoration of the Property is completed; the amount of such business interruption/loss of rents insurance shall be determined prior to the Closing Date and at least once each year thereafter based on Lender’s determination of the net operating income plus fixed expenses for the Property for an eighteen (18) month period and (D) containing an extended period of indemnity endorsement which provides that after the physical loss to the Improvements and the Personal Property has been repaired, the continued loss of income will be insured until such income either returns to the same level it was at prior to the loss, or the expiration of twelve (12) months from the date that the Property is repaired or replaced and operations are resumed, whichever first occurs, and notwithstanding that the policy may expire prior to the end of such period. To the extent that insurance proceeds are payable to Lender pursuant to this Subsection (the “**Rent Loss Proceeds**”) and Borrower is

entitled to disbursement of such Rent Loss Proceeds in accordance with the terms hereof, such Rent Loss Proceeds shall be deposited by Lender in the Cash Management Account and disbursed as provided in Section 2.7 hereof; provided, however, that (I) nothing herein contained shall be deemed to relieve Borrower of its obligations to pay the obligations secured hereunder on the respective dates of payment provided for in the Note except to the extent such amounts are actually paid out of the Rent Loss Proceeds, and (II) in the event the Rent Loss Proceeds are paid in a lump sum in advance and Borrower is entitled to disbursement of such Rent Loss Proceeds in accordance with the terms hereof, Lender or Servicer shall hold such Rent Loss Proceeds in an account at an institution acceptable to Lender (which shall be deemed to be included within the definition of the "Accounts" hereunder) and Lender or Servicer shall estimate the number of months required for Borrower to restore the damage caused by the applicable Casualty, shall divide the applicable aggregate Rent Loss Proceeds by such number of months and shall disburse such monthly installment of Rent Loss Proceeds from such account into the Cash Management Account each month during the performance of such Restoration;

(iv) at all times during which structural construction, repairs or alterations are being made with respect to the Improvements but only if the existing applicable property or liability coverage forms do not otherwise apply (A) commercial general liability and umbrella liability insurance covering claims related to the construction, repairs or alterations being made which are not covered by or under the terms or provisions of the above mentioned commercial general liability insurance policy; and (B) the insurance provided for in Subsection 6.1(a)(2)(i) written in a so-called builder's risk completed value form (1) on a non-reporting basis, (2) against all risks insured against pursuant to Subsection 6.1(a)(2)(i), and, as applicable, Subsections 6.1(a)(2)(iii), (vi), (vii) and (viii), (3) including permission to occupy the Property and (4) with an agreed amount endorsement waiving co-insurance provisions;

(v) workers' compensation, subject to the statutory limits of the state in which the Property is located, and employer's liability insurance with a limit of at least \$1,000,000 per accident and per disease per employee, and \$1,000,000 for disease aggregate in respect of any work or operations on or about the Property, or in connection with the Property or its operation (if applicable);

(vi) comprehensive boiler and machinery insurance covering all mechanical and electrical equipment and pressure vessels and boilers in an amount not less than their replacement cost (or in such other amount as shall be reasonably required by Lender) and on terms otherwise consistent with the commercial property insurance policy required under subsection (i) above;

(vii) if any portion of the Improvements is at any time located in an area identified by the Federal Emergency Management Agency or any successor thereto as an area having special flood hazards pursuant to Flood Insurance Acts, flood hazard insurance in an amount equal to the maximum limit of coverage available

for the Property under the Flood Insurance Acts through the National Flood Insurance Program and, if required by Lender, excess flood limits in amounts acceptable to Lender in its reasonable discretion, in each case having deductibles acceptable to Lender;

(viii) earthquake, if required by Lender, in amounts equal to two hundred percent (200%) of the probable maximum loss (PML) or scenario expected loss (SEL) of the Property plus loss of rents and/or business interruption insurance, in all cases, as determined by Lender in its reasonable discretion and in form and substance satisfactory to Lender, provided that the insurance pursuant to this Subsection (viii) shall (A) provide for no deductible in excess of 5% of the total insurable value of the Property; and (B) be on terms consistent with the all risk insurance policy required under Section 6.1(a)(2)(i);

(ix) umbrella liability insurance in an amount not less than \$25,000,000 per occurrence and on terms otherwise consistent with the commercial general liability insurance policy required under subsection (ii) above;

(x) intentionally omitted;

(xi) intentionally omitted;

(xii) motor vehicle liability coverage for all owned and non-owned vehicles, including rented and leased vehicles containing minimum limits per occurrence, including umbrella coverage, of One Million and No/100 Dollars (\$1,000,000) if applicable; and

(xiii) such other insurance and in such amounts as (A) may be required pursuant to the terms of the Property Documents and (B) Lender from time to time may reasonably request against such other insurable hazards which at the time are commonly insured against for property similar to the Property located in or around the region in which the Property is located.

(b) All insurance provided for in Subsection 6.1(a) hereof shall be obtained under valid and enforceable policies (the “**Policies**” or in the singular, the “**Policy**”), in such forms and, from time to time after the date hereof, in such amounts as may be satisfactory to Lender, issued by financially sound and responsible insurance companies authorized to do business in the state in which the Property is located and approved by Lender. The insurance companies must have a claims paying ability/financial strength rating of “A+” or better by S&P or “A1” by Moody’s or a general policy rating of “A” or better and a financial class of “X” or better by A.M. Best Company, Inc. (each such insurer shall be referred to below as a “**Qualified Insurer**”); provided, however, that Borrower shall be permitted to maintain Palomar Excess and Surplus Insurance Company, rated “A-:IX” by A.M. Best Company, Inc., under the builder’s risk Policy during the construction. Not less than fifteen (15) days prior to the expiration dates of the Policies theretofore furnished to Lender pursuant to Subsection 6.1(a), Borrower shall furnish Lender with carrier-issued binders and Acord Form 28 Certificates, accompanied by evidence satisfactory to Lender

of payment in full of the premiums due thereunder (the “**Insurance Premiums**”), therefor to be followed by the original Policies when issued. Prior to the Closing Date, Borrower shall deliver complete copies (or such other evidence as shall be acceptable to Lender in its sole discretion) of the Policies marked “premium paid” or accompanied by evidence satisfactory to Lender of payment in full of the Insurance Premiums.

(c) Borrower shall not obtain (or permit to be obtained) separate insurance concurrent in form or contributing in the event of loss with that required in Subsection 6.1(a) to be furnished by, or which may be reasonably required to be furnished by, Borrower. Further, Borrower shall not obtain (or permit to be obtained) any blanket liability or property Policy unless, in each case, such Policy is approved in advance in writing by Lender, Lender’s interest is included therein as provided in this Agreement, such Policy is issued by a Qualified Insurer and such Policy includes such changes to the coverages and any and all requirements set forth herein as may be required by Lender (including, without limitation, increases to the amount of coverages required herein). In the event Lender approves a blanket Policy and Borrower obtains (or causes to be obtained) such blanket Policy, Borrower shall notify Lender of the same and shall cause complete copies of each Policy to be delivered as required in Subsection 6.1(a).

(d) All Policies provided for or contemplated by Section 6.1(a), except for the Policy referenced in Section 6.1(a)(1)(ii) and Section 6.1(a)(2)(xi) if applicable, shall name Borrower as the insured and, in the case of liability policies, except for the Policies referenced in Section 6.1(a)(1)(iii) and Section 6.1(a)(2)(v), (xi) and (xiii) if applicable, shall name Lender its successors and/or assigns, as an additional insured, as its interests may appear, and in the case of property damage, including but not limited to terrorism, boiler and machinery, flood and earthquake insurance, shall contain a so-called New York standard non-contributing mortgagee clause in favor of Lender providing that the loss thereunder shall be payable to Lender.

(e) All property Policies provided for in Section 6.1 shall contain clauses or endorsements to the effect that:

(i) the following shall in no way affect the validity or enforceability of the Policy insofar as Lender is concerned: (A) any act or negligence of Borrower, of anyone acting for Borrower, or of any other Person named as an insured under such Policies, (B) or any foreclosure or other proceeding or notice of sale relating to the Property, and (C) the failure to comply with the provisions of the Policy which might otherwise result in a forfeiture of the insurance or any part thereof;

(ii) shall contain a waiver of subrogation against Lender;

(iii) the Policy shall not be cancelled without at least 30 days’ written notice to Lender (except 10 days’ written notice for non-payment of Insurance Premiums);

(iv) the issuer(s) of the Policy shall give written notice to Lender if the issuer(s) of such Policy elects not to renew, not less than ten (10) days prior to its expiration;

(v) shall not contain any clause or endorsement that would make Lender liable for any Insurance Premiums thereon or subject to any assessments or commissions thereunder; and

(vi) Lender shall, at its option and with no obligation to do so, have the right to directly pay Insurance Premiums in order to avoid cancellation, expiration and/or termination of the Policy due to non-payment of Insurance Premiums.

(f) By no later than five (5) days following the expiration date of any Policies, Borrower shall furnish to Lender a statement certified by Borrower or a Responsible Officer of Borrower of the amounts of insurance maintained in compliance herewith, of the risks covered by such insurance and of the insurance company or companies which carry such insurance and, if requested by Lender, verification of the adequacy of such insurance by an independent insurance broker or appraiser acceptable to Lender. Without limitation of the foregoing, Borrower shall also comply with the foregoing within ten (10) days of written request of Lender.

(g) If at any time Lender is not in receipt of written evidence that all Policies are in full force and effect, Lender shall have the right, without notice to Borrower, to take such action as Lender deems necessary to protect its interest in the Property, including obtaining such insurance coverage as Lender in its sole discretion deems appropriate. All premiums incurred by Lender in connection with such action or in obtaining such insurance and keeping it in effect shall be paid by Borrower to Lender upon demand and, until paid, shall be secured by the Mortgage and shall bear interest at the Default Rate. Borrower shall promptly forward to Lender a copy of each written notice received by Borrower of any modification, reduction or cancellation of any of the Policies or of any of the coverages afforded under any of the Policies.

(h) With respect to commercial property/builder's risk, loss of rents and/or business interruption insurance, commercial general liability and umbrella liability insurance required under this Section 6.1(a) (including, if applicable, insurance required under Section 6.1(a)(2)(iv) above), insurance for loss resulting from acts of terrorism in amounts and with terms and conditions applicable to commercial property/builder's risk, loss of rents and/or business interruption insurance, commercial general liability and umbrella liability insurance required under this Section 6.1(a), the policy or endorsement providing for such insurance shall be in form and substance satisfactory to Lender and shall satisfy Rating Agency criteria for securitized loans; provided that, for so long as the Terrorism Risk Insurance Act of 2002, as extended and modified by the Terrorism Risk Insurance Program Reauthorization Act of 2019 (as the same may have been or may further be modified, amended, or extended, "**TRIPRA**") or subsequent statute, extension, or reauthorization is in effect and covers both foreign and domestic acts of terror, the provisions of TRIPRA shall determine the acts of terrorism for which coverage shall be required; provided further, however, if TRIPRA (or such subsequent statute, extension or

reauthorization) is not in effect, Borrower shall not be required to pay annual premiums in excess of the TC Cap (defined below) in order to obtain the terrorism coverage (but Borrower shall be obligated to purchase the maximum amount of terrorism coverage available with funds equal to the TC Cap). As used above, “**TC Cap**” shall mean an amount equal to two (2) times the premium then currently payable in respect of the property, business interruption/loss of rents and liability insurance required under this Agreement (without giving effect to the cost of terrorism, flood, and earthquake and windstorm components of such insurance at the time terrorism coverage is excluded from any Policy).

(i) In the event of a foreclosure of the Mortgage or other transfer of title to the Property in extinguishment in whole or in part of the Debt, all right, title and interest of Borrower in and to the Policies then in force concerning the Property and all proceeds payable thereunder shall thereupon vest exclusively in Lender or the purchaser at such foreclosure or other transferee in the event of such other transfer of title.

Section 6.2 Casualty. If the Property shall be damaged or destroyed, in whole or in part, by fire or other casualty (a “**Casualty**”), Borrower shall give prompt notice of such damage to Lender and shall promptly commence and diligently prosecute the completion of the Restoration of the Property as nearly as possible to the condition the Property was in immediately prior to such Casualty, with such alterations as may be reasonably approved by Lender and otherwise in accordance with Section 6.4. Borrower shall pay all costs of such Restoration (including, without limitation, payment of all deductibles under the Policies) whether or not such costs are covered by insurance. Lender may, but shall not be obligated to, make proof of loss if not made promptly by Borrower. Borrower shall have the right to settle all claims under the Policies less than the Restoration Threshold so long as no Event of Default then exists. Any claims in excess of the Restoration Threshold shall be settled by Borrower jointly with Lender, provided that (a) no Event of Default exists, (b) Borrower promptly and with commercially reasonable diligence negotiates a settlement of any such claims and (c) the insurer with respect to the Policy under which such claim is brought has not raised any act of the insured as a defense to the payment of such claim. If an Event of Default exists, Lender shall, at its election, have the exclusive right to settle or adjust any claims made under the Policies in the event of a Casualty.

Section 6.3 Condemnation. Borrower shall promptly give Lender notice of the actual or threatened (in writing) commencement of any proceeding for the Condemnation of the Property and shall deliver to Lender copies of any and all papers served in connection with such proceedings. Lender may participate in any such proceedings, and Borrower shall from time to time deliver to Lender all instruments requested by it to permit such participation. Borrower shall, at its expense, diligently prosecute any such proceedings, and shall consult with Lender, its attorneys and experts, and cooperate with them in the carrying on or defense of any such proceedings. Notwithstanding any taking by any public or quasi-public authority through Condemnation or otherwise (including, but not limited to, any transfer made in lieu of or in anticipation of the exercise of such taking), Borrower shall continue to pay the Debt at the time and in the manner provided for its payment in the Note and in this Agreement and the Debt shall not be reduced until any Award shall have been actually received and applied by Lender, after the deduction of expenses of collection, to the reduction or discharge of the Total Debt. Lender shall not be limited to the interest paid on the Award by the condemning authority but shall be entitled

to receive out of the Award interest at the rate or rates provided herein or in the Building Loan Note. If the Property or any portion thereof is taken by a condemning authority, Borrower shall promptly commence and diligently prosecute the Restoration of the Property and otherwise comply with the provisions of Section 6.4. Borrower shall pay all costs of Restoration whether or not such costs are covered by the Net Proceeds. If the Property is sold, through foreclosure or otherwise, prior to the receipt by Lender of the Award, Lender shall have the right, whether or not a deficiency judgment on the Building Loan Note shall have been sought, recovered or denied, to receive the Award, or a portion thereof sufficient to pay the Total Debt.

Section 6.4 Restoration. Prior to Completion of the Improvements, disbursements of the Net Proceeds to Borrower hereunder shall be made from time to time as if such Net Proceeds constituted unadvanced Loan proceeds and shall be subject to all of the conditions precedent thereof set forth in Sections 2.10 through 2.20 hereof *mutatis mutandis*. If the Casualty occurs following the Completion of the Improvements, the following provisions shall apply in connection with the Restoration:

(a) If the Net Proceeds and the costs of completing the Restoration shall both be less than the Restoration Threshold, the Net Proceeds will be disbursed by Lender to Borrower upon receipt, provided that all of the conditions set forth in Section 6.4(b)(i) are met and Borrower delivers to Lender a written undertaking to expeditiously commence and to satisfactorily complete with due diligence the Restoration in accordance with the terms of this Agreement.

(b) If the Net Proceeds are equal to or greater than the Restoration Threshold or the costs of completing the Restoration is equal to or greater than the Restoration Threshold, the Net Proceeds will be held by Lender and Lender shall make the Net Proceeds available for the Restoration in accordance with the provisions of this Section 6.4.

(i) The Net Proceeds shall be made available to Borrower for Restoration upon the approval of Lender in its reasonable discretion that the following conditions are met or waived in writing by Lender:

(A) no Event of Default shall have occurred and be continuing;

(B) (1) in the event the Net Proceeds are insurance proceeds, less than thirty percent (30%) of each of (i) fair market value of the Property as reasonably determined by Lender, (ii) rentable area of the Property has been damaged, destroyed or rendered unusable as a result of a Casualty, and Legal Requirements permit the Restoration of the damaged, destroyed or unusable Improvements at the Property to the same configuration and occupancy that existed immediately preceding such Casualty or (2) in the event the Net Proceeds are condemnation proceeds, less than ten percent (10%) of each of (i) the fair market value of the Property as reasonably determined by Lender and (ii) rentable area of the Property is taken, such land is located along the perimeter or periphery of the Property, no portion of the Improvements is located on such land and such taking does not materially impair the existing access to the Property;

(C) Intentionally omitted.

(D) Borrower shall commence the Restoration as soon as reasonably practicable (but in no event later than sixty (60) days after such Casualty or Condemnation, whichever the case may be, occurs) and shall diligently pursue the same to satisfactory completion in compliance with all applicable Legal Requirements, including, without limitation, all applicable Environmental Laws and any applicable requirements of the Property Documents;

(E) Lender shall be satisfied that any operating deficits, including all scheduled payments of principal and interest under the Note, which will be incurred with respect to the Property as a result of the occurrence of any such Casualty or Condemnation, whichever the case may be, will be covered out of (1) the Net Proceeds, (2) the insurance coverage referred to in Section 6.1(a)(2)(iii), if applicable, or (3) by other funds of Borrower;

(F) Lender shall be satisfied that (i) the Net Proceeds together with any cash or cash equivalent deposited by Borrower with Lender are sufficient to cover the cost of the Restoration and (ii) the Property following Restoration will contain substantially the same number of dwelling units and same unit mix and same rentable square feet as immediately prior to the Casualty or Condemnation;

(G) Lender shall be satisfied that, upon the completion of the Restoration, the (1) fair market value and cash flow of the Property will not be less than the fair market value and cash flow of the Property as the same existed immediately prior to the applicable Casualty or Condemnation and (2) the as-stabilized Debt Service Coverage Ratio shall be not less than 1.20:1.00;

(H) Lender shall be satisfied that the Restoration will be completed on or before the earliest to occur of (1) six (6) months prior to the Scheduled Maturity Date, (2) the earliest date required for such completion under the terms of any Leases, (3) such time as may be required under applicable Legal Requirements and Property Documents, or (4) the expiration of the insurance coverage referred to in Section 6.1(a)(2)(iii);

(I) Borrower and Guarantor shall execute and deliver to Lender a completion guaranty in form and substance satisfactory to Lender and its counsel pursuant to the provisions of which Borrower and Guarantor shall jointly and severally guaranty to Lender the lien-free completion by Borrower of the Restoration in accordance with the provisions of this Section 6.4(b);

(J) the Property and the use thereof after the Restoration will be in compliance with and permitted under all applicable Legal Requirements and Property Documents, and the Casualty or Condemnation, as applicable, does not result in the loss of access to the Property or the related Improvements;

(K) the Restoration shall be done and completed by Borrower in an expeditious and diligent fashion and in compliance with all applicable Legal Requirements and Property Documents;

(L) Borrower shall deliver, or cause to be delivered, to Lender a signed detailed budget approved in writing by Borrower's architect or engineer stating the entire cost of completing the Restoration, which budget shall be acceptable to Lender; and

(M) the Property Documents will remain in full force and effect during and after the Restoration and (if applicable) a Property Document Event shall not occur as a result of the applicable Casualty, Condemnation and/or Restoration.

(ii) The Net Proceeds shall be held by Lender in an account at an institution acceptable to Lender and, until disbursed in accordance with the provisions of this Section 6.4(b), shall constitute additional security for the Debt and other obligations under the Loan Documents. The Net Proceeds (other than the Rent Loss Proceeds) shall be disbursed by Lender to, or as directed by, Borrower from time to time during the course of the Restoration, upon receipt of evidence satisfactory to Lender that (A) all materials installed and work and labor performed (except to the extent that they are to be paid for out of the requested disbursement) in connection with the Restoration have been paid for in full, and (B) there exist no notices of pendency, stop orders, mechanic's or materialman's liens or notices of intention to file same, or any other liens or encumbrances of any nature whatsoever on the Property (excluding Permitted Encumbrances) which have not either been fully bonded to the satisfaction of Lender and discharged of record or in the alternative fully insured to the satisfaction of Lender by the title company issuing the Title Insurance Policy.

(iii) All plans and specifications required in connection with the Restoration shall be subject to prior review and acceptance in all respects by Lender and by an independent consulting engineer selected by Lender (the "**Casualty Consultant**"). Lender shall have the use of the plans and specifications and all permits, licenses and approvals required or obtained in connection with the Restoration. The identity of the contractors, subcontractors and materialmen engaged in the Restoration, as well as the contracts under which they have been engaged, shall be subject to prior review and acceptance by Lender and the Casualty Consultant. All costs and expenses incurred by Lender in connection with making the Net Proceeds available for the Restoration including, without limitation, reasonable counsel fees and disbursements and the Casualty Consultant's fees, shall be paid by Borrower.

(iv) In no event shall Lender be obligated to make disbursements of the Net Proceeds in excess of an amount equal to the costs actually incurred from time to time for work in place as part of the Restoration, as certified by the Casualty Consultant, minus the Casualty Retainage. The term "**Casualty Retainage**" shall mean an amount equal to ten percent (10%) of the costs actually incurred for work

in place as part of the Restoration, as certified by the Casualty Consultant, until the Restoration has been completed. The Casualty Retainage shall in no event, and notwithstanding anything to the contrary set forth above in this Section 6.4(b), be less than the amount actually held back by Borrower from contractors, subcontractors and materialmen engaged in the Restoration. The Casualty Retainage shall not be released until the Casualty Consultant certifies to Lender that the Restoration has been completed in accordance with the provisions of this Section 6.4(b) and that all approvals necessary for the re-occupancy and use of the Property have been obtained from all appropriate governmental and quasi-governmental authorities, and Lender receives evidence satisfactory to Lender that the costs of the Restoration have been paid in full or will be paid in full out of the Casualty Retainage; provided, however, that Lender will release the portion of the Casualty Retainage being held with respect to any contractor, subcontractor or materialman engaged in the Restoration as of the date upon which the Casualty Consultant certifies to Lender that the contractor, subcontractor or materialman has satisfactorily completed all work and has supplied all materials in accordance with the provisions of the contractor's, subcontractor's or materialman's contract, the contractor, subcontractor or materialman delivers the lien waivers and evidence of payment in full of all sums due to the contractor, subcontractor or materialman as may be reasonably requested by Lender or by the title company issuing the Title Insurance Policy, and Lender receives an endorsement to the Title Insurance Policy insuring the continued priority of the lien of the Mortgage and evidence of payment of any premium payable for such endorsement. If required by Lender, the release of any such portion of the Casualty Retainage shall be approved by the surety company, if any, which has issued a payment or performance bond with respect to the contractor, subcontractor or materialman.

(v) Lender shall not be obligated to make disbursements of the Net Proceeds more frequently than once every calendar month.

(vi) If at any time the Net Proceeds or the undisbursed balance thereof shall not, in the reasonable opinion of Lender in consultation with the Casualty Consultant, be sufficient to pay in full the balance of the costs which are estimated by the Casualty Consultant to be incurred in connection with the completion of the Restoration, Borrower shall deposit the deficiency (the "**Net Proceeds Deficiency**") with Lender before any further disbursement of the Net Proceeds shall be made. The Net Proceeds Deficiency deposited with Lender shall be held by Lender and shall be disbursed for costs actually incurred in connection with the Restoration on the same conditions applicable to the disbursement of the Net Proceeds, and until so disbursed pursuant to this Section 6.4(b) shall constitute additional security for the Debt and other obligations under the Loan Documents.

(vii) The excess, if any, of the Net Proceeds and the remaining balance, if any, of the Net Proceeds Deficiency deposited with Lender after the Casualty Consultant certifies to Lender that the Restoration has been completed in accordance with the provisions of this Section 6.4(b), and the receipt by Lender of evidence satisfactory to Lender that all costs incurred in connection with the

Restoration have been paid in full, shall be remitted by Lender to Borrower, provided no Event of Default shall have occurred and shall be continuing.

(c) All Net Proceeds not required (i) to be made available for the Restoration or (ii) to be returned to Borrower as excess Net Proceeds pursuant to Section 6.4(b)(vii) may be retained and applied by Lender in accordance with Section 2.4.2 hereof toward the payment of the Debt (whether or not then due and payable) in such order, priority and proportions as Lender in its sole discretion shall deem proper, or, at the discretion of Lender, the same may be paid, either in whole or in part, to Borrower for such purposes as Lender shall approve, in its discretion. If Lender shall receive and retain Net Proceeds, the lien of the Mortgage shall be reduced only by the amount of such Net Proceeds actually applied by Lender in reduction of the principal amount of the Debt.

VII. RESERVE FUNDS.

Section 7.1 The Accounts Generally.

(a) Borrower grants to Lender a first-priority perfected security interest in each of the Accounts and any and all sums now or hereafter deposited in the Accounts as additional security for payment of the Debt. Until expended or applied in accordance herewith, the Accounts and the funds deposited therein shall constitute additional security for the Debt. The provisions of this Section 7.1 (together with the other related provisions of the other Loan Documents) are intended to give Lender and/or Servicer “control” of the Accounts and the Account Collateral and serve as a “security agreement” and a “control agreement” with respect to the same, in each case, within the meaning of the UCC. Borrower acknowledges and agrees that the Accounts are subject to the sole dominion, control and discretion of Lender, its authorized agents or designees (including Servicer), subject to the terms hereof, and Borrower shall have no right of withdrawal with respect to any Account except with the prior written consent of Lender or as otherwise provided herein. The funds on deposit in the Accounts shall not constitute trust funds and may be held in Lender’s name and commingled with other monies held by Lender.

(b) Borrower shall not, without obtaining the prior written consent of Lender (which consent Lender may grant or deny in Lender’s sole and absolute discretion), further pledge, assign or grant any security interest in the Accounts or the sums deposited therein or permit any lien to attach thereto, or any levy to be made thereon, or any UCC-1 Financing Statements, except those naming Lender as the secured party, to be filed with respect thereto. Borrower hereby authorizes Lender to file a financing statement or statements under the UCC in connection with any of the Accounts and the Account Collateral in the form required to properly perfect Lender’s security interest therein. Borrower agrees that at any time and from time to time, at the expense of Borrower, Borrower will promptly execute and deliver all further instruments and documents, and take all further action, that may be reasonably necessary or desirable, or that Lender may reasonably request, in order to perfect and protect any security interest granted or purported to be granted hereby or to enable Lender to exercise and enforce its rights and remedies hereunder with respect to any Account or Account Collateral.

(c) Notwithstanding anything to the contrary contained herein or in any other Loan Document, during the continuance of an Event of Default (and without notice from Lender or Servicer): (i) Borrower shall have no rights in respect of the Accounts, (ii) Lender may liquidate and transfer any amounts then invested in investments acceptable to Lender pursuant to the applicable terms hereof to the Accounts or reinvest such amounts in other investments acceptable to Lender as Lender may reasonably determine is necessary to perfect or protect any security interest granted or purported to be granted hereby or pursuant to the other Loan Documents or to enable Lender to exercise and enforce Lender's rights and remedies hereunder or under any other Loan Document with respect to any Account or any Account Collateral, and (iii) Lender shall have all rights and remedies with respect to the Accounts and the amounts on deposit therein and the Account Collateral as described in this Agreement and in the other Loan Documents, in addition to all of the rights and remedies available to a secured party under the UCC, and, notwithstanding anything to the contrary contained in this Agreement or in the other Loan Documents, may apply the amounts of such Accounts as Lender determines in its sole discretion including, but not limited to, payment of the Debt.

(d) The insufficiency of funds on deposit in the Accounts shall not absolve Borrower of the obligation to make any payments for which the proceeds of such Account are to be applied, as and when due pursuant to this Agreement and the other Loan Documents, and such obligations shall be separate and independent, and not conditioned on any event or circumstance whatsoever. If at any time Lender determines that the funds available in any Account will not be sufficient to pay for the cost or expense for which such funds have been required to be deposited with Lender hereunder by the date required therefor, or if Lender determines (based on the then-current Approved Annual Budget or on review of a physical conditions report for the Property, among other sources) to reassess its estimate of the amount necessary to be reserved for any such costs or expenses, then, at Lender's option, Borrower shall increase its monthly payments to Lender with respect to the applicable Account(s) by the amount that Lender so notifies Borrower is required and/or deposit the shortfall amount reasonably determined by Lender into the applicable Account(s) within five (5) Business Days of notice from Lender.

(e) Borrower shall indemnify Lender and hold Lender harmless from and against any and all Losses arising from or in any way connected with the Accounts, the sums deposited therein or the performance of the obligations for which the Accounts were established, except to the extent arising from the gross negligence or willful misconduct of Lender, its agents or employees. Borrower shall assign to Lender all rights and claims Borrower may have against all Persons supplying labor, materials or other services which are to be paid from or secured by the Accounts; provided, however, that Lender may not pursue any such right or claim unless an Event of Default has occurred and remains uncured.

(f) Borrower and Lender (or Servicer on behalf of Lender) shall maintain each applicable Account with an institution acceptable to Lender. From time to time Borrower shall cooperate with Lender in transferring the applicable Accounts to an institution satisfactory to Lender. Borrower hereby grants Lender power of attorney (irrevocable for so long as the Loan is outstanding) with respect to any such transfers and the establishment

of accounts with a successor institution, such power only to be exercisable by Lender during the continuance of an Event of Default.

(g) Lender or Servicer shall have the right to invest amounts on deposit in the Accounts in investments acceptable to Lender as and to the extent elected by Lender or Servicer, and any interest accrued thereon shall not be required to be remitted either to Borrower or to any Account and may instead be retained by Lender.

(h) Borrower acknowledges and agrees that it solely shall be, and shall at all times remain, liable to Lender or Servicer for all fees, charges, costs and expenses in connection with the Accounts, this Agreement and the enforcement hereof, including, without limitation, any monthly or annual fees or charges as may be assessed by Lender or Servicer in connection with the administration of the Accounts and the reasonable fees and expenses of legal counsel to Lender and Servicer as needed to enforce, protect or preserve the rights and remedies of Lender and/or Servicer under this Agreement.

Section 7.2 Shortfall Reserve Account.

7.2.1 Borrower shall, if required in connection with the exercise of the first Extension Option, make an initial deposit into the Shortfall Reserve Account (as defined below) in the amount required pursuant to Section 2.9(k) hereof, which amount is intended to cover potential shortfalls in Debt Service and Operating Expenses (amounts deposited pursuant to this Section 7.2.1 are referred to herein as “**Shortfall Reserve Funds**” and the account in which such amounts are held shall hereinafter be referred to as the “**Shortfall Reserve Account**”). In the event Borrower elects to make such a deposit into the Shortfall Reserve Account pursuant to Section 2.9(k), then on a quarterly basis from and after the exercise of the first Extension Option, Lender shall calculate the Debt Service Coverage Ratio (First Extension) and the Debt Yield (Extension). In the event that the Debt Service Coverage Ratio (First Extension) is less than 1.10 to 1.00 or the Debt Yield (Extension) is less than nine percent (9.0%), after giving effect to funds on deposit in the Shortfall Reserve Account by adding them to the Underwritable Cash Flow (First Extension), Borrower must either (i) prepay a portion of the Outstanding Principal Balance in the amount of the First Extension Prepayment Amount, provided that any such prepayment shall be treated as a voluntary prepayment under Section 2.4.1 hereof or (ii) deposit cash in an amount equal to the greater of (A) the First Extension Prepayment Amount, (B) the amount by which the Underwritable Cash Flow (First Extension) would need to increase in order to achieve a Debt Service Coverage Ratio (First Extension) of 1.10 to 1.00, or (C) the amount by which the Underwritable Cash Flow (First Extension) would need to increase in order to achieve a Debt Yield (Extension) of nine percent (9.0%) into the Shortfall Reserve Account. Lender shall make disbursements of the Shortfall Reserve Funds from time to time in accordance with the provisions of Section 7.2.2 hereof. For the avoidance of doubt, to the extent Borrower elects to make a prepayment of the Loan to satisfy the conditions set forth in Section 2.9(k) hereof, then this Section 7.2 shall have no force or effect.

7.2.2 Lender shall, as long as no Event of Default has occurred and is continuing, upon written request from Borrower (a) withdraw funds from the Shortfall Reserve Account to pay the Monthly Debt Service Payment Amount on the date when due (if applicable pursuant to the terms of this Agreement), together with any late payment charges or interest accruing at the Default Rate

and (b) on each Payment Date, disburse Shortfall Reserve Funds for the payment of Approved Operating Expenses and Approved Extraordinary Expenses.

Section 7.3 Tax and Insurance Escrow Funds. On each Payment Date from and after Stabilization, until the Loan is paid in full in accordance with this Agreement, Borrower shall pay to Lender (a) one-twelfth of the Taxes and Other Charges that Lender estimates (in its reasonable judgment) will be payable during the next ensuing twelve (12) months, in order to accumulate with Lender sufficient funds to pay all such Taxes at least thirty (30) days prior to their respective due dates, and (b) one-twelfth of the Insurance Premiums that Lender estimates will be payable for the renewal of the coverage afforded by the Policies upon the expiration thereof in order to accumulate with Lender sufficient funds to pay all such Insurance Premiums at least thirty (30) days prior to the expiration of the Policies (amounts deposited pursuant to this Section 7.3 are referred to herein as “**Tax and Insurance Escrow Funds**” and the account in which such amounts are held shall hereinafter be referred to as the “**Tax and Insurance Escrow Account**”). Notwithstanding the foregoing, for purposes of the foregoing clause (a) the Taxes shall not include any assessments for the C-PACE Loan until the Payment Date occurring in August, 2024. Provided no Event of Default is continuing, Lender will apply the Tax and Insurance Escrow Funds to payments of Taxes and Other Charges and Insurance Premiums required to be made by Borrower pursuant to Section 4.1.2 hereof and under the Mortgage. In making any payment relating to the Tax and Insurance Escrow Funds, Lender may do so according to any bill, statement or estimate procured from the appropriate public office (with respect to Taxes and Other Charges) or insurer or agent (with respect to Insurance Premiums), without inquiry into the accuracy of such bill, statement or estimate or into the validity of any tax, assessment, sale, forfeiture, tax lien or title or claim thereof. If the amount of the Tax and Insurance Escrow Funds in the Tax and Insurance Escrow Account shall exceed the amounts due for Taxes and Other Charges and Insurance Premiums, Lender shall credit such excess against future payments to be made to the Tax and Insurance Escrow Account and otherwise under this Agreement. Any amount remaining in the Tax and Insurance Escrow Account after the Debt has been paid in full shall be returned to Borrower. In allocating such excess, Lender may deal with the Person shown on the records of Lender to be the owner of the Property. If at any time Lender reasonably determines that the Tax and Insurance Escrow Funds are not or will not be sufficient to pay Taxes and Other Charges and Insurance Premiums by the dates set forth in (a) and (b) above, Lender shall notify Borrower of such determination and within ten (10) days of such notice, Borrower shall make a True Up Payment with respect to such insufficiency into the Tax and Insurance Escrow Account and/or increase its monthly payments to Lender by the amount that Lender estimates is sufficient to make up the deficiency at least thirty (30) days prior to the due date of the Taxes and Other Charges and/or thirty (30) days prior to expiration of the Policies, as the case may be.

Section 7.4 Replacements and Replacement Reserve.

7.4.1 Replacement Reserve Funds. Commencing on the Payment Date occurring in February, 2026, and on each Payment Date occurring thereafter until the Loan is paid in full in accordance with this Agreement, Borrower shall pay to Lender an amount equal to the greater of (a) the amount recommended by Lender’s engineering consultant and (b) 1/12th of (x) \$150 per bed plus (y) \$0.20 per rentable square foot of commercial/retail space (the “**Replacement Reserve Monthly Deposit**”) (all said amounts, collectively being hereinafter called the “**Replacement Reserve Funds**” and the account in which such amounts are held shall hereinafter be referred to

as the “**Replacement Reserve Account**”). Moneys in the Replacement Reserve Account shall be used solely to pay the costs of replacements and repairs required to be made to the Property which, under the Approved Accounting Method, are categorized as capital expenses and not as operating expenses (collectively, the “**Replacements**”), as more fully set forth in this Section 7.4. Lender may reassess its estimate of the amount of Replacement Reserve Funds required from time to time, and may increase the monthly amounts required to be deposited into the Replacement Reserve Account upon thirty (30) days’ notice to Borrower if Lender determines in its reasonable discretion that an increase is necessary to maintain the proper maintenance and operation of the Property.

7.4.2 Disbursements from Replacement Reserve Account. Lender shall disburse to Borrower Replacement Reserve Funds (or any portion thereof) from the Replacement Reserve Account from time to time, but not more frequently than once in any thirty (30) day period, upon (i) satisfaction of the Disbursement Conditions for Capital Expenditures or Replacements, (ii) at Lender’s option, delivery to Lender of a title search or title endorsement, in each event at Borrower’s cost, indicating that the Property is free from all Liens, claims and other encumbrances not previously approved by Lender, and (iii) at Lender’s option, if the cost of the Replacements exceeds \$25,000.00, delivery to Lender of a report, at Borrower’s cost, satisfactory to Lender in its reasonable discretion from an architect or engineer approved by Lender in respect of such architect or engineer’s inspection of the Replacements. Borrower shall have paid all invoices with respect to which a disbursement is requested or, at the request of Borrower, if Borrower is requesting a payment rather than a reimbursement of all such costs, Lender shall issue joint checks, payable to Borrower and the contractor (or a direct payment directly to such contractor), supplier, materialman, mechanic, subcontractor or other party to whom payment is due. In the case of payments made by joint check or direct payment, Lender may require a conditional waiver of lien from each Person receiving payment prior to Lender’s disbursement. Any lien waiver (conditional or otherwise) delivered hereunder shall conform to the requirements of applicable law and shall cover all work performed and materials supplied (including equipment and fixtures) for the Property by that contractor, supplier, subcontractor, mechanic or materialman through the date covered by the current reimbursement request (or, if payment to such contractor, supplier, subcontractor, mechanic or materialmen is to be made by a joint check, the release of lien shall be effective through the date covered by the previous release of funds request). During a Trigger Period, Lender may require that any disbursement for costs that have not been previously paid by Borrower (as demonstrated by evidence acceptable to Lender) be made either directly to the contractor, vendor or supplier (if any) or, at Lender’s option, by two-party check jointly to Borrower and such Person. Lender shall not be required to disburse Replacement Reserve Funds in an amount less than \$5,000 (or a lesser amount if the total amount remaining in the Replacement Reserve Account is less than \$5,000). Lender may require an inspection of the Property at Borrower’s expense prior to making a monthly disbursement in order to verify completion of replacements and repairs of items in excess of \$25,000.00 for which reimbursement is sought.

7.4.3 Balance in the Replacement Reserve Account. The insufficiency of any balance in the Replacement Reserve Account shall not relieve Borrower from its obligation to perform all Replacements reasonably required and to fulfill all preservation and maintenance covenants in the Loan Documents.

Section 7.5 Prepaid Rent Reserve. Upon the commencement of the first Trigger Period (if any) hereunder, Borrower shall deposit with Lender all Rents that have been paid more than

one (1) month in advance (“**Prepaid Rent**”). Thereafter, within three (3) business days of receipt of any additional Prepaid Rent, Borrower shall deposit such additional Prepaid Rent with Lender. All amounts deposited with Lender pursuant to this Section 7.5, collectively are referred to herein as the “**Prepaid Rent Funds**” and the account in which such funds are held is referred to as the “**Prepaid Rent Reserve Account**”. The initial deposit and each future deposit of Prepaid Rent Funds shall be accompanied by (i) a current copy of the Prepaid Rent Schedule that lists the Tenant(s) and calendar month(s) to which such deposit applies and (ii) an Officer’s Certificate stating that such Prepaid Rent Schedule is true, correct, accurate and complete in all respects. Provided no Event of Default exists, Prepaid Rent Funds shall be deposited by Lender into the Cash Management Account in accordance with the Prepaid Rent Schedule.

Section 7.6 Intentionally Omitted.

Section 7.7 Excess Cash Flow Funds. During any Trigger Period, Borrower shall deposit or cause to be deposited with Lender all Excess Cash Flow, to be held by Lender as additional security for the Loan (amounts so held shall be hereinafter referred to as the “**Excess Cash Flow Funds**” and the account in which such amounts are held shall hereinafter be referred to as the “**Excess Cash Flow Account**”). Upon the termination of each Trigger Period, all amounts (if any) then remaining on deposit in the Excess Cash Flow Account shall be disbursed to Borrower’s Operating Account.

VIII. DEFAULTS.

Section 8.1 Event of Default.

(a) Each of the following events shall constitute an event of default hereunder (an “**Event of Default**”):

(i) if (A) any Monthly Debt Service Payment Amount, or the deposit to any Reserve Account due on any Payment Date (provided that it shall not be an Event of Default if there are sufficient funds in the Cash Management Account to pay such amounts when due, and Lender or Servicer fails to make such deposit and Lender’s access to such sums is not restricted or constrained in any manner), or the full payment of the Debt due on the Maturity Date, is not paid when due, or (B) any other portion of the Debt is not paid when due and such non-payment (pursuant to this clause (B) only) continues for ten (10) days following notice to Borrower that the same is due and payable;

(ii) if any of the Taxes or Other Charges is not paid when the same is due and payable except to the extent sums sufficient to pay such Taxes and Other Charges have been deposited with Lender in accordance with the terms of this Agreement and Lender’s access to such sums is not restricted or constrained in any manner;

(iii) if the Policies are not kept in full force and effect or if evidence of the same is not delivered to Lender as required hereunder except to the extent sums sufficient to pay the cost of such Policies have been deposited with Lender in

accordance with the terms of this Agreement and Lender's access to such sums is not restricted or constrained in any manner;

(iv) if (1) any Borrower Party shall commence any case, proceeding or other action (A) under any Creditor's Rights Laws seeking to have an order for relief entered with respect to it, or seeking to adjudicate it a bankrupt or insolvent, or seeking reorganization, or (B) seeking appointment of a receiver, trustee, custodian, conservator or other similar official for it or for all or any substantial part of its assets, or any Borrower Party shall make a general assignment for the benefit of its creditors; (2) there shall be commenced against Borrower, Guarantor or any SPE Party any case, proceeding or other action of a nature referred to in clause (1) above which (A) results in the entry of an order for relief or any such adjudication or appointment or (B) remains undismissed, undischarged or unbonded for a period of sixty (60) days; (3) there shall be commenced against Borrower, Guarantor or any SPE Party any case, proceeding or other action seeking issuance of a warrant of attachment, execution, distraint or similar process against all or any substantial part of its assets which results in the entry of any order for any such relief which shall not have been vacated, discharged, or stayed or bonded pending appeal within sixty (60) days from the entry thereof; (4) any Borrower Party shall take any action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the acts set forth in clause (1), (2), or (3) above; or (5) Borrower, any SPE Party or Guarantor shall generally not, or shall be unable to, or shall admit in writing its inability to, pay its debts as they become due;

(v) if any representation, warranty or other statement or information made or provided herein, in the other Loan Documents, in the Guaranty or in the Environmental Indemnity or in any other guaranty, or in any certificate, report, financial statement or other instrument or document furnished to Lender by a Borrower Party in connection with the Loan shall have been false or misleading such that they have, or would reasonably expected to have, a Material Adverse Effect when made;

(vi) if there shall be any Transfer, other than a Permitted Transfer or as otherwise permitted by Article IX of this Agreement or approved by Lender in writing; provided, however, that if (i) such Transfer did not either (A) effectuate a change in Control of Borrower or Guarantor or (B) result in a Person acquiring in excess of a twenty percent (20%) interest (or, to the extent such Person is domiciled in a country other than the United States, a ten percent (10%) interest) in Borrower that did not own in excess of such amount prior to such Transfer, (ii) such Transfer as not an intentional breach of Article IX, and (iii) such Transfer is reversed within ten (10) days after the earlier to occur of (A) Borrower obtaining knowledge of such Transfer or (B) Borrower's receipt of written notice thereof from Lender, then such Transfer shall not constitute an Event of Default;

(vii) if Borrower shall be in default beyond applicable notice and grace periods under any other mortgage, deed of trust, deed to secure debt or other security agreement covering any part of the Property, whether it be superior or

junior in lien to the Mortgage (it being acknowledged that the foregoing shall not be deemed to constitute consent to any such mortgage, trust deed or security deed);

(viii) if the Property becomes subject to any mechanic's, materialman's or other Lien (other than a Lien for any Taxes or Other Charges not then due and payable) and such Lien shall remain undischarged of record (by payment, bonding or otherwise) for a period of thirty (30) days;

(ix) subject to Borrower's rights to contest as provided herein or in Section 3.6 of the Mortgage, if any federal tax lien is filed against Borrower, any SPE Party, Sponsor, Guarantor or the Property and same is not discharged of record (by payment, bonding or otherwise) within thirty (30) days after same is filed;

(x) if any portion of the Property shall be subject to intentional waste, or damaged by an act of gross negligence or willful misconduct of any Borrower Party, or if any portion of the Property shall be removed in violation of this Agreement, or except as permitted herein, the alteration, improvement, or demolition of any of the Property without the prior written consent of Lender;

(xi) if any default beyond the expiration of applicable notice and grace periods by Guarantor (including, without limitation, failure to meet requirements with respect to Net Worth and/or liquidity or distribution of assets) occurs under any guaranty or indemnity executed in connection herewith (including, without limitation, the Environmental Indemnity and/or the Guaranty);

(xii) with respect to any term, covenant or provision set forth herein which specifically contains a notice requirement or grace period, if Borrower shall be in default under such term, covenant or condition after the giving of such notice or the expiration of such grace period;

(xiii) if Borrower defaults under the Management Agreement beyond the expiration of applicable notice and grace periods, if any, thereunder or if the Management Agreement is canceled, terminated or surrendered, expires pursuant to its terms or otherwise ceased to be in full force and effect, unless, in each such case, Borrower, contemporaneously with such cancellation, termination, surrendered, expiration or cessation, enters into a Replacement Management Agreement with a Qualified Manager in accordance with the applicable terms and provisions hereof;

(xiv) if any of the representations set forth in Section 3.1.11 or otherwise related to Prescribed Laws set forth herein are not true, correct and complete at all times;

(xv) intentionally omitted;

(xvi) if Borrower shall fail to maintain at all times an Independent Director as required by Section 5.2 hereof;

(xvii) if Borrower fails to comply with Section 2.8 hereof;

(xviii) if (A) Borrower shall fail to pay any sums payable under any Property Document as and when payable thereunder, which failure continues beyond any applicable notice or cure period set forth therein, or (B) either (1) Borrower defaults under the Property Documents beyond the expiration of applicable notice and grace periods, if any, thereunder, (2) any of the Property Documents are amended, supplemented, replaced, restated or otherwise modified without Lender's prior written consent or if Borrower consents to a transfer of any party's interest thereunder without Lender's prior written consent, or (3) any Property Document and/or the estate created thereunder is canceled, rejected, terminated, surrendered or expires pursuant to its terms, unless in such case Borrower enters into a replacement thereof in accordance with the applicable terms and provisions hereof, and in the case of any matter set forth in this clause (B), Lender determines (in accordance with the Prudent Lender Standard) that the foregoing would have a Material Adverse Effect;

(xix) if Borrower attempts to assign its rights or delegate its duties under any of the Loan Documents or any interest herein or therein in contravention of the Loan Documents;

(xx) if Borrower shall continue to be in Default under any of the other terms, covenants or conditions of this Agreement not specified above in this Section 8.1(a), or under any of the terms, covenants or conditions of any other Loan Document, for ten (10) days after notice to Borrower from Lender, in the case of any Default which can be cured by the payment of a sum of money, or for thirty (30) days after notice from Lender in the case of any other Default; provided, however, that if such non-monetary Default is susceptible of cure but cannot reasonably be cured within such thirty (30) day period and provided further that Borrower shall have commenced to cure such Default within such thirty (30) day period and thereafter diligently and expeditiously proceeds to cure the same, such thirty (30) day period shall be extended for such time as is reasonably necessary for Borrower in the exercise of due diligence to cure such Default, such additional period not to exceed ninety (90) days, unless otherwise extended by Lender in writing in its sole discretion;

(xxi) if any covenant or indemnification obligation of Borrower set forth in Sections 10.1 through 10.3, inclusive, of this Agreement are violated or breached;

(xxii) intentionally omitted;

(xxiii) if Borrower ceases to continuously operate the Property or any material portion thereof for the use specified in Section 3.1.26 hereof for any reason whatsoever (other than temporary cessation in connection with any repair or renovation thereof undertaken with the prior written consent of Lender or as permitted by this Agreement);

(xxiv) if the Improvements are not Completed in accordance with Section 4.1.31 on or prior to the Completion Date;

(xxv) if any voucher or invoice is fraudulently submitted by Borrower in connection with any Additional Advance for services performed or for materials used in or furnished for the Property;

(xxvi) if there is any cessation at any time in construction of the Improvements for more than thirty (30) consecutive Business Days except if due to a Force Majeure Event;

(xxvii) if Lender, the Construction Consultant or their representatives are not permitted at all reasonable times upon not less than two (2) Business Days' notice to enter upon the Property, inspect the Improvements and the construction thereof and all materials, fixtures and articles used or to be used in the construction and to examine all the Plans and Specifications, or if Borrower shall fail to furnish to Lender or its authorized representative, when requested upon not less than two (2) Business Days' notice, copies of the Plans and Specifications;

(xxviii) (A) the neglect, failure or refusal of Borrower to keep in full force and effect any material permit, license, consent or approval required for the construction or operation of the Improvements that is not fully reinstated within thirty (30) days after the lapse of effectiveness of such material permit, license, consent or approval or (B) the curtailment in availability to the Property of utilities or other public services necessary for the full occupancy and utilization of the Improvements that is not restored to full availability within thirty (30) days after such curtailment of availability;

(xxix) a default by Borrower under the C-PACE Loan that continues beyond the date on which the lender pursuant to the C-PACE Loan has the right to exercise any remedies (beyond the expiration of all notice and cure periods) or has otherwise initiated any enforcement proceedings thereunder; or

(b) Upon either (i) the declaration of Lender at any time during the continuance of any Event of Default, or (ii) the existence of any Event of Default described in Section 8.1(a)(iv) above with respect to Borrower or any SPE Party (as to which no declaration or other action of Lender shall be required), then the Debt shall be immediately due and payable. Borrower hereby expressly waives any notice or demand (other than as expressly required pursuant to this Section 8.1) as a condition to such acceleration of the Debt, anything to the contrary herein or in any other Loan Document notwithstanding. The foregoing shall be in addition to any other rights or remedies available to Lender pursuant to this Agreement and the other Loan Documents or at law or in equity. During the continuance of any Event of Default, Lender may take each and any such action, without notice or demand, that Lender deems advisable to protect and enforce its rights against Borrower and in and to the Property, and Lender may enforce or avail itself of any or all rights or remedies provided in the Loan Documents against Borrower and the Property, including, without limitation, all rights or remedies available at law or in equity.

Section 8.2 Remedies.

(a) Upon the occurrence and during the continuation of an Event of Default, all or any one or more of the rights, powers, privileges and other remedies available to Lender against Borrower under this Agreement or any of the other Loan Documents executed and delivered by, or applicable to, Borrower or at law or in equity may be exercised by Lender at any time and from time to time, whether or not all or any of the Debt shall be declared due and payable, and whether or not Lender shall have commenced any foreclosure proceeding or other action for the enforcement of its rights and remedies under any of the Loan Documents. Any such actions taken by Lender shall be cumulative and concurrent and may be pursued independently, singularly, successively, together or otherwise, at such time and in such order as Lender may determine in its sole discretion, to the fullest extent permitted by law, without impairing or otherwise affecting the other rights and remedies of Lender permitted by law, equity or contract or as set forth herein or in the other Loan Documents. Without limiting the generality of the foregoing, Borrower agrees that if an Event of Default is continuing (i) Lender is not subject to any “one action” or “election of remedies” law or rule, and (ii) all liens and other rights, remedies or privileges provided to Lender shall remain in full force and effect until Lender has exhausted all of its remedies against the Property and the Mortgage has been foreclosed, sold and/or otherwise realized upon in satisfaction of the Debt or the Debt has been paid in full.

(b) With respect to Borrower and the Property, nothing contained herein or in any other Loan Document shall be construed as requiring Lender to resort to the Property for the satisfaction of any of the Debt in any preference or priority, and Lender may seek satisfaction out of the Property, or any part thereof, in its discretion in respect of the Debt. Lender shall have the right from time to time to partially foreclose the Mortgage in any manner and for any amounts secured by the Mortgage then due and payable as determined by Lender in its sole discretion including, without limitation, the following circumstances: (i) in the event Borrower defaults beyond any applicable grace period in the payment of one or more scheduled payments of principal and interest, Lender may foreclose the Mortgage to recover such delinquent payments, or (ii) in the event Lender elects to accelerate less than the entire Outstanding Principal Balance, Lender may foreclose the Mortgage to recover so much of the principal balance of the Loan as Lender may accelerate and such other sums secured by the Mortgage as Lender may elect. Notwithstanding one or more partial foreclosures, the Property shall remain subject to the Mortgage to secure payment of sums secured by the Mortgage and not previously recovered.

(c) Lender shall have the right from time to time to sever the Note and the other Loan Documents into one or more separate notes, mortgages and other security documents (the “**Severed Loan Documents**”) in such denominations and priorities as Lender shall determine in its sole discretion for purposes of evidencing and enforcing its rights and remedies provided hereunder; provided that notwithstanding anything in this Agreement to the contrary, (i) the aggregate outstanding principal balance of all components immediately after the effective date of any such severance equals the outstanding principal balance of all components immediately prior to such modification, and (ii) no such severance shall cause the weighted average interest rate of the notes and components of the Loan immediately after giving effect to such severance, or upon any subsequent

prepayment of any note or component of the Loan (or portion of any of the foregoing (other than any payments made pursuant to Section 2.4.2 hereof or otherwise applied during the continuance of an Event of Default)) to be greater than the interest rate of the original Note. Borrower shall execute and deliver to Lender from time to time, promptly after the request of Lender, a severance agreement and such other documents as Lender shall request in order to effect the severance described in the preceding sentence, all in form and substance reasonably satisfactory to Lender. Upon the occurrence and during the continuance of an Event of Default, Borrower hereby absolutely and irrevocably appoints Lender as its true and lawful attorney, coupled with an interest, in its name and stead to make and execute all documents necessary or desirable to effect the aforesaid severance, Borrower ratifying all that its said attorney shall do by virtue thereof; provided, however, Lender shall not make or execute any such documents under such power until three (3) days after notice has been given to Borrower by Lender of Lender's intent to exercise its rights under such power. Borrower shall be obligated to pay any costs or expenses incurred in connection with the preparation, execution, recording or filing of the Severed Loan Documents and the Severed Loan Documents shall not contain any representations, warranties or covenants not contained in the Loan Documents and any such representations and warranties contained in the Severed Loan Documents will be given by Borrower only as of the Closing Date.

(d) Notwithstanding anything to the contrary contained herein or in any other Loan Document, any amounts recovered from the Property or any other collateral for the Loan and/or paid to or received by Lender may, during the existence of an Event of Default, be applied by Lender toward the Debt in such order, priority and proportions as Lender in its sole discretion shall determine.

(e) Upon the occurrence and during the continuance of an Event of Default, Lender may, but without any obligation to do so and without notice to or demand on Borrower and without releasing Borrower from any obligation hereunder or being deemed to have cured any Event of Default hereunder, make, do or perform any obligation of Borrower hereunder in such manner and to such extent as Lender may deem necessary. At any time (i) upon the occurrence and during the continuance of an Event of Default, (ii) upon reasonable prior notice or (iii) in cases of emergency (in which event no prior notice shall be required), Lender is authorized to enter upon the Property for such purposes, or appear in, defend, or bring any action or proceeding to protect its interest in the Property for such purposes, and the cost and expense thereof (including reasonable attorneys' fees to the extent permitted by applicable law), with interest as provided in this Section, shall constitute a portion of the Debt and shall be due and payable to Lender upon demand. All such out-of-pocket costs and expenses incurred by Lender in remedying such Event of Default or such failed payment or act or in appearing in, defending, or bringing any action or proceeding shall bear interest at the Default Rate, for the period after such cost or expense was incurred until the date of payment to Lender. All such costs and expenses incurred by Lender together with interest thereon calculated at the Default Rate shall be deemed to constitute a portion of the Debt and be secured by the liens, claims and security interests provided to Lender under the Loan Documents and shall be immediately due and payable upon demand by Lender therefore.

(f) The rights, powers and remedies of Lender under this Agreement shall be cumulative and not exclusive of any other right, power or remedy which Lender may have against Borrower pursuant to this Agreement or the other Loan Documents, or existing at law or in equity or otherwise. Lender's rights, powers and remedies hereunder and under any such other Loan Documents may be pursued singularly, concurrently or otherwise, at such time and in such order as Lender may determine in Lender's sole discretion. No delay or omission to exercise any remedy, right or power accruing upon an Event of Default shall impair any such remedy, right or power or shall be construed as a waiver thereof, but any such remedy, right or power may be exercised from time to time and as often as may be deemed expedient. A waiver of one Default or Event of Default with respect to Borrower shall not be construed to be a waiver of any subsequent Default or Event of Default by Borrower or to impair any remedy, right or power consequent thereon. As used in this Section 8.2, a "foreclosure" shall include, without limitation, any sale by power of sale.

(g) Upon the occurrence and during the continuation of an Event of Default, Lender may declare its obligation to make Additional Advances hereunder to be terminated, whereupon the same shall terminate, and/or declare all unpaid principal of and accrued interest on the Building Loan Note, together with all other sums payable under the Building Loan Documents, to be immediately due and payable, whereupon same shall become and be immediately due and payable, anything in the Building Loan Documents to the contrary notwithstanding, and without presentation, protest or further demand or notice of any kind, all of which are expressly hereby waived by Borrower; provided, however, that Lender may make Additional Advances or parts of Additional Advances thereafter without thereby waiving the right to demand payment of the Building Loan Note, without becoming liable to make any other or further Additional Advances, and without affecting the validity of or enforceability of the Building Loan Documents. Notwithstanding and without limiting the generality of the foregoing or anything else to the contrary contained in this Agreement, upon the occurrence and during the continuation of an Event of Default, Lender's obligation to make Additional Advances hereunder shall automatically terminate and upon the occurrence and during the continuance of a Default, Lender shall not be obligated to make any further Additional Advance until such time as the same is remedied.

(h) Upon the occurrence and during the continuation of an Event of Default, Lender may cause the Improvements to be completed and may enter upon the Property and construct, equip and complete the Improvements in accordance with the Plans and Specifications, with such changes therein as Lender may, from time to time, and in its sole discretion, deem appropriate. In connection with any construction of the improvements undertaken by Lender pursuant to the provisions of this subsection, Lender may:

(i) use any funds of Borrower, including any balance which may be held by Lender as security or in escrow, and any funds remaining unadvanced under the Building Loan;

(ii) employ existing contractors, subcontractors, including Major Trade Contractors, agents, architects, engineers, and the like, or terminate the same and employ others;

- (iii) employ security watchmen to protect the Property;
- (iv) make such additions, changes and corrections in the Plans and Specifications as shall, in the reasonable judgment of Lender, be necessary or desirable to complete the Project in accordance with the Plans and Specifications, provided that such changes, additions and corrections shall not increase the cost of the Improvements;
- (v) take over and use any and all Personal Property contracted for or purchased by Borrower, if appropriate, or dispose of the same as Lender sees fit;
- (vi) execute all applications and certificates on behalf of Borrower which may be required by any Governmental Authority or Legal Requirement or contract documents or agreements;
- (vii) pay, settle or compromise all existing or future bills and claims which are or may be liens against the Property, or may be necessary for the Completion of the Improvements or the clearance of title to the Property, including, without limitation, all Taxes and assessments;
- (viii) prosecute and defend all actions and proceedings in connection with the construction of the Improvements or in any other way affecting the Property, the Improvements and take such action and require such performance as Lender deems necessary under the Payment and Performance Bonds and/or Subguard Insurance, as applicable; and
- (ix) take such other action hereunder, or refrain from acting hereunder, as Lender may, in its sole and absolute discretion, from time to time determine, and without any limitation whatsoever, to carry out the intent of this Section 8.2.

Borrower shall be liable to Lender for all costs paid or incurred for the construction, completion and equipping of the Improvements, whether the same shall be paid or incurred pursuant to the provisions of this Section or otherwise, and all payments made or liabilities incurred by Lender hereunder of any kind whatsoever shall be deemed advances made to Borrower under this Agreement and shall be secured by the Building Loan Mortgage and the other Building Loan Documents.

To the extent that any costs so paid or incurred by Lender, together with all other Additional Advances made by Lender hereunder, exceed the Building Loan Amount, such excess costs shall be paid by Borrower to Lender on demand, with interest thereon at the Default Rate until paid; and Borrower shall execute such notes or amendments to the Building Loan Note as may be requested by Lender to evidence Borrower's obligation to pay such excess costs and until such notes or amendments are so executed by Borrower, Borrower's obligation to pay such excess costs shall be deemed to be evidenced by this Agreement. In the event Lender takes possession of the Property and assumes control of such construction as aforesaid, Lender shall not be obligated to continue such construction longer than Lender shall see fit and may thereafter, at any time, change any course of action undertaken by it or abandon such construction and decline to make further payments for the account of Borrower whether or not the Property shall have been completed. For

the purpose of this Section, the construction, equipping and completion of the Property shall be deemed to include any action necessary to cure any Event of Default by Borrower under any of the terms and provisions of any of the Building Loan Documents.

IX. NO SALE OR ENCUMBRANCE.

Section 9.1 Due on Sale and Encumbrance.

(a) Borrower acknowledges that Lender has examined and relied on the experience of Borrower and its stockholders, general partners, members, principals and (if Borrower is a trust) trustees and beneficial owners in owning and operating properties such as the Property in agreeing to make the Loan, and will continue to rely on Borrower's ownership of the Property as a means of maintaining the value of the Property as security for repayment of the Debt and the performance of the obligations contained in the Loan Documents. Borrower acknowledges that Lender has a valid interest in maintaining the value of the Property so as to ensure that, should Borrower default in the repayment of the Debt or the performance of the obligations contained in the Loan Documents, Lender can recover the Debt by a sale of the Property.

(b) It shall be an Event of Default hereof if, without the prior written consent of Lender, a Sale or Pledge of the Property or any part thereof or any legal or beneficial interest therein occurs, a Sale or Pledge of any direct or indirect interest in Borrower or any other Restricted Party occurs and/or Borrower shall acquire any real property in addition to the real property encumbered by the Mortgage as of the Closing Date or any Lease (each of the foregoing, individually and collectively, a "**Transfer**"), other than (i) pursuant to Leases of space in the Improvements to Tenants in accordance with the provisions hereof, and (ii) as permitted pursuant to the express terms of this Article IX.

(c) Without limiting Section 9.1(b) above, a Transfer shall include, but not be limited to, (i) an installment sales agreement wherein Borrower agrees to sell the Property or any part thereof for a price to be paid in installments; (ii) an agreement by Borrower leasing all or a substantial part of the Property or a sale, assignment or other transfer of, or the grant of a security interest in, Borrower's right, title and interest in and to any Leases or any Rents; (iii) if a Restricted Party is a corporation, any division, merger, consolidation or Sale or Pledge of such corporation's stock or the creation or issuance of new stock in one or a series of transactions; (iv) if a Restricted Party is a limited or general partnership or joint venture, any division, merger or consolidation or the change, removal, resignation or addition of a general partner or the Sale or Pledge of the partnership interest of any general or limited partner or any profits or proceeds relating to such partnership interests or the creation or issuance of new limited partnership interests; (v) if a Restricted Party is a limited liability company, any division, merger or consolidation or the change, removal, resignation or addition of a managing member or non-member manager (or if no managing member, any member) or the Sale or Pledge of the membership interest of any member or any profits or proceeds relating to such membership interest; (vi) if a Restricted Party is a trust or nominee trust, any division, merger, consolidation or the Sale or Pledge of the legal or beneficial interest in a Restricted Party or the creation or issuance of new legal or beneficial interests; or (vii) any action for partition of the Property (or any portion thereof

or interest therein) or any similar action instituted or prosecuted by Borrower or by any other Person, pursuant to any contractual agreement or other instrument or under applicable law (including, without limitation, common law).

(d) Without Lender's prior written consent thereto, in its sole discretion, any Transfer resulting in any direct or indirect ownership interests in Borrower or the Property being held in any Prohibited Entity/Ownership Structure is prohibited.

(e) For the avoidance of doubt, a Transfer shall not include any assignments, transfers, Sales or Pledges by ACRES of debt originated by ACRES in connection with any repurchase or warehouse facility.

Section 9.2 Intentionally Omitted.

Section 9.3 Permitted Transfers.

Notwithstanding anything to the contrary contained in Section 9.1, the following Transfers (herein, "**Permitted Transfers**") shall be permitted hereunder:

(a) A Lease entered into in accordance with this Agreement;

(b) A Permitted Encumbrance;

(c) Provided no Event of Default shall then exist, a Transfer of any direct or indirect interest in Borrower (other than a Transfer of an SPE Party's interest in Borrower, if applicable) related to or in connection with the estate planning of such transferor to (1) an immediate family member (*i.e.*, a sibling, parent, spouse, child (or step-child), grandchild or other lineal descendant of the related Person) of such interest holder (or to partnerships or limited liability companies Controlled solely by one or more of such family members) or (2) a trust established for the benefit of such immediate family member, provided that:

(i) Borrower shall provide to Lender thirty (30) days prior written notice thereof;

(ii) such Transfer shall not otherwise result in a change of Control of Borrower or change of the day-to-day management and operations of the Property;

(iii) each of Borrower and any SPE Party, if applicable, shall continue to be a Special Purpose Entity;

(iv) if such Transfer would cause the transferee, together with its Affiliates, to increase its direct or indirect interest in Borrower to an amount which equals or exceeds twenty percent (20%) (or, to the extent such Person is domiciled in a country other than the United States, ten percent (10%)), such transferee shall be a Qualified Transferee;

(v) intentionally omitted; and

(vi) the conditions of Section 9.4 shall have been satisfied;

(d) A Transfer of any direct or indirect interest in Borrower (other than the Transfer by an SPE Party of its interest in Borrower, if applicable) that occurs by devise or bequest or by operation of law upon the death of a natural person that was the holder of such interest, provided that:

(i) Borrower shall give Lender notice of such Transfer together with copies of all instruments effecting such Transfer not more than thirty (30) days after the date of such Transfer;

(ii) each of Borrower and any SPE Party, if applicable, shall continue to be a Special Purpose Entity;

(iii) the Property shall continue to be managed by a Qualified Manager;

(iv) if such Transfer would cause the transferee, together with its Affiliates, to increase its direct or indirect interest in Borrower to an amount which equals or exceeds twenty percent (20%) (or, to the extent such Person is domiciled in a country other than the United States, ten percent (10%)), such transferee shall be a Qualified Transferee;

(v) if such Transfer results in a change of Control of Borrower to a Person other than (A) Guarantor or Sponsor (directly or indirectly), or (B) the estate of any Guarantor (during the pendency of the settlement by the estate of such Guarantor and if such Transfer occurs as a result of the death of Guarantor), then such Transfer must be approved by Lender, in accordance with the Prudent Lender Standard;

(vi) intentionally omitted; and

(vii) the conditions of Section 9.4 shall have been satisfied;

(e) Provided that no Event of Default shall then exist, a Transfer of a direct or indirect limited partnership or non-managing member interests in Borrower (other than a Transfer of an SPE Party's interest in Borrower, if applicable) shall be permitted without Lender's consent provided that:

(i) such Transfer shall not (x) cause the transferee (other than Guarantor or Sponsor), together with its Affiliates, to increase its direct or indirect interest in Borrower to an amount which equals or exceeds forty-nine percent (49%), (y) result in a change in Control of Borrower or any SPE Party; or (z) result in ACRES, together with other ACRES Affiliates and the REIT, owning in the aggregate less than a fifty-one percent (51%) indirect interest in Borrower;

(ii) each of Borrower and any SPE Party, if applicable shall continue to be a Special Purpose Entity;

(iii) if such Transfer would cause the transferee, together with its Affiliates, to increase its direct or indirect interest in Borrower to an amount which equals or exceeds twenty percent (20%) (or, to the extent such Person is domiciled in a country other than the United States, ten percent (10%)), (x) such transferee is a Qualified Transferee and (y) Borrower shall provide to Lender thirty (30) days prior written notice thereof;

(iv) after giving effect to such Transfer, Guarantor or Sponsor shall continue to control the day to day operations of Borrower and any SPE Party, if applicable, and shall continue to own at least fifty one percent (51%) of all equity interests (direct or indirect) of Borrower;

(v) the Property shall continue to be managed by a Qualified Manager or by a property manager reasonably acceptable to Lender; and

(vi) the conditions of Section 9.4 shall have been satisfied;

(f) a Transfer of direct membership interests in Charles Street – ACRES FSU Student Venture, LLC (the “**Joint Venture**”) among the existing members of the Joint Venture as of the Closing Date, provided that (i) Lender shall receive prior written notice of such Transfer, (ii) such Transfer does not result in ACRES, together with other ACRES Affiliates and the REIT, owning in the aggregate less than a fifty-one percent (51%) indirect interest in Borrower and (iii) such Transfer shall not result in a change in Control of Borrower;

(g) the removal of CSDC FSU, LLC, a Delaware limited liability company, as managing member of the Joint Venture in accordance with Section 5.2 of the Joint Venture’s operating agreement, provided that (i) the ACRES Change of Control Conditions have been satisfied in connection therewith; and (ii) the conditions of Section 9.4 have otherwise been satisfied in connection therewith;

(h) the sale, transfer or issuance of shares of stock in any Restricted Party that is a publicly traded entity, provided such shares of stock are listed on the New York Stock Exchange or another nationally recognized stock exchange;

(i) Transfers among ACRES, other ACRES Affiliates and the REIT, so long as (i) such Transfer does not result in ACRES, together with other ACRES Affiliates and the REIT, owning in the aggregate less than a fifty-one percent (51%) indirect interest in Borrower and (ii) the conditions of Section 9.4 have been satisfied in connection therewith; and

(j) any Sale or Pledge of an Excluded Entity, provided that (i) (A) other than in connection with any transfers pursuant to Section 9.3(h) above, to the extent such Sale or Pledge results in any Person owning twenty percent (20%) (or, to the extent such Person is domiciled in a country other than the United States, ten percent (10%)) or more of the direct or indirect ownership interests in Borrower immediately following such transfer (provided such transferee owned less than twenty percent (20%) (or, to the extent such Person is domiciled in a country other than the United States, ten percent (10%)) of the direct or

indirect ownership interests in Borrower as of the Closing Date), Borrower shall deliver customary searches reasonably requested by Lender in writing (including, but not limited to, credit, judgment, lien, litigation, bankruptcy, criminal and watch list) reasonably acceptable to Lender with respect to such Person) and (B) in connection with any transfers pursuant to Section 9.3(h) above that results in any Person owning twenty percent (20%) (or, to the extent such Person is domiciled in a country other than the United States, ten percent (10%)) or more of the direct or indirect ownership interests in Borrower immediately following such transfer (provided such transferee owned less than twenty percent (20%) (or, to the extent such Person is domiciled in a country other than the United States, ten percent (10%)) of the direct or indirect ownership interests in Borrower as of the Closing Date), Borrower shall deliver (1) written notice of same to Lender within ten (10) days of such Sale or Pledge and (2) an updated organizational chart of Borrower reflecting such ownership change and (ii) such Sale or Pledge does not result in the Guarantor no longer satisfying the Net Worth and Unencumbered Liquid Assets (as defined in the Recourse Guaranty) requirements of Section 3.6 of the Recourse Guaranty.

Section 9.4 Additional Requirements as to Transfers.

(a) If, as a result of any Permitted Transfer, Guarantor no longer either Controls Borrower or owns any direct or indirect interest in Borrower, Lender may require that one or more Approved Replacement Guarantors execute and deliver to Lender replacement guaranties (each in the same form as the applicable Guaranty delivered to Lender by Guarantor as of the Closing Date) and an environmental indemnity agreement, jointly and severally with Borrower (in the same form as the Environmental Indemnity delivered to Lender by Guarantor and Borrower as of the Closing Date) on or prior to the date of such Permitted Transfer (or, in the case of a Permitted Transfer described in clause (f), within thirty (30) days after the date of such Permitted Transfer), pursuant to which, in each case, the Approved Replacement Guarantor agrees to be liable under each such guaranty and environmental indemnity agreement from and after the date of such Permitted Transfer.

(b) Borrower shall provide Lender with copies of all organizational documents (if any) relating to any Permitted Transfer, together with a revised Organizational Chart reflecting such Transfer. Borrower shall also deliver to Lender such other additional documentation, all of which shall be reasonably satisfactory to Lender, as to matters related to such Transfer that may be requested by Lender based on the deliveries required by this Agreement and the inquiries and due diligence of Lender into such proposed Transfer.

(c) Borrower and Guarantor and any transferee in such Transfer, shall deliver to Lender an Officer's Certificate dated as of such Transfer certifying that such Transfer (and the ownership in Borrower following such Transfer) is in compliance with the ERISA Provisions, and that all representations in such ERISA Provisions are true, correct and complete in all material respects after giving effect to such Transfer.

(d) In connection with any Permitted Transfer, Lender shall be provided with (i) satisfactory documentation reasonably required by Lender in order to fulfill its then-current compliance guidelines with respect to the Patriot Act and other Prescribed Laws, and (ii) to the extent a transferee shall own twenty percent (20%) (or, to the extent such Person is

domiciled in a country other than the United States, ten percent (10%)) or more of the direct or indirect ownership interests in Borrower immediately following such transfer (provided such transferee owned less than twenty percent (20%) (or, to the extent such Person is domiciled in a country other than the United States, ten percent (10%)) of the direct or indirect ownership interests in Borrower as of the Closing Date), customary searches reasonably requested by Lender in writing (including, but not limited to, credit, judgment, lien, litigation, bankruptcy, criminal and watch list) reasonably acceptable to Lender with respect to such transferee).

(e) As a condition to evaluating any requested consent to a Transfer (whether or not a fee is payable to Lender pursuant to Section 9.3 as a condition thereto), Lender may require that Borrower post a cash deposit with Lender in an amount equal to Lender's anticipated out-of-pocket costs and expenses in evaluating any such request for consent.

(f) No Transfer shall result in, give effect to, or permit the imposition, creation, attachment or levy of a pledge of or Lien on any of the direct or indirect interests in Borrower.

(g) Without Lender's prior written consent thereto, in its sole discretion, any Transfer or Permitted Transfer resulting in any direct or indirect ownership interests in Borrower or the Property being held in any Prohibited Entity/Ownership Structure is prohibited, even if the same would be otherwise allowed pursuant to Section 9.3, the definition of a Permitted Transfer or any other provision of any Loan Document.

(h) If required by Lender, any transferee shall be approved by the Rating Agencies selected by Lender, which approval, if required by Lender, shall take the form of a confirmation in writing from such Rating Agencies to the effect that such Transfer will not result in a requalification, reduction, downgrade or withdrawal of the ratings in effect immediately prior to such assumption or transfer for the Securities or any class thereof issued in connection with a Securitization which are then outstanding.

Section 9.5 Legal Requirements as to Transfers. Borrower shall (and shall cause its direct and indirect constituent owners and Affiliates to) (a) at all times comply with the representations and covenants contained in Section 3.1.11 and 3.1.12, and with those relating to Prescribed Laws such that the same remain true, correct and not violated or breached and (b) not permit a Transfer to occur if, upon such transfer, any representation or covenant contained in Section 3.1.11 or 3.1.12 would be breached. Borrower shall cause the ownership requirements specified in this Article IX (including, without limitation, those stipulated in Section 9.3 hereof) to be complied with at all times. Borrower hereby represents that, other than in connection with the Loan, the Loan Documents and any Permitted Encumbrances, as of the date hereof, there exists no Sale or Pledge of (i) the Property or any part thereof or any legal or beneficial interest therein, or (ii) any interest in any Restricted Party.

Section 9.6 Death or Incapacity of Guarantor. To the extent that any Guarantor is a natural person, upon the death or incapacity of such Guarantor each of Borrower and the remaining Guarantor shall affirm each of their respective obligations under the Loan Documents within fifteen (15) days after such death or incapacity. No such death of a Guarantor shall hinder, impair,

limit, terminate or effectuate a novation of the obligations or liabilities of any other Guarantor under any of the Loan Documents.

X. SPECIAL PROVISIONS.

Section 10.1 Securitization.

10.1.1 **Lender's Rights Not Limited.** In addition to all other rights of Lender as owner and holder of the Loan, Lender shall have the right (i) to pledge, sell or otherwise transfer or grant a security interest in the Loan (or any portion thereof and/or interest therein), (ii) to syndicate, or sell participation or co-lender interests in, the Loan (or any portion thereof and/or interest therein) or (iii) to securitize the Loan (or any portion thereof and/or interest therein) in a single asset securitization or a pooled asset securitization or by transfer to a CDO, CLO, CMO or other securitization vehicle(s). The transaction referred to in clauses (i), (ii) and (iii) above shall hereinafter be referred to collectively as "**Secondary Market Transactions**" and the transactions referred to in clause (iii) shall hereinafter be referred to as a "**Securitization**". Any certificates, notes or other securities issued in connection with a Securitization are hereinafter referred to as "**Securities**".

10.1.2 **Cooperation.** If requested by Lender, Borrower shall (and shall cause each Borrower Party to) assist Lender in satisfying the market standards to which Lender customarily adheres or which may be reasonably required in the marketplace or by the Rating Agencies in connection with any Secondary Market Transactions, including, without limitation, to:

(a) provide (A) updated financial and other information with respect to the Property, the business operated at the Property, Borrower, Guarantor, Sponsor, SPE Party and Manager, (B) updated budgets relating to the Property, and (C) updated appraisals, market studies, environmental reviews (Phase I's and, if appropriate, Phase II's), property condition reports and other due diligence investigations of the Property, all as may reasonably be requested by the holder of the Note or the Rating Agencies or as may reasonably be necessary or appropriate in connection with a Securitization (the "**Updated Information**"), together, if customary, with appropriate verification of the Updated Information through letters of auditors or opinions of counsel acceptable to Lender and the Rating Agencies;

(b) provide new and/or updated opinions of counsel, which may be relied upon by Lender, the Rating Agencies and their respective counsel, agents and representatives, as to substantive non-consolidation, fraudulent conveyance, matters of Delaware and federal bankruptcy law relating to limited liability companies, true sale and any other opinion customary in Secondary Market Transactions or required by the Rating Agencies with respect to the Property, Borrower and Borrower's Affiliates, which counsel and opinions shall be satisfactory in form and substance to Lender and the Rating Agencies;

(c) if required by any Rating Agency, use commercially reasonable efforts to deliver such additional Tenant estoppel letters, subordination agreements or other agreements from parties to agreements that affect the Property, which estoppel letters,

subordination agreements or other agreements shall be reasonably satisfactory to Lender and the Rating Agencies;

(d) provide updated, as of the closing date of the Secondary Market Transaction, representations and warranties made in the Loan Documents and such additional representations and warranties as the Rating Agencies may require;

(e) execute such amendments to the Loan Documents and Borrower's or any SPE Party's organizational documents as may be reasonably requested by Lender or requested by the Rating Agencies or otherwise to effect any Secondary Market Transaction, including, without limitation, (A) to amend and/or supplement the Independent Director provisions provided herein and therein, in each case, in accordance with the applicable requirements of the Rating Agencies, (B) bifurcating the Loan into two or more components and/or additional separate notes and/or creating additional senior/subordinate note structure(s) (any of the foregoing, a "**Loan Bifurcation**") and (C) to modify all operative dates (including but not limited to payment dates, interest period start dates and end dates, etc.) under the Loan Documents, by up to ten (10) days; provided, however, that Borrower shall not be required to so modify or amend any Loan Document if such modification or amendment would change the interest rate, the stated maturity (except as provided in subclause (C) above) or the amortization of principal set forth herein, except in connection with a Loan Bifurcation which may result in varying fixed interest rates and amortization schedules, but which shall have the same initial weighted average coupon of the original Note;

(f) if requested by Lender, review any information regarding the Property, Borrower, SPE Party, the Manager and the Loan which is contained in a Disclosure Document to be used by Lender or any affiliate thereof; and

(g) supply to Lender such documentation, financial statements and reports in form and substance required in order to comply with any applicable securities laws.

10.1.3 **Regulation AB Compliance.** Upon request, Borrower shall furnish to Lender from time to time such financial data and financial statements as Lender determines to be necessary, advisable or appropriate for complying with any applicable Legal Requirements (including those applicable to Lender or any Servicer or any Investor (including, without limitation and to the extent applicable, Regulation AB)) by reason of their ownership of (or servicing of) the Loan or any interest therein, in each case within the timeframes necessary, advisable or appropriate in order to comply with such legal requirements.

10.1.4 **Secondary Market Fees and Costs.** All costs and expenses incurred by Borrower and Guarantors and Lender in connection with Section 10.1 (including, without limitation, the fees and expenses of the Rating Agencies) shall be paid by Borrower; provided, however, in no event shall the costs and expenses incurred by Borrower in connection with its performance under this Section 10.1 exceed \$10,000.00.

10.1.5 **Federal Reserve Bank Assignments.** In addition to the assignments and participations permitted under the foregoing provisions of Section 10.1, and without the need to

comply with any of the formal or procedural requirements of this Section 10.1, notwithstanding any other provision set forth in this Agreement or any of the other Loan Documents, Lender may at any time create a security interest in all or any portion of its rights under this Agreement and any other Loan Document in favor of (i) any Federal Reserve Bank, any Federal Home Loan Bank or the central reserve bank or similar authority of any other country to secure any obligation of Lender to such bank or similar authority (a “**Central Bank Pledge**”). In the event that the interest of Lender that is assigned in connection with a Central Bank Pledge is foreclosed upon and transferred to the pledgee thereof, Lender shall have no further liability hereunder with respect to the interest that was the subject of such transfer and the assignee shall be Lender with respect to such interest. Lender shall not be required to notify Borrower of any Central Bank Pledge.

Section 10.2 Intentionally Omitted.

Section 10.3 Disclosure.

10.3.1 Borrower (on its own behalf and on behalf of each of Guarantor and Sponsor) understands that information provided to Lender by Borrower, any of Guarantor or Sponsor and/or their respective agents, counsel and representatives may be (i) included in (A) the Disclosure Documents and (B) filings under the Securities Act and/or the Exchange Act and (ii) made available to Investors, the Rating Agencies and service providers, in each case, in connection with any Secondary Market Transaction.

10.3.2 Borrower shall indemnify each Indemnified Person against any actual out-of-pocket losses, claims, damages or liabilities (collectively, the “**Liabilities**”) to which any Indemnified Person may become subject in connection with any Disclosure Document and/or any Covered Rating Agency Information, in each case, insofar as such Liabilities arise out of or are based upon any untrue statement of any material fact in the Provided Information and/or arise out of or are based upon the omission to state a material fact in the Provided Information required to be stated therein or necessary in order to make the statements in the applicable Disclosure Document and/or Covered Rating Agency Information, in light of the circumstances under which they were made, not misleading.

10.3.3 Promptly after receipt by an Indemnified Person of notice of any claim or the commencement of any action, the Indemnified Person shall, if a claim in respect thereof is to be made against any Indemnifying Person, notify such Indemnifying Person in writing of the claim or the commencement of that action; provided, however, that the failure to notify such Indemnifying Person shall not relieve it from any liability which it may have under the indemnification provisions of this Section 10.3 except to the extent that it has been materially prejudiced by such failure and, provided further that the failure to notify such Indemnifying Person shall not relieve it from any liability which it may have to an Indemnified Person otherwise than under the provisions of this Section 10.3. If any such claim or action shall be brought against an Indemnified Person, and it shall notify any Indemnifying Person thereof, such Indemnifying Person shall be entitled to participate therein and, to the extent that it wishes, assume the defense thereof with counsel reasonably satisfactory to the Indemnified Person. After notice from any Indemnifying Person to the Indemnified Person of its election to assume the defense of such claim or action, such Indemnifying Person shall not be liable to the Indemnified Person for any legal or other expenses subsequently incurred by the Indemnified Person in connection with the defense

thereof except as provided in the following sentence; provided, however, if the defendants in any such action include both an Indemnifying Person, on the one hand, and one or more Indemnified Persons on the other hand, and an Indemnified Person shall have reasonably concluded that there are any legal defenses available to it and/or other Indemnified Persons that are different or in addition to those available to the Indemnifying Person, the Indemnified Person or Persons shall have the right to select separate counsel to assert such legal defenses and to otherwise participate in the defense of such action on behalf of such Indemnified Person or Persons. The Indemnified Person shall instruct its counsel to maintain reasonably detailed billing records for fees and disbursements for which such Indemnified Person is seeking reimbursement hereunder and shall submit copies of such detailed billing records to substantiate that such counsel's fees and disbursements are solely related to the defense of a claim for which the Indemnifying Person is required hereunder to indemnify such Indemnified Person. No Indemnifying Person shall be liable for the expenses of more than one (1) such separate counsel unless such Indemnified Person shall have reasonably concluded that there may be legal defenses available to it that are different from or additional to those available to another Indemnified Person.

10.3.4 Without the prior consent of Oceanview Life and Annuity Company (which consent shall not be unreasonably withheld), no Indemnifying Person shall settle or compromise or consent to the entry of any judgment in any pending or threatened claim, action, suit or proceeding in respect of which indemnification may be sought hereunder (whether or not any Indemnified Person is an actual or potential party to such claim, action, suit or proceeding) unless the Indemnifying Person shall have given Oceanview Life and Annuity Company reasonable prior notice thereof and shall have obtained an unconditional release of each Indemnified Person hereunder from all liability arising out of such claim, action, suit or proceedings. As long as an Indemnifying Person has complied with its obligations to defend and indemnify hereunder, such Indemnifying Person shall not be liable for any settlement made by any Indemnified Person without the consent of such Indemnifying Person (which consent shall not be unreasonably withheld).

10.3.5 The Indemnifying Persons agree that if any indemnification or reimbursement sought pursuant to this Section 10.3 is finally judicially determined to be unavailable for any reason or is insufficient to hold any Indemnified Person harmless (with respect only to the Liabilities that are the subject of this Section 10.3), then the Indemnifying Persons, on the one hand, and such Indemnified Person, on the other hand, shall contribute to the Liabilities for which such indemnification or reimbursement is held unavailable or is insufficient: (x) in such proportion as is appropriate to reflect the relative benefits to the Indemnifying Persons, on the one hand, and such Indemnified Person, on the other hand, from the transactions to which such indemnification or reimbursement relates; or (y) if the allocation provided by clause (x) above is not permitted by applicable law, in such proportion as is appropriate to reflect not only the relative benefits referred to in clause (x) but also the relative faults of the Indemnifying Persons, on the one hand, and all Indemnified Persons, on the other hand, as well as any other equitable considerations. Notwithstanding the provisions of this Section 10.3, (A) no party found liable for a fraudulent misrepresentation shall be entitled to contribution from any other party who is not also found liable for such fraudulent misrepresentation, and (B) the Indemnifying Persons agree that in no event shall the amount to be contributed by the Indemnified Persons collectively pursuant to this paragraph exceed the amount of the fees (by underwriting discount or otherwise) actually received by the Indemnified Persons in connection with the closing of the Loan or the Securitization.

10.3.6 The Indemnifying Persons agree that the indemnification, contribution and reimbursement obligations set forth in this Section 10.3 shall apply whether or not any Indemnified Person is a formal party to any lawsuits, claims or other proceedings. The Indemnifying Persons further agree that the Indemnified Persons are intended third party beneficiaries under this Section 10.3.

10.3.7 The liabilities and obligations of the Indemnified Persons and the Indemnifying Persons under this Section 10.3 shall survive the termination of this Agreement and the satisfaction and discharge of the Debt.

Section 10.4 Reserves/Escrows. In the event that Securities are issued in connection with the Loan, all funds held by Lender in escrow or pursuant to reserves in accordance with this Agreement and the other Loan Documents shall be deposited in “eligible accounts” at “eligible institutions” and, to the extent applicable, invested in “permitted investments” as then defined and required by the Rating Agencies and/or the Servicing Agreement governing each such Securitization in which the Loan (or any portion thereof) is included.

Section 10.5 Conversion to Registered Form. At the request of Lender, Borrower shall appoint, as its agent, a registrar and transfer agent reasonably acceptable to Lender (the “**Registrar**”) which shall maintain, subject to such reasonable regulations as it shall provide, such books and records as are necessary for the registration and transfer of the Note in a manner that shall cause the Note to be, or to ensure the Note is, considered to be in registered form for purposes of Section 163(f) of the IRS Code. The status of the Note in registered form may not be revoked. Any agreement setting out the rights and obligation of the Registrar shall be subject to the reasonable approval of Lender. Borrower may revoke the appointment of any particular person as Registrar, effective upon the effectiveness of the appointment of a replacement Registrar. The Registrar shall not be entitled to any fee from Lender or any other lender in respect of transfers of the Note and other Loan Documents.

Section 10.6 General Indemnification.

10.6.1 **General Indemnification.** Borrower shall, at its sole cost and expense, protect, defend, indemnify, release and hold harmless each Indemnified Person from and against any and all actual out-of-pocket losses incurred by Lender in respect of or as a result of any and all claims, suits, liabilities (including strict liabilities), actions, demands, proceedings, obligations, debts, damages (excluding special, speculative, exemplary, punitive and consequential damages to the extent not asserted against or actually incurred by an Indemnified Person to a third party and claims for diminution of property value), (including, but not limited, to reasonable attorneys’ fees and other costs of defense) (collectively, the “**Losses**”) imposed upon or incurred by or asserted against any Indemnified Person and directly or indirectly arising out of or in any way relating to any one or more of the following: (a) ownership of the Loan and/or the Loan Documents, the Property, or receipt of any Rents (or any interest in any of the foregoing); (b) any amendment to, or restructuring of, the Debt, the Note, this Agreement or any other Loan Documents; (c) any and all lawful action that may be taken by Lender in connection with the enforcement of the provisions of this Agreement, the Note or any of the other Loan Documents, whether or not suit is filed in connection with same, or in connection with Borrower, any guarantor or indemnitor and/or any partner, joint venturer or shareholder thereof becoming a party to a voluntary or involuntary federal

or state bankruptcy, insolvency or similar proceeding; (d) any accident, injury to, or death of, persons or loss of or damage to property occurring in, on or about the Property or any part thereof or on the adjoining sidewalks, curbs, adjacent property or adjacent parking areas, streets or ways; (e) any use, nonuse or condition in, on or about the Property or any part thereof or on the adjoining sidewalks, curbs, adjacent property or adjacent parking areas, streets or ways; (f) any failure on the part of Borrower to perform or be in compliance with any of the terms of this Agreement or any of the other Loan Documents; (g) performance of any labor or services or the furnishing of any materials or other property in respect of the Property or any part thereof; (h) the failure of any person to file timely with the Internal Revenue Service an accurate Form 1099-B, Statement for Recipients of Proceeds from Real Estate, Broker and Barter Exchange Transactions, which may be required in connection with the Mortgage, or to supply a copy thereof in a timely fashion to the recipient of the proceeds of the transaction in connection with which the Mortgage is made; (i) any failure of the Property to be in compliance with any Legal Requirements; (j) the enforcement by any Indemnified Person of the provisions of this Section 10.6.1; (k) any and all claims and demands whatsoever which may be asserted against Lender by reason of any alleged obligations or undertakings on its part to perform or discharge any of the terms, covenants, or agreements contained in any Lease; (l) the payment of any commission, charge or brokerage fee to anyone claiming through Borrower which may be payable in connection with the funding of the Loan; or (m) any misrepresentation made by Borrower in this Agreement or any other Loan Document. Any amounts payable to Lender by reason of the application of this Section 10.6.1 shall become immediately due and payable and shall bear interest at the Default Rate from the date loss or damage is sustained by Lender until paid. Notwithstanding anything to the contrary contained herein, in no event shall Borrower be obligated to indemnify Lender from any loss or expense arising from Lender's or Lender's agents willful misconduct or gross negligence.

10.6.2 Mortgage and Intangible Tax Indemnification. Borrower shall, at its sole cost and expense, protect, defend, indemnify, release and hold harmless each Indemnified Person from and against any and all Losses imposed upon or incurred by or asserted against any Indemnified Person and directly or indirectly arising out of or in any way relating to any tax on the making and/or recording of the Mortgage, the Note or any of the other Loan Documents.

10.6.3 ERISA Indemnification. Borrower shall, at its sole cost and expense, protect, defend, indemnify, release and hold harmless each Indemnified Person from and against any and all Losses (including, without limitation, reasonable attorneys' fees and costs incurred in the investigation, defense, and settlement of Losses incurred in correcting any prohibited transaction or in the sale of a prohibited loan, and in obtaining any individual prohibited transaction exemption under ERISA that may be required, in Lender's sole discretion) that Lender may incur, directly or indirectly, as a result of a default under the ERISA Provisions.

10.6.4 Duty to Defend, Legal Fees and Other Fees and Expenses. Upon written request by any Indemnified Person, Borrower shall defend such Indemnified Person (if requested by any Indemnified Person, in the name of the Indemnified Person) by attorneys and other professionals reasonably approved by each Indemnified Person. Notwithstanding the foregoing, any Indemnified Person may, in their sole discretion, engage their own attorneys and other professionals to defend or assist them, and, at the option of each Indemnified Person, their attorneys shall control the resolution of any claim or proceeding. Upon demand, Borrower shall pay or, in the sole discretion of each Indemnified Person, reimburse, each Indemnified Person, for

the payment of reasonable fees and disbursements of attorneys, engineers, environmental consultants, laboratories and other professionals in connection therewith.

10.6.5 **Survival.** The indemnifications made pursuant to Sections 10.6.2, 10.6.3 and 10.6.6 of this Agreement shall continue indefinitely in full force and effect and shall survive and shall in no way be impaired by any of the following: any satisfaction or other termination of the Mortgage, any assignment or other transfer of all or any portion of the Mortgage or Lender's interest in the Property (but, in such case, shall benefit both Indemnified Persons and any assignee or transferee), any exercise of Lender's rights and remedies pursuant hereto including, but not limited to, foreclosure or acceptance of a deed in lieu of foreclosure, any exercise of any rights and remedies pursuant to this Agreement, the Note or any of the other Loan Documents, any transfer of all or any portion of the Property (whether by Borrower or by Lender following foreclosure or acceptance of a deed in lieu of foreclosure or at any other time), any amendment to this Agreement, the Note or the other Loan Documents, and any act or omission that might otherwise be construed as a release or discharge of Borrower from the obligations pursuant hereto.

Section 10.7 Exculpation.

(a) Subject to the qualifications below, Lender shall not enforce the liability and obligation of Borrower to perform and observe the obligations contained in the Note, this Agreement, the Mortgage or the other Loan Documents by any action or proceeding wherein a money judgment or any deficiency judgment or other judgment establishing personal liability shall be sought against Borrower or any direct or indirect principal, director, officer, employee, beneficiary, shareholder, partner, member, trustee, agent, manager or Affiliate of Borrower or any legal representatives, successors or assigns of any of the foregoing (collectively, the "**Exculpated Parties**"), except that Lender may bring a foreclosure action, an action for specific performance or any other appropriate action or proceeding to enable Lender to enforce and realize upon its interest under the Note, this Agreement, the Mortgage and the other Loan Documents, or in the Property, the Rents, or any other collateral given to Lender pursuant to the Loan Documents; provided, however, that, except as specifically provided herein, any judgment in any such action or proceeding shall be enforceable against Borrower only to the extent of Borrower's interest in the Property, in the Rents and in any other collateral given to Lender, and Lender, by accepting the Note, this Agreement, the Mortgage and the other Loan Documents, agrees that it shall not sue for, seek or demand any deficiency or other monetary judgment against Borrower or any of the Exculpated Parties in any such action or proceeding under, or by reason of, or in connection with, the Note, this Agreement, the Mortgage or the other Loan Documents. The provisions of this Section shall not, however, (1) constitute a waiver, release or impairment of any obligation evidenced or secured by any of the Loan Documents; (2) impair the right of Lender to name Borrower as a party defendant in any action or suit for foreclosure and sale under the Mortgage; (3) affect the validity or enforceability of any indemnity, guaranty or similar instrument (including, without limitation, indemnities set forth herein, in the Guaranty and the Environmental Indemnity) made in connection with the Loan or any of the rights and remedies of Lender thereunder (including, without limitation, Lender's right to enforce said rights and remedies against Borrower and/or Guarantor (as applicable) personally and without the effect of the exculpatory provisions of this Section 10.7); (4) impair the right of Lender to obtain the

appointment of a receiver; (5) impair the enforcement of the Assignment of Leases; (6) constitute a prohibition against Lender to seek a deficiency judgment against Borrower in order to fully realize the security granted by the Mortgage or to commence any other appropriate action or proceeding in order for Lender to exercise its remedies against the Property; or (7) impair the right of Lender to obtain a deficiency judgment (or other judgment on the Note) against Borrower (but not against any Guarantor), if (and only to the extent) necessary to obtain any Insurance Proceeds or Awards to which Lender would otherwise be entitled under the terms of the Loan Documents, it being agreed that Lender shall only enforce any deficiency judgment (or other such judgment) pursuant to this clause (7) to the extent of such Insurance Proceeds or Awards, as applicable; or (8) impair the right of Lender to enforce Section 7.1 hereof or the other Cash Management Provisions. Further, the provisions of this Section 10.7 shall in no event constitute a waiver of the right of Lender to enforce the liability and obligation of Borrower, by money judgment or otherwise, to the extent of, and Borrower shall be and at all times remain fully and personally liable to Lender for (and shall and does hereby agree to indemnify and hold harmless Lender from and against), any and all actual loss, damage, cost, expense, liability, claim or other obligation incurred by Lender (including reasonable attorneys' fees and costs reasonably incurred by Lender in connection with exercising its rights and remedies) arising out of or in connection with the following first arising before Lender or Lender's agents, including a receiver appointed at the request of Lender takes possession or control of the Property, whether by foreclosure, deed in lieu or other transfer of the Property:

(i) fraud, willful misrepresentation, or willful failure to disclose a material fact, in each case, by (or at the direction of) Borrower or any Borrower Party in connection with the Loan or Property; or

(ii) conversion, misapplication or misappropriation of Rents, security deposits, Awards or insurance payments by (or at the direction of) Borrower or any Borrower Party; or

(iii) gross negligence or willful misconduct of (or at the direction of) Borrower or any Borrower Party in connection with the Loan or Property; or

(iv) intentional material physical waste to the Property by (or at the direction of) any Borrower Party, or damage to the Property caused by the intentional acts or intentional omissions of any Borrower Party, and/or (during the continuance of an Event of Default) the removal or disposal of any portion of the Property which is not replaced by Property of equivalent use or value; or

(v) subject to applicable contest rights as set forth herein, failure to pay Taxes or Other Charges, in each case to the full extent of revenues received from ownership and operation of the Property except to the extent the funds to pay such Taxes were in possession of Lender and Lender's access to such funds were not restricted or constrained in any manner; or

(vi) failure to pay Insurance Premiums, to the full extent of revenues received from ownership and operation of the Property, or to maintain the Policies

in full force and effect and/or to provide Lender evidence of the same, in each case, as expressly provided herein, in each case except to the extent the funds to pay the Insurance Premiums were in possession of Lender and Lender's access to such funds were not restricted or constrained in any manner; or

(vii) any breach or misrepresentation of the SPE Provisions, other than one described in Section 10.7(b)(iii) below; or

(viii) any litigation or other legal proceeding related to the Debt filed by, or any other act or omission by, any Borrower Party that delays, opposes, impedes, obstructs, hinders, enjoins or otherwise interferes with or frustrates the efforts of Lender to exercise any rights and remedies available to Lender as provided herein or in any other Loan Document or to realize on any collateral for the Loan, including, without limitation, the assertion by any Borrower Party of any defenses (other than defenses raised in good faith) or counterclaims against Lender; or

(ix) failure to pay charges for labor or materials or other charges that can create Liens on any portion of the Property, to the extent such Liens are not bonded over or discharged in accordance with the Loan Documents or otherwise approved by Lender; or

(x) any indemnification obligation arising under any of Section 10.6.2 and/or Section 10.6.3 of this Agreement; or

(xi) seizure or forfeiture of the Property, or any portion thereof, or Borrower's interest therein, resulting from criminal wrongdoing by any Borrower Party; or

(xii) any breach of the Cash Management Provisions other than those covered by Section 10.7(b)(v) below; or

(xiii) the breach of any representation, warranty, covenant or indemnification provision in the Environmental Indemnity, the Mortgage or any other Loan Document concerning environmental laws, hazardous substances and asbestos and any indemnification of Lender with respect thereto in any such document; or

(xiv) Borrower fails to (A) permit on-site inspections of the Property, as and when required herein, and such failure continues for a period of more than three (3) Business Days after delivery of written notice of such failure to Borrower, provided, however, if any Tenant at the Property shall refuse to provide Lender with access to such Tenant's leased space at the Property, then no Borrower Party shall have any liability under this subsection (xiv) for any Loss incurred by Lender as a direct result of Lender's inability to access such Tenant's leased space at the Property, (B) provide financial information, or (C) obtain Lender's approval prior to termination or replacement of the property manager or timely appoint a new property manager at the request of Lender, each as required by, and in accordance with, the terms and provisions of, the Loan Documents; or

(xv) the failure to purchase or replace (as applicable) any Interest Rate Cap Agreement or Replacement Interest Rate Cap Agreement, in each case, as and when required by the terms of Section 2.8 hereof.

(b) Notwithstanding anything to the contrary in this Agreement, the Note or any of the Loan Documents, Lender shall not be deemed to have waived any right which Lender may have under Section 506(a), 506(b), 1111(b) or any other provisions of the Bankruptcy Code to file a claim for the full amount of the Debt secured by the Mortgage or to require that all collateral shall continue to secure all of the Debt owing to Lender in accordance with the Loan Documents. Furthermore, and notwithstanding the provisions of Section 10.7(a) above, the Debt shall be fully recourse to Borrower (but not to any partner, member, manager or stockholder of Borrower, other than any party to the Guaranty from time to time), and Borrower (but not any partner, member, manager or stockholder of Borrower, other than any party to the Guaranty from time to time) shall be and remain fully and personally liable to Lender for the full amount of the Debt, in the event of any of the following:

(i) a Bankruptcy Recourse Event occurs; or

(ii) the Transfer Provisions are breached; or

(iii) any breach of the SPE Provisions, but only to the extent that such breach is cited as a factor in a judicial decision resulting in the substantive consolidation of Borrower with any other Person; or

(iv) if Guarantor, Borrower or any Affiliate of any of the foregoing, in connection with any enforcement action or exercise or assertion of any right or remedy by or on behalf of Lender under or in connection with the Note, the Mortgage or any other Loan Document, seeks a defense (other than defenses raised in good faith), judicial intervention or injunctive or other equitable relief of any kind or asserts in a pleading filed in connection with a judicial proceeding any defense against Lender or any right in connection with any security for the Loan; or

(v) any material breach of the Cash Management Provisions resulting in the failure to (A) open the Lockbox Account, (B) deliver the Lockbox Agreement, (C) open the Cash Management Account, (D) deliver the Cash Management Agreement or (E) deposit Rents into the Lockbox Account.

(c) Notwithstanding anything to the contrary in the Note, this Loan Agreement or any of the other Loan Documents, and in addition to the other provisions set forth in this Section 10.7, upon a failure of Borrower to make a Trigger Period True Up Deposit, Borrower shall be and remain fully and personally liable to Lender for the payment of the amount of the Trigger Period True Up Deposit.

(d) Notwithstanding anything to the contrary in the Note, this Loan Agreement or any of the other Loan Documents, and in addition to the other provisions set forth in this Section 10.7, Borrower shall be personally liable for the Debt, not to exceed and in an

amount equal to the amount of any Rents that are not deposited with Lender (or into the Lockbox Account) in violation of the Loan Documents.

Section 10.8 Servicer. At the option of Lender, the Loan may be serviced by a servicer/trustee (the “**Servicer**”) selected by Lender and Lender may delegate all or any portion of its responsibilities under this Agreement and the other Loan Documents to the Servicer pursuant to a servicing agreement (the “**Servicing Agreement**”) between Lender and Servicer. Borrower shall be responsible for any reasonable set-up fees or any other initial costs relating to or arising under the Servicing Agreement; provided, however, that Borrower shall not be responsible for payment of the monthly servicing fee due to the Servicer under the Servicing Agreement.

XI. MISCELLANEOUS.

Section 11.1 Survival. This Agreement and all covenants, agreements, representations and warranties made herein and in the certificates delivered pursuant hereto shall survive the making by Lender of the Loan and the execution and delivery to Lender of the Note, and shall continue in full force and effect so long as all or any of the Debt is outstanding and unpaid unless a longer period is expressly set forth herein or in the other Loan Documents. Whenever in this Agreement any of the parties hereto is referred to, such reference shall be deemed to include the legal representatives, successors and assigns of such party. All covenants, promises and agreements in this Agreement, by or on behalf of Borrower, shall inure to the benefit of the legal representatives, successors and assigns of Lender.

Section 11.2 Lender’s Discretion; Approval. Except as otherwise provided herein, whenever pursuant to this Agreement or any other Loan Document, Lender exercises any right given to it to consent, approve or disapprove, or any arrangement, term or condition is to be approved by, or acceptable or satisfactory to, Lender, or subject to Lender’s discretion, the decision of Lender to approve or disapprove or to decide whether arrangements, terms or conditions are approved, acceptable or satisfactory, as applicable, shall (except as is otherwise specifically provided) be in the sole and absolute discretion of Lender and shall be final and conclusive. Notwithstanding anything to the contrary contained in this Agreement or any other Loan Document, except as otherwise provided herein, in the context of Lender’s “discretion”, “discretion” means Lender’s “sole and absolute” discretion. Whenever pursuant to this Agreement or any other Loan Document, Lender’s consent, approval, waiver or other action or response is required, except as expressly provided in this Agreement or other applicable Loan Document, such consent, approval, waiver or other action or response will not be binding upon Lender unless it is in writing.

Section 11.3 Governing Law; Jurisdiction.

(A) THIS AGREEMENT WAS NEGOTIATED IN THE STATE OF NEW YORK, AND DELIVERED TO LENDER BY BORROWER IN THE STATE OF NEW YORK, AND THE PROCEEDS OF THE NOTE DELIVERED PURSUANT HERETO WERE DISBURSED FROM THE STATE OF NEW YORK, WHICH STATE THE PARTIES AGREE HAS A SUBSTANTIAL RELATIONSHIP TO THE PARTIES AND TO THE UNDERLYING TRANSACTION EMBODIED HEREBY, AND IN ALL RESPECTS,

INCLUDING, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE, THIS AGREEMENT AND THE OBLIGATIONS ARISING HEREUNDER SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO CONTRACTS MADE AND PERFORMED IN SUCH STATE (WITHOUT REGARD TO PRINCIPLES OF CONFLICT OF LAWS) AND ANY APPLICABLE LAW OF THE UNITED STATES OF AMERICA, EXCEPT THAT AT ALL TIMES THE PROVISIONS FOR THE CREATION, PERFECTION AND ENFORCEMENT OF THE LIEN AND SECURITY INTEREST CREATED PURSUANT TO THE LOAN DOCUMENTS SHALL BE GOVERNED BY AND CONSTRUED ACCORDING TO THE LAW OF THE STATE, COMMONWEALTH OR DISTRICT, AS APPLICABLE, IN WHICH THE PROPERTY IS LOCATED, IT BEING UNDERSTOOD THAT, TO THE FULLEST EXTENT PERMITTED BY THE LAW OF SUCH STATE, COMMONWEALTH OR DISTRICT, AS APPLICABLE, THE LAW OF THE STATE OF NEW YORK SHALL GOVERN THE CONSTRUCTION, VALIDITY AND ENFORCEABILITY OF ALL LOAN DOCUMENTS AND ALL OF THE OBLIGATIONS ARISING HEREUNDER OR THEREUNDER. TO THE FULLEST EXTENT PERMITTED BY LAW, BORROWER HEREBY UNCONDITIONALLY AND IRREVOCABLY WAIVES ANY CLAIM TO ASSERT THAT THE LAW OF ANY OTHER JURISDICTION GOVERNS THIS AGREEMENT AND THE NOTE, AND THIS AGREEMENT AND THE NOTE SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK PURSUANT TO SECTION 5-1401 OF THE NEW YORK GENERAL OBLIGATIONS LAW.

(B) ANY LEGAL SUIT, ACTION OR PROCEEDING AGAINST LENDER OR BORROWER ARISING OUT OF OR RELATING TO THIS AGREEMENT MAY AT LENDER'S OPTION BE INSTITUTED IN ANY FEDERAL OR STATE COURT IN THE CITY OF NEW YORK, COUNTY OF NEW YORK, PURSUANT TO SECTION 5-1402 OF THE NEW YORK GENERAL OBLIGATIONS LAW AND BORROWER WAIVES ANY OBJECTIONS WHICH IT MAY NOW OR HEREAFTER HAVE BASED ON VENUE AND/OR FORUM NON CONVENIENS OF ANY SUCH SUIT, ACTION OR PROCEEDING, AND BORROWER HEREBY IRREVOCABLY SUBMITS TO THE EXCLUSIVE JURISDICTION OF ANY SUCH COURT IN ANY SUIT, ACTION OR PROCEEDING. BORROWER DOES HEREBY DESIGNATE AND APPOINT:

UNITED CORPORATE SERVICES, INC.
10 BANK STREET, SUITE 560
WHITE PLAINS, NEW YORK 10606

AS ITS AUTHORIZED AGENT TO ACCEPT AND ACKNOWLEDGE ON ITS BEHALF SERVICE OF ANY AND ALL PROCESS WHICH MAY BE SERVED IN ANY SUCH SUIT, ACTION OR PROCEEDING IN ANY FEDERAL OR STATE COURT IN NEW

New York, New York 10019
Attention: Matthew Philip

And to: Oceanview Life and Annuity Company
c/o Oceanview Asset Management
142 West 57th Street, 3rd Floor
New York, New York 10019
Attention: Marnie Adams

And to: Cadwalader, Wickersham & Taft LLP
650 South Tryon Street
Charlotte, North Carolina 28202
Attention: Christopher J. Dickson

If to Borrower: c/o Charles Street Development Company
1331 17th Street, Suite M-100
Denver, Colorado 80202
Attention: Jason Pollack

and to: ACRES Capital
390 RXR Plaza
Uniondale, NY 11556
Attention: Jaclyn Jesberger, Esq.

With a copy to: Greenberg Traurig LLP
One International Place
Boston, MA02110
Attention: Dina Conlin, Esq.

With a copy to: Murland Dainoff LLC
651 E. Township Line Road, #1055
Blue Bell, PA 19422
Attention: A. Eric Levine, Esq.

A notice shall be deemed to have been given: in the case of hand delivery, at the time of delivery or refusal of delivery; in the case of certified mail, when delivered or the first attempted delivery on a Business Day; or in the case of expedited prepaid delivery, upon the first attempted delivery on a Business Day.

Section 11.7 Trial by Jury. BORROWER AND LENDER HEREBY AGREE NOT TO ELECT A TRIAL BY JURY OF ANY ISSUE TRIABLE OF RIGHT BY JURY, AND WAIVE ANY RIGHT TO TRIAL BY JURY FULLY TO THE EXTENT THAT ANY SUCH RIGHT SHALL NOW OR HEREAFTER EXIST WITH REGARD TO THE LOAN DOCUMENTS, OR ANY CLAIM, COUNTERCLAIM OR OTHER ACTION ARISING IN CONNECTION THEREWITH. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS GIVEN KNOWINGLY AND VOLUNTARILY BY EACH OF BORROWER AND LENDER, AND IS INTENDED TO ENCOMPASS INDIVIDUALLY EACH INSTANCE AND EACH ISSUE AS TO WHICH THE RIGHT TO A TRIAL BY JURY WOULD OTHERWISE ACCRUE. EACH OF BORROWER

AND LENDER IS HEREBY AUTHORIZED TO FILE A COPY OF THIS PARAGRAPH IN ANY PROCEEDING AS CONCLUSIVE EVIDENCE OF THIS WAIVER BY THE OTHER PARTY.

Section 11.8 Headings. The Article and/or Section headings and the Table of Contents in this Agreement are included herein for convenience of reference only and shall not constitute a part of this Agreement for any other purpose.

Section 11.9 Severability. Wherever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement shall be prohibited by or invalid under applicable law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

Section 11.10 Preferences. Lender shall have the continuing and exclusive right to apply or reverse and reapply any and all payments by Borrower to any portion of the obligations of Borrower hereunder. To the extent Borrower makes a payment or payments to Lender, which payment or proceeds or any part thereof are subsequently invalidated, declared to be fraudulent or preferential, set aside or required to be repaid to a trustee, receiver or any other party under any bankruptcy law, state or federal law, common law or equitable cause, then, to the extent of such payment or proceeds received, the obligations hereunder or part thereof intended to be satisfied shall be revived and continue in full force and effect, as if such payment or proceeds had not been received by Lender.

Section 11.11 Waiver of Notice. Borrower hereby expressly waives, and shall not be entitled to, any notices of any nature whatsoever from Lender except with respect to matters for which this Agreement or the other Loan Documents specifically and expressly provide for the giving of notice by Lender to Borrower and except with respect to matters for which Borrower is not, pursuant to applicable Legal Requirements, permitted to waive the giving of notice.

Section 11.12 Remedies of Borrower. In the event that a claim or adjudication is made that Lender or its agents have acted unreasonably or unreasonably delayed acting in any case where by law or under this Agreement or the other Loan Documents, Lender or such agent, as the case may be, has an obligation to act reasonably or promptly, Borrower agrees that neither Lender nor its agents shall be liable for any monetary damages, and Borrower's sole remedies shall be limited to commencing an action seeking injunctive relief or declaratory judgment. The parties hereto agree that any action or proceeding to determine whether Lender has acted reasonably shall be determined by an action seeking declaratory judgment.

Section 11.13 Expenses. Borrower covenants and agrees to pay or, if Borrower fails to pay, to reimburse, Lender upon receipt of notice from Lender for all reasonable costs and expenses (including reasonable attorneys' fees and disbursements) incurred by Lender in connection with (i) the preparation, negotiation, execution and delivery of this Agreement and the other Loan Documents and the consummation of the transactions contemplated hereby and thereby and all the costs of furnishing all opinions by counsel for Borrower (including without limitation any opinions requested by Lender as to any legal matters arising under this Agreement or the other Loan Documents with respect to the Property); (ii) Borrower's ongoing performance of and

compliance with Borrower's respective agreements and covenants contained in this Agreement and the other Loan Documents on its part to be performed or complied with after the Closing Date, including, without limitation, confirming compliance (through third party service providers or otherwise) with environmental and insurance requirements; (iii) Lender's ongoing performance and compliance with all agreements and conditions contained in this Agreement and the other Loan Documents on its part to be performed or complied with after the Closing Date; (iv) the negotiation, preparation, execution, delivery and administration of any consents, amendments, waivers or other modifications to this Agreement and the other Loan Documents and any other documents or matters requested by Borrower or Guarantor; (v) securing Borrower's compliance with any requests made pursuant to the provisions of this Agreement; (vi) the filing and recording fees and expenses, title insurance and reasonable fees and expenses of counsel for providing to Lender all required legal opinions, and other similar expenses incurred in creating and perfecting the Liens in favor of Lender pursuant to this Agreement and the other Loan Documents; (vii) enforcing or preserving any rights, either in response to third party claims or in prosecuting or defending any action or proceeding or other litigation, in each case against, under or affecting Borrower, this Agreement, the other Loan Documents, the Property, or any other security given for the Loan; or (viii) enforcing any obligations of, or collecting any payments due from, Borrower under this Agreement, the other Loan Documents or with respect to the Property, whether incurred prior to or during the continuance of an Event of Default. Any cost and expenses due and payable to Lender may be paid from any amounts in the Lockbox Account and/or Cash Management Account. Borrower covenants and agrees to pay for or, if Borrower fails to pay, to reimburse Lender for, any fees and expenses incurred by any Rating Agency in connection with (i) any Rating Agency Confirmation required by the Loan Documents, and/or (ii) other Rating Agency review required in connection with any action requiring the consent or approval of Lender, if such review is required pursuant to the Servicing Agreement following a Securitization of the Loan. Lender shall be entitled to require payment of such fees and expenses as a condition precedent to the obtaining of any such consent, approval, waiver or confirmation.

Section 11.14 Schedules and Exhibits Incorporated; Counterparts. The Schedules and Exhibits annexed hereto are hereby incorporated herein as a part of this Agreement with the same effect as if set forth in the body hereof. This Agreement may be executed in one or more counterparts, all of which taken together shall (upon execution and delivery by each party) constitute a single instrument. This Agreement will become effective only when all parties to this Agreement have executed a counterpart hereof. A photocopied, scanned, telecopied, or other electronic signature of any party to this Agreement shall have the same force and effect as an original signature for all purposes.

Section 11.15 Offsets, Counterclaims and Defenses. Any assignee of Lender's interest in and to this Agreement, the Note and the other Loan Documents shall take the same free and clear of all offsets, counterclaims or defenses which are unrelated to such documents which Borrower may otherwise have against any assignor of such documents, and no such unrelated counterclaim or defense shall be interposed or asserted by Borrower in any action or proceeding brought by any such assignee upon such documents and any such right to interpose or assert any such unrelated offset, counterclaim or defense in any such action or proceeding is hereby expressly waived by Borrower. Upon assignment of the Loan and Loan Documents by Lender and delivery (or crediting) of any funds in the Account to the assignee, any responsibility of Lender, as assignor, with respect thereto shall terminate.

Section 11.16 No Joint Venture or Partnership; No Third Party Beneficiaries.

(a) Borrower and Lender intend that the relationships created hereunder and under the other Loan Documents be solely that of borrower and lender. Nothing herein or therein is intended to create a joint venture, partnership, tenancy-in-common, or joint tenancy relationship between Borrower and Lender nor to grant Lender any interest in the Property other than that of mortgagee, beneficiary or lender.

(b) This Agreement and the other Loan Documents are solely for the benefit of Lender (and, as set forth herein, certain Affiliates, employees and agents of the party originally named as Lender herein) and Borrower and nothing contained in this Agreement or the other Loan Documents shall be deemed to confer upon anyone other than Lender and Borrower any right to insist upon or to enforce the performance or observance of any of the obligations contained herein or therein. All conditions to the obligations of Lender to make the Loan hereunder are imposed solely and exclusively for the benefit of Lender and no other Person shall have standing to require satisfaction of such conditions in accordance with their terms or be entitled to assume that Lender will refuse to make the Loan in the absence of strict compliance with any or all thereof and no other Person shall under any circumstances be deemed to be a beneficiary of such conditions, any or all of which may be freely waived in whole or in part by Lender if, in Lender's sole discretion, Lender deems it advisable or desirable to do so.

Section 11.17 Publicity. All news releases, publicity or advertising by Borrower or their Affiliates through any media intended to reach the general public which refers to the Loan Documents or the financing evidenced by the Loan Documents, to Lender or any Affiliate shall be subject to the prior approval of Lender.

Section 11.18 Waiver of Marshalling of Assets. To the fullest extent permitted by law, Borrower, for itself and its successors and assigns, waives all rights to a marshalling of the assets of Borrower, Borrower's partners and others with interests in Borrower, and of the Property, or to a sale in inverse order of alienation in the event of foreclosure of the Mortgage, and agrees not to assert any right under any laws pertaining to the marshalling of assets, the sale in inverse order of alienation, homestead exemption, the administration of estates of decedents, or any other matters whatsoever to defeat, reduce or affect the right of Lender under the Loan Documents to a sale of the Property for the collection of the Debt without any prior or different resort for collection or of the right of Lender to the payment of the Debt out of the net proceeds of the Property in preference to every other claimant whatsoever.

Section 11.19 Waiver of Counterclaim. Borrower hereby waives the right to assert a counterclaim, other than a compulsory counterclaim, in any action or proceeding brought against it by Lender or its agents.

Section 11.20 Conflict; Construction of Documents; Reliance. In the event of any conflict between the provisions of this Agreement and any of the other Loan Documents, the provisions of this Agreement shall control. The parties hereto acknowledge that they were represented by competent counsel in connection with the negotiation, drafting and execution of the Loan Documents and that such Loan Documents shall not be subject to the principle of

construing their meaning against the party which drafted same. Borrower acknowledges that, with respect to the Loan, Borrower shall rely solely on its own judgment and advisors in entering into the Loan without relying in any manner on any statements, representations or recommendations of Lender or any parent, subsidiary or Affiliate of Lender. Lender shall not be subject to any limitation whatsoever in the exercise of any rights or remedies available to it under any of the Loan Documents or any other agreements or instruments which govern the Loan by virtue of the ownership by it or any parent, subsidiary or Affiliate of Lender of any equity interest any of them may acquire in Borrower, and Borrower hereby irrevocably waives the right to raise any defense or take any action on the basis of the foregoing with respect to Lender's exercise of any such rights or remedies. Borrower acknowledges that Lender engages in the business of real estate financings and other real estate transactions and investments which may be viewed as adverse to or competitive with the business of Borrower or its Affiliates.

Section 11.21 Brokers and Financial Advisors. Borrower hereby represents that it has dealt with no financial advisors, brokers, underwriters, placement agents, agents or finders in connection with the transactions contemplated by this Agreement, except for a broker whose commission is being paid in full as set forth on the Closing Statement. Borrower hereby agrees to indemnify, defend and hold Lender harmless from and against any and all claims, liabilities, costs and expenses of any kind (including Lender's reasonable attorneys' fees and expenses) in any way relating to or arising from a claim by any Person that such Person acted on behalf of Borrower or Lender in connection with the transactions contemplated herein. Lender may pay additional compensation, fees, commissions or other payments to any broker relating to the origination, sale and/or securitization of the Loan, in addition to any other compensation, fees, commissions or other payments which may be paid by Borrower or any other party directly to any broker. Borrower hereby acknowledges and agrees that (i) the payment of any such compensation, fees, commissions or other payments are in addition to any other compensation, fees, commissions or other payments which may be paid by Borrower or any other party directly to any broker, (ii) the payment of any such compensation, fees, commissions or other payments may create a potential conflict of interest for any broker in its relationship with Borrower, and Lender is not responsible for any recommendation, services or advice given to Borrower by any broker, and (iii) no fiduciary or other special relationship exists or will exist between Borrower and Lender other than as lender and borrower. Borrower (A) acknowledges that (1) such compensation, fees, commissions or other payments may include a direct, one-time payment of an origination or similar fee, certain payments based on volume and/or size of referrals, profit-sharing payments and/or an ongoing financial interest in the Loan (including by acting as sub-servicer for the Loan) and (2) Borrower has had an opportunity to discuss the specifics of any compensation, fees, commissions or other payments with any broker to the extent Borrower deemed necessary and Borrower has independently determined to proceed with the Loan and (B) consents to any such arrangement and the payment by Lender to any broker of any such compensation, fees, commissions or other payments. The provisions of this Section 11.21 shall survive the expiration and termination of this Agreement and the payment of the Debt.

Section 11.22 Prior Agreements. This Agreement and the other Loan Documents embody the final and entire agreement of Borrower and Lender with respect to the Loan, and supersede any and all prior commitments, agreements, representations and understandings, whether written or oral, relating to the subject matter hereof and thereof, including any loan application, term sheet or commitment letter between Borrower (or any Affiliate) and Lender. This

Agreement and the other Loan Documents are intended by Borrower and Lender as the final and complete expression of the terms of the Loan and the security therefor, and no course of dealing between Borrower (or any other party) and Lender, no course of performance, no trade practices, and no evidence of prior, contemporaneous or subsequent oral agreements or discussions or other extrinsic evidence of any nature shall be used to contradict, vary, supplement or modify any term of this Agreement or any other Loan Document. There are no oral agreements between Borrower and Lender.

Section 11.23 Certain Additional Rights of Lender (VCOC). Notwithstanding anything to the contrary contained in this Agreement, Lender shall have:

- (a) the right to routinely consult with and advise Borrower's management regarding the significant business activities and business and financial developments of Borrower; provided, however, that such consultations shall not include discussions of environmental compliance programs or disposal of Hazardous Substances or other matters related to Environmental Laws. Consultation meetings should occur on a regular basis (no less frequently than quarterly) with Lender having the right to call special meetings at any reasonable times and upon reasonable advance notice;
- (b) the right, in accordance with the terms of this Agreement, to examine the books and records of Borrower at any reasonable times upon reasonable notice;
- (c) the right, in accordance with the terms of this Agreement, including, without limitation, Section 4.1.11 hereof, to receive monthly, quarterly and year-end financial reports, including balance sheets, statements of income, shareholder's equity and cash flow, a management report and schedules of outstanding indebtedness; and
- (d) the right, without restricting any other rights of Lender under this Agreement (including any similar right), to approve any acquisition by Borrower of any other significant property (other than personal property required for the day to day operation of the Property).
- (e) the rights described above in this Section 11.23 may be exercised by any entity which owns and Controls, directly or indirectly, substantially all of the interests in Lender.

[No Further Text on This Page; Signature Pages Follow]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed by their duly authorized representatives, all as of the day and year first above written.

BORROWER:

Chapel Drive East, LLC a Delaware limited liability company

By: /s/ Jason Pollack
Name: Jason Pollack
Title: Authorized Signatory

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed by their duly authorized representatives, all as of the day and year first above written.

LENDER:

**OCEANVIEW LIFE AND ANNUITY
COMPANY**, an Alabama corporation

By: /s/ Marnie Adams
Name: Marnie Adams
Title: Authorized Signatory

EXHIBIT A

FORM OF TENANT DIRECTION NOTICE

[DATE]

[TENANT]
[Address]
[_____]

Re: Payment Direction Letter for [_____] (the “**Property**”)

Ladies and Gentlemen:

[_____] , a [_____], the owner of the Property (“**Owner**”), has granted a first mortgage on the Property to [_____] (together with its successors and assigns, “**Lender**”) and has agreed that all rents due for the Property will be paid directly to a bank selected by Owner and approved by Lender. Therefore, all rent to be paid by you under the Lease between Owner and you (the “**Lease**”) from and after [_____ -- FOR CLOSING INSERT FIRST RENT PAYMENT DATE AFTER LOCKBOX WILL BE READY; FOR FUTURE LEASES, “the date hereof”] (and all payments of any past-due rents after that date) should be sent directly to the following account or address:

Via ACH/Wire:

{INSERT INSTRUCTIONS PROVIDED BY LOCKBOX BANK}

Via U.S. Mail:

{INSERT INSTRUCTIONS PROVIDED BY LOCKBOX BANK}

Via Overnight Delivery:

{INSERT INSTRUCTIONS PROVIDED BY LOCKBOX BANK}

These payment instructions cannot be withdrawn or modified without the prior written consent of Lender or its loan servicing agent (“**Servicer**”), or pursuant to a joint written instruction from Owner and Lender or Servicer. Until you receive written instructions from Lender or Servicer, continue to send all rent payments due under the Lease as set forth above. All rent payments must be delivered as set forth above no later than the day on which such amounts are due under the Lease.

If you have any questions concerning this letter, please contact Linda Conwell of Community Loan Servicing, Lender's servicer, by emailing LindaConwell@communityloanservicing.com. Please be sure to include the loan number ([____]) on all correspondence.

Sincerely yours,

[BORROWER SIGNATURE BLOCK]

SCHEDULE I

(Rent Roll)

SCHEDULE II

Intentionally Omitted

SCHEDULE III
(Organizational Chart)

SCHEDULE IV

(Construction Schedule)

SCHEDULE 2.8

(Notional Schedule for Rate Cap)

Schedule 2.10

Project Budget

**List of Subsidiaries of
ACRES Commercial Realty Corp.**

| <u>Subsidiaries</u> | <u>State of Incorporation</u> |
|---|--------------------------------------|
| 2501-2901 Renaissance JV, LLC | Delaware |
| 2901 Renaissance Holdings 1 LLC | Delaware |
| 2901 Renaissance Holdings 2 LLC | Delaware |
| 2901 Renaissance, LLC | Delaware |
| 209 West Jackson Holdings, LLC | Delaware |
| ACRES 2100 Holdings, LLC | Delaware |
| ACRES Commercial Realty 2021-FL1 Holder, LLC | Delaware |
| ACRES Commercial Realty 2021-FL1 Issuer, Ltd. | Cayman Islands |
| ACRES Commercial Realty 2021-FL1 Co-Issuer, LLC | Delaware |
| ACRES Commercial Realty 2021-FL2 Holder, LLC | Delaware |
| ACRES Commercial Realty 2021-FL2 Issuer, Ltd. | Cayman Islands |
| ACRES Commercial Realty 2021-FL2 Co-Issuer, LLC | Delaware |
| ACRES FSU, LLC | Delaware |
| ACRES Real Estate TRS 9 LLC | Delaware |
| ACRES Real Estate SPE 10, LLC | Delaware |
| ACRES Realty Funding, Inc. (F/K/A RCC Real Estate, Inc.) | Delaware |
| ACRES Renaissance Holdings, LLC | Delaware |
| Apidos CDO I, Ltd. (“TRS”) | Cayman Islands |
| Apidos CDO III, Ltd. (“TRS”) | Cayman Islands |
| Apidos Cinco CDO, Ltd (“TRS”) | Cayman Islands |
| Appleton Hotel Holdings, LLC | Delaware |
| Appleton Hotel Leasing, LLC (“TRS”) | Delaware |
| Exantas Phili Holdings, LLC (F/K/A Exantas HGI Holdings, LLC) | Delaware |
| Exantas Real Estate TRS, Inc. | Delaware |
| Innovation 2100 LLC | Delaware |
| Innovation 2100 Senior LLC | Delaware |
| Life Care Funding, LLC | New York |
| Plymouth Meeting Holdings, LLC | Delaware |
| Primary Capital Mortgage, LLC (F/K/A Primary Capital Advisors, LLC) | Georgia |
| RCC Commercial, Inc. | Delaware |
| RCC Commercial II, Inc. | Delaware |
| RCC Commercial III, Inc. | Delaware |
| RCC Prospect Holdings, LLC | Delaware |
| RCC Real Estate Acquisitions SPE, LLC | Delaware |
| RCC Real Estate SPE 7, LLC | Delaware |
| RCC Real Estate SPE 8, LLC | Delaware |
| RCC Real Estate SPE Holdings LLC | Delaware |
| RCC Real Estate SPE 9 LLC | Delaware |
| RCC TRS, LLC | Delaware |
| RCC Trust II | Delaware |
| Resource Capital Trust I | Delaware |
| Resource TRS III, LLC | Delaware |
| Resource TRS LLC | Delaware |
| RSO EquityCo, LLC | Delaware |
| Stonelake Holdings, LLC | Delaware |

CONSENT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM

We have issued our reports dated March 7, 2023, with respect to the consolidated financial statements and internal control over financial reporting included in the Annual Report of ACRES Commercial Realty Corp. on Form 10-K for the year ended December 31, 2022. We consent to the incorporation by reference of said reports in the Registration Statements of ACRES Commercial Realty Corp. on Form S-3 (File No. 333-254315, effective April 20, 2021, and File No. 333-255523, effective May 12, 2021) and Form S-8 (File No. 333-151622, effective June 12, 2008, File No. 333-176448, effective August 24, 2011, File No. 333-200133, effective November 12, 2014, File No. 333-232371, effective June 26, 2019 and File No. 333-257901, effective July 14, 2021).

/s/ GRANT THORNTON LLP

San Francisco, California

March 7, 2023

CERTIFICATION

I, Mark Fogel, certify that:

1. I have reviewed this annual report on Form 10-K for the year ended December 31, 2022 of ACRES Commercial Realty Corp.;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
 - a. Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
 - b. Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
 - c. Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
 - d. Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
 - a. All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
 - b. Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

March 7, 2023

/s/ Mark Fogel

Mark Fogel

Chief Executive Officer & President

CERTIFICATION

I, David J. Bryant, certify that:

1. I have reviewed this annual report on Form 10-K for the year ended December 31, 2022 of ACRES Commercial Realty Corp.;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
 - a. Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
 - b. Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
 - c. Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
 - d. Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
 - a. All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
 - b. Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

March 7, 2023

/s/ David J. Bryant

David J. Bryant

Chief Financial Officer and Treasurer

**CERTIFICATION PURSUANT TO
18 U.S.C. SECTION 1350,
AS ADOPTED PURSUANT TO
SECTION 906 OF THE SARBANES-OXLEY ACT OF 2002**

In connection with the Annual Report on Form 10-K of ACRES Commercial Realty Corp. (the “Company”) for the year ended December 31, 2022 as filed with the Securities and Exchange Commission on the date hereof (the “Report”), I, Mark Fogel, Chief Executive Officer of the Company, certify, pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that, to the best of my knowledge:

- (1) The Report fully complies with the requirements of section 13(a) or 15(d) of the Securities Exchange Act of 1934, and
- (2) The information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company.

March 7, 2023

/s/ Mark Fogel

Mark Fogel

Chief Executive Officer and President

This certification is being furnished and shall not be deemed filed by the Company for purposes of Section 18 of the Securities Exchange Act of 1934, as amended.

A signed original of this certification required by Section 906 has been provided to the Company and will be retained by the Company and furnished to the Securities and Exchange Commission or its staff upon request.

**CERTIFICATION PURSUANT TO
18 U.S.C. SECTION 1350,
AS ADOPTED PURSUANT TO
SECTION 906 OF THE SARBANES-OXLEY ACT OF 2002**

In connection with the Annual Report on Form 10-K of ACRES Commercial Realty Corp. (the “Company”) for the year ended December 31, 2022 as filed with the Securities and Exchange Commission on the date hereof (the “Report”), I, David J. Bryant, Chief Financial Officer of the Company, certify, pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that, to the best of my knowledge:

- (1) The Report fully complies with the requirements of section 13(a) or 15(d) of the Securities Exchange Act of 1934, and
- (2) The information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company.

March 7, 2023

/s/ David J. Bryant

David J. Bryant

Chief Financial Officer and Treasurer

This certification is being furnished and shall not be deemed filed by the Company for purposes of Section 18 of the Securities Exchange Act of 1934, as amended.

A signed original of this certification required by Section 906 has been provided to the Company and will be retained by the Company and furnished to the Securities and Exchange Commission or its staff upon request.

MATERIAL FEDERAL INCOME TAX CONSIDERATIONS

The following is a summary of the material federal income tax considerations relating to ACRES Commercial Realty Corp.'s qualification and taxation as a real estate investment trust, or REIT, and the acquisition, holding, and disposition of ACRES Commercial Realty Corp.'s capital stock. For purposes of this Exhibit, references to "we," "us," "our" and "company" refer to "ACRES Commercial Realty Corp." only and not its subsidiaries or other lower-tier entities, except as otherwise indicated.

This summary is based upon the Internal Revenue Code of 1986, as amended, or the Internal Revenue Code, the Treasury regulations, current administrative interpretations and practices of the Internal Revenue Service, or the IRS, (including administrative interpretations and practices expressed in private letter rulings that are binding on the IRS only with respect to the particular taxpayers who requested and received those rulings) and judicial decisions, all as currently in effect and all of which are subject to differing interpretations or to change, possibly with retroactive effect. No assurance can be given that the IRS would not assert, or that a court would not sustain, a position contrary to any of the tax consequences described below. No advance ruling has been or will be sought from the IRS regarding any matter discussed in this summary. The summary is also based upon the assumption that the operation of the company, and of its subsidiaries and other lower-tier and affiliated entities, will, in each case, be in accordance with its applicable organizational documents. This summary is for general information only, and does not purport to discuss all aspects of federal income taxation that may be important to a particular stockholder in light of its investment or tax circumstances or to stockholders subject to special tax rules, such as:

- U.S. expatriates;
- persons who mark-to-market shares of our capital stock;
- subchapter S corporations;
- U.S. stockholders (as defined below) whose functional currency is not the U.S. dollar;
- financial institutions;
- insurance companies;
- broker-dealers;
- regulated investment companies;
- trusts and estates;
- holders who receive shares of our capital stock through the exercise of employee shares options or otherwise as compensation;
- persons holding shares of our capital stock as part of a "straddle," "hedge," "conversion transaction," "synthetic security" or other integrated investment;
- persons subject to the alternative minimum tax provisions of the Internal Revenue Code;
- persons holding shares of our capital stock through a partnership or similar pass-through entity;
- persons holding a 10% or more (by vote or value) beneficial interest in the company; and, except to the extent discussed below:
- tax-exempt organizations; and
- non-U.S. stockholders (as defined below).

This summary assumes that stockholders will hold our shares of capital stock as capital assets, which generally means as property held for investment.

THE FEDERAL INCOME TAX TREATMENT OF HOLDERS OF SHARES OF OUR CAPITAL STOCK DEPENDS IN SOME INSTANCES ON DETERMINATIONS OF FACT AND INTERPRETATIONS OF COMPLEX PROVISIONS OF FEDERAL INCOME TAX LAW FOR WHICH NO CLEAR PRECEDENT OR AUTHORITY MAY BE AVAILABLE. IN ADDITION, THE TAX CONSEQUENCES OF HOLDING SHARES OF OUR CAPITAL STOCK FOR ANY PARTICULAR STOCKHOLDER WILL DEPEND ON THE STOCKHOLDER'S PARTICULAR TAX CIRCUMSTANCES. YOU ARE URGED TO CONSULT YOUR TAX ADVISOR REGARDING THE FEDERAL, STATE, LOCAL, AND FOREIGN INCOME AND OTHER TAX CONSEQUENCES TO YOU, IN LIGHT OF YOUR PARTICULAR INVESTMENT OR TAX CIRCUMSTANCES, OF ACQUIRING, HOLDING, AND DISPOSING OF SHARES OF OUR CAPITAL STOCK.

Taxation of Our Company

We elected to be taxed as a REIT under the federal income tax laws effective for our initial taxable year ended on December 31, 2005. We believe that, commencing with such taxable year, we have been organized and operated in such a manner so as to qualify for taxation as a REIT under the federal income tax laws, and we intend to continue to operate in such a manner, but no assurances can be given that we have qualified or will continue to operate in a manner so as to qualify or remain qualified as a REIT. This section discusses the laws governing the federal income tax treatment of a REIT and its stockholders. These laws are highly technical and complex.

We believe that we have been organized and operated in a manner that will allow us to qualify for taxation as a REIT under the Internal Revenue Code, and we intend to continue to be organized and operated in such a manner. Qualification and taxation as a REIT depends on our ability to meet, on a continuing basis, through actual operating results, distribution levels, diversity of stock ownership, and various qualification requirements imposed upon REITs by the Internal Revenue Code and the Treasury regulations issued thereunder, including requirements relating to the nature and composition of our assets and income. Our ability to comply with the REIT asset requirements also depends, in part, upon the fair market values of assets that we own directly or indirectly. Such values may not be susceptible to a precise determination. For a discussion of the federal income tax consequences of our failure to qualify as a REIT, see “-Failure to Qualify.”

If we qualify as a REIT, we generally will not be subject to federal income tax on our net taxable income that we distribute currently to our stockholders, but taxable income generated by all of our domestic “taxable REIT subsidiaries,” or TRSs, will be subject to regular corporate income tax. However, our stockholders will generally be taxed on dividends that they receive at ordinary income rates unless such dividends are designated by us as capital gain dividends, return of capital or qualified dividend income. This differs from non-REIT C corporations, which generally are subject to federal corporate income taxes but whose individual and certain non-corporate trust and estate stockholders are generally taxed on dividends they receive at a rate of 20% (in the case of taxpayers whose taxable income exceeds certain thresholds depending on filing status) on qualified dividend income, and whose corporate stockholders generally receive the benefits of a dividends received deduction that substantially reduces the effective rate that they pay on such dividends. In general, income earned by a REIT and distributed to its stockholders will be subject to less federal income taxation than if such income were earned by a non-REIT C corporation, subjected to corporate income tax, and then distributed and taxed to stockholders.

While we generally are not subject to corporate income taxes on income that we distribute currently to our stockholders, we will be subject to federal tax in the following circumstances:

- We will pay federal income tax on taxable income, including net capital gain, that we do not distribute to our stockholders during, or within a specified time period after, the calendar year in which the income is earned.
- We may be subject to the “alternative minimum tax” on any items of tax preference that we do not distribute or allocate to our stockholders.
- We will pay income tax at the highest corporate rate on:
 - net income from the sale or other disposition of property acquired through foreclosure, or foreclosure property, that we hold primarily for sale to customers in the ordinary course of business, and
 - other non-qualifying income from foreclosure property.
- We will pay a 100% tax on net income earned on sales or other dispositions of property, other than foreclosure property, that we hold primarily for sale to customers in the ordinary course of business.
- If we fail to satisfy the 75% gross income test or the 95% gross income test due to reasonable cause and not willful neglect, as described below under “-Requirements for Qualification-Gross Income Tests,” and nonetheless continue to qualify as a REIT, we will pay a 100% tax on the amount by which we fail the 75% gross income test or the 95% gross income test, multiplied, in either case, by a fraction intended to reflect our profitability.

- In the event of a failure of any of the asset tests (other than certain de minimis failures of the 5% and 10% asset tests), as described below under “-Requirements for Qualification-Asset Tests,” as long as the failure was due to reasonable cause and not to willful neglect and we dispose of the assets or otherwise comply with such asset tests within six months after the last day of the quarter, we will pay a tax equal to the greater of (i) \$50,000 or (ii) an amount determined by multiplying the highest federal income tax rate applicable to corporations by the net income from the nonqualifying assets during the period in which we failed to satisfy such asset tests.
- If we fail to satisfy one or more requirements for REIT qualification, other than the gross income tests and the asset tests, and the violation is due to reasonable cause, we may retain our qualification as a REIT but will be required to pay a penalty of \$50,000 for each such failure.
- If we fail to distribute during a calendar year at least the sum of:
 - 85% of our REIT ordinary income for the year,
 - 95% of our REIT capital gain net income for the year, and
 - any undistributed taxable income from earlier periods, we will pay a 4% nondeductible excise tax on the excess of the required distribution over the amount we actually distributed, plus any retained amounts on which income tax has been paid at the corporate level.
- We may elect to retain and pay income tax on our net capital gain. In that case, a U.S. stockholder (as defined below) would be deemed to have paid tax on its proportionate share of our undistributed capital gain and include such proportionate share in income as long-term capital gains (to the extent that we make a timely designation of such gain to the stockholder) and would receive a credit for its proportionate share of the tax we paid or receive a refund to the extent the tax paid by us exceeds the U.S. stockholder’s tax liability on the undistributed capital gains.
- We will be subject to a 100% excise tax on transactions between us and a TRS that are not conducted on an arm’s-length basis.
- If we acquire any asset from a C corporation, or a corporation that generally is subject to full corporate-level tax, in a merger or other transaction in which we acquire a basis in the asset that is determined by reference either to the C corporation’s basis in the asset or to another asset, we will pay tax at the highest regular corporate rate applicable if we recognize gain on the sale or disposition of the asset during the 10-year period after we acquire the asset. The amount of gain on which we will pay tax is the lesser of:
 - the amount of gain that we recognize at the time of the sale or disposition, and
 - the amount of gain that we would have recognized if we had sold the asset at the time we acquired it, assuming that the C corporation will not elect in lieu of this treatment to an immediate tax when the asset is acquired.
- If we own a residual interest in a real estate mortgage investment conduit, or REMIC, we will be taxable at the highest corporate rate on the portion of any excess inclusion income that we derive from the REMIC residual interests allocable to stockholders that are “disqualified organizations.” Similar rules will also apply if we own an equity interest in a taxable mortgage pool. To the extent that we own a REMIC residual interest or a taxable mortgage pool through a TRS, we will not be subject to this tax. For a discussion of “excess inclusion income,” see “-Requirements for Qualification-Taxable Mortgage Pools.” A “disqualified organization” includes:
 - Not more than 50% in value of its outstanding shares or ownership certificates is owned, directly or indirectly, by five or fewer individuals, which the federal income tax laws define to include certain entities, during the last half of any taxable year.
 - It elects to be a REIT, or has made such an election for a previous taxable year, which has not been revoked or terminated, and satisfies all filing and other administrative requirements established by the IRS that must be met to elect and maintain REIT status.
 - It meets certain other qualification tests, described below, regarding the nature of its income and assets.
 - the United States;
 - any state or political subdivision of the United States;
 - any foreign government;
 - any international organization;

- any agency or instrumentality of any of the foregoing;
- any other tax-exempt organization, other than a farmer’s cooperative described in section 521 of the Internal Revenue Code, that is exempt both from income taxation and from taxation under the unrelated business taxable income provisions of the Internal Revenue Code; and
- any rural electrical or telephone cooperative.

We do not currently hold, or intend to hold, REMIC residual interests nor do we currently own residual interests in taxable mortgage pools.

In addition, notwithstanding our qualification as a REIT, we may also have to pay certain state and local income taxes, because not all states and localities treat REITs in the same manner that they are treated for federal income tax purposes. Moreover, as further described below, any domestic TRS in which we own an interest, will be subject to federal corporate income tax on its taxable income.

Requirements for Qualification

A REIT is a corporation, trust, or association that meets each of the following requirements:

- It is managed by one or more trustees or directors.
- Its beneficial ownership is evidenced by transferable shares, or by transferable certificates of beneficial interest.
- It would be taxable as a domestic corporation, but for the REIT provisions of the federal income tax laws.
- It is neither a financial institution nor an insurance company subject to special provisions of the federal income tax laws.
- At least 100 persons are beneficial owners of its shares or ownership certificates.

We must meet the first four requirements during our entire taxable year and must meet the fifth requirement during at least 335 days of a taxable year of 12 months, or during a proportionate part of a taxable year of less than 12 months. If we comply with regulatory rules pursuant to which we are required to send annual letters to our stockholders requesting information regarding the actual ownership of our stock, and we do not know, or exercising reasonable diligence would not have known, whether we failed to meet the sixth requirement, we will be treated as having met the requirement. For purposes of determining share ownership under the sixth requirement, an “individual” generally includes a supplemental unemployment compensation benefits plan, a private foundation, or a portion of a trust permanently set aside or used exclusively for charitable purposes. An “individual,” however, generally does not include a trust that is a qualified employee pension or profit sharing trust under the federal income tax laws, and beneficiaries of such a trust will be treated as holding our stock in proportion to their actuarial interests in the trust for purposes of the sixth requirement.

We believe that we have issued sufficient common stock with sufficient diversity of ownership to satisfy the fifth and sixth requirements. In addition, our charter restricts the ownership and transfer of our stock so that we should continue to satisfy these requirements. In addition, we must satisfy all relevant filing and other administrative requirements established by the IRS that must be met to elect and maintain our REIT qualification, use a calendar year for federal income tax purposes, and comply with the record keeping requirements of the Internal Revenue Code and regulations promulgated thereunder which we have satisfied or intend to satisfy.

Qualified REIT Subsidiaries. A corporation that is a “qualified REIT subsidiary” is not treated as a corporation separate from its parent REIT. All assets, liabilities, and items of income, deduction and credit of a “qualified REIT subsidiary” are treated as assets, liabilities, and items of income, deduction and credit of the REIT. A “qualified REIT subsidiary” is a corporation, other than a TRS, all of the capital stock of which is owned by the REIT. Thus, in applying the requirements described herein, any “qualified REIT subsidiary” that we own will be ignored, and all assets, liabilities, and items of income, deduction, and credit of such subsidiary will be treated as our assets, liabilities, and items of income, deduction and credit.

Other Disregarded Entities and Partnerships. An unincorporated domestic entity, such as a partnership or limited liability company, that has a single owner, generally is not treated as an entity separate from its parent for federal income tax purposes. An unincorporated domestic entity with two or more owners generally is treated as a partnership for federal income tax purposes. In the case of a REIT that is a partner in a partnership that has other partners, the REIT is treated as owning its proportionate share of the assets of the partnership and as earning its allocable share of the gross income of the partnership for purposes of the applicable REIT qualification tests. For purposes of the 10% value test (described in “-Asset Tests”), our proportionate share is based on our proportionate interest in the equity interests and certain debt securities issued by the partnership. For all of the other asset and income tests, our proportionate share is based on our proportionate interest in the capital interests in the partnership. Our proportionate share of the assets, liabilities and items of income of any partnership, joint venture, or limited liability company that is treated as a partnership for federal income tax purposes in which we acquire an interest, directly or indirectly, will be treated as our assets and gross income for purposes of applying the various REIT qualification requirements.

Taxable REIT Subsidiaries. A REIT is permitted to own up to 100% of the stock of one or more TRS. A TRS is generally a fully taxable corporation that may earn income that would not be qualifying income if earned directly by the parent REIT. The subsidiary and the REIT must jointly elect to treat the subsidiary as a TRS. A corporation of which a TRS directly or indirectly owns more than 35% of the voting power or value of the stock will automatically be treated as a TRS. However, an entity will not qualify as a TRS if it directly or indirectly operates or manages a lodging or health care facility or, generally, provides to another person, under a franchise, license or otherwise, rights to any brand name under which any lodging facility or health care facility is operated. Overall, no more than 20% of the value of a REIT’s assets may consist of stock or securities of one or more TRSs.

TRSs are subject to federal income tax, and state and local income tax where applicable, on their taxable income. To the extent that a TRS is required to pay taxes, it will have less cash available for distribution to us. If our TRSs pay dividends to us, then the dividends we pay to our stockholders who are taxed as individuals, up to the amount of dividends we receive from such TRSs, will generally be eligible to be taxed at the reduced rate applicable to qualified dividend income. See “-Taxation of Taxable U.S. Stockholders.” The decision as to whether our TRSs will distribute their after-tax income to us will be made on a periodic basis, subject to our compliance with the 20% asset test with respect to TRSs.

We have made TRS elections with respect to several foreign corporations involved in securitizations, and Exantas Real Estate TRS Inc., or XAN RE TRS, and we may in the future make TRS elections with respect to certain entities that issue equity interests to us pursuant to CDO securitizations. The Internal Revenue Code and the Treasury regulations promulgated thereunder provide a specific exemption from federal income tax to non-U.S. corporations that restrict their activities in the United States to trading in stock and securities (or any activity closely related thereto) for their own account, whether such trading (or such other activity) is conducted by the corporation or its employees through a resident broker, commission agent, custodian or other agent. Certain U.S. stockholders of such non-U.S. corporations are required to include in their income currently their proportionate share of the earnings of such a corporation, whether or not such earnings are distributed. Certain CDO vehicles in which we invested and may invest in the future and with which we will jointly make a TRS election, are or will be organized as Cayman Islands companies and either rely on such exemption or otherwise operate in a manner so that are not be subject to federal income tax on their net income. Therefore, despite such contemplated entities’ anticipated status as TRSs, such entities generally are not subject to federal corporate income tax on their earnings. However, we are required to include in our income, on a current basis, the earnings of these TRSs. This could affect our ability to comply with the REIT income tests and distribution requirements. See “-Gross Income Tests” and “-Distribution Requirements.”

The TRS rules limit the deductibility of interest paid or accrued by a TRS to its parent REIT to assure that the TRS is subject to an appropriate level of corporate taxation. Further, the rules impose a 100% excise tax on transactions between a TRS and its parent REIT or the REIT’s tenants that are not conducted on an arm’s-length basis. Any TRSs that are not able to qualify as an electing real property trade or business would not be able to deduct interest that exceeds its interest income plus 30 percent of its taxable income.

Taxable Mortgage Pools. An entity, or a portion of an entity, may be classified as a taxable mortgage pool under the Internal Revenue Code if:

- substantially all of its assets consist of debt obligations or interests in debt obligations;
- more than 50% of those debt obligations are real estate mortgage loans or interests in real estate mortgage loans as of specified testing dates;
- the entity has issued debt obligations that have two or more maturities; and
- the payments required to be made by the entity on its debt obligations “bear a relationship” to the payments to be received by the entity on the debt obligations that it holds as assets.

Under the Treasury regulations, if less than 80% of the assets of an entity (or a portion of an entity) consists of debt obligations, these debt obligations are considered not to comprise “substantially all” of its assets, and therefore the entity would not be treated as a taxable mortgage pool.

We have made and may continue in the future to make investments or enter into financing and securitization transactions that give rise to us being considered to own an interest in one or more taxable mortgage pools. Where an entity, or a portion of an entity, is classified as a taxable mortgage pool, it is generally treated as a taxable corporation for federal income tax purposes. However, special rules apply to a REIT, a portion of a REIT, or a qualified REIT subsidiary that is a taxable mortgage pool. The portion of the REIT's assets, held directly or through a qualified REIT subsidiary that qualifies as a taxable mortgage pool is treated as a qualified REIT subsidiary that is not subject to corporate income tax, and the taxable mortgage pool classification does not affect the tax qualification of the REIT. Rather, the consequences of the taxable mortgage pool classification are generally, except as described below, limited to the tax liability on the REIT and the REIT's stockholders. The Treasury Department has yet to issue regulations governing the tax treatment of the stockholders of a REIT that owns an interest in a taxable mortgage pool.

A portion of our income from a taxable mortgage pool arrangement, which might be non-cash accrued income, or "phantom" taxable income, could be treated as "excess inclusion income" and allocated to our stockholders. Excess inclusion income is an amount, with respect to any calendar quarter, equal to the excess, if any, of (i) income allocable to the holder of a REMIC residual interest or taxable mortgage pool interest over (ii) the sum of an amount for each day in the calendar quarter equal to its ratable portion of the product of (a) the adjusted issue price of the interest at the beginning of the quarter multiplied by (b) 120% of the long-term federal rate (determined on the basis of compounding at the close of each calendar quarter and properly adjusted for the length of such quarter). This non-cash or "phantom" income would be subject to the distribution requirements that apply to us and could therefore adversely affect our liquidity. See "-Distribution Requirements."

Our excess inclusion income would be allocated among our stockholders in proportion to dividends paid. A stockholder's share of excess inclusion income (i) would not be allowed to be offset by any net operating losses otherwise available to the stockholder, (ii) would be subject to tax as unrelated business taxable income in the hands of most types of stockholders that are otherwise generally exempt from federal income tax, (iii) would result in the application of federal income tax withholding at the maximum rate (30%), without reduction for any otherwise applicable income tax treaty, to the extent allocable to most types of foreign stockholders and (iv) in the case of a stockholder that is a REIT, a regulated investment company or common trust fund, would be considered excess inclusion income of such entity.

Excess inclusion income is taxable (at the highest corporate tax rates) to us, rather than our stockholders, to the extent allocable to our shares held in record name by disqualified organizations (generally, tax-exempt entities not subject to unrelated business income tax, including governmental organizations). Nominees who hold our shares on behalf of disqualified organizations are subject to this tax on the portion of our excess inclusion income allocable to the capital stock held on behalf of disqualified organizations. A regulated investment company or other pass-through entity owning our capital stock in record name will be subject to tax at the highest corporate tax rate on any excess inclusion income allocated to their owners that are disqualified organizations. In addition, we will withhold on dividends paid to non-U.S. stockholders (as defined below) with respect to the excess inclusion portion of dividends paid to such stockholders without regard to any treaty exception or reduction in tax rate.

The manner in which excess inclusion income would be allocated among shares of different classes of stock is not clear under current law. Tax-exempt investors, regulated investment company or REIT investors, foreign investors and taxpayers with net operating losses should consult their tax advisors with respect to excess inclusion income.

If we own less than 100% of the ownership interests in a subsidiary that is a taxable mortgage pool, or if we made a TRS election with respect to a subsidiary that is a taxable mortgage pool, the foregoing rules would not apply. Rather, the subsidiary would be treated as a corporation for federal income tax purposes, and would potentially be subject to corporate income tax. In addition, this characterization would alter our REIT income and asset test calculations and could adversely affect our compliance with those requirements. We currently do not have any subsidiary in which we own some, but less than all, of the ownership interests that is or will become a taxable mortgage pool and for which we have not made TRS elections. We intend to monitor the structure of any taxable mortgage pools in which we have an interest to ensure that they will not adversely affect our qualification as a REIT.

Gross Income Tests

We must satisfy two gross income tests annually to maintain our qualification as a REIT. First, at least 75% of our gross income for each taxable year must consist of defined types of income that we derive, directly or indirectly, from investments relating to real property or mortgage loans on real property or qualified temporary investment income. Qualifying income for purposes of the 75% gross income test generally includes:

- rents from real property;
- interest on debt secured by a mortgage on real property, or on interests in real property;
- dividends or other distributions on, and gain from the sale of, shares in other REITs;
- gain from the sale of real estate assets;
- income derived from a REMIC in proportion to the real estate assets held by the REMIC, unless at least 95% of the REMIC's assets are real estate assets, in which case all of the income derived from the REMIC; and

- income derived from the temporary investment of new capital that is attributable to the issuance of our stock or a public offering of our debt with a maturity date of at least five years and that we receive during the one-year period beginning on the date on which we received such new capital.

Second, in general, at least 95% of our gross income for each taxable year must consist of income that is qualifying income for purposes of the 75% gross income test, other types of interest and dividends, gain from the sale or disposition of stock or securities or any combination of these. Cancellation of indebtedness income and gross income from our sale of property that we hold primarily for sale to customers in the ordinary course of business are excluded from both the numerator and the denominator in both income tests. In addition, income and gain from certain “hedging transactions,” as defined in “-Hedging Transactions,” that we enter into in the normal course of our business to hedge indebtedness incurred or to be incurred to acquire or carry real estate assets or to manage risk of currency fluctuations with respect to certain items of income or gain and that are clearly and timely identified as such will be excluded from both the numerator and the denominator for purposes of the gross income tests (but for hedges entered into prior to July 30, 2008, the rules applicable to hedging transactions were more restrictive). We will monitor the amount of our non-qualifying income and we will manage our investment portfolio to comply at all times with the gross income tests. The following paragraphs discuss the specific application of the gross income tests to us.

Interest. The term “interest,” as defined for purposes of both gross income tests, generally excludes any amount that is based in whole or in part on the income or profits of any person. However, interest generally includes the following:

- an amount that is based on a fixed percentage or percentages of receipts or sales; and
- an amount that is based on the income or profits of a debtor, as long as the debtor derives substantially all of its income from the real property securing the debt from leasing substantially all of its interest in the property, and only to the extent that the amounts received by the debtor would be qualifying, “rents from real property” if received directly by a REIT.

If a loan contains a provision that entitles a REIT to a percentage of the borrower’s gain upon the sale of the real property securing the loan or a percentage of the appreciation in the property’s value as of a specific date, income attributable to that loan provision will be treated as gain from the sale of the property securing the loan, which generally is qualifying income for purposes of both gross income tests, provided that the property is not held as inventory or dealer property.

In the case of real estate mortgage loans secured by both real and personal property, if the fair market value of such personal property does not exceed 15% of the total fair market value of all property securing the loan, then the personal property securing the loan will be treated as real property for purposes of determining whether the mortgage is qualifying under the 75% asset test and interest income that qualifies for purposes of the 75% gross income test.

Interest on debt secured by a mortgage on real property or on interests in real property, including, for this purpose, discount points, prepayment penalties, loan assumption fees, and late payment charges that are not compensation for services, generally is qualifying income for purposes of the 75% gross income test. However, if the highest principal amount of a loan outstanding during a taxable year exceeds (1) the fair market value of the real property securing the loan as of the date the REIT agreed to originate or acquire the loan or (2) as discussed further below, in the event of a “significant modification,” the date we modified the loan, a portion of the interest income from such loan will not be qualifying income for purposes of the 75% gross income test, but will be qualifying income for purposes of the 95% gross income test. The portion of the interest income that will not be qualifying income for purposes of the 75% gross income test will be equal to the interest income multiplied by the proportion the amount by which the loan exceeds the value of the real estate that is security for the loan bears to the outstanding principal amount of the loan.

The interest, original issue discount, and market discount income that we receive from our mortgage-related assets generally, including B notes, will be qualifying income for purposes of both gross income tests. We expect that some of our loans, which we have called mezzanine loans, will not be secured by a direct interest in real property. Instead, such loans will be secured by ownership interests in a non-corporate entity owning real property. In Revenue Procedure 2003-65, the IRS established a safe harbor under which interest from loans secured by a first priority security interest in ownership interests in a partnership or limited liability company owning real property will be treated as qualifying income for both the 75% and 95% gross income tests, and the loans will be treated as qualifying assets for the purposes of the 75% asset test, provided several requirements are satisfied. Although the Revenue Procedure provides a safe harbor on which taxpayers may rely, it does not prescribe rules of substantive law. In situations where a loan is secured by interests in non-corporate entities but not all of the requirements of the safe harbor are met, the interest income from the loan will be qualifying income for purposes of the 95% gross income test, but potentially will not be qualifying income for purposes of the 75% gross income test. We have not limited ourselves to acquiring mezzanine loans that comply with all requirements of the safe harbor. Based on advice of counsel, we believe that substantially all of our mezzanine loans should be treated as qualifying assets notwithstanding the failures to comply with all of the requirements of the safe harbor and we will not treat any future mezzanine loans as qualifying assets absent such advice. Nevertheless, in light of the sparse guidance regarding mezzanine loans that do not meet with foregoing safe harbor, it is possible that the IRS could disagree and challenge the treatment of these loans as qualifying assets and/or our qualification as a REIT. In addition, certain investments characterized by us as debt for federal income tax purposes could, if successfully challenged and determined to represent equity for federal income tax purposes, result in us failing to meet the REIT gross income tests; the result of which could cause us to fail to qualify as a REIT or be subject to a penalty tax. Finally, some of our loans will not be secured by mortgages on real property or interests in real property. Our interest income from those loans will be qualifying income for purposes of the 95% gross income test, but not the 75% gross income test. Further, as discussed above, if the fair market value of the real estate securing any of our loans is less than the principal amount of the loan, a portion of the income from that loan will be qualifying income for purposes of the 95% gross income test but not the 75% gross income test.

We hold certain participation interests, including B Notes, in mortgage loans and mezzanine loans. Such interests in an underlying loan are created by virtue of a participation or similar agreement to which the originator of the loan is a party, along with one or more participants. The borrower on the underlying loan is typically not a party to the participation agreement. The performance of this investment depends upon the performance of the underlying loan, and if the underlying borrower defaults, the participant typically has no recourse against the originator of the loan. The originator often retains a senior position in the underlying loan, and grants junior participations that absorb losses first in the event of a default by the borrower. We believe that our participation interests qualify as real estate assets for purposes of the REIT asset tests described below, and that the interest that we derive from such investments will be treated as qualifying mortgage interest for purposes of the 75% income test. The appropriate treatment of participation interests for federal income tax purposes is not entirely certain, however, and no assurance can be given that the IRS will not challenge our treatment of our participation interests. In the event of a determination that such participation interests do not qualify as real estate assets, or that the income that we derive from such participation interests does not qualify as mortgage interest for purposes of the REIT asset and income tests, we could be subject to a penalty tax, or could fail to qualify as a REIT. See “-Taxation of Our Company,” “-Requirements for Qualification,” “-Asset Tests” and “-Failure to Qualify.”

We have modified some of our loans by agreement with the borrowers and, especially in light of current economic conditions, we may agree to additional loan modifications. If the amendments to an outstanding loan results in a “significant modifications” under the applicable Treasury regulations, the modified debt is generally treated for federal income tax purposes as a new debt instrument issued in exchange for the original loan. Long-standing REIT regulations might be read to require us to redetermine whether the amount of the loan exceeds the fair market value of the real property securing the loan as of the date of such a significant modification for purposes of apportioning interest under the gross income tests. Because modifications often occur in distressed scenarios, this retesting of the new debt instrument for REIT qualification purposes may result in a portion of a loan that was a qualifying real estate asset prior to modification to be treated as a non-qualifying security that produces non-qualifying income for the 75% income test, which could result in loss of our REIT qualification. The IRS issued Revenue Procedure 2011-16, which was recently modified and superseded by Revenue Procedure 2014-51, under which we would not be required to revalue the real estate underlying the new debt instrument for purposes of the 75% gross income test and the REIT asset tests if the modification occurred by default or certain other conditions apply.

In addition, although not currently contemplated, in the event that we invest in a mortgage that is secured by both real property and other property, and the loan is not fully secured by real property, we would be required to apportion our annual interest income to the real property security based on a fraction, the numerator of which is the value of the real property securing the loan, determined when we commit to acquire the loan, and the denominator of which is the highest “principal amount” of the loan during the year. Revenue Procedure 2014-51 interprets the “principal amount” of the loan to be the face amount of the loan, despite the Internal Revenue Code requiring taxpayers to treat any market discount, which is the difference between the purchase price of the loan and its face amount, for all purposes (other than certain withholding and information reporting purposes) as interest rather than principal. Any mortgage loan that we invest in that is not fully secured by real property may therefore be subject to the interest apportionment rules and the position taken in Revenue Procedure 2014-51 as described above.

Fee Income. We may receive various fees in connection with our operations. The fees will be qualifying income for purposes of both the 75% and 95% gross income tests if they are received in consideration for entering into an agreement to make a loan secured by mortgages on real property and the fees are not determined by income and profits. Other fees for services are not qualifying income for purposes of either gross income test. Any fees earned by XAN RE TRS and any other TRS, will not be included in our gross income for purposes of the gross income tests.

Dividends. Our share of any dividends received from any corporation (including any TRS, but excluding any REIT) in which we own an equity interest will qualify for purposes of the 95% gross income test but not for purposes of the 75% gross income test. Our share of any dividends received from any other REIT in which we own an equity interest will be qualifying income for purposes of both gross income tests.

In prior years, we have treated certain income inclusions received with respect to our past equity investments in foreign TRSs as qualifying income for purposes of the 95% gross income test but not the 75% gross income test. The provisions that set forth what income is qualifying income for purposes of the 95% gross income test provide that gross income derived from dividends, interest and certain other enumerated classes of passive income qualify for purposes of the 95% gross income test. Income inclusions from equity investments in our foreign TRSs are technically neither dividends nor any of the other enumerated categories of income specified in the 95% gross income test for federal income tax purposes, and there is no clear precedent with respect to the qualification of such income for purposes of the REIT gross income tests. However, based on advice of counsel, we treated such income inclusions, to the extent distributed by a foreign TRS in the year accrued, as qualifying income for purposes of the 95% gross income test. In 2011, the IRS issued two private letter rulings considering situations in which a REIT had to include income from foreign corporations. The IRS ruled that such income would qualify for the 95% gross income test. Since private letter rulings only protect the recipient of the letter, it is still possible that, because this income does not meet the literal requirements of the REIT provisions, the IRS could successfully take the position that such income is not qualifying income. In the event that such income was determined not to qualify for the 95% gross income test, we would be subject to a penalty tax with respect to such income to the extent it and other nonqualifying income exceeded 5% of our gross income and/or we could fail to qualify as a REIT.

Rents from Real Property. We have acquired real property through foreclosure, the receipt of the deed-in-lieu of foreclosure and direct investment and may acquire additional real property or an interest therein in the future. To the extent that we acquire real property or an interest therein, rents we receive will qualify as “rents from real property” in satisfying the gross income requirements for a REIT described above only if the following conditions are met:

- First, the amount of rent must not be based in whole or in part on the income or profits of any person. However, an amount received or accrued generally will not be excluded from rents from real property solely by reason of being based on fixed percentages of receipts or sales.
- Second, rents we receive from a “related party tenant” will not qualify as rents from real property in satisfying the gross income tests unless the tenant is a TRS, at least 90% of the property is leased to unrelated tenants and the rent paid by the TRS is substantially comparable to the rent paid by the unrelated tenants for comparable space. A tenant is a related party tenant if the REIT, or an actual or constructive owner of 10% or more of the REIT, actually or constructively owns 10% or more of the tenant.
- Third, if rent attributable to personal property, leased in connection with a lease of real property, is greater than 15% of the total rent received under the lease, then the portion of rent attributable to the personal property will not qualify as rents from real property.
- Fourth, we generally must not operate or manage our real property or furnish or render services to our tenants, other than through an “independent contractor” who is adequately compensated and from whom we do not derive revenue. However, we may provide services directly to tenants if the services are “usually or customarily rendered” in connection with the rental of space for occupancy only and are not considered to be provided for the tenants’ convenience. In addition, we may provide a minimal amount of “non-customary” services to the tenants of a property, other than through an independent contractor, as long as our income from the services does not exceed 1% of our income from the related property. Furthermore, we may own up to 100% of the stock of a TRS, which may provide customary and non-customary services to tenants without tainting its rental income from the related properties.

Hedging Transactions and Foreign Currency Gains. From time to time, we may enter into hedging transactions with respect to one or more of our assets or liabilities. Income and gain from a “hedging transaction” that is clearly identified as a hedging transaction as specified in the Internal Revenue Code will not constitute gross income and thus will be exempt from the 95% gross income test and the 75% gross income test. The term “hedging transaction” as used above generally means any transaction entered into in the normal course of business primarily to manage risk of (1) interest rate changes or fluctuations with respect to borrowings made or to be made, or incurred or to be incurred, to acquire or carry real estate assets, or (2) currency fluctuations with respect to an item of qualifying income under the 75% or 95% gross income test. In addition, if we entered into a hedging transaction (i) to manage the risk of interest rate, price changes or currency fluctuations with respect to borrowings made or to be made or (ii) to manage the risk of currency fluctuations, and a portion of the hedged indebtedness or property is disposed of and in connection with such extinguishment or disposition we enter into a new clearly identified hedging transaction (a “Counteracting Hedge”), income from the applicable hedge and income from the Counteracting Hedge (including gain from the disposition of such Counteracting Hedge) will not be treated as gross income for purposes of the 95% and 75% gross income tests. We are required to clearly identify any such hedging transaction before the close of the day on which it was acquired, originated, or entered into. To the extent that we do not properly identify such transactions as hedges or hedge with other types of financial instruments, the income from those transactions will likely be treated as nonqualifying income for purposes of the gross income tests. We intend to structure any hedging transactions in a manner that does not jeopardize our qualification as a REIT. In addition, certain foreign currency gains will be excluded from gross income for purposes of one or both of the gross income tests.

Prohibited Transactions. A REIT will incur a 100% tax on the net income derived from any sale or other disposition of property, other than foreclosure property, that the REIT holds primarily for sale to customers in the ordinary course of a trade or business. We believe that none of our assets will be held primarily for sale to customers and that a sale of any of our assets will not be in the ordinary course of our business. Whether a REIT holds an asset “primarily for sale to customers in the ordinary course of a trade or business” depends, however, on the facts and circumstances in effect from time to time, including those related to a particular asset. Nevertheless, we will attempt to comply with the terms of safe-harbor provisions in the federal income tax laws prescribing when a sale of real property will not be characterized as a prohibited transaction. We cannot assure you however, that we can comply with the safe-harbor provisions or that we will avoid owning property that may be characterized as property that we hold “primarily for sale to customers in the ordinary course of a trade or business.” To the extent necessary to avoid the prohibited transactions tax, we will conduct sales of our assets through a TRS.

Foreclosure Property. We will be subject to tax at the maximum corporate rate on any income from foreclosure property, other than income that otherwise would be qualifying income for purposes of the 75% gross income test, less expenses directly connected with the production of that income. However, gross income from foreclosure property will qualify under the 75% and 95% gross income tests. Foreclosure property is any real property, including interests in real property, and any personal property incident to such real property:

- that is acquired by a REIT as the result of the REIT having bid on such property at foreclosure, or having otherwise reduced such property to ownership or possession by agreement or process of law, after there was default or default was imminent on a lease of such property or on indebtedness that such property secured;
- for which the related loan or lease was acquired by the REIT at a time when the default was not imminent or anticipated; and
- for which the REIT makes a proper election to treat the property as foreclosure property.

However, a REIT will not be considered to have foreclosed on a property where the REIT takes control of the property as a mortgagee-in-possession and cannot receive any profit or sustain any loss except as a creditor of the mortgagor. Property generally ceases to be foreclosure property at the end of the third taxable year following the taxable year in which the REIT acquired the property, or longer if an extension is granted by the Secretary of the Treasury. This grace period terminates and foreclosure property ceases to be foreclosure property on the first day:

- on which a lease is entered into for the property that, by its terms, will give rise to income that does not qualify for purposes of the 75% gross income test, or any amount is received or accrued, directly or indirectly, pursuant to a lease entered into on or after such day that will give rise to income that does not qualify for purposes of the 75% gross income test;
- on which any construction takes place on the property, other than completion of a building or any other improvement, where more than 10% of the construction was completed before default became imminent; or
- which is more than 90 days after the day on which the REIT acquired the property and the property is used in a trade or business that is conducted by the REIT, other than through an independent contractor from whom the REIT itself does not derive or receive any income.

Failure to Satisfy Gross Income Tests. If we fail to satisfy one or both of the gross income tests for any taxable year, we nevertheless may qualify as a REIT for that year if we qualify for relief under certain provisions of the federal income tax laws. Those relief provisions generally will be available if:

- our failure to meet such tests is due to reasonable cause and not due to willful neglect; and
- following such failure for any taxable year, a schedule of the sources of our income is filed in accordance with regulations prescribed by the Secretary of the Treasury.

It is not possible, however, to state whether in all circumstances we would be entitled to the benefit of these relief provisions. For example, if the IRS were to determine that we failed the 95% gross income test because income inclusions with respect to our equity investments in foreign TRSs that were distributed by the foreign TRSs during the year such income was accrued are not qualifying income for purposes of the 95% gross income test, or if such income caused us to fail the 75% gross income test, the IRS could conclude that our failure to satisfy the applicable gross income test was not due to reasonable cause. If these relief provisions are inapplicable to such failure, we will fail to qualify as a REIT. See “-Failure to Qualify.” In addition, as discussed above in “-Taxation of Our Company,” even if the relief provisions apply, we would incur a 100% tax on the gross income attributable to the amount by which we fail the 75% or 95% gross income test, multiplied, in either case, by a fraction intended to reflect our profitability.

Asset Tests

To qualify as a REIT, we also must satisfy the following asset tests at the end of each quarter of each taxable year. First, at least 75% of the value of our total assets must consist of:

- cash or cash items, including certain receivables;
- government securities;
- interests in real property, including leaseholds and options to acquire real property and leaseholds;
- interests in mortgage loans secured by real property (including mortgages secured by both real and personal property if the value of such property does not exceed 15% of the total property securing the loan) ;
- stock in other REITs;
- debt instruments issued by publicly-traded REITs (not to exceed 25% of our assets unless secured by interests in real property);
- investments in stock or debt instruments during the one-year period following our receipt of new capital that we raise through equity offerings or public offerings of debt with at least a five-year term; and
- regular or residual interests in a REMIC.

However, if less than 95% of the assets of a REMIC consists of assets that are qualifying real estate-related assets under the federal income tax laws, determined as if we held such assets, we will be treated as holding directly our proportionate share of the assets of such REMIC.

Second, of our investments not included in the 75% asset class, the value of our interest in any one issuer’s securities may not exceed 5% of the value of our total assets.

Third, of our investments not included in the 75% asset class, we may not own more than 10% of the voting power or value of any one issuer’s outstanding securities.

Fourth, of our investments not included in the 75% asset class, no more than 25% (20% for years beginning after December 31, 2017) of the value of our total assets may consist of the securities of one or more TRSs.

Fifth, of our investments not included in the 75% asset class, no more than 25% of the value of our total assets may consist of securities other than those in the 75% asset class.

For purposes of the second, third and fifth asset tests, the term “securities” does not include stock in another REIT, equity or debt securities of a qualified REIT subsidiary or TRS, mortgage loans that constitute real estate assets, or equity interests in a partnership.

For purposes of the 10% value test, the term “securities” does not include:

- “Straight debt” securities, which is defined as a written unconditional promise to pay on demand or on a specified date a sum certain in money if (i) the debt is not convertible, directly or indirectly, into stock, and (ii) the interest rate and interest payment dates are not contingent on profits, the borrower’s discretion, or similar factors. “Straight debt” securities do not include any securities issued by a partnership or a corporation in which we or any controlled TRS (i.e., a TRS in which we own directly or indirectly more than 50% of the voting power or value of the stock) hold non-“straight debt” securities that have an aggregate value of more than 1% of the issuer’s outstanding securities. However, “straight debt” securities include debt subject to the following contingencies:
 - a contingency relating to the time of payment of interest or principal, as long as either (i) there is no change to the effective yield of the debt obligation, other than a change to the annual yield that does not exceed the greater of 0.25% or 5% of the annual yield, or (ii) neither the aggregate issue price nor the aggregate face amount of the issuer’s debt obligations held by us exceeds \$1 million and no more than 12 months of unaccrued interest on the debt obligations can be required to be prepaid; and
 - a contingency relating to the time or amount of payment upon a default or prepayment of a debt obligation, as long as the contingency is consistent with customary commercial practice.
- Any loan to an individual or an estate.
- Any “section 467 rental agreement,” other than an agreement with a related party tenant.
- Any obligation to pay “rents from real property.”
- Certain securities issued by governmental entities.
- Any security issued by a REIT.
- Any debt instrument issued by an entity treated as a partnership for federal income tax purposes to the extent of our interest as a partner in the partnership.
- Any debt instrument issued by an entity treated as a partnership for federal income tax purposes not described above if at least 75% of the partnership’s gross income, excluding income from prohibited transaction, is qualifying income for purposes of the 75% gross income test described above in “-Requirements for Qualification-Gross Income Tests.”

As discussed above under “Gross Income Tests”, we hold and may make additional mezzanine loans that do not comply with the IRS safe harbor, but which we treat as qualifying assets. Although we believe substantially all of our mezzanine loans are qualifying assets, it is possible that the IRS could challenge our characterization of such loans and our qualification as a REIT. If any such IRS challenge was successful, the applicable mezzanine loan would be subject to the second, third and fifth asset tests described above.

We believe that most of the residential mortgage loans (including the B notes) and mortgage-backed securities, or MBS, that we have held and expect to hold have been and will be qualifying assets for purposes of the 75% asset test. For purposes of these rules, however, if the outstanding principal balance of a mortgage loan exceeds the fair market value of the real property securing the loan at the time we commit to acquire the loan, a portion of such loan likely will not be a qualifying real estate asset under the federal income tax laws. Furthermore, we may be required to retest modified loans that we hold to determine if the modified loan is adequately secured by real property if the modification results in a significant modification, as discussed above in “Gross Income Tests-Interest.” Although the law on the matter is not entirely clear, it appears that the non-qualifying portion of that mortgage loan will be equal to the portion of the loan amount that exceeds the value of the associated real property that is security for that loan.

In the event that we invest in a mortgage loan that is secured by both real property and other property, Revenue Procedure 2014-51 may apply to determine what portion of the mortgage loan will be treated as a real estate asset for purposes of the 75% asset test. Pursuant to Revenue Procedure 2014-51, modifying and superseding Revenue Procedure 2011-16, the IRS will not challenge a REIT's treatment of a loan as being, in part, a qualifying real estate asset in an amount equal to the lesser of (1) the fair market value of the loan on the date of the relevant quarterly REIT asset testing date or (2) the greater of (a) the fair market value of the real property securing the loan on the date of the relevant quarterly REIT asset testing date or (b) the fair market value of the real property securing the loan determined as of the date the REIT committed to acquire the loan. Our debt securities issued by other REITs or corporations that are not secured by mortgages on real property will not be qualifying assets for purposes of the 75% asset test. We believe that any stock that we will acquire in other REITs will be qualifying assets for purposes of the 75% asset test. However, if a REIT in which we own stock fails to qualify as a REIT in any year, the stock in such REIT will not be a qualifying asset for purposes of the 75% asset test. Instead, we would be subject to the second, third, and fifth assets tests described above with respect to our investment in such a disqualified REIT. We will also be subject to those assets tests with respect to our investments in any non-REIT C corporations for which we do not make a TRS election. We believe that the value of our investment in XAN RE TRS, together with the value of our interest in the securities of our TRSs, including our TRS securitizations, has been and will continue to be less than 20% for years beginning after December 31, 2017 (and less than 25% for years beginning prior to January 1, 2018) of the value of our total assets.

We will monitor the status of our assets for purposes of the various asset tests and will seek to manage our portfolio to comply at all times with such tests. There can be no assurances, however, that we will be successful in this effort. In this regard, to determine our compliance with these requirements, we will need to estimate the value of the real estate securing our mortgage loans at various times, including at the time of any modification that results in a significant modification to a debt instrument we hold. In addition, we will have to value our investment in our other assets to ensure compliance with the asset tests. Although we will seek to be prudent in making these estimates, there can be no assurances that the IRS might not disagree with these determinations and assert that a different value is applicable, in which case we might not satisfy the 75% and the other asset tests and would fail to qualify as a REIT. If we fail to satisfy the asset tests at the end of a calendar quarter, we will not lose our REIT qualification if:

- we satisfied the asset tests at the end of the preceding calendar quarter; and
- the discrepancy between the value of our assets and the asset test requirements arose from changes in the market values of our assets and was not wholly or partly caused by the acquisition of one or more non-qualifying assets

If we did not satisfy the condition described in the second item, above, we still could avoid disqualification by eliminating any discrepancy within 30 days after the close of the calendar quarter in which it arose.

In the event that we violate the second or third asset tests described above at the end of any calendar quarter, we will not lose our REIT qualification if the failure is de minimis (up to the lesser of 1% of the total value of our assets at the end of the quarter in which the failure occurs or \$10 million) and we dispose of assets or otherwise comply with the asset tests within six months after the last day of the quarter. In the event of a failure of any of the asset tests (other than a de minimis failure of the 5% and 10% asset tests described in the preceding sentence), as long as the failure was due to reasonable cause and not to willful neglect, we will not lose our REIT qualification if we dispose of assets or otherwise comply with the asset tests within six months after the last day of the quarter in which our identification of the failure occurs and pay a tax equal to the greater of \$50,000 or an amount determined by multiplying the highest federal income tax rate applicable to corporations by the net income from the nonqualifying assets during the period in which we failed to satisfy the asset tests.

We currently believe that the mortgage-related assets, securities and other assets that we expect to hold will satisfy the foregoing asset test requirements. However, no independent appraisals will be obtained to support our conclusions as to the value of our assets and securities, or in many cases, the real estate collateral for the mortgage loans that we hold. Moreover, the values of some assets, such as the securities of some of our TRSs, may not be susceptible to a precise determination. As a result, there can be no assurance that the IRS will not contend that our ownership of securities and other assets violates one or more of the asset tests applicable to REITs.

We currently have financing arrangements that are structured as sale and repurchase agreements pursuant to which we sell certain of our assets to a counter party and simultaneously enter into an agreement to repurchase these assets at a later date in exchange for a purchase price. Economically, these agreements are financings that are secured by the assets sold pursuant thereto. We believe that we would be treated for REIT asset and income test purposes as the owner of the assets that are the subject of any such sale and repurchase agreement notwithstanding that such agreements may transfer record ownership of the assets to the counterparty during the term of the agreement. It is possible, however, that the IRS could assert that we did not own the assets during the term of the sale and repurchase agreement, in which case we could fail to qualify as a REIT.

Distribution Requirements

Each taxable year, we must distribute dividends, other than capital gain dividends and deemed distributions of retained capital gain, to our stockholders in an aggregate amount at least equal to:

- the sum of:
 - 90% of our “REIT taxable income,” computed without regard to the dividends paid deduction and our net capital gain, and
 - 90% of our after-tax net income, if any, from foreclosure property, minus
 - the sum of certain items of non-cash income.

We must make such distributions in the taxable year to which they relate, or in the following taxable year if either (i) we declare the distribution before we timely file our federal income tax return for the year and pay the distribution on or before the first regular dividend payment date after such declaration or (ii) we declare the distribution in October, November or December of the taxable year, payable to stockholders of record on a specified day in any such month, and we actually make the distribution before the end of January of the following year. The distributions under clause (i) are taxable to the stockholders in the year in which paid, and the distributions in clause (ii) are treated as paid on December 31 of the prior taxable year. In both instances, these distributions relate to our prior taxable year for purposes of the 90% distribution requirement.

We may satisfy the 90% distribution test with taxable distributions of our stock or debt securities. The IRS has issued private letter rulings to other REITs treating certain distributions that are paid partly in cash and partly in stock as dividends that would satisfy the REIT annual distribution requirement and qualify for the dividends paid deduction for federal income tax purposes. Those rulings may be relied upon only by taxpayers to whom they were issued, but we could request a similar ruling from the IRS. Accordingly, it is unclear whether and to what extent we will be able to make taxable dividends payable in cash and stock. We have no current intention to make a taxable dividend payable in our stock.

We will pay federal income tax on taxable income, including net capital gain, that we do not distribute to stockholders. Furthermore, if we fail to distribute during a calendar year, or by the end of January following the calendar year in the case of distributions with declaration and record dates falling in the last three months of the calendar year, at least the sum of:

- 85% of our REIT ordinary income for such year,
- 95% of our REIT capital gain income for such year, and
- any undistributed taxable income from prior periods.

We will incur a 4% nondeductible excise tax on the excess of such required distribution over the amounts we actually distribute. We may elect to retain and pay income tax on the net capital gain we receive in a taxable year. See “-Taxation of Taxable U.S. Stockholders.” If we so elect, we will be treated as having distributed any such retained amount for purposes of the 4% nondeductible excise tax described above. We intend to make timely distributions sufficient to satisfy the annual distribution requirements and to avoid corporate income tax and the 4% nondeductible excise tax.

It is possible that, from time to time, we may experience timing differences between the actual receipt of income and actual payment of deductible expenses and the inclusion of that income and deduction of such expenses in arriving at our REIT taxable income. Possible examples of those timing differences include the following:

- Because we may deduct capital losses only to the extent of our capital gains, we may have taxable income that exceeds our economic income.
- We will recognize taxable income in advance of the related cash flow if any of our MBS are deemed to have original issue discount. We generally must accrue original issue discount based on a constant yield method that takes into account projected prepayments but that defers taking into account credit losses until they are actually incurred.
- We will include in our taxable income for federal income tax purposes, items of income from certain of our foreign CDO entities even in the absence of actual cash distributions.
- We may recognize taxable market discount income when we receive the proceeds from the disposition of, or principal payments on, loans that have a stated redemption price at maturity that is greater than our tax basis in those loans, although such proceeds often will be used to make non-deductible principal payments on related borrowings.
- We may recognize phantom taxable income from any residual interests in REMICs or equity interests in taxable mortgage pools not held through a TRS.

Although several types of non-cash income are excluded in determining the annual distribution requirement, we will incur corporate income tax and the 4% nondeductible excise tax with respect to those non-cash income items if we do not distribute those items on a current basis. As a result of the foregoing, we may have less cash than is necessary to distribute all of our taxable income and thereby avoid corporate income tax and the excise tax imposed on certain undistributed income. In such a situation, we may need to borrow funds or issue additional common or preferred stock.

Under certain circumstances, we may be able to correct a failure to meet the distribution requirement for a year by paying “deficiency dividends” to our stockholders in a later year. We may include such deficiency dividends in our deduction for dividends paid for the earlier year. Although we may be able to avoid income tax on amounts distributed as deficiency dividends, we will be required to pay interest to the IRS based upon the amount of any deduction we take for deficiency dividends.

Recordkeeping Requirements

We must maintain certain records in order to qualify as a REIT. In addition, to avoid a monetary penalty, we must request on an annual basis information from our stockholders designed to disclose the actual ownership of our outstanding stock. We intend to comply with these requirements.

Failure to Qualify

If we fail to satisfy one or more requirements for REIT qualification, other than the gross income tests and the asset tests, we could avoid disqualification if our failure is due to reasonable cause and not to willful neglect and we pay a penalty of \$50,000 for each such failure. In addition, there are relief provisions for a failure of the gross income tests and asset tests, as described in “-Gross Income Tests” and “-Asset Tests.”

If we fail to qualify as a REIT in any taxable year, and no relief provision applies, we would be subject to federal income tax and any applicable alternative minimum tax on our taxable income at regular corporate rates. In calculating our taxable income in a year in which we fail to qualify as a REIT, we would not be able to deduct amounts paid out to stockholders. In fact, we would not be required to distribute any amounts to stockholders in that year. In such event, to the extent of our current and accumulated earnings and profits, all distributions to stockholders would be taxable as dividend income. Subject to certain limitations of the federal income tax laws, corporate stockholders might be eligible for the dividends received deduction, and individual and certain non-corporate trust and estate stockholders may be eligible for the reduced federal income tax rate of 15% on such dividends. Unless we qualified for relief under specific statutory provisions, we also would be disqualified from electing to be taxed as a REIT for the four taxable years following the year during which we ceased to qualify as a REIT. We cannot predict whether in all circumstances we would qualify for such statutory relief.

Taxation of Taxable U.S. Stockholders

The term “U.S. stockholder” means a holder of our capital stock that, for federal income tax purposes, is:

- a citizen or resident (as defined in Section 7701(b) of the Internal Revenue Code) of the United States;
- a corporation (including an entity treated as a corporation for federal income tax purposes) created or organized under the laws of the United States, any of its States, or the District of Columbia;
- an estate whose income is subject to federal income taxation regardless of its source; or
- any trust if (i) a U.S. court is able to exercise primary supervision over the administration of such trust and one or more U.S. persons have the authority to control all substantial decisions of the trust or (ii) it has a valid election in place to be treated as a U.S. person.

If a partnership, entity or arrangement treated as a partnership for federal income tax purposes holds our capital stock, the federal income tax treatment of a partner in the partnership will generally depend on the status of the partner and the activities of the partnership. If you are a partner in a partnership holding our capital stock, you should consult your tax advisor regarding the consequences of the purchase, ownership and disposition of our capital stock by the partnership. A “non-U.S. stockholder” is a holder of our capital stock that is not a U.S. stockholder, a partnership or an entity classified as a partnership for U.S. federal income tax purposes.

As long as we qualify as a REIT, a taxable “U.S. stockholder” must generally take into account as ordinary income distributions made out of our current or accumulated earnings and profits that we do not designate as capital gain dividends or retained long-term capital gain. For purposes of determining whether a distribution is made out of our current or accumulated earnings and profits, our earnings and profits will be allocated first to our preferred stock, then to our common stock. A U.S. stockholder will not qualify for the dividends received deduction generally available to corporations. In addition, dividends paid to a U.S. stockholder generally will not qualify as “qualified dividend income” for the maximum tax rate accorded to capital gains. Qualified dividend income generally includes dividends paid to individuals, trusts and estates by domestic C corporations and certain qualified foreign corporations. Because we are not generally subject to federal income tax on the portion of our REIT taxable income distributed to our stockholders (see “-Taxation of Our Company” above), our dividends generally will not be eligible for the 20% rate (in the case of taxpayers whose taxable income exceeds certain thresholds depending on filing status) on qualified dividend income. However, under the Tax Cuts and Jobs Act, regular dividends from REITs are treated as income from a pass-through entity and are eligible for a 20% deduction. As a result, our regular dividends will be taxed at 80% of an individual’s marginal tax rate. The current maximum rate is 37% resulting in a maximum tax rate of 29.6%. However, the maximum 20% tax rate for qualified dividend income will apply to our ordinary REIT dividends attributable to dividends received by us from non-REIT corporations, such as our domestic TRSs (but generally not from our TRSs organized as Cayman organizations), and to the extent attributable to income upon which we have paid corporate income tax (e.g., to the extent that we distribute less than 100% of our taxable income). In general, to qualify for the reduced tax rate on qualified dividend income, a stockholder must hold our capital stock for more than 60 days during the 121-day period beginning on the date that is 60 days before the date on which our capital stock became ex-dividend. U.S. stockholders other than corporations are also subject to a 3.8% Medicare surtax on investment income (including both qualified and nonqualified dividends) if certain thresholds of modified adjusted gross income are exceeded.

A U.S. stockholder generally will recognize distributions that we designate as capital gain dividends as long-term capital gain without regard to the period for which the U.S. stockholder has held our capital stock. A corporate U.S. stockholder, however, may be required to treat up to 20% of certain capital gain dividends as ordinary income.

The aggregate amount of dividends that we may designate as “capital gain dividends” or “qualified dividend income” with respect to any taxable year may not exceed the dividends paid by us with respect to such year, including dividends that are paid in the following year (if they are declared before we timely file our tax return for the year and if made with or before the first regular dividend payment after such declaration) are treated as paid with respect to such year.

A U.S. stockholder will not incur tax on a distribution in excess of our current and accumulated earnings and profits if the distribution does not exceed the adjusted basis of the U.S. stockholder’s capital stock. Instead, the distribution will reduce the adjusted basis of such capital stock. A U.S. stockholder will recognize a distribution in excess of both our current and accumulated earnings and profits and the U.S. stockholder’s adjusted basis in his or her capital stock as long-term capital gain, or short-term capital gain if the shares of capital stock have been held for one year or less, assuming the shares of capital stock are a capital asset in the hands of the U.S. stockholder. In addition, if we declare a distribution in October, November, or December of any year that is payable to a U.S. stockholder of record on a specified date in any such month, such distribution will be treated as both paid by us and received by the U.S. stockholder on December 31 of such year, provided that we actually pay the distribution during January of the following calendar year.

Stockholders may not include in their individual income tax returns any of our net operating losses or capital losses. Instead, these losses are generally carried over by us for potential offset against our future income. Taxable distributions from us and gain from the disposition of our capital stock will not be treated as passive activity income and, therefore, stockholders generally will not be able to apply any “passive activity losses,” such as losses from certain types of limited partnerships in which the stockholder is a limited partner, against such income. In addition, taxable distributions from us and gain from the disposition of our capital stock generally will be treated as investment income for purposes of the investment interest limitations. We will notify stockholders after the close of our taxable year as to the portions of the distributions attributable to that year that constitute ordinary income, return of capital and capital gain.

We may recognize taxable income in excess of our economic income, known as phantom income, in the first years that we hold certain investments, and experience an offsetting excess of economic income over our taxable income in later years. As a result, stockholders at times may be required to pay federal income tax on distributions that economically represent a return of capital rather than a dividend. These distributions would be offset in later years by distributions representing economic income that would be treated as returns of capital for federal income tax purposes. Taking into account the time value of money, this acceleration of federal income tax liabilities may reduce a stockholder’s after-tax return on his or her investment to an amount less than the after-tax return on an investment with an identical before-tax rate of return that did not generate phantom income. For example, if an investor with a 30% tax rate purchases a taxable bond with an annual interest rate of 10% on its face value, the investor’s before-tax return on the investment would be 10% and the investor’s after-tax return would be 7%. However, if the same investor purchased our capital stock at a time when the before-tax rate of return was 10%, the investor’s after-tax rate of return on such stock might be somewhat less than 7% as a result of our phantom income. In general, as the ratio of our phantom income to our total income increases, the after-tax rate of return received by a taxable stockholder will decrease. We will consider the potential effects of phantom income on our taxable stockholders in managing our investments.

Any excess inclusion income (See “-Requirements for Qualification-Taxable Mortgage Pools” for a definition of excess inclusion income) that we recognize generally will be allocated among our stockholders to the extent that it exceeds our undistributed REIT taxable income in a particular year. A stockholder’s share of excess inclusion income would not be allowed to be offset by any net operating losses or other deductions otherwise available to the stockholder.

Taxation of U.S. Stockholders on the Disposition of Capital Stock

In general, a U.S. stockholder who is not a dealer in securities must treat any gain or loss realized upon a taxable disposition of our capital stock as long-term capital gain or loss if the U.S. stockholder has held the capital stock for more than one year and otherwise as short-term capital gain or loss. In general, a U.S. stockholder will realize gain or loss in an amount equal to the difference between (i) the sum of the fair market value of any property and the amount of cash received in such disposition, and (ii) the U.S. stockholder’s adjusted basis in the shares for tax purposes. Such adjusted tax basis will equal the U.S. stockholder’s acquisition cost, increased by the excess of net capital gains deemed distributed to the U.S. stockholder (discussed above) less tax deemed paid on it and reduced by any returns of capital. However, a U.S. stockholder must treat any loss upon a sale or exchange of capital stock held by such stockholder for six months or less as a long-term capital loss to the extent of capital gain dividends and any other actual or deemed distributions from us that such U.S. stockholder treats as long-term capital gain. All or a portion of any loss that a U.S. stockholder realizes upon a taxable disposition of our capital stock may be disallowed if the U.S. stockholder purchases other capital stock within 30 days before or after the disposition.

Conversion of Preferred Stock

Except as provided below, (i) a U.S. stockholder generally will not recognize gain or loss upon a conversion of preferred stock into our common stock, and (ii) a U.S. stockholder’s basis and holding period in our common stock received upon conversion generally will be the same as those of the converted preferred stock (but the basis will be reduced by the portion of adjusted tax basis allocated to any fractional share exchanged for cash). Any of our common stock received in a conversion that is attributable to accumulated and unpaid dividends on the converted preferred stock will be treated as a distribution that is potentially taxable as a dividend. Cash received upon conversion in lieu of a fractional share generally will be treated as a payment in a taxable exchange for such fractional share, and gain or loss will be recognized on the receipt of cash in an amount equal to the difference between the amount of cash received and the adjusted tax basis allocable to the fractional share deemed exchanged. This gain or loss will be long-term capital gain or loss if the U.S. stockholder has held the preferred stock for more than one year at the time of conversion. U.S. stockholders are urged to consult with their tax advisors regarding the federal income tax consequences of any transaction by which such holder exchanges common shares received on a conversion of preferred stock for cash or other property.

Redemption of Preferred Stock

Redemption of preferred stock for cash will be treated under Section 302 of the Internal Revenue Code as a distribution taxable as a dividend (to the extent of our current and accumulated earnings and profits) at ordinary income rates, unless the redemption satisfies one of the tests set forth in Section 302(b) of the Internal Revenue Code for the sale or exchange of the redeemable shares. The redemption will be treated as a sale or exchange if it (i) is “substantially disproportionate” with respect to you, (ii) results in a “complete termination” of your share interest in us, or (iii) is “not essentially equivalent to a dividend” with respect to you, all within the meaning of Section 302(b) of the Internal Revenue Code.

In determining whether any of these tests have been met, common stock, all series of preferred stock and any options to acquire the foregoing considered to be owned by you by reason of certain constructive ownership rules set forth in the Internal Revenue Code, as well as common stock, all series of preferred stock and any options to acquire the foregoing actually owned by you, must generally be taken into account. If you do not own (actually or constructively) any of our common stock, or you own an insubstantial percentage of our outstanding common or preferred stock, based upon current law, a redemption of your preferred stock is likely to qualify for sale or exchange treatment because the redemption would not be “essentially equivalent to a dividend.” However, because the determination as to whether any of the alternative tests of Section 302(b) of the Internal Revenue Code will be satisfied with respect to your preferred stock depends upon the facts and circumstances at the time the determination must be made, you are advised to consult your own tax advisor to determine such tax treatment.

If a redemption of preferred stock is not treated as a distribution taxable as a dividend to you, it will be treated as a taxable sale or exchange of the stock. As a result, you will recognize gain or loss for federal income tax purposes in an amount equal to the difference between (i) the amount of cash and the fair market value of any property received (less any portion thereof attributable to accumulated and declared but unpaid dividends, which will be taxable as a dividend to the extent of our current and accumulated earnings and profits), and (ii) your adjusted basis in the preferred stock for tax purposes. Such gain or loss will be capital gain or loss if the preferred stock has been held as a capital asset, and will be long-term gain or loss if the preferred stock has been held for more than one year at the time of the redemption. If a redemption of preferred stock is treated as a distribution taxable as a dividend, the amount of the distribution will be measured by the amount of cash and the fair market value of any property received by you. Your adjusted basis in the redeemable preferred stock for tax purposes will be transferred to your remaining shares in us. If you do not own any of our other shares, such basis may, under certain circumstances, be transferred to a related person or it may be lost entirely.

The IRS recently published proposed Treasury regulations that would require a share-by-share determination upon redemption so that a holder with varying tax basis for its shares of preferred stock could have taxable income with respect to some shares, even though the holder's aggregate basis for the shares would be sufficient to absorb the entire redemption distribution. Additionally, these proposed Treasury regulations would not permit the transfer of basis in the redeemed shares to the remaining shares of our stock held (directly or indirectly) by the redeemed holder. Instead, the unrecovered basis in our preferred shares would be treated as a deferred loss to be recognized when certain conditions are satisfied. These proposed Treasury regulations would be effective for transactions that occur after the date the regulations are published as final Treasury regulations.

Capital Gains and Losses

A taxpayer generally must hold a capital asset for more than one year for gain or loss derived from its sale or exchange to be treated as long-term capital gain or loss. The highest marginal individual income tax rate for years beginning after December 31, 2017 is 37%. The maximum tax rate on long-term capital gain applicable to stockholders taxed at individual rates is 20% for sales and exchanges of assets held for more than one year. The maximum tax rate on long-term capital gain from the sale or exchange of "section 1250 property," or depreciable real property, is 25% to the extent that such gain would have been treated as ordinary income if the property were "section 1245 property." With respect to distributions that we designate as capital gain dividends and any retained capital gain that we are deemed to distribute, we generally may designate whether such a distribution is taxable to our stockholders taxed at individual rates at a maximum 20% or 25% rate. Thus, the tax rate differential between capital gain and ordinary income for those taxpayers may be significant. In addition, the characterization of income as capital gain or ordinary income may affect the deductibility of capital losses. A non-corporate taxpayer may deduct capital losses not offset by capital gains against its ordinary income only up to a maximum annual amount of \$3,000. A non-corporate taxpayer may carry forward unused capital losses indefinitely. A corporate taxpayer must pay tax on its net capital gain at ordinary corporate rates. A corporate taxpayer may deduct capital losses only to the extent of capital gains, with unused losses being carried back three years and forward five years. Capital gains (as well as other investment income taxed at ordinary rates) are also subject to the 3.8% Medicare surtax in the case of certain taxpayers whose modified adjusted gross income exceeds certain thresholds depending on filing status.

Information Reporting Requirements and Backup Withholding

We will report to our stockholders and to the IRS the amount of distributions we pay during each calendar year, and the amount of tax we withhold, if any. Under the backup withholding rules, a stockholder may be subject to backup withholding at a current rate of 24% (28% for years beginning prior to January 1, 2018 or after December 31, 2025) with respect to distributions unless the holder:

- is a corporation or comes within certain other exempt categories and, when required, demonstrates this fact; or
- provides a taxpayer identification number, certifies as to no loss of exemption from backup withholding, and otherwise complies with the applicable requirements of the backup withholding rules.

A stockholder who does not provide us with its correct taxpayer identification number also may be subject to penalties imposed by the IRS. Any amount paid as backup withholding will be creditable against the stockholder's income tax liability. In addition, we may be required to withhold a portion of capital gain distributions to any stockholders who fail to certify their non-foreign status to us. For a discussion of the backup withholding rules as applied to non-U.S. stockholders. See "-Taxation of Non-U.S. Stockholders."

Medicare Tax on Unearned Income

As noted above, U.S. stockholders that are individuals, estates or trusts to pay an additional 3.8% tax on "net investment income" earned directly or indirectly by U.S. Holders that are individuals, trusts and estates whose income exceeds certain thresholds. Among other items, net investment income generally includes interest on debt instruments and dividends on stock and net gain attributable to the disposition of such securities to the extent that such gain would be otherwise included in taxable income. U.S. stockholders should consult their tax advisors regarding the effect, if any, of this legislation on their ownership and disposition of our capital stock.

Taxation of Tax-Exempt Stockholders

Tax-exempt entities, including qualified employee pension and profit sharing trusts and individual retirement accounts, generally are exempt from federal income taxation. However, they are subject to taxation on their unrelated business taxable income, or UBTI. While many investments in real estate generate UBTI, the IRS has issued a ruling that dividend distributions from a REIT to an exempt employee pension trust do not constitute UBTI so long as the exempt employee pension trust does not otherwise use the shares of the REIT in an unrelated trade or business of the pension trust. Based on that ruling, amounts that we distribute to tax-exempt stockholders generally should not constitute UBTI. However, if a tax-exempt stockholder were to finance its acquisition of capital stock with debt, a portion of the income that it receives from us would constitute UBTI pursuant to the “debt-financed property” rules. Moreover, social clubs, voluntary employee benefit associations, supplemental unemployment benefit trusts and qualified group legal services plans that are exempt from taxation under special provisions of the federal income tax laws are subject to different UBTI rules, which generally will require them to characterize distributions that they receive from us as UBTI. Furthermore, a tax-exempt stockholder’s share of any excess inclusion income that we recognize would be subject to tax as UBTI. Finally, in certain circumstances, a qualified employee pension or profit sharing trust that owns more than 10% of our stock must treat a percentage of the dividends that it receives from us as UBTI. Such percentage is equal to the gross income we derive from an unrelated trade or business, determined as if we were a pension trust, divided by our total gross income for the year in which we pay the dividends. That rule applies to a pension trust holding more than 10% of our stock only if:

- the percentage of our dividends that the tax-exempt trust must treat as UBTI is at least 5%;
- we qualify as a REIT by reason of the modification of the rule requiring that no more than 50% of our stock be owned by five or fewer individuals that allows the beneficiaries of the pension trust to be treated as holding our stock in proportion to their actuarial interests in the pension trust; and
- either:
 - one pension trust owns more than 25% of the value of our stock; or
 - a group of pension trusts individually holding more than 10% of the value of our stock collectively owns more than 50% of the value of our stock.

Taxation of Non-U.S. Stockholders

The rules governing federal income taxation of nonresident alien individuals, foreign corporations, foreign partnerships, and other foreign stockholders are complex. This section is only a summary of such rules. **We urge non-U.S. stockholders to consult their own tax advisors to determine the impact of federal, state, and local income tax laws on ownership of our capital stock, including any reporting requirements.**

Ordinary Dividends. A non-U.S. stockholder that receives a distribution that is not attributable to gain from our sale or exchange of United States real property interests, as defined below, and that we do not designate as a capital gain dividend or retained capital gain will recognize ordinary income to the extent that we pay the distribution out of our current or accumulated earnings and profits. A withholding tax equal to 30% of the gross amount of the distribution ordinarily will apply unless an applicable tax treaty reduces or eliminates the tax. However, if a distribution is treated as effectively connected with the non-U.S. stockholder’s conduct of a U.S. trade or business, the non-U.S. stockholder generally will be subject to federal income tax on the distribution at graduated rates, in the same manner as U.S. stockholders are taxed on distributions and also may be subject to the 30% branch profits tax in the case of a corporate non-U.S. stockholder. We plan to withhold federal income tax at the rate of 30% on the gross amount of any distribution paid to a non-U.S. stockholder unless either:

- a lower treaty rate applies and the non-U.S. stockholder files an IRS Form W-8BEN evidencing eligibility for that reduced rate with us, or
- the non-U.S. stockholder files an IRS Form W-8ECI with us claiming that the distribution is effectively connected income.

However, reduced treaty rates are not available to the extent that the income allocated to the non-U.S. stockholder is excess inclusion income. Our excess inclusion income generally will be allocated among our stockholders to the extent that it exceeds our undistributed REIT taxable income in a particular year.

Non-Dividend Distributions. A non-U.S. stockholder will not incur tax on a distribution in excess of our current and accumulated earnings and profits if the excess portion of the distribution does not exceed the adjusted basis of its capital stock. Instead, the excess portion of the distribution will reduce the adjusted basis of that capital stock. A non-U.S. stockholder will be subject to tax on a distribution that exceeds both our current and accumulated earnings and profits and the adjusted basis of the capital stock if the non-U.S. stockholder otherwise would be subject to tax on gain from the sale or exchange of its capital stock, as described below. Because we generally cannot determine at the time we make a distribution whether the distribution will exceed our current and accumulated earnings and profits, we normally will withhold tax on the entire amount of any distribution at the same rate as we would withhold on a dividend. However, a non-U.S. stockholder may obtain a refund from the IRS of amounts that we withhold if we later determine that a distribution in fact exceeded our current and accumulated earnings and profits.

Capital Gain Dividends. A non-U.S. stockholder will incur tax on distributions that are attributable to gain from our sale or exchange of “United States real property interests” under the Foreign Investment in Real Property Act of 1980 (“FIRPTA”). The term “United States real property interests” includes interests in real property, other than interests in real property solely in a capacity as a creditor, and shares in corporations at least 50% of whose assets consist of interests in real property. As a result, we do not anticipate that we will generate material amounts of gain that would be subject to FIRPTA. Nonetheless, we cannot exclude the possibility, for example, if we are able to resell a foreclosure property for an amount higher than the fair market value of such property at the time of foreclosure. Under the FIRPTA rules, a non-U.S. stockholder is taxed on distributions attributable to gain from sales of United States real property interests as if the gain were effectively connected with a U.S. business of the non-U.S. stockholder. A non-U.S. stockholder thus would be taxed on such a distribution at the normal capital gain rates applicable to U.S. stockholders, subject to applicable alternative minimum tax. A non-U.S. corporate stockholder not entitled to treaty relief or exemption also may be subject to the 30% branch profits tax on such a distribution. We must withhold 21% (35% for years beginning prior to January 1, 2018) of any such distribution that we could designate as a capital gain dividend. A non-U.S. stockholder may receive a credit against our tax liability for the amount we withhold. However, a non-U.S. stockholder that owns, actually or constructively, no more than 10% (5% for 2015 and prior years) of our capital stock at all times during the one-year period ending on the date of the distribution will not be subject to the 21% FIRPTA withholding tax with respect to distributions that are attributable to gain from our sale or exchange of United States real property interests, provided our capital stock is regularly traded on an established securities market. Instead, non-U.S. stockholders generally would be subject to withholding tax on such capital gain distributions in the same manner as they are subject to withholding tax on ordinary dividends.

Sale of Capital Stock. In the unlikely event that our capital stock constituted a United States real property interest (which generally requires that at least 50% of our assets consist of United States real property interests), gains from the sale of our capital stock by a non-U.S. stockholder could be subject to a FIRPTA tax. However, even if that event were to occur, a non-U.S. stockholder generally would not incur tax under FIRPTA on gain from the sale of our capital stock if we were a “domestically controlled qualified investment entity.” We will be a domestically controlled qualified investment entity if, at all times during a specified testing period, we are a REIT and less than 50% in value of our stock is held directly or indirectly by non-U.S. stockholders. Because our capital stock is publicly traded, no assurance can be given that we will continue to be a domestically controlled qualified investment entity.

Even if we are a domestically controlled qualified investment entity, upon disposition of our capital stock, a non-U.S. stockholder may be treated as having gain from the sale or exchange of a United States real property interest if the non-U.S. stockholder disposes of an interest in our stock and directly or indirectly acquires, enters into a contract or option to acquire or is deemed to acquire, other shares of our stock within a specified period. This rule does not apply if the exception for distributions to 10% (5% for 2015 and prior years) or smaller stockholder of regularly traded classes of stock is satisfied

Even if we do not qualify as a domestically controlled qualified investment entity at the time the non-U.S. stockholder sells or exchanges our capital stock, the gain from such a sale or exchange will not be subject to tax under FIRPTA as a sale of United States real property interests if our capital stock is regularly traded, as defined by the applicable Treasury regulations, on an established securities market, and such non-U.S. stockholder owned, actually or constructively, 5% or less of our capital stock at all times throughout the five-year period ending on the date of the sale or exchange.

If the gain on the sale of the capital stock were taxed under FIRPTA, a non-U.S. stockholder would be taxed on that gain in the same manner as a taxable U.S. stockholder, subject to applicable alternative minimum tax, and the purchaser of the stock could be required to withhold 15% of the purchase price and remit such amount to the IRS. Furthermore, a non-U.S. stockholder generally will incur tax on gain not subject to FIRPTA if:

- the gain is effectively connected with the non-U.S. stockholder’s U.S. trade or business, in which case the non-U.S. stockholder will be subject to the same treatment as U.S. stockholders with respect to such gain, or
- the non-U.S. stockholder is a nonresident alien individual who is present in the U.S. for 183 days or more during the taxable year and certain other conditions are met, in which case the non-U.S. stockholder will incur a 30% tax on his or her capital gains.

Recent legislation provides for additional exemptions from provisions relating to ownership of interests in U.S. real estate by non-U.S. persons applicable to “qualified shareholders” and “qualified foreign pension plans,” as further described below.

Subject to the exception discussed below, any distribution to a “qualified shareholder” who holds REIT stock directly or indirectly (through one or more partnerships) will not be subject to U.S. tax as income effectively connected with a U.S. trade or business and thus will not be subject to special withholding rules under FIRPTA. While a “qualified shareholder” will not be subject to FIRPTA withholding on REIT distributions, certain investors of a “qualified shareholder” (i.e., non-U.S. persons who hold interests in the “qualified shareholder” (other than interests solely as a creditor), and hold more than 10% of the stock of such REIT (whether or not by reason of the investor’s ownership in the “qualified shareholder”)) may be subject to FIRPTA withholding.

In addition, a sale of our stock by a “qualified shareholder” who holds such stock directly or indirectly (through one or more partnerships) will not be subject to U.S. federal income taxation under FIRPTA. As with distributions, certain investors of a “qualified shareholder” (i.e., non-U.S. persons who hold interests in the “qualified shareholder” (other than interests solely as a creditor), and hold more than 10% of the stock of such REIT (whether or not by reason of the investor’s ownership in the “qualified shareholder”)) may be subject to FIRPTA withholding on a sale of our stock.

A “qualified shareholder” is a foreign person that (i) either is eligible for the benefits of a comprehensive income tax treaty that includes an exchange of information program and whose principal class of interests is listed and regularly traded on one or more recognized stock exchanges (as defined in such comprehensive income tax treaty), or is a foreign partnership that is created or organized under foreign law as a limited partnership in a jurisdiction that has an agreement for the exchange of information with respect to taxes with the United States and has a class of limited partnership units representing greater than 50% of the value of all the partnership units that is regularly traded on the NYSE or NASDAQ markets, (ii) is a qualified collective investment vehicle (defined below), and (iii) maintains records on the identity of each person who, at any time during the foreign person’s taxable year, is the direct owner of 5% or more of the class of interests or units (as applicable) described in (1), above.

A qualified collective investment vehicle is a foreign person that (i) would be eligible for a reduced rate of withholding under the comprehensive income tax treaty described above, even if such entity holds more than 10% of the stock of such REIT, (ii) is publicly traded, is treated as a partnership under the Internal Revenue Code, is a withholding foreign partnership, and would be treated as a “United States real property holding corporation” if it were a domestic corporation, or (iii) is designated as such by the Secretary of the Treasury and is either (a) fiscally transparent within the meaning of section 894, or (b) required to include dividends in its gross income, but is entitled to a deduction for distributions to its investors.

Qualified Foreign Pension Funds. Any distribution to a “qualified foreign pension fund” (or an entity all of the interests of which are held by a “qualified foreign pension fund”) who holds REIT stock directly or indirectly (through one or more partnerships) will not be subject to U.S. tax as income effectively connected with a U.S. trade or business and thus will not be subject to special withholding rules under FIRPTA. In addition, a sale of our stock by a “qualified foreign pension fund” that holds such stock directly or indirectly (through one or more partnerships) will not be subject to U.S. federal income taxation under FIRPTA.

A qualified foreign pension fund is any trust, corporation or other organization or arrangement (i) which is created or organized under the law of a country other than the United States, (ii) which is established to provide retirement or pension benefits to participants or beneficiaries that are current or former employees (or persons designated by such employees) of one or more employers in consideration for services rendered, (iii) which does not have a single participant or beneficiary with a right to more than 5% of its assets or income, (iv) which is subject to government regulation and provides annual information reporting about its beneficiaries to the relevant tax authorities in the country in which it is established or operates, and (v) with respect to which, under the laws of the country in which it is established or operates, (a) contributions to such organization or arrangement that would otherwise be subject to tax under such laws are deductible or excluded from the gross income of such entity or taxed at a reduced rate, or (b) taxation of any investment income of such organization or arrangement is deferred or such income is taxed at a reduced rate.

The tax provisions relating to qualified shareholders and qualified foreign pension funds are complex. Stockholders should consult their tax advisors with respect to the impact of those provisions on them.

Provisions Relating to Foreign Accounts

Legislation (known as the Foreign Account Tax Compliance Act, or FATCA) imposes withholding taxes on certain types of payments made to “foreign financial institutions” and certain other non-U.S. entities. Under this legislation, the failure to comply with additional certification, information reporting and other specified requirements could result in withholding tax being imposed on payments of dividends and sales proceeds to U.S. stockholders (as defined above) who own shares of our capital stock through foreign accounts or foreign intermediaries and certain non-U.S. stockholders. The legislation imposes a 30% withholding tax on dividends on, and gross proceeds from the sale or other disposition of, our capital stock paid to a foreign financial institution or to a foreign entity other than a financial institution, unless (i) the foreign financial institution undertakes certain diligence and reporting obligations, or (ii) the foreign entity that is not a financial institution either certifies it does not have any substantial United States owners or furnishes identifying information regarding each substantial United States owner. If the payee is a foreign financial institution, it must enter into an agreement with the U.S. Treasury Department requiring, among other things, that it undertake to identify accounts held by certain United States persons or United States-owned foreign entities, annually report certain information about such accounts, and withhold 30% on payments to account holders whose actions prevent it from complying with these reporting and other requirements. The IRS has required withholding under FATCA with respect to dividends paid after June 30, 2014 (subject to a “transition period” applicable through the end of 2015 with respect to which the IRS will take into account certain good faith compliance efforts) and was expected to begin to require withholding under FATCA with respect to gross proceeds of a disposition of our capital stock paid after December 31, 2018. However on December 13, 2018, the Treasury Department issued a Notice of Proposed Rulemaking that would eliminate FATCA withholding on payments of gross sales proceeds before such withholding would have begun. The IRS and the Treasury Department have been collaborating with foreign governments under bilateral “intergovernmental agreements” to implement the policy objectives of FATCA. Prospective investors should consult their tax advisors regarding FATCA.

Legislative or Other Actions Affecting REITs

The rules dealing with federal income taxation are constantly under review by persons involved in the legislative process by the IRS and the U.S. Treasury Department. No assurance can be given as to whether, when, or in what form, federal income tax laws applicable to us or our stockholders may be enacted, possibly with retroactive effect. Such changes may occur even though The Tax Cuts and Jobs Act was recently passed, particularly since there is a new administration. Changes to the federal income tax laws and interpretations of federal income tax laws could adversely affect an investment in our shares of capital stock.

State and Local Taxes

We and/or our stockholders may be subject to taxation by various states and localities, including those in which we or a stockholder transacts business, owns property or resides. The state and local tax treatment may differ from the federal income tax treatment described above. Consequently, stockholders should consult their own tax advisors regarding the effect of state and local tax laws upon an investment in our capital stock.