

LESMARK

LesMark Capital, LLC

SELF-AMORTIZING BOND LOAN PROGRAM

Special Purpose Entity (SPE) Requirements

[SPECIAL PURPOSE LANGUAGE TO BE ADDED TO ORGANIZATIONAL DOCUMENTS OF BORROWER]

ARTICLE I

The purpose of [BORROWER] (the “*Company*”) is solely the ownership and development of the real property located at the [Property Intersection] of [First Cross Street] and [Second Cross Street], City of [Property City], County of [Property County], [Property State] (the “*Property*”), the leasing of the Property to [Tenant], including its permitted successors and assigns (the “*Tenant*”) and the financing thereof through the issuance of the Note (hereinafter defined).

ARTICLE II

Notwithstanding anything to the contrary contained in this Operating Agreement or the [Articles of Organization],¹ until the date on which all obligations of the Company under the Operative Agreements (as defined in the Mortgage described below) are indefeasibly and fully satisfied, the written consent or affirmative vote of at least one [Independent Manager/Independent Member]² shall be required to:

(a) change the ownership or capital structure of the Company (other than in accordance with the provisions of this Operating Agreement and the Operative Agreements);

(b) acquire all, or substantially all, of the assets or capital stock or other ownership interest of any corporation or other entity;

¹ Name of filed organizational document depends on type of entity and state of organization.

² Assuming the Company is a limited liability company, the Company needs to decide whether they will have an Independent Manager or Independent Member and make a global change to these provisions before inserting into the Operating Agreement. If the Company is a corporation, it will have an independent director.

(c) dissolve or liquidate, in whole or in part, consolidate or merge with or into any other entity or convey or transfer its properties and assets substantially as an entirety to any entity;

(d) institute proceedings to be adjudicated bankrupt or insolvent, consent to the institution of bankruptcy or insolvency proceedings against it, or file, or consent to, a petition seeking reorganization or relief under any applicable federal or state law relating to bankruptcy or insolvency, or consent to the appointment of a receiver, liquidator, assignee, trustee, sequestrator (or other similar official) of the Company or any substantial part of its property, or make an assignment for the benefit of creditors, or admit in writing its inability to pay its debts generally as they become due, or take limited liability company action in furtherance of any such action; or

(e) authorize the amendment of the Company's **[Articles of Organization]** or this Operating Agreement to: (i) provide for the removal and/or substitution of the **[Independent Manager/Independent Member]** provided for hereunder unless a new **[Independent Manager/Independent Member]** is appointed and accepts such appointment; (ii) enlarge or alter the permitted business purposes of the Company as provided in **[Article I]** above; (iii) remove the **[Independent Manager/Independent Member]** (even upon the insolvency or institution of bankruptcy proceedings involving the Company); or (iv) permit or cause the Company to dissolve or to liquidate.

[If the Company shall not have at least one (1) [Independent Manager/Independent Member], no vote upon any matter set forth in this section shall be taken unless and until such an [Independent Manager/Independent Member] shall have been duly elected and voting.]³

[Until the date on which all obligations of the Company under the Operative Agreements (as defined in the Mortgage) are indefeasibly and fully satisfied, there shall at all times be one (1) [Independent Manager/Independent Member] of the Company.]⁴

Notwithstanding that the Company is not then insolvent, the Members shall take into account the interests of the Company's creditors as well as those of the Members.

The **[Independent Manager/Independent Member]** shall be given and entitled to receive all notices as and when given or to be given under this Operating Agreement to any Manager or Member, and the **[Independent Manager/Independent Member]** shall be entitled to participate in all meetings or votes of the Members or Managers to the extent that the **[Independent Manager/Independent Member]**'s vote would be required by **[Article II]** and

³ Leave this language in for a "Springing Independent Member/Independent Manager" but REMOVE the next paragraph. (This is the case for deals under \$15,000,000.)

⁴ Leave this language in if an Independent Member/Independent Manager is required at all times during the deal but REMOVE previous paragraph. (This is sometimes the case for deals exceeding \$15,000,000 but question needs to be asked.)

shall be notified of all action on the part of the Managers and Members as to which the **[Independent Manager/Independent Member]**'s votes are required in connection with such action.

ARTICLE III

Until the date on which all obligations of the Company under the Operative Agreements (as defined in the Mortgage) are indefeasibly and fully satisfied, the Company represents, warrants and covenants that it:

(a) has not owned, does not own and will not own any assets other than the Property including cash, cash equivalents and incidental personal property necessary for the operation thereof and proceeds therefrom;

(b) has not engaged and will not engage in any business or activity other than as permitted in **[Article I]** hereof;

(c) has not and will not incur debt other than the Note defined below and debt incurred in connection with ordinary operating expenses;

(d) will not incur any debt, secured or unsecured, direct or contingent (including guaranteeing any obligation), other than (i) obligations of the Company under the Operative Agreements (as defined in the Mortgage described below) and (ii) unsecured trade payables incurred in the ordinary course of business of operating the Property;

(e) intends to remain solvent and has maintained and intends 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;

(f) has not made and will not make any loans or advances to or acquire obligations or securities of any other Person;

(g) has not held and will not hold any property of any other Person in the name of the Company;

(h) has not knowingly failed and will not knowingly fail to correct any known misunderstanding regarding its separate identity;

(i) has continuously maintained and shall continuously maintain its existence and has been and will be qualified to do business in all states necessary to carry on its business, including the state in which the Property is located;

(j) has conducted and operated and will conduct and operate its business as presently conducted and operated and in its own name;

(k) has maintained and will maintain books, records, bank accounts, accounting records and other entity documents separate from those of its partners, members, shareholders, trustees, beneficiaries, principals, Affiliates, and any other Person;

(l) has been and will be, and at all times has held and will hold itself out to the public as, a legal entity separate and distinct from any other Person (including any of its partners, members, shareholders, trustees, beneficiaries, principals and Affiliates, and any Affiliates of any of the same), and not as a department or division of any other Person (except to the extent the Company is disregarded for Federal income tax purposes);

(m) has filed and will file such tax returns with respect to itself as may be required under applicable law and has prepared and will prepare separate financial statements, or if the Company's financial statements are consolidated with those of any other Person, as permitted or required by generally accepted financial practice, such consolidated financial statements shall contain a footnote to the effect that the Company is a separate legal entity, the assets of which are not available to satisfy the debts or obligations of any other Person;

(n) has paid and shall pay its own liabilities, indebtedness, and obligations of any kind, as the same shall become due, from its own separate assets, rather than from those of other Persons, except to the extent set forth in the Indemnity and Guaranty Agreement and the Hazardous Material Indemnity Agreement and except to the extent the Manager or any Member pays out-of-pocket expenses of the Company for which expenses the Manager or Member will be reimbursed and has not paid and will not pay from its assets and liabilities, indebtedness, and obligations of any kind of any other Person;

(o) has not commingled and will not commingle or permit to be commingled its funds or other assets or liabilities with those of any other Person; and has held and will hold title to its assets in its own name (except as may be required by the Operative Agreements);

(p) has maintained and will maintain its assets and liabilities in such a manner that it is not costly or difficult to segregate, ascertain or identify its individual assets or liabilities from those of any other Person;

(q) has not and will not hold itself or its assets out to be responsible for the debts or obligations of any other Person;

(r) has not and will not guarantee or otherwise become liable on or in connection with any obligation of any other Person;

(s) has observed and will observe, as applicable, all limited liability company formalities and record keeping;

(t) has allocated and will allocate fairly and reasonably the costs associated with common employees and any overhead for shared office space and has used and will use separate stationary, invoices and checks;

(u) shall not have any employees;

(v) has not and will not conduct the business of or act on behalf of any other Person (except as required by the Operative Agreements);

(w) has not and will not represent that any other Person owns an interest in the property of the Company;

(x) has not and will not make any contributions, payments or distributions or transfer any assets to any other Person in violation of the Operative Agreements; and

(y) shall not (i) liquidate or dissolve, in whole or in part; (ii) consolidate, merge or enter into any form of consolidation with or into any other Person, nor, except as required or permitted by the Operative Agreements, convey, transfer or lease its assets substantially as an entirety to any Person nor permit any Person to consolidate, merge or enter into any form of consolidation with or into itself; or (iii) amend any provisions of its organizational documents containing provisions similar to those contained in this **[Article III]**.

“*Affiliate*” shall have the same meaning as now defined in Section 101 of the United States Bankruptcy Code (the “*Code*”) and shall include all “insiders” (as such term is now defined in Code Section 101) with respect to the Company (as defined in **[Article I]** hereof) and the **[Independent Manager/Independent Member]**, except that the percentage of direct or indirect legal or beneficial interest required to be held by the relevant entity for purposes hereof shall be ten percent (10%), not the twenty percent (20%) provided in Code Section 101.

“*Creditor*” shall mean a Person (x) to whom the Company, the **[Independent Manager/Independent Member]** or any Affiliate thereof has, at any time from and after the date hereof, outstanding indebtedness in an amount equal to or greater than ten percent (10%) of the Company’s, the **[Independent Manager/Independent Member]’s** or such Affiliate’s, as the case may be, total outstanding general unsecured indebtedness at such time, or (y) to whom total payments have been made by the Company, the **[Independent Manager/Independent Member]** or such Affiliate during the immediately preceding fiscal year which are equal to or greater than ten percent (10%) of the respective gross annual revenues of the Company, **[Independent Manager/Independent Member]** or such Affiliate for such immediately preceding fiscal year.

“**[Independent Manager/Independent Member]**” shall mean an individual who is not at the time of his appointment as **[Independent Manager/Independent Member]**, has not been at any time during the preceding five (5) years, and does not become subsequently: (i) a direct or indirect legal or beneficial holder of any stock, partnership or other equity interest in such the Company or any of its Affiliates; (ii) a Creditor, Supplier (as defined below), employee, officer,

director, family member, manager (other than during the individual's tenure as **[Independent Manager/Independent Member]**) or contractor of the Company or any of its Affiliates; or (iii) an individual who controls, directly, indirectly or otherwise the Company or any of its Affiliates or any Creditor, Supplier, officer, director, member, manager or contractor of such Person or its Affiliates.

"Mortgage" shall mean that certain Mortgage, Security Agreement, Assignment of Leases and Rents and Fixture Filing Statement dated as of [Document Date] from the Company for the benefit of the Noteholder.

"Note" means that certain Senior Secured Note in the principal amount not to exceed [Loan Amount] executed by the Company pursuant to and in accordance with a certain Note Purchase Agreement between the Company and [Lender], which is secured by, among other liens, mortgages and security interests, a certain Mortgage, Security Agreement, Assignment of Leases and Rents and Fixture Filing Statement covering the Property.

"Noteholder" means the current lawful owner and holder of the Note.

"Person" shall mean any individual, corporation, association, partnership (general or limited), joint venture, trust, estate, limited liability company, or other legal entity or organization and any governmental authority.

"Supplier" shall mean a Person who provides or has provided goods or services to the Company, the **[Independent Manager/Independent Member]**, and any Affiliate thereof such that the total payments received by or due to such Person by the Company, **[Independent Manager/Independent Member]**, and such Affiliate during such Person's immediately preceding fiscal year are equal to or greater than ten percent (10%) of such Person's total annual gross revenue for such Person's immediately preceding fiscal year.

INSERT RE: EXCLUSIVE USE FOR ORGANIZATIONAL DOCUMENTS

The following Language should be added to the organizational documents of [Borrower] but is only necessary if the Lease contains an Exclusive Use Provision which is applicable to any parties other than the Landlord (such as owners, officers, trustees or employees).

[Borrower] is party to that certain Lease dated [Lease Date] with [Tenant] (the "*Lease*") which provides in Section [___] thereof that, [Borrower] may not own or control, directly or indirectly, any real property within 500 feet of any boundary of the Property which property is used in the operation of a business in competition with [Tenant] (the foregoing restriction is herein referred to as the "*Exclusive Use Restriction*"). Each of the current Members, and each future Member by its acceptance of an ownership or equity interest in [Borrower], agrees that it shall not, and shall not cause or permit [Borrower] to, violate the Exclusive Use Restriction,

Section [____] of the Lease or any other restriction or covenant set forth in the Lease which binds, affects or makes reference to the activities of any owner or holder of an ownership or equity interest in [Borrower]. Each new Member, prior to its becoming a Member, shall execute a written agreement to the foregoing effect. **[Only a Member shall be permitted to be an officer, director, employee or trustee of [Borrower].]**

**CERTIFICATE OF MEMBER
OF
[BORROWER]**

The undersigned, _____, does hereby certify that:

1. The undersigned is a Member of [BORROWER] (the “*Company*”), a [Borrower Entity] duly organized and existing and in good standing under the laws of the State of [Borrower Jurisdiction], and that, as a Member, has custody of the records of the Company.

2. There have been no amendments to the [Articles of Organization] of the Company since _____ and the [Articles of Organization] of the Company as certified by the Secretary of State of the State of [Borrower Jurisdiction] on said date remain in full force and effect on the date hereof.

3. Attached hereto as *Annex A* is a true, correct and complete copy of the Operating Agreement of the Company, which was duly adopted by the Company and which was on the date of the written consent to action without meeting referred to in paragraph 4 hereof and which is on the date hereof in full force and effect.

4. Attached hereto as *Annex B* is a true, correct and complete copy of the certain written consent to action without meeting duly adopted by the Company on or prior to the date hereof, which written consent to action without meeting does not in any manner contravene the [Articles of Organization] or the Operating Agreement of the Company and has not been rescinded or modified in any manner and is in full force and effect on the date hereof.

5. Each of the Operative Agreements (as defined in the Mortgage, Security Agreement, Assignment of Leases and Rents and Fixture Filing Statement dated as of [Document Date] from the Company to [Lender]), to which the Company is a party, are in substantially the same form as the copies of such instruments which are referred to in said written consent to action without meeting and each are in the form which was authorized to be executed and delivered on behalf of the Company.

IN WITNESS WHEREOF, the undersigned has hereunto set [his/her] hand this _____ day of _____, [Document Year].

Member, as aforesaid

ANNEX A
(Operating Agreement)

ANNEX B

([Written Consent/Resolutions])

**WRITTEN CONSENT TO ACTION WITHOUT MEETING
BY THE [MEMBER]
OF
[BORROWER]**

DATED AS OF _____, [DOCUMENT YEAR]

The undersigned, being the [member] of

[BORROWER]

a [Borrower Jurisdiction] limited liability company (the “*Company*”), pursuant to the applicable provisions of the [Borrower Jurisdiction] Limited Liability Company Act and the Operating Agreement of the Company, does hereby consent that the following resolutions be and they hereby are adopted as of the date first written above, and are and shall be of the same force and effect as if they were adopted at a special meeting of the [member] of the Company held pursuant to the Operating Agreement of the Company and the laws of the State of [Borrower Jurisdiction], to wit:

WHEREAS, in order to provide funds to repay indebtedness of the Company incurred to finance the [construction/purchase] of a [Tenant] store located in [Property City], [Property State] (the “*Property*”), authorized representatives of the Company have negotiated with [Lender] (the “*Purchaser*”) for the issuance and sale to the Purchaser at par of the Company’s [Coupon Rate] Senior Secured Note, due [Maturity Date] **[on the Maturity Date (as defined therein)]**, in a principal amount not to exceed [Loan Amount] (the “*Note*”) to be issued under and sold pursuant to the Note Purchase Agreement hereinafter referred to, such Note to be dated the date of issue, to bear interest at the rate of [Coupon Rate] per annum prior to maturity and to be expressed to mature in monthly installments, each including principal and interest, as set forth on the amortization schedule attached to such Note and to have the other characteristics set forth in the Note Purchase Agreement hereinafter defined; and

WHEREAS, the officers or members of the Company have caused to be prepared and presented to the undersigned the following documents (collectively, the “*Operative Agreements*”):

- (i) The form of the Note Purchase Agreement dated as of [Document Date] (the “*Note Purchase Agreement*”) between the Company and the Purchaser;
- (ii) The form of the Mortgage, Security Agreement, Assignment of Leases and Rents and Fixture Filing Statement dated as of [Document Date] from the Company for the benefit of the Purchaser to be executed in respect of the Property;
- (iii) The form of the Note to be issued and delivered to the Purchaser pursuant to the Note Purchase Agreement (the “*Note*”);

(iv) The form of Escrow and Servicing Agreement dated as of [Document Date] among the Company, the Purchaser and [Servicer];

(v) The form of Subordination, Non-Disturbance and Attornment Agreement dated as of [Document Date] among [Tenant], the Company and the Purchaser [; and]

(vi) The form of Hazardous Material Indemnity Agreement dated as of [Document Date] from the Company and the other parties thereto [; and]

[(vii) The form of the Letter of Credit Agreement (as defined in the Note Purchase Agreement).]

[(viii) The form of the Assignment of Leases and Rents dated as of [Document Date] from the Company to the Purchaser.]

WHEREAS, it appears that each of the instruments referred to above is, or was at the time of execution, in appropriate form and is, or was at the time of execution, an appropriate instrument to be executed and delivered by the Company for the purpose intended; and

WHEREAS, in the judgment of the undersigned, it is advisable and in the best interest of the Company and its owners that [Borrower Signatory] be authorized to execute certain documents on behalf of the Company;

NOW, THEREFORE, Be It and It Is Hereby Resolved, as follows:

1. That [Borrower Signatory] is hereby authorized, empowered and directed for and on behalf of and in the name of the Company to execute the Note in a principal amount not to exceed [Loan Amount] having the characteristics specified for said Note in the Note Purchase Agreement and in the form of the Note hereby approved.

2. That [Borrower Signatory] is hereby authorized, empowered and directed for and on behalf of the Company to execute, on behalf of the Company, the Operative Agreements, such instruments, respectively, to be substantially in the forms of the Operative Agreements, hereby approved and/or with such additional, modified or revised terms as may be acceptable to [Borrower Signatory], as evidenced by [his] execution thereof.

3. That [Borrower Signatory] hereby is authorized and directed to do all such things and acts and to make, execute and deliver all such other agreements, instruments and documents and to pay all such costs, expenses, insurance premiums and taxes on behalf of the Company as may be necessary in order to carry out the purposes and intent of these resolutions, and all of the acts and doings of the officers, employees or owners of the Company which are consistent with the purposes and intent of these resolutions shall be, and the same hereby are, in all respects ratified, approved and confirmed.

[Remainder of page intentionally left blank]

IN WITNESS Whereof, the undersigned, being the [member] of the Company, has affixed [his] signature hereunto as of the date first written above, in acknowledgment of [his] consent to the adoption of the resolutions hereinabove set forth.

[MEMBER]

By: _____

Name:

Its: