

COMPLETION GUARANTY (STUDENT HOUSING)

THIS COMPLETION GUARANTY (STUDENT HOUSING) (this “**Guaranty**”) is made and entered into this ____ day of ____, 2019, by and among [____], a [____] [____] (“**Student Housing Guarantor**”), for the benefit of the **FAIRFAX COUNTY REDEVELOPMENT AND HOUSING AUTHORITY**, a political subdivision of the Commonwealth of Virginia, its successors and assigns (the “**FCRHA**”).

RECITALS:

WHEREAS, Fairfax Properties I, LLC a Delaware limited liability company (“**Tenant**”), and FCRHA, as landlord, have entered into the Deed of Lease, dated _____, 20__ by and between FCRHA and Tenant (the “**Lease**”), covering certain real property located in Fairfax County, Virginia, as more particularly described therein;

WHEREAS, Tenant (also referred to herein as “**Student Housing Developer**”) is obligated to deliver a payment and performance guaranty for the Final Completion (as defined in the Lease) of the Project (as defined in the Lease), and Tenant has caused the delivery of this Guaranty by Student Housing Guarantor, to satisfy Tenant’s obligations with respect to the delivery of such guaranty; and

WHEREAS, the Student Housing Guarantor will receive material benefit from the execution of this Guaranty;

NOW, THEREFORE, for valuable consideration, the receipt and adequacy of which are hereby acknowledged, Student Housing Guarantor hereby guarantees the Guaranteed Obligations (hereinafter defined) upon the following terms and conditions:

1. Incorporation of Recitals; Defined Terms. The Recitals set forth above are hereby incorporated in this Guaranty by this reference. Capitalized terms used in this Guaranty and not otherwise defined herein shall have the meanings set forth in the Lease.

2. Guaranteed Obligations. The term “**Guaranteed Obligations,**” as used herein means the timely payment and performance of all of Student Housing Developer’s obligations under the Lease with respect to Final Completion (as defined in the Lease) of Student Housing; including, without limitation, the full and timely payment of all contractors, subcontractors, materialmen, engineers, architects or other Persons who have rendered or furnished services or materials that are or become a part of the initial construction thereof; *provided however*, that, Student Housing Guarantor’s obligations under this Guaranty are limited to the payment and performance obligations of the Student Housing Developer under the Lease.

3. Enforcement of Guaranty. Upon the occurrence of a default by Student Housing Developer in the timely payment or performance, as the case may be, of any of its obligations under the Lease which constitute Guaranteed Obligations hereunder (or any part thereof) and which default continues beyond any applicable notice and cure periods provided for in the Lease, Student Housing Guarantor shall, within thirty (30) days from the date of notice from the County, pay or perform any Guaranteed Obligations then due, at its sole cost and expense.

4. Cumulative Remedies. The exercise by the FCRHA of any right or remedy hereunder or under any other instrument, or at law or in equity, shall not preclude the concurrent or subsequent exercise of any other right or remedy; *provided however*, that in any event the FCRHA shall be entitled to only one recovery of the Guaranteed Obligations from Tenant and Student Housing Guarantor, collectively.

5. Direct Action Against Guarantor. It shall not be necessary for the FCRHA, in order to enforce the Guaranteed Obligations, first to institute suit or exhaust its remedies against Tenant or others liable on such indebtedness, liability, undertaking, or obligation, or to enforce its rights against any security which shall ever have been given to secure the same.

6. Unimpaired Liability. Student Housing Guarantor hereby agrees that its obligations under the terms of this Guaranty shall not be released, diminished, impaired, reduced, or affected by the occurrence of any one or more of the following events: (a) the taking or accepting of any other security or guaranty for any or all of the Guaranteed Obligations; (b) any release, surrender, exchange, subordination, or loss of any security at any time existing in connection with any or all of the Guaranteed Obligations; (c) the insolvency, bankruptcy, or lack of partnership or corporate power of Tenant, or any party at any time liable for any or all of the Guaranteed Obligations, whether now existing or hereafter occurring; (d) any neglect, delay, omission, failure, or refusal of the FCRHA to take or prosecute any action for the collection of any of the Guaranteed Obligations or to foreclose or take or prosecute any action in connection with any instrument or agreement evidencing or securing all or any part of the Guaranteed Obligations; (e) the existence of any claim, setoff, counterclaim, defense or other rights which Guarantor may have against Tenant or the FCRHA, whether in connection with the Project or any other transaction; (f) any assignment of the Lease or the Guaranteed Obligations or any part thereof; (g) the unenforceability of all or any part of the Guaranteed Obligations against Tenant by reason of the fact that the act of creating the Guaranteed Obligations, or any part thereof, is ultra vires, or the officers creating same acted in excess of their authority; (h) any payment by Tenant to the FCRHA in respect of the Guaranteed Obligations is held to constitute a preference under the bankruptcy laws or if for any other reason the FCRHA is required to refund such payment or pay the amount thereof to someone else; or (i) any impairment, modification, release, or limitation of liability of Tenant or its estate in bankruptcy, resulting from the operation of any present or future provision of the Bankruptcy Code of the United States or from the decision of any court interpreting same.

7. Binding Effect. This Guaranty is for the benefit of the FCRHA and its respective successors and assigns.

8. Representations and Warranties. The Student Housing Guarantor represents and warrants for itself that (a) it has examined or has had an opportunity to examine the Lease and it will receive a direct or indirect material benefit from the execution and delivery of the Lease; (b) this Guaranty has been duly authorized by all necessary limited liability company action on Student Housing Guarantor's part and has been duly executed and delivered by a duly authorized agent of the limited liability company; (c) this Guaranty constitutes Student Housing Guarantor's valid and legally binding agreement, enforceable in accordance with its terms; (d) Student Housing Guarantor's execution of this Guaranty will not violate Student Housing Guarantor's organizational documents or result in the breach of, or conflict with, or result in the acceleration of, any obligation under any guaranty, indenture, credit facility or other instrument to which Student Housing Guarantor or any of its assets may be subject or violate any order, judgment or decree to which Student Housing Guarantor or any of its assets is subject; (e) no action, suit, proceeding or investigation, judicial, administrative or otherwise (including without limitation any reorganization, bankruptcy, insolvency or similar proceeding), currently is pending or, to the best of Student Housing Guarantor's knowledge, threatened against Student Housing Guarantor which, either in any one instance or in the aggregate, may have a material adverse effect on Student Housing Guarantor's ability to perform its obligations under this Guaranty; and (f) Student Housing Guarantor is currently solvent and will not be rendered insolvent by providing this Guaranty.

9. Affirmative Covenants. At all times until the Guaranteed Obligations have been fully satisfied or Final Completion under the Lease has occurred, the Student Housing Guarantor will maintain its respective covenants set forth herein:

a. Student Housing Guarantor Financial Covenants. Student Housing Guarantor:

i. shall maintain unencumbered and unrestricted cash and cash equivalents of at least [REDACTED] Dollars (\$[REDACTED]);

ii. shall maintain a Total Tangible Net Worth of not less than [REDACTED] Dollars (\$[REDACTED]). "**Total Tangible Net Worth**" means the sum of (x) [REDACTED] percent ([REDACTED]%) of the Tangible Net Worth of [REDACTED], a [REDACTED] [REDACTED] ("[REDACTED]"), plus (y) Student Housing Guarantor's Exclusive Tangible Net Worth. "**Student Housing Guarantor's Exclusive Tangible Net Worth**" means the Student Housing Guarantor's Tangible Net Worth, excluding the value of Student Housing Guarantor's interest in [REDACTED]. "**Tangible Net Worth**" means, with respect to Student Housing Guarantor or [REDACTED], (a) the value of all of such entity's assets, as determined in accordance with this Section, less (b) such entity's Direct

Liabilities and intangible assets (including without limitation goodwill, franchises, patents, trademarks, trade names, copyrights, service marks and brand names). “**Direct Liabilities**” means, with respect to either Student Housing Guarantor or [_____], all direct obligations of such entity, including without limitation (1) indebtedness for borrowed money or for the deferred purchase price of property or services, (2) obligations under leases which shall have been or should be, in accordance with generally accepted accounting principles consistently applied, recorded as capital leases, and (3) any unrefunded obligation of such entity to any “Employee Benefit Plan,” as defined in the Employee Retirement Income Security Act of 1974, as amended.

b. Financial Reporting Requirements. Every twelve (12) months after execution of this Guaranty, and at such other times as the FCRHA may reasonably request, the Student Housing Guarantor shall provide a financial statement, certified by Student Housing Guarantor to be true and correct in all material respects, with sufficient detail, as reasonably requested by the FCRHA, for the FCRHA to determine that such Student Housing Guarantor has satisfied its financial covenants set forth herein.

c. Limited Liability Company Existence. The Student Housing Guarantor will do any and all things necessary to preserve and keep in full force and effect its limited liability company status in good standing under the laws of the state of its organization and in the Commonwealth of Virginia.

10. Waiver and Subordination. Student Housing Guarantor (a) waives to the fullest extent permitted by law any rights that Student Housing Guarantor may have: (i) against Tenant by reason of any one or more payments or acts in compliance with the obligations of Guarantor hereunder, (ii) to assert a counterclaim, other than a mandatory or compulsory counterclaim, in any action or proceeding brought against Student Housing Guarantor, and (iii) to presentment for payment, demand, protest, notice of nonpayment or failure to perform or observe, or any other proof, notice or demand (except as may be otherwise expressly required herein); and (b) subordinates any liability or indebtedness of Tenant held by Student Housing Guarantor to the obligations of Tenant to the FCRHA under the Lease for the Guaranteed Obligations.

11. Enforcement Costs. Student Housing Guarantor hereby agrees to pay, on written demand by the FCRHA, all costs incurred by the FCRHA in collecting any amount payable under this Guaranty or enforcing or protecting its rights under the Guaranty in each case whether or not legal proceedings are commenced. Such fees and expenses include, without limitation, reasonable fees for attorneys and other hired professionals, court fees, costs incurred in connection with pretrial, trial and appellate level proceedings (including discovery and expert witnesses), costs incurred in post judgment collection efforts or in any bankruptcy proceeding. Amounts incurred by the FCRHA shall be immediately due and payable, and shall bear interest from the date of disbursement until paid in full, if not paid in full within ten (10) business days after Lender’s written demand for payment at a

rate equal to twelve percent (12%) per annum, compounded monthly, or the highest amount allowed by law, whichever is less.

12. Notices. Any notice, demand, statement, request or consent made hereunder shall be in writing and shall be deemed to be received by the addressee on the day such notice is delivered in hand, on the following day if tendered to a nationally recognized overnight delivery service or on the third day following the day such notice is deposited with the United States Postal Service first class certified mail, return receipt requested, in either instance, addressed to the address, as set forth below, of the party to whom such notice is to be given, or to such other address as either party shall in like manner designate in writing. The addresses of the parties are as follows:

Guarantor:

[_____]

[_____]

[_____]

Attention: [_____]

With a copy to:

Klein Hornig LLP
1275 K Street NW, Suite 1200
Washington, DC 20005
Attention: Erik Hoffman

And

Coleman Talley LLP
109 S. Ashley Street
Valdosta, GA 31601
Attention: Justin S. Scott

the FCRHA:

Fairfax County Redevelopment and Housing Authority
3700 Pender Drive
Fairfax, Virginia 22030
Attention: Director, HCD

With a Copy to:

Office of the County Attorney
12000 Government Center Parkway, Suite 549
Fairfax, Virginia 22035-0064
Attention: County Attorney

13. Governing Law. THIS GUARANTY SHALL BE GOVERNED BY, INTERPRETED UNDER THE LAWS OF, AND ENFORCED IN THE COURTS OF THE COMMONWEALTH OF VIRGINIA, WITHOUT ITS REGARD TO THE APPLICATION OF ITS INTERNAL RULES GOVERNING CONFLICTS OF LAWS. ANY ACTION OR CLAIM UNDER THIS GUARANTY THAT IS BROUGHT IN A COURT OF LAW SHALL BE BROUGHT SOLELY IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA, OR IN THE EASTERN DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, OR IN THEIR RESPECTIVE SUCCESSOR COURTS.

14. Unenforceable Provisions; Severability. If any provision of this Guaranty is held to be illegal, invalid, or unenforceable under present or future laws effective during the term of this Guaranty, such provision shall be fully severable and this Guaranty shall be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part of this Guaranty, and the remaining provisions of this Guaranty shall remain in full force and effect and shall not be affected by the illegal, invalid or unenforceable provision or by its severance from his Guaranty, unless such continued effectiveness of this Guaranty, as modified, would be contrary to the basic understandings and intentions of the parties as expressed herein.

15. Entire Agreement. This Guaranty represents the entire agreement by and between the Student Housing Guarantor and the FCRHA with respect to the subject matter hereof and may be amended only by an instrument in writing executed by the party or an authorized representative of the party against whom such amendment is sought to be enforced.

16. Headings. The headings in this Guaranty have been used for administrative convenience only and should not be used in interpreting and construing the meaning of any provision of this Guaranty.

17. Time of the Essence. Time is of the essence in the performance of this Guaranty.

18. Counterparts; Facsimile Signatures. Any party may execute this Guaranty by delivery to the other party of a facsimile copy hereof evidencing such party's signature. In any such case, the party executing by facsimile shall promptly thereafter provide a signed original counterpart hereof to the other parties; provided, that the non-delivery of such a signed counterpart shall not affect the validity or enforceability hereof.

EXECUTED on this the _____ day of _____, 2019.

STUDENT HOUSING GUARANTOR

[____], a [____]
[____]

By:

Name:

Title:

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