

# **\$70.96MM PERFORMING NYC LOAN RELATIONSHIP**

## **PRE-WAR APARTMENTS & GROUND FLOOR RETAIL**

### **CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT**

This Confidentiality and Non-Disclosure Agreement dated as of [DATE], 2023 (this “Agreement”) is between [RECIPIENT] (“Recipient”) and CAPITAL ONE, NATIONAL ASSOCIATION (“Company”).

Recipient intends to enter into discussions with Company regarding a possible sale transaction between the parties (“Transaction” or “Potential Transaction”) of one or more loans (collectively, the “Loans”) to a company or entity (collectively, the “Borrowers”). This Agreement sets forth the terms and conditions that will apply to the treatment of certain information that Company discloses to Recipient in connection with the Potential Transaction.

In consideration of Company providing Confidential Information (as defined below) to Recipient, among other things, the Parties agree as follows

1. Definitions. As used in this Agreement:

“Affiliate” means, with respect to any Person, another Person that directly, or indirectly through one or more intermediaries, Controls or is Controlled by or is under common Control with the Person specified.

“Confidential Information” means (a) all information relating to the Borrowers or Loans that is disclosed to Recipient or its Representatives by or on behalf of Company in connection with the Potential Transaction (whether prepared or communicated by Company or the Borrowers, their respective Representatives or otherwise), and (b) any Work Product using any of the information described in clause (a) above, but excludes (i) information that was, is or becomes generally available to the public other than as a result of a disclosure by Recipient or any of its Representatives in breach of this Agreement and (ii) information that was within the possession of Recipient or any of its Representatives prior to being furnished to Recipient or its Representatives pursuant hereto or is lawfully obtained by Recipient or any of its Representatives thereafter from a source that, in each case, is not, by virtue of such disclosure, in breach of any obligation of confidentiality of such source with respect to such information.

“Confidentiality Provisions” means the provisions in any applicable Underlying Documents that relate to the disclosure and/or use of confidential information that is delivered in connection with such Underlying Documents.

“Control” means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person whether through the ability to exercise voting power, by contract or otherwise (and “Controlled” shall have a meaning correlative thereto).

“Person” means any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership or other entity.

“Representatives” means, with respect to any Person, its Affiliates and the directors, officers, employees, partners, members, agents, advisors, counsel and auditors and financing sources of such Person and of such Person’s Affiliates; provided that, Recipient’s Representatives shall be limited to the foregoing Person that receive Confidential Information from the Recipient or on its behalf

“Underlying Documents” means the underlying documents governing the loans, claims, and/or securities relevant to the Loans.

"Work Product" means all memoranda, notes and any other documents and/or analyses of any kind created or developed by Company or its Representatives.

2. Restrictions on Disclosure and Use. Except as otherwise set forth in this Agreement, Recipient agrees as follows:

- (a) Recipient shall use any Confidential Information disclosed to Recipient for the sole purpose of evaluating and negotiating its or an Affiliate's Potential Transaction ("Permitted Purpose") and shall not use any Confidential Information for any other purpose;
- (b) Recipient shall keep confidential and not disclose any Confidential Information to any Person and shall use reasonable care in protecting the confidentiality of the Confidential Information; and
- (c) Recipient shall not disclose to any Person the identity of Company or any Borrower, any Potential Transaction or any of the terms or conditions of such Potential Transaction (it being understood that the foregoing shall be deemed "Confidential Information" hereunder and shall be subject to the same exceptions to non-disclosure set forth in Section 3(b) below on the same conditions applicable to Confidential Information pursuant to such Section).

3. Permitted Disclosure. Recipient may disclose Confidential Information only as follows:

- (a) Recipient may disclose Confidential Information to its Representatives for the Permitted Purpose and to its internal auditors to comply with internal audit or compliance policies; provided that (i) such Confidential Information shall not be used for any other purpose, (ii) Recipient informs such Representatives of the confidential nature of such information and directs them to treat such information in accordance with the terms of this Agreement, and (iii) Recipient shall be responsible for any breach of this Agreement that results from the actions of omissions of such Representatives; and
- (b) If Recipient or any of its Representatives receives a demand to disclose Confidential Information under the terms of a discovery request, subpoena, order, civil investigative demand, agency administrative demand, or similar legal or administrative process, or as required by applicable law, rule, governmental authority or regulation or stock exchange requirement, provided that prior to disclosing any Confidential Information to a Person pursuant to this paragraph (b), Recipient will, to the extent not prohibited by any applicable law, rule, or regulation:
  - (i) inform such Person of the confidential nature of such information and that disclosure of such information be treated as Confidential Information in accordance with by the terms of this Agreement;
  - (ii) immediately inform Company in writing of any request or demand received by Recipient for disclosure of Confidential Information in time that Company may seek appropriate relief in regard to disclosure of any Confidential Information,
  - (iii) consult and cooperate with Company in taking legally available steps to object to and/or narrow the scope of any disclosure demand; and
  - (iv) not object to of challenge any relief requested by Company in regard to any Confidential Information,

provided, however, that the Recipient and its Representatives shall not be required to inform such Person or give such notification to Company if the disclosure is made solely to a bank examiner,

regulatory examiner, or self-regulatory examiner in the ordinary course of such examiner's examination or inspection of Recipient.

4. No Rights. This Agreement does not, and it is not intended to, grant any rights under any patent, trademark, trade name, copyright, service mark or other intellectual property of Company, nor does this Agreement grant Recipient any rights in or to Confidential Information, except the limited right to review such Confidential Information solely for the Permitted Purpose. Recipient shall not use, at any time, any Company trade name, trademark, service mark or other intellectual property, in any writing (regardless of form) issued or displayed by Recipient to a third party or otherwise. In addition, Recipient acknowledges and agrees that none of the Confidential Information is property of Recipient and that nothing herein shall be construed to grant to Recipient or its Representatives any ownership or other rights in or to any Confidential Information.
5. Underlying Documents' Confidentiality Provisions. To the extent that any Underlying Documents contain Confidentiality Provisions that conflict with, are more restrictive than, or otherwise impose requirements that are in addition to the terms and conditions contained herein, then such Confidentiality Provisions shall be incorporated herein by this reference and shall supersede and control the terms of this Agreement to the extent that such provisions are in conflict with or more restrictive than the terms hereof or are in addition to those contained herein. Upon Recipient's written request, Company shall furnish to Recipient copies of any such applicable Confidentiality Provisions.
6. Return of Confidential Information. Upon the completion of the Potential Transaction, or at any time at the written request of Company (electronic mail suffices), Recipient will promptly return to Company or, with Company's written consent, destroy as soon as practical all Confidential Information and/or any materials prepared by Recipient which contain any Confidential Information, including, but not limited to, any written notes, emails, memoranda, photocopies, reports, computer generated data or other similar repositories; provided that, Recipient and its Representatives may retain Confidential Information as required by law, regulation, professional obligation or bona fide document retention policy, and shall not be required to delete or expunge any automatically archived records stored on back-up media.
7. Material Non-Public Information. Recipient acknowledges that the Confidential Information may include material non-public information, and Recipient represents that it has developed compliance procedures regarding the use of material non-public information and agrees that it will handle such material non-public information only in accordance with applicable law.
8. Remedies. Recipient acknowledges and agrees that money damages would not be a sufficient remedy for breach of this Agreement and that, in addition to all other remedies available at law or in equity, Company shall be entitled to seek equitable relief, including injunctive relief and specific performance of this Agreement, all without proof of actual damages. Recipient waives any defense regarding, and agrees not to oppose, any request by Company for injunctive relief, specific performance, or any other equitable relief to any use and/or disclosure of Confidential Information that violates the terms of this Agreement, all in addition to all other remedies available to Company in law or in equity for any breach or violation of this Agreement.
9. No Company Representations or Warranties. Recipient acknowledges and agrees that Company has not and does not make any representations or warranties of any kind or nature whatsoever (whether express, implied or otherwise), including, without limitation, with respect to (a) the accuracy or completeness of the information contained in the Confidential Information, (b) the presence or absence of any errors or omissions contained in the Confidential Information, (c) the scope or adequacy of Company's due diligence in connection with the Confidential Information, or (d) any work performed by Company or any other Persons in connection with the Confidential Information. Without limiting the generality of the foregoing, Recipient acknowledges and agrees that Company has no responsibility for the appropriateness of the Confidential Information for any of Recipient's purposes, that Company has no obligation to provide complete or any particular

information to Recipient, and Company shall have no present, continuing or future duty to correct, supplement or update the Confidential Information or any fact contained therein or related to the Confidential Information

10. Non-Reliance. Recipient confirms it has performed or is performing its own diligence and has made or is making its own independent investigation and will continue to make its own decisions with respect to the Potential Transaction based solely on its own analysis. Recipient hereby represents and warrants that neither Recipient nor any of its Representatives will rely on the Confidential Information or make any claim that it has done so.
11. No Obligation Regarding Any Potential Transaction. Recipient acknowledges and agrees that execution of and performance under this Agreement creates no obligation on the part of Company to enter into any subsequent agreements, arrangements or business relationships with Recipient or any other Person or to close any Potential Transaction, if any Company makes no representation or warranty that it will not enter into negotiations with any other Person or Persons to purchase the Loans.
12. Electronic Delivery. The Parties acknowledge that Company may provide Confidential Information by electronic mail or other electronic means of communication (including through establishing websites, electronic workspaces or other electronic means to facilitate providing Confidential Information) and that such information furnished through such means shall be considered "Confidential Information" for all purposes of this Agreement.
13. Electronic Execution. This Agreement may be executed electronically through an electronic acceptance and acknowledgement in an electronic workspace designed for that purpose, which acceptance and acknowledgement shall have the same legal effect, validity and enforceability as a signature affixed by hand to the extent and as provided for in any applicable law including the Federal Electronic Signatures in Global and National Commerce Act, the New York State Electronic Signatures and Records Act, or any other similar state laws based on the Uniform Electronic Transactions Act. Transmission by telecopy, facsimile, email or other form of electronic transmission of an executed Agreement shall be deemed to constitute due and sufficient delivery.
14. Recipient hereby acknowledges and agrees that (i) Recipient's entering into this Agreement and receiving any Confidential Information in accordance with the terms herein, are solely undertaken to facilitate Recipient's evaluation of the Loans and discussion, if any, between Recipient and Company regarding a Potential Transaction, (ii) this Agreement and Recipient's receipt of any Confidential Information (as defined herein below) does not, and shall not be construed to, constitute an offer and acceptance to purchase and sell the Loans or consummate a Potential Transaction or any other transaction, (iii) Company expressly reserves unto itself the right, in its sole and absolute discretion, to withdraw the marketing of the Loans for sale as well as cease from any and all discussions with Recipient with respect to a Potential Transaction, at any time, without any recourse, liability, duty or obligation owed to Recipient, (iv) the final decision to sell the Loans and enter into a Potential Transaction is absolutely subject to, and reserved in accordance, with Company's applicable internal approval procedures and processes, and (v) there is no agreement by Company with respect to the Potential Transaction until such time when it has been documented, in form, content and detail satisfactory to Company, and fully executed.
15. This Agreement shall inure to the benefit of Company and its successors and assigns, and shall be binding upon Recipient, Recipient's affiliates, subsidiaries, entities in common control with, in control of or controlled by Recipient ("Related Interests"), all Personnel thereof, and their respective successors or assigns, provided, however, Recipient may not assign any right or delegate any duty or obligation under this Agreement without the prior written consent of Company.
16. Recipient represents and warrants that neither Recipient nor any of its Related Interests, nor any Person having a direct controlling interest in Recipient or Recipient's Related Interests is a director, executive officer or principal shareholder of Company or any of Company's affiliated companies,

and that no individual having a direct controlling interest in Recipient of any of Recipient's Related Interests is an immediate family member of a director, executive officer or principal shareholder of the Company or any of Company's affiliated companies. Furthermore, Recipient represents and warrants that neither Recipient nor any of its Related Interests, nor any Person having a direct controlling interest in Recipient or Recipient's Related Interests is affiliated with any Person or Persons which are obligated under, own an interest in, or are otherwise associated with the Assets.

17. Miscellaneous.

- (a) Governing Law. This Agreement shall be governed by the laws of the State of New York without regard to its choice of law principles.
- (b) Submission to Jurisdiction. In the event of any action or claim to enforce or interpret the terms of this Agreement, the parties hereto hereby agree and consent to the jurisdiction and venue of the State or Federal courts located in New York, New York.
- (c) Waiver of Right to Trial by Jury. As a material inducement to entering into this Agreement, each of Recipient and Company hereby irrevocably, and as an independent covenant, WAIVE ANY RIGHT TO TRIAL BY JURY, in any action or proceeding, whether hereunder or under the terms and conditions of any other of the documents or agreements associated herewith.
- (d) Entire Agreement. This Agreement (including the provisions of any Underlying Documents incorporated herein by reference) embodies the entire understanding and agreement between the Parties with respect to all Confidential Information and supersedes all prior understandings and agreements relating thereto.
- (e) Severability. If any provision of this Agreement shall be determined to be illegal or unenforceable, such determination shall not affect any other provision of this Agreement, and all other such provisions shall remain in full force and effect.
- (f) Notices. Notice pursuant to this Agreement shall be made by email and overnight courier or delivery services to the addresses set forth above and shall be effective upon receipt.
- (g) Term. This Agreement shall terminate on the earlier of (i) the date that the parties enter into a definitive agreement in respect of the Transaction (ii) 18 months from the date hereof.

[Signature Page Follows]

IN WITNESS WHEREOF, the Recipient has caused this Confidentiality and Non-Disclosure Agreement to be duly executed and delivered by its respective authorized signatory as of the date first written above.

**RECIPIENT:**

**[RECIPIENT NAME]**

By: \_\_\_\_\_  
Name:  
Title: