PRE-NEGOTIATION AGREEMENT

This Pre-Negotiation Agreement (this “Agreement”), dated [\_\_\_\_\_], 2020, is by and between KEB HANA BANK AS A TRUSTEE OF KB NORTH AMERICA PRIVATE REAL ESTATE DEBT FUND3, a Korean real estate investment trust (“Lender”), on the one hand, and MANCHESTER AUSTIN PARENT LLC, a Delaware limited liability company (“Borrower”) and PAPA DOUG TRUST u/t/d January 11, 2010, a trust formed under the laws of the State of California (“Guarantor” and, with Borrower, the “Borrower Parties”) on the other. The Borrower Parties and Lender shall each be referred to herein as a “Party”, and collectively as the “Parties”.

We refer to that certain Mezzanine Loan Agreement, dated as of September 5, 2019, between Borrower and Lender, as amended by that certain First Amendment to Mezzanine Loan Agreement, dated as of October 4, 2019 (the “Loan Agreement”). Capitalized terms used but not defined herein shall have the respective meanings set forth in the Loan Agreement.

# For and in consideration of the promises contained herein and other good and sufficient consideration, the receipt and adequacy of which are hereby acknowledged, the Parties acknowledge and agree as follows.

1. Negotiations. The Parties have commenced or may hereafter commence discussions and negotiations regarding possible modifications, waivers or deferrals of certain terms of the Loan (such discussions and negotiations from and after the date hereof, “Negotiations”). For avoidance of doubt, the Negotiations shall not include any discussions or negotiations among the Parties or any Affiliates of the Parties with respect to any matter other than the Loan. In addition, Negotiations shall not include any action, communication (including emails or other forms of electronic communication) or statements made by Lender in connection with Lender’s enforcement of Lender’s rights and remedies under the Loan Documents, this Agreement or in law or equity (including, without limitation, judicial or non-judicial foreclosure actions). The Parties further acknowledge that the Lender and Mortgage Lender and Mezzanine B Lender have commenced or may hereafter commence discussions and negotiations regarding possible modifications, waivers or deferrals of certain terms of the Loan and/or Mortgage Loan and/or Mezzanine B Loan, which shall constitute Negotiations for purposes hereunder (other than for purposes of paragraph 8 hereof). No Party is under any obligation to reach any agreement, and any Party may terminate the Negotiations at any time for any or no reason by written notice to the other Party in accordance with the Loan Agreement (as modified by paragraph 15 hereof). Notwithstanding that the Parties may reach oral understandings or agreements on one or more issues, no Party shall be bound by any such oral agreement, and no rights, claims, obligations or liabilities of any kind shall arise or exist in favor of or be binding upon any Party, nor shall Lender be deemed to have waived or agreed to forbear on any of its rights under the Loan Documents, nor shall the Loan Documents be deemed to have been modified, in each case except if and to the extent expressly set forth in a definitive written agreement hereafter signed by the Parties that are to be bound thereby. The Parties acknowledge and agree that email(s) or other forms of electronic communication among the Parties or their respective attorneys, agents and representatives with respect to the Loan shall under no circumstances whatsoever (and regardless of whether such email(s) or other forms of electronic communication purport to do so) constitute a signed and binding agreement among the Parties. The Parties have entered into this Agreement in order to encourage Negotiations in an open, frank and direct manner without risk of exposure to liability as a result thereof and in order to avoid any claim or allegation that the Loan, the Loan Documents or any obligations arising thereunder have been modified, amended, waived, released or altered in any manner whatsoever by reason thereof. Borrower and Guarantor understand that Lender would not enter into communications and Negotiations concerning the Loan Documents without the execution and delivery of this Agreement.
2. No Waiver or Release. Without limitation of the foregoing or any other provision of this Agreement, the following are not and shall not be construed as a waiver or release of any rights or remedies by Lender, as an indication of a course of dealing, or in any manner to give rise to an obligation of any of the parties hereto or in any manner to modify the legal relationship among the parties hereto: (a) the attendance by the parties hereto or their respective attorneys and representatives at any meetings with respect to the Loan, the Loan Documents and/or the Negotiations; (b) the making of any advance or protective advance, or the acceptance of any partial prepayment, under circumstances where Lender is not obligated to do so under the terms of the Loan Documents; or (c) correspondence, statements, discussions, negotiations, meetings, drafts of documents (including, without limitation, unexecuted drafts of this document) and telephone communications among the parties hereto or their respective attorneys, agents and representatives with respect to the Loan, the Loan Documents and/or the Negotiations.
3. No Representations by Lender. Borrower and Guarantor acknowledge that Lender has not made any representations, warranties or other statements that Lender will consent to a modification or waiver of any of the terms or conditions of any of the Loan Documents, that Lender would agree to a consensual workout, that Lender would advance any additional monies to any person or entity, or that Lender would forbear or refrain from taking any enforcement action.
4. Alternative Opportunities. As the Negotiations may not result in an agreement, the Borrower Parties acknowledge and agree that the Negotiations are not and will not be a deterrent to their consideration of any alternative opportunities that they believe may be in their best interest (subject, however, in all cases to the terms of the Loan Documents).
5. Non-Admissible. The Parties acknowledge that the Negotiations are in the nature of settlement negotiations and, therefore, that statements made in the course of the Negotiations may not be used for any other purpose (including, without limitation, proof of admissions of liability or for other evidentiary purposes). All evidence of conduct and communications of any nature whatsoever (whether verbal or nonverbal, express or implied) of any party hereto in connection with the Negotiations or in any meetings or correspondence which relate to possible modification or amendment of the Loan or any forbearance from exercising rights or remedies, any of the Loan Documents shall be inadmissible for any purpose whatsoever in any judicial or similar proceeding. The foregoing sentence is intended to be broader than the restrictions on admissibility contained in Rule 408 of the Federal Rules of Evidence or similar rule or statute under any applicable state law. Notwithstanding the foregoing, each of the Parties hereto acknowledges and agrees that this Agreement is a legally binding agreement that may affect such party’s rights.
6. Waiver and Release of Future Claims Related to the Negotiations. Each Party hereby irrevocably waives and releases any and all claims, actions, causes of action, suits, and defense which such Party might hereafter have against the other Parties for or by reason of, arising from, or in connection with, any statement, representation, conduct, action, inaction or utterance (whether oral or in writing) whatsoever which hereafter may be made during the course of Negotiations, whether based on contract, tort, equity or otherwise; provided, however, that the waiver and release set forth in the preceding portion of this paragraph 6 shall not waive, release, limit, restrict or affect in way (i) any of the Parties’ obligations under this Agreement, (ii) the Borrower’s obligations under the Loan Documents or (iii) Lender’s rights and remedies pursuant to the Loan Documents.
7. Waiver of Jury Trial. BORROWER, GUARANTOR 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 THIS AGREEMENT, ANY COMMUNICATIONS OR NEGOTIATIONS. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS GIVEN KNOWINGLY AND VOLUNTARILY BY BORROWER, GUARANTOR AND LENDER, AND IS INTENDED TO ENCOMPASS INDIVIDUALLY EACH INSTANCE AND EACH ISSUE AS TO WHICH THE RIGHT TO TRIAL BY JURY WOULD OTHERWISE ACCRUE OR EXIST. EACH PARTY IS HEREBY AUTHORIZED TO FILE A COPY OF THIS AGREEMENT IN ANY PROCEEDING AS CONCLUSIVE EVIDENCE OF THIS WAIVER BY ANY OTHER PARTY.
8. Confidentiality. The Negotiations shall be kept strictly confidential and shall not be disclosed to any third party without the express written consent of the other parties hereto, except to the extent disclosed to a respective Party’s partners, members, officers, directors, employees, participants, successors and assigns or to a Party’s legal counsel, accountants, regulators or financial or other professional advisors (including, but not limited to, appraisers and brokers). Further, no party hereto shall disclose to any third party (not including any of the persons or entities to which disclosure is permitted in the foregoing sentence) the nature of the Negotiations, or the fact they are being held at all. Notwithstanding anything to the contrary, no Party shall be prohibited from disclosing the subject matter of any Negotiations, or the nature or existence of such Negotiations, if and to the extent that disclosure is required pursuant to applicable law or compulsory legal process. Each Party acknowledges and agrees that, notwithstanding anything to the contrary herein, each Party may disclose to and discuss with Mortgage Borrower and/or Mortgage Lender and/or Mezzanine B Lender the Negotiations. Nothing contained herein shall limit or restrict the right of Lender or Mortgage Lender or Mezzanine B Lender to negotiate with the Borrower or Mortgage Borrower or Mezzanine B Borrower, respectively, and/or Guarantor.
9. Assignees. This Agreement shall be binding upon and shall inure to the benefit of any assignee of Lender, Borrower, and Guarantor, including, without limitation, any successor under the Loan Documents.
10. No Joint Venture. Nothing contained in this Agreement, any Negotiations, communications or any prior actions by Lender, whether pursuant to the Loan Documents or otherwise, shall be deemed to contemplate or constitute a joint venture or partnership agreement of any kind between Lender, on the one hand, and Borrower and Guarantor, on the other hand, or otherwise create the relationship of joint venturers or partners between Lender, on the one hand, and Borrower and Guarantor, on the other hand. The Parties acknowledge and agree that the relationship between Borrower and Guarantor, on the one hand, and Lender, on the other hand, arose entirely pursuant to and in accordance with the Loan Documents.
11. Expenses. Borrower shall reimburse Lender for all reasonable out-of-pocket costs and expenses (including reasonable attorneys’ fees and advisory fees) incurred by Lender in connection with this Agreement and the Negotiations.
12. Governing Law. This Agreement shall be governed by and construed and interpreted in accordance with the laws of the State of New York without regard to principles of conflicts of law.
13. Miscellaneous. **Each Party is represented by legal counsel of its choice, has consulted with such counsel regarding this Agreement, is fully aware of the terms and provisions contained herein and of their effect, and has voluntarily and without coercion or duress of any kind entered into this Agreement.** This Agreement may only be amended pursuant to written instruments executed by the parties hereto. This Agreement may be executed in any number of counterparts, each of which when so executed and delivered shall be an original, but all of which shall together constitute one and the same instrument. Copies of originals, including copies delivered by facsimile, pdf or other electronic means, shall have the same import and effect as originals and shall be valid, enforceable and binding for the purposes of this Agreement.
14. Notices. Notwithstanding anything to the contrary in the Loan Agreement, notices under this Agreement shall be delivered by e-mail in addition to any method of providing notice in accordance with the Loan Agreement. Notice must be given as a .pdf attachment to an e-mail to each of the e-mail addresses set forth below for each Party and in accordance with this paragraph. Any such notice shall be deemed to have been received either (x) upon acknowledgement of receipt of such e-mail notice by the Party(ies) to which it is addressed or (y) actual receipt of such notice by the Party(ies) to which it is addressed sent by any other method of providing notice set forth in the Loan Agreement. The e-mail addresses for purposes of delivering notice pursuant to this paragraph 15 to the Parties are as follows:

If to Lender: Email: [\_\_]

Email: [\_\_]

And to: Email: dreynolds@cgsh.com

If to the Borrower Parties: Email: [●]

And to: Email: [●]

1. Survival. The provisions of this Agreement shall survive any termination of the Negotiations.

Please sign this letter in the space provided below to confirm that this letter accurately summarizes the terms of our agreement with respect to the subject matter hereof.

KEB HANA BANK AS A TRUSTEE OF KB NORTH AMERICA PRIVATE REAL ESTATE DEBT FUND3, a Korean real estate investment trust

By:

Name:

Title:

[\_\_\_\_], a [\_\_\_\_][[1]](#footnote-1)

By:

Name:

Title:

[\_\_\_\_], a [\_\_\_][[2]](#footnote-2)

By:

Name:

Title:

1. NTD: Mezz borrower. [↑](#footnote-ref-1)
2. NTD: Guarantor. [↑](#footnote-ref-2)