

UNOFFICIAL COPY

0010060838

8728/0026 33 001 Page 1 of 41

2001-01-24 10:29:58

Cook County Recorder 101.50



0010060838

**MORTGAGE, SECURITY AGREEMENT,
ASSIGNMENT OF LEASES, RENTS AND REVENUES,
AND FIXTURE FILING**

Dated as of January 5, 2001

Made by

Dearborn Center, L.L.C.
as the Borrower,

to

Bayerische Hypo- und
Vereinsbank AG, New York Branch,
as the Agent for the Lenders

Prepared in consultation with Illinois counsel by and after
recording please return to:

Shearman & Sterling
599 Lexington Avenue
New York, New York 10022
Attn: John L. Opar, Esq. (766/44)

Property of Cook County Clerk's Office

New North 0001567

8

UNOFFICIAL COPY

10060838

THIS MORTGAGE, SECURITY AGREEMENT, ASSIGNMENT OF LEASES, RENTS AND REVENUES, AND FIXTURE FILING (this "**Mortgage**") is dated as of January 5, 2001 and is made by **DEARBORN CENTER, L.L.C.**, a Delaware limited liability company (the "**Borrower**"), in consideration of the premises and covenants hereinafter set forth and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, to **Bayerische Hypo- und Vereinsbank AG, New York Branch**, a banking corporation organized under the laws of the Federal Republic of Germany (the "**Agent**"), as Agent on behalf of each lender (collectively, the "**Lenders**") from time to time a party to the Credit Agreement (as hereinafter defined).

WITNESSETH

WHEREAS, the Borrower and the Agent have entered into that certain Credit Agreement dated as of the date hereof (as the same may be amended, modified supplemented or restated from time to time the "**Credit Agreement**");

WHEREAS, pursuant to the Credit Agreement and subject to the terms and conditions therein set forth, the Lenders have agreed to make a loan to the Borrower in a principal amount of up to TWO HUNDRED THIRTY MILLION AND NO/100 DOLLARS (\$230,000,000.00) (the "**Loan**");

WHEREAS, to evidence such indebtedness, the Borrower has executed and delivered one or more promissory notes (collectively the "**Note**"), dated of even date herewith in favor of the Lenders in an aggregate principal amount equal to the Loan and issued pursuant to, and in accordance with, the Credit Agreement;

WHEREAS, the Borrower is the owner of the Mortgaged Property (as hereinafter defined); and

WHEREAS, the Borrower has duly authorized the execution and delivery of this Mortgage and has taken all actions required by law and all other actions of the Borrower required therefor.

NOW, THEREFORE, in order to secure: (a) payment by the Borrower of the outstanding principal amount set forth in, and evidenced by the Note, together with all interest accrued and unpaid thereon and all other sums due to the Lenders and the Agent in respect of the Loan, including any Breakage Costs and any sums due or any obligation of any kind owing under the Notes, the Credit Agreement or in any other Loan Document to which Borrower is a party (including, without limitation, any reimbursement or indemnity obligation) (the "**Debt**"); (b) the performance by the Borrower of all the covenants and agreements contained in the Notes, this Mortgage and the other Loan Documents to which Borrower is a party, as the same may be amended, modified, supplemented or restated, to be performed or observed by or on the part of the Borrower (items (a) and (b) being referred to collectively herein as, the "**Secured Obligations**"), the Borrower by these presents hereby agrees as follows:

UNOFFICIAL COPY

1006083g

THE BORROWER HEREBY IRREVOCABLY GRANTS, BARGAINS, SELLS, PLEDGES, CONVEYS, TRANSFERS, MORTGAGES AND ASSIGNS unto the Agent (for the benefit of the Lenders), its successors and assigns forever, and grants a security interest to Agent (for the benefit of the Lenders) in, all of the following property (such property being referred to collectively herein as the "**Mortgaged Property**"):

(a) all estate, right, title and interest of the Borrower, now owned or hereafter acquired, in and to those certain tracts or parcels of land as described in **Exhibit A** hereto, together with all rights of way or use, sidewalks, alleys, strips, gores, rights (including rights in streets (including those vacated or to be vacated)), privileges, air rights and development rights, sewer rights, waters, water courses, water rights, reservoir and drainage rights, and powers, servitudes, estates, licenses, easements, tenements, hereditaments and appurtenances incident, belonging or pertaining to such land, including any mineral, mining, oil and gas rights and rights to produce or share in the production of anything related thereto and similar or comparable rights of any nature whatsoever now or hereafter appurtenant) (collectively, the "**Land**"), and all estate, right, title and interest of the Borrower in the buildings, structures, fixtures and improvements now or hereafter located or placed thereon (which buildings and improvements, together with any additions thereto or alterations or replacements thereof, being referred to herein as the "**Improvements**");

(b) all right, title and interest of the Borrower in and to all machinery, apparatus, equipment, materials, fittings, fixtures, chattels, articles of personal property and all other property (real, personal or mixed), and all appurtenances and additions thereto and betterments, renewals, substitutions and replacements thereof, now or hereafter owned by the Borrower or in which the Borrower has or shall acquire an interest (to the extent of such interest), and now or hereafter located on, attached to or contained in or used in connection with the Land or the Improvements, or placed on any part thereof though not attached thereto, including, without limitation, all indoor and outdoor furniture, landscaping, indoor plants, tools, screens, awnings, shades, blinds, curtains, draperies, partitions, carpets, rugs, furniture and furnishings, heating, lighting, plumbing, water heating, cooking, monitoring, ventilating, air conditioning, refrigerating, sanitation, waste removal, incinerating or compacting plants, systems, fixtures and equipment, elevators, escalators, stoves, ranges, vacuum systems, window washing and other cleaning systems, call systems, sprinkler systems and other fire prevention and extinguishing apparatus and materials, alarms, computers, televisions, telecommunications, entertainment, recreational or security systems and equipment, motors, machinery, pipes, ducts, conduits, dynamos, engines, compressors, generators, boilers, stokers, furnaces, pumps, tanks, appliances, (including, without limitation, any and all fixtures, furnishings, equipment, furniture, and other items of corporeal (tangible) movable (personal) property now or hereafter located on or used in connection with the Land or the Improvements or used in connection with the use, occupancy, operation and maintenance of all or any part of the Land or the Improvements, including, without limitation, appliances, machinery, equipment, signs, office furnishings and equipment, guest room furnishings, and specialized equipment for kitchens, laundries, bars, restaurant (dining room), public rooms, health and recreational facilities, linens, dishwashers, and two-way radios), roadways, highways and streets; but expressly

UNOFFICIAL COPY

1006083g

excluding artwork (i.e., paintings, prints, sculpture and other fine art) (collectively, "**Equipment**"; the Land, Improvements and Equipment are collectively referred to herein as the "**Premises**");

(c) all right, title and interest of Borrower in and to personal property now or hereafter located at or used in connection with the Premises (and not in connection with any other property) and owned by the Borrower, including, without limitation, all building materials, supplies and equipment now or hereafter placed on the Land or in the Improvements and all architectural renderings, models, drawings, plans, specifications, studies and data now or hereafter relating to the Land or the Improvements but expressly excluding artwork (i.e., paintings, prints, sculpture and other fine art);

(d) all right, title and interest of Borrower in and to real estate tax refunds and credits and all awards or payments, including, without limitation, interest on any of them, and any right to receive the same which the Borrower may have, which may be made with respect to any of the Premises whether from a Condemnation thereof or for any other injury to, decrease in the value of, or other occurrence affecting any of the Premises, subject, in each case, to the rights of Tenants under Leases or parties under Operating Agreements to the extent such Leases or Operating Agreements are not subordinate to the terms of this Mortgage and subject to the other terms and conditions of this Mortgage, the Credit Agreement and the other Loan Documents;

(e) all right, title and interest of Borrower in and to Leases, Operating Agreements and Property Management Agreements and guarantees thereof, and all other agreements for, affecting or related to the use and occupancy of the Premises, now or hereafter entered into (including any use or occupancy arrangements created pursuant to **Section 365(d)** of Title 11 of the United States Code (the "**Bankruptcy Code**") or otherwise in connection with the commencement or continuance of any bankruptcy, reorganization, arrangement, insolvency, dissolution, receivership or similar proceedings, or any assignment for the benefit of creditors, in respect of any Tenant or occupant of any portion of the Mortgaged Property and all extensions, amendments and modifications thereto heretofore or hereafter entered into), and all rents, incomes, issues, royalties, revenues and profits derived by the Borrower from the Premises and the right to apply such rents, incomes, issues, royalties, revenues and profits to the payment of the Note and the other obligations secured by this Mortgage, together with the security deposits or other payments or instruments delivered as security under such Leases, Operating Agreements and agreements (the grant of such security deposits and other security being subject to application in accordance with the express requirements of such Leases, Operating Agreements and any other agreements applicable thereto and subject to the other terms and conditions of this Mortgage, the Credit Agreement and the other Loan Documents); all of the Borrower's claims and rights to damages and any other remedies in connection with or arising from the rejection of the Leases by the Tenant or any trustee, custodian or receiver pursuant to the Bankruptcy Code in the event that there shall be filed by or against the Tenant any petition, action or proceeding under the Bankruptcy Code or under any other similar federal or state law now or hereafter in effect;

UNOFFICIAL COPY

1006083₈

(f) all monies, accounts, instruments and other property (including all Eligible Collateral, additional collateral and other pledges of money provided to Agent pursuant to the terms of this Mortgage or any other Loan Documents) constituting a part of the security for the Loan or the performance by the Borrower of its obligations under this Mortgage or the other Loan Documents as of any particular time, including all collateral subject to the lien evidenced by any of the Loan Documents or assigned to the Borrower after the date hereof, and any proceeds of the foregoing;

(g) all right, title and interest of the Borrower in and to all proceeds of, and any unearned premiums or refunds of premiums on, any insurance policies covering all or any part of the Premises or other portion of the Mortgaged Property, including the right to receive and apply the proceeds of any insurance, judgments or settlements made in lieu thereof for damage to or the diminution of the Premises, but subject, in each case, to the rights of Tenants under Leases or parties under Operating Agreements to the extent such Leases and Operating Agreements are not subordinate to the terms of this Mortgage and subject to the other terms and conditions of this Mortgage, the Credit Agreement and the other Loan Documents;

(h) all right, title and interest of the Borrower in and to all general intangibles relating to design, development, operation, management and use of the Premises, all certificates of occupancy, zoning variances, building, use or other permits, approvals, authorizations, licenses and consents obtained from any Governmental Authority in connection with the development, use, operation or management of the Premises, all construction, service, engineering, consulting, management, leasing, architectural and other similar contracts concerning the design, construction, management, operation, occupancy and/or use of the Premises, all architectural drawings, plans, specifications, soil tests, appraisals, engineering reports and similar materials relating to all or any portion of the Premises and all payment and performance bonds or warranties or guarantees relating to the Premises, all to the extent assignable;

(i) all right, title and interest of the Borrower in and to all trademarks, trade names, corporate names, company names, business names, fictitious business names, trade styles, service marks, logos, other source and business identifiers, trademark registrations and applications for registration used exclusively at or relating exclusively to the Premises or any portion thereof; all renewals, extensions and continuations-in-part of the items referred to above; any written agreement granting to the Borrower any right to use any trademark or trademark registration at or in connection with any of the Premises; and the right of the Borrower to sue for past, present and future infringements of the foregoing;

(j) all rights, dividends and/or claims of any kind whatsoever relating to the Premises (including damage, secured, unsecured, lien, priority and administration claims); together with the right to take any action or file any papers or process in any court of competent jurisdiction, which may in the opinion of Mortgagee be necessary to preserve, protect, or enforce such rights or claims, including the filing of any proof of claim in any insolvency proceeding under any state, federal or other laws and any rights, claims or awards accruing to or to be paid to the Borrower in its capacity as landlord

UNOFFICIAL COPY

1006083,

under the Leases, Operating Agreements or Property Management Agreements; and the right in the name and on behalf of the Borrower to appear in and defend any action or proceeding brought with respect to any of the Premises or any other component of the Mortgaged Property, and to commence any action or proceeding to protect the interest of the Agent therein in each case subject to the other terms and conditions of this Mortgage, the Credit Agreement and the other Loan Documents;

(k) all appurtenances in respect of or otherwise relating to the Leases, including, but not limited to, all the estate and rights of the Borrower of, in and to (i) all modifications, extensions and renewals of the Leases and all rights to renew or extend the term thereof, (ii) all of the Borrower's rights, if any, pertaining to deposits of the lessee under the Leases (including lessee security deposits, if any) (iii) all the right or privilege of the Borrower to terminate, cancel, abridge, surrender, merge, modify or amend the Leases and (iv) any and all possessory rights of the Borrower and other rights and/or privileges of possession, including, without limitation, the Borrower's right to elect to take possession of the Mortgaged Property;

(l) all present and future monetary deposits given by the Borrower to any public or private utility with respect to utility services furnished to any part of the Premises or the Improvements;

(m) all right, title and interest of the Borrower in and to all refunds and rebates of taxes and assessments relating to the Premises (except to the extent such refunds and rebates relate to taxes or assessments paid by the lessee under the Leases);

(n) any of the foregoing to the extent acquired from and after the date hereof;

(o) all of the Borrower's interest in and to all proceeds, products, substitutions and accessions (including, without limitation, claims and demands therefor) including interest receivable thereon, of the voluntary or involuntary conversion of any of the foregoing, including proceeds of insurance and condemnation awards, into cash or liquidated claims; and

(p) all other or greater rights and interests of every nature in the Premises and in the possession or use thereof and income therefrom, whether now owned or hereafter acquired by the Borrower.

TOGETHER with all right, title and interest of the Borrower in and to all extensions, improvements, betterments, renewals, substitutes and replacements of, and all additions and appurtenances to, any of the foregoing hereafter acquired by, or released to, the Borrower or constructed, assembled or placed by the Borrower on the Premises and all conversions of the security constituted thereby, immediately upon such acquisition, release, construction, assemblage, placement or conversion, as the case may be, and in each such case, without any further mortgage, conveyance, assignment or other act by the Borrower, shall become subject to the lien of this Mortgage as fully and completely, and with the same effect, as though now owned by the Borrower and specifically described herein.

TO HAVE AND TO HOLD the above granted and described property, subject in all respect only to the Permitted Encumbrances, unto and to the proper use and benefit of the Agent, its successors and assigns, forever, upon the terms and conditions set forth herein.

The following actions of the Agent, with or without notice, shall not affect the liability of the Borrower for payment and performance of the Secured Obligations, and shall not affect the lien hereof upon any portion of the Mortgaged Property not expressly released herefrom:

- (a) retain or obtain a security interest in any property to secure all or any portion of the Secured Obligations,
- (b) alter, exchange, extend, renew, modify, release or cancel for any period (whether or not longer than their original maturity) any terms, conditions, provisions or covenants contained in any or all of the Loan Documents to which Borrower is a party,
- (c) release or compromise any liability of any party or parties primarily or secondarily liable on all or any portion of the Secured Obligations,
- (d) release its security interest, if any, in all or any portion of the Mortgaged Property and/or permit any substitution or exchange for any such portion of the Mortgaged Property,
- (e) resort to the Mortgaged Property conveyed by this Mortgage, or any portion thereof, for payment of the Secured Obligations, or any portion thereof, whether or not the Agent shall have resorted to any other property otherwise securing the Secured Obligations, or to the extent permitted by law, shall have proceeded against any other party primarily or secondarily liable on the Secured Obligations, and/or
- (f) apply all or any portion of the Mortgaged Property or direct the order or manner of sale thereof as the Agent in its sole discretion chooses in accordance with the terms of this Mortgage.

To protect the security of this Mortgage, the Borrower covenants and agrees with and (as of the date hereof) represents and warrants to the Agent, as follows:

SECTION 1. DEFINITIONS.

Section 1.1 Capitalized Terms Not Defined Herein.

Capitalized terms, not otherwise defined in this Mortgage but defined in the Credit Agreement, shall have the respective meanings assigned thereto in the Credit Agreement.

Section 1.2 Recitals.

The recitals set forth above are true and correct and incorporated herein by this reference.

UNOFFICIAL COPY

1006083g

Section 1.3 Construction.

For all purposes of this Mortgage, except as otherwise expressly provided or unless the context otherwise requires:

(a) The terms defined in this **Section 1** shall have the meanings assigned to them in this Section and shall include the plural as well as the singular.

(b) All accounting terms not otherwise defined herein shall have the meanings assigned to them in accordance with generally accepted accounting principles in the United States of America, and, except as otherwise herein expressly provided, the term "generally accepted accounting principles" with respect to any computation required or permitted hereunder shall mean such accounting principles as are generally accepted in the United States of America as of the date of such computation.

(c) The word "including" shall be construed to be followed by the words "without limitation".

(d) Captions are for the convenience of the reader and shall not be considered in interpreting this Mortgage or the intent of the parties hereto.

(e) The words "herein", "hereof" and "hereunder" and other words of similar import shall refer to this Mortgage as a whole and not to any particular Article, Section or other subdivision.

(f) The term "Mortgaged Property" shall be deemed to mean "Mortgaged Property or any portion thereof".

Section 1.4 Certain Definitions.

As used in this Mortgage, the following terms have the following respective meanings:

(a) "Act" has the meaning set forth in **Section 13.1(a)** hereof.

(b) "Agent" has the meaning given to such term in the preamble to this Mortgage.

(c) "Bankruptcy Code" shall have the meaning given to such term in the recitals to this Mortgage.

(d) "Borrower" has the meaning given to such term in the preamble to this Mortgage.

(e) "Borrower's Contest Right" shall mean the Borrower's right to contest certain matters pursuant to Section 5.1(b)(ii) of the Credit Agreement, subject to all of the terms and conditions set forth in said Section.

UNOFFICIAL COPY

10060838

- (f) "Claim" shall have the meaning stated in **Section 10** hereof.
- (g) "Construction Mortgage" shall have the meaning stated in **Section 31.1** hereof.
- (h) "Debt" shall have the meaning given to such term in the recitals to this Mortgage.
- (i) "Equipment" shall have the meaning given to such term in the recitals to this Mortgage.
- (j) "Excusable Delay" shall mean any delay due, in whole or in part, to any Force Majeure Event.
- (k) "Improvements" shall have the meaning given to such term in the recitals to this Mortgage.
- (l) "Indemnified Party" shall have the meaning stated in **Section 10** hereof.
- (l) "Land" shall have the meaning given to such term in the recitals to this Mortgage.
- (m) "Leases" shall mean any lease, sublease, license, letting, concession, occupancy agreement or other agreement (whether written or oral and whether now or hereafter in effect), existing as of the date hereof or hereafter entered into by the Borrower, 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 Mortgaged Property, and every modification, amendment or other agreement relating to such lease, sublease, or other agreement entered into pursuant thereto, and every guarantee of the performance and observance of the covenants, conditions and agreements to be performed and observed by the other party thereto.
- (n) "Lender" shall have the meaning given to such term in the preamble to this Mortgage.
- (o) "Loan" shall have the meaning given to such term in the recitals to this Mortgage.
- (p) "Mortgage" shall mean this Mortgage, Security Agreement, Assignment of Leases, Rents and Revenues, and Fixture Filing, as modified, amended or supplemented from time to time pursuant to the provisions hereof.
- (q) "Mortgaged Property" shall have the meaning given to such term in the recitals to the Mortgage.
- (r) "Note" shall have the meaning given to such term in the recitals to this Mortgage.

(s) "Operating Agreements" shall mean (i) reciprocal easement and/or operating agreements, (ii) covenants, conditions and restrictions and (iii) similar agreements affecting the Mortgaged Property and binding upon and/or benefiting the Borrower and a third party.

(t) "Personal Property" shall have the meaning stated in Section 25.1 hereof.

(u) "Premises" shall have the meaning given to such term in the recitals to this Mortgage.

(v) "Protective Advances" shall have the meaning set forth in Section 35 hereof.

(w) "Secured Obligations" shall have the meaning given to such term in the recitals to this Mortgage.

(x) "Tenant Guaranties" shall have the meaning set forth in Section 28.1 hereof.

(x) "Tenant Guaranty" shall have the meaning set forth in Section 28.1 hereof.

SECTION 2. PAYMENT OF THE NOTE, ALL OTHER DEBT AMOUNTS.

The Borrower will duly pay the amounts owed under the Note and the other portions of the Debt, including, without limitation, all amounts due under this Mortgage and any other Loan Document, at the places, at the respective times and in the manner provided therein and herein (as applicable). The Borrower acknowledges that the Note secured by this Mortgage bears interest at a variable rate which may change from time to time.

SECTION 3. PERFORMANCE AND OBSERVANCE OF CREDIT AGREEMENT COVENANTS; REPRESENTATIONS AND WARRANTIES.

Section 3.1 Covenants.

The Borrower will duly perform, observe and comply with all of the affirmative and negative covenants, agreements and obligations to be performed, observed and complied with by the Borrower, and all of the other terms and conditions applicable to the Borrower, under the terms of the Credit Agreement and any other Loan Document, as if each such covenant, agreement, obligation, term and condition were expressly set forth herein in full. Without limiting the generality of the foregoing, the Borrower will maintain the Premises, pay Taxes and Other Charges, obtain and maintain insurance, keep the Mortgaged Property free of Liens (other than Permitted Encumbrances), pay the utility charges for the Premises, perform alterations and repairs in respect of the Premises, cause the Premises to comply with all Legal Requirements, transfer the Premises, restore the Premises upon any Casualty or Condemnation, and lease the Premises, all in accordance with and to the extent required under and subject to all of the applicable terms and conditions of the Credit Agreement and the other Loan Documents.

UNOFFICIAL COPY

10060838

Section 3.2 Representations and Warranties.

The Borrower hereby represents and warrants with respect to itself and/or the Mortgaged Property owned by it that, as of the date hereof, each of the representations and warranties contained in Section 4.1 of the Credit Agreement is true and correct and any schedules or exhibits referred to in said representations and warranties (as the same apply to the Borrower and the Mortgaged Property) that are attached thereto and incorporated therein by reference are true and correct. Such representations and warranties are hereby incorporated by reference as though set forth in this Mortgage in their entirety.

SECTION 4. INSURANCE.

The Borrower shall, at its sole cost and expense, continuously keep and maintain insurance in respect to the Mortgaged Property and the Borrower's operations thereat, of the type and in the form and with insurers, all as provided in the Credit Agreement. All Net Proceeds to which the Borrower may be entitled resulting from damage to or destruction of the Mortgaged Property or any part thereof by a Casualty shall be distributed and applied in accordance with the applicable provisions of Article 8 of the Credit Agreement.

SECTION 5. CONDEMNATION/EMINENT DOMAIN.

All proceeds to which the Borrower may be entitled resulting from the Condemnation of the Mortgaged Property or any part thereof or interest therein or injury to the Mortgaged Property or any part thereof in connection with any such Condemnation shall be distributed and in accordance with the applicable provisions of Article 8 of the Credit Agreement.

SECTION 6. MAINTENANCE OF VALIDITY AND RECORDING.

Section 6.1 Maintenance of Validity of Mortgage by the Borrower.

The Borrower covenants that it will forthwith after the execution and delivery of this Mortgage and thereafter as necessary from time to time cause this Mortgage and the other Loan Documents and any continuation statement or similar instrument reasonably requested by Agent relating to any property subject thereto or to any property intended to be granted, conveyed, transferred and assigned by this Mortgage, to be filed, registered and recorded in such manner and in such places as may be required by law in order to publish notice of and fully to protect the validity thereof or the grant thereby of the property subject thereto and the interest and rights of the Agent therein. The Borrower covenants that it has paid or will pay or cause to be paid all taxes and fees incident to such filing, registration and recording, and all expense incident to the preparation, execution and acknowledgment thereof, and of any instrument of further assurance reasonably requested by Agent, and all federal or state stamp taxes or other charges arising out of or in connection with the execution and delivery of such instruments.

Section 6.2 Maintenance of Validity of Mortgage by Third Parties.

The Borrower covenants that at all times it will itself, or will use its commercially reasonable efforts to cause parties to, preserve, warrant and defend the Agent's title and right in

UNOFFICIAL COPY

1006083g

and to the Mortgaged Property, subject to the Permitted Encumbrances and items then being contested in accordance with the Borrower's Contest Right, against the claims of all Persons and will maintain and preserve such title and right so long as the Debt is outstanding.

Section 6.3 Maintenance of Validity of Mortgage and Other Loan Documents.

The Borrower shall maintain the validity, perfection, priority and effectiveness of this Mortgage and the other Loan Documents. Unless otherwise permitted in this Mortgage or the other Loan Documents, the Borrower will not take any action, will not permit any action to be taken by others and will not omit to take any action, nor will the Borrower give any notice, approval or consent or exercise, waive or modify any rights under or in respect of the Permitted Encumbrances, which action, omission, notice, approval, consent or exercise, waiver or modification of rights would release the Borrower from, or reduce any of the Borrower's obligations or liabilities under, or would result in the termination, surrender or assignment of, or the amendment or modification of, any of the Loan Documents, or would impair the validity of this Mortgage or any of the other Loan Documents, or would have a Material Adverse Effect on the Mortgaged Property, without the Agent's consent, and any attempt to do any of the foregoing without such consent shall be of no force and effect.

Section 6.4 Further Assurances.

Upon demand by the Agent, the Borrower shall, at the cost of the Borrower and without expense to the Agent, do, execute, acknowledge and deliver all such further acts, deeds, conveyances, mortgages, assignments, notices of assignment, transfers and assurances as the Agent shall from time to time reasonably require for better assuring, conveying, assigning, transferring and confirming unto the Agent the property and rights hereby conveyed or assigned or intended now or hereafter so to be, or which the Borrower may be or may hereafter become bound to convey or assign to the Agent, or for carrying out the intention or facilitating the performance of the terms of this Mortgage, or for filing, registering or recording this Mortgage, and on demand, the Borrower will also execute and deliver and hereby appoints the Agent as its true and lawful attorney-in-fact (which appointment shall be effective in the event that ten (10) days after the Borrower's receipt of Agent's demand to comply with the covenant in the immediately preceding sentence the Borrower has not so complied) and agent, for the Borrower and in its name, place and stead, in any and all capacities, to execute and file to the extent it may lawfully do so, one or more financing statements, chattel mortgages or comparable security instruments reasonably requested by the Agent to evidence more effectively the lien hereof upon the Personal Property and to perform each and every act and thing requisite and necessary to be done to accomplish the same; provided, however, that, except as set forth in this Section 6.4, no such act of the Borrower undertaken pursuant to this Section 6.4 will limit or decrease the Borrower's benefits or rights, or increase the Borrower's liabilities or obligations under, the Credit Agreement, this Mortgage or the other Loan Documents.

SECTION 7. ADDITIONS TO MORTGAGED PROPERTY.

All right, title and interest of the Borrower in and to all extensions, improvements, betterments, renewals, substitutes and replacements of, and all additions and appurtenances to, the Mortgaged Property hereafter acquired by or released to the Borrower or constructed,

assembled or placed by the Borrower upon the Premises or the Improvements, and all conversions of the security constituted thereby, immediately upon such acquisition, release, construction, assembling, placement or conversion, as the case may be, and in each such case without any further mortgage, conveyance, assignment or other act by the Borrower, shall become subject to the lien and security interest of this Mortgage as fully and completely and with the same effect as though now owned by the Borrower and specifically described in the grant of the Mortgaged Property above, but at any and all times the Borrower will execute and deliver to the Agent any and all such further assurances, mortgages, conveyances or assignments thereof as the Agent may reasonably require for the purpose of expressly and specifically subjecting the same to the lien and security interest of this Mortgage (it being agreed that, except as set forth in this Section 7, no such execution or delivery of the Borrower undertaken pursuant to this Section 7 will limit or decrease the Borrower's benefits or rights, or increase the Borrower's liabilities or obligations under the Credit Agreement, this Mortgage or the other Loan Documents).

SECTION 8. ENFORCEMENT.

The Borrower acknowledges that the Debt is secured by this Mortgage, the Assignment of Leases, the Assignment of Agreements and various other documents or instruments securing or evidencing the Loan. Upon the occurrence of an Event of Default, the Agent shall have the right to institute a proceeding or proceedings for the total or partial foreclosure of this Mortgage and any or all of the other Loan Documents securing repayment of the Debt, whether by court action, power of sale or otherwise, in accordance with Laws and Regulations, for all or any portion of the Debt and the liens and the security interests by the Loan Documents shall continue in full force and effect as to the Mortgaged Property (or portions thereof) not foreclosed, without loss of priority securing that portion of the Debt then due and payable and still outstanding. The Borrower acknowledges and agrees that, upon the occurrence of an Event of Default, the Agent shall be entitled to enforce payment of the Debt secured by the Loan Documents and the performance of any term, covenant or condition of the Loan Documents and exercise any and all rights and remedies under any Loan Document or as provided by law or at equity, by one or more proceedings, whether contemporaneous, consecutive or both, to be determined by the Agent in its sole discretion. Neither the acceptance of this Mortgage or any other Loan Document nor the enforcement thereof in any one state, whether by court action, foreclosure, power of sale or otherwise, shall prejudice or in any way limit or preclude enforcement by court action, foreclosure, power of sale or otherwise, of the Note, this Mortgage or any other Loan Document through one or more additional proceedings in that state or in any other state. Any and all sums received by the Agent under the Note, this Mortgage, the Credit Agreement or any other Loan Document shall be applied toward the repayment of the Debt in accordance with the applicable requirements of the Loan Documents.

SECTION 9. NO CLAIMS AGAINST THE AGENT.

Nothing contained in this Mortgage or in any other Loan Document shall constitute any consent or request by the Agent, express or implied, for the performance of any labor or services or the furnishing of any materials or other property in respect of the Premises or any part thereof, nor as giving the Borrower any right, power or authority to contract for or permit the performance of any labor or services or the furnishing of any materials or other property in such fashion, as would permit the making of any claim against the Agent in respect

thereof or any claim that any Lien based on the performance of such labor or services or the furnishing of any such materials or other property is prior to the interest of the Agent under this Mortgage; provided, however, that in the event that, despite the foregoing provision, any such claim against the Agent or Lien arises, the Borrower's obligations with respect to such claims or Liens are as set forth in Section 10 hereof.

SECTION 10. INDEMNIFICATION.

The Borrower will protect, indemnify and save harmless the Agent, the Lenders, the Servicer (if any) and each of their respective Affiliates and their officers, directors, employees, agents and advisors (each, an "**Indemnified Party**") from and against all liabilities, obligations, claims, actual damages, penalties, causes of action, and out-of-pocket costs and expenses (including all reasonable attorneys' fees and expenses) imposed upon or incurred by or asserted against the Agent (and not arising from the bad faith, negligence or wilful misconduct of the Agent or Lenders) by reason of the occurrence or existence of any of the following (to the extent the insurance proceeds payable on account of the following and received by the Agent shall be inadequate) arising prior to the earliest to occur of (A) the payment in full of the Debt and the satisfaction of all conditions for the satisfaction and release of this Mortgage, (B) a foreclosure of title to the Mortgaged Property by the Agent, or any sale of the Mortgaged Property pursuant thereto, or the obtaining of a deed in lieu of foreclosure and (C) the date that is five (5) years after the occurrence of the applicable event (each, a "**Claim**"):

- (a) ownership or possession of the Borrower's interest in the Mortgaged Property, or any interest therein, or receipt of any rent or other sum therefrom;
- (b) any accident, injury to or death of any persons or loss of or damage to property occurring on or about the Premises or any part thereof or the adjoining parking areas, sidewalks, curbs, vaults and vault space, if any, streets or ways;
- (c) any use, non-use or condition of the Premises or any part thereof or the adjoining parking areas, sidewalks, curbs, streets or ways, including claims or penalties arising from violation of any Legal Requirement or Insurance Requirement, as well as any claim based on any patent or latent defect, whether or not discoverable by the Agent, any claim the insurance as to which is inadequate, and any claim in respect of any adverse environmental impact or effect;
- (d) any failure on the part of the Borrower to perform or comply with any of the material terms of this Mortgage, any Lease, Property Management Agreement, Operating Agreement or any other Loan Document to which it is a party and any breach in any material respect of any representation made by the Borrower herein or in any other Loan Document;
- (e) any performance of any labor or services or the furnishing of any materials or other property in respect of the Mortgaged Property or any part thereof;
- (f) any bad faith, negligence or tortious act or omission on the part of the Borrower or any of its agents, contractors, servants, employees, sublessees, licensees or invitees; or

UNOFFICIAL COPY

1006083g

(g) any contest undertaken by the Borrower (even if the same is permitted by the terms of the Loan Documents).

The Agent shall give notice to the Borrower of any Claims for which the Agent believes it is entitled to indemnification hereunder promptly upon its discovery of the action or event giving rise to such Claim, but the failure of the Agent to provide such notice shall neither cause the forfeiture of the right to receive indemnity hereunder nor limit such right except to the extent, if any, that the Borrower is prejudiced by the failure of the Indemnified Party promptly to give such notice. Subject to Borrower's Contest Right, any amounts payable under this **Section 10** to the Agent that are not paid within thirty (30) days after written demand therefor by the Agent, setting forth in reasonable detail the amount of such demand and the basis therefor, shall bear interest from the date of demand until paid at the Default Rate and shall be secured by this Mortgage. In case any action, suit or proceeding is brought against the Agent by reason of any such occurrence, the Borrower, upon the request of the Agent, will (or, at the option of the Agent, the Agent may) at the Borrower's expense resist and defend such action, suit or proceeding or cause the same to be resisted and defended by counsel for the insurer of the liability or by counsel selected by the Borrower (unless reasonably disapproved by the Agent); provided that the Borrower shall be entitled to recover from the Agent any costs or expenses incurred by the Borrower on behalf of the Agent in satisfaction of its obligation under this sentence (or otherwise under this **Section 10**) if it is determined by final judgment that the action, suit or proceeding in question was not properly the subject of a claim for indemnification under this **Section 10**. So long as the Borrower is resisting and defending such action, suit or proceeding as provided above in a prudent and commercially reasonable manner, the Agent shall not be entitled to settle such action, suit or proceeding or claim the benefit of this **Section 10** with respect to such action, suit or proceeding (including the right to reimbursement of the Agent's counsel fees and expenses), and the Agent agrees that it will not settle any such action, suit or proceeding without the written consent of the Borrower which consent shall not be unreasonably withheld or delayed; provided that if the Borrower is not defending such action, suit or proceeding in a prudent and commercially reasonable manner as provided above, the Agent may settle such action, suit or proceeding subject only to the written consent of the Borrower, which consent shall not be unreasonably withheld or delayed, and claim the benefit of this **Section 10** with respect to settlement of such action, suit or proceeding. As used in this Article, the term "Agent" shall be deemed to include both or either of the Agent and any Servicer, as applicable.

SECTION 11. NO ENDORSEMENT.

The Agent shall not become or be considered to be an endorser, co-maker or co-obligor on the Note or on any obligation of the Borrower secured by this Mortgage.

SECTION 12. NO CREDIT FOR PAYMENT OF TAXES OR OTHER CHARGES.

Section 12.1 Payment of Taxes.

The Borrower shall pay any taxes imposed by any law of the United States or of the state or municipality where the Mortgaged Property is located, adopted after the date hereof,

(a) changing in any way the laws for the taxation of mortgages or debts secured thereby for federal, state or local purposes, or the manner of collection of any such taxes, and (b) imposing a tax, either directly or indirectly, on mortgages or debts secured thereby (other than a tax that may arise in connection with ownership or transfer of this Mortgage or the Note, that is imposed upon the income of the Agent, or any income, franchise or similar tax payable by the Agent or any Lender).

Section 12.2 No Credit.

The Borrower shall not be entitled to any credit against the principal, interest or other amounts, if any, payable on the Note or under any other Loan Document, and the Borrower shall not be entitled to any credit against any other amounts which may become payable under the terms thereof or hereof, by reason of the payment of any Taxes or Other Charges on the Mortgaged Property or any part thereof or by reason of payment of any other amount required to be paid hereunder. No deduction shall be made or claimed from the taxable value of the Mortgaged Property or any part thereof by reason of this Mortgage.

SECTION 13. FORECLOSURE.

Section 13.1 Foreclosure.

If any Event of Default shall have occurred and be continuing, the Agent may at any time proceed, at law or in equity or otherwise, to enforce the payment of the Note in accordance with the terms thereof and, if the Note has been declared due and payable:

(a) to institute an action to foreclose its interest under the Lien of this Mortgage against the Mortgaged Property by judicial foreclosure sale or strict foreclosure in one proceeding or against portions of the Mortgaged Property in a series of separate proceedings, and to have the same sold under the judgment or decree of a court of competent jurisdiction or proceed to take any of such actions. In any suit to foreclose the Lien hereof, there shall be allowed and included as additional indebtedness hereby secured in the decree of sale, all reasonable out of pocket expenditures and expenses authorized by the Illinois Mortgage Foreclosure Law, 735 ILCS 5/15-1101 et seq., as from time to time amended (the "Act") and all other out of pocket expenditures and expenses which may be paid or incurred by or on behalf of the Agent for reasonable attorney's fees, appraiser's fees, outlays for documentary and expert evidence, stenographer's charges, publication costs, and costs (which may be estimated as to items to be expended after entry of the decree) of procuring all such abstracts of title, title searches and examinations, title insurance policies, and similar data and assurance with respect to title as the Agent may deem reasonably necessary either to prosecute such suit or to evidence to bidders at sales which may be had pursuant to such decree the true conditions of the title to or the value of the Mortgaged Property;

(b) to take such other action at law or in equity or otherwise for the enforcement of this Mortgage and the realization, upon obtaining a judgment for foreclosure, on the security or any other security herein or elsewhere provided for, in such manner and at such times as the law may allow, and may proceed therein to the

UNOFFICIAL COPY

1006083g

extent permitted, and subject to the limitations imposed by law, to final judgment and execution for the entire unpaid balance of the Debt, together with all other sums payable by the Borrower in accordance with the provisions of the Note, this Mortgage and the other Loan Documents, and all sums which may have been advanced pursuant to and in accordance with the Loan Documents by the Agent for Taxes and Other Charges, water or sewer rents, charges or claims, payment on prior liens, insurance or repairs to the Mortgaged Property, all costs of suit, together with interest thereon at such interest rate as may be awarded in any judgment obtained by the Agent, as the case may be, from and after the date of any foreclosure sale until actual payment is made to the Agent of the full amount due the Agent, and reasonable attorneys' fees through and including all appellate levels, and/or

(c) to sell, assign, transfer and deliver the whole or, from time to time, any part of the Mortgaged Property, or any interest in any part thereof, at any private sale or at public auction permitted by law, with such demand, advertisement or notice as required by law, and on such other terms as required or permitted by law.

Before taking title to or possession of all or any portion of the Mortgaged Property, the Agent may order the performance of environmental assessments of the Mortgaged Property by qualified professionals, the reasonable cost of which shall be borne by the Borrower and secured hereby.

Section 13.2 The Borrower's Waivers.

It shall not be necessary for the Agent to have actual or constructive possession of any part of the Mortgaged Property in order to pass the title to and the right of possession of the Mortgaged Property, and the title to and the right of possession of the Mortgaged Property shall pass to the purchaser or purchasers thereof at any sale hereunder as fully as if the same actually had been present and delivered. To the fullest extent allowed by laws and Regulations, upon foreclosure of this Mortgage, whether by power of sale or any other nonjudicial or by judicial foreclosure process, the Borrower or any person claiming any part of the Mortgaged Property by, through or under the Borrower shall not be entitled to direct the order of sale, a marshaling of assets or a sale in inverse order of alienation. The recitals and statements of fact contained in any notice or in any conveyance to the purchaser or purchasers at any sale hereunder shall be prima facie evidence of the truth of such facts, and all prerequisites and requirements necessary to the validity of any such sale shall be presumed to have been performed. In the event of a foreclosure sale, to the extent that the Borrower is in possession of the Premises (absent an Approved Lease therefor), the Borrower shall be deemed a tenant at will of the purchaser at such judicial foreclosure sale and shall be liable for a reasonable rental for the use of the Premises; and if the Borrower refuses to surrender possession of the Premises upon demand, the purchaser shall be entitled to institute and maintain the statutory action of forcible entry and detainer and procure an order of possession thereunder, provided, however, that if an Approved Lease is then in effect, the terms and conditions of such Lease shall govern and control and the Borrower expressly waives all damages not arising due to the gross negligence or willful misconduct of the Agent, any Lender or the purchaser at such foreclosure sale, sustained by reason thereof and the Borrower agrees to pay to the purchaser the reasonable costs and expenses (including all reasonable attorneys' fees and expenses) of such action.

Section 13.3 Recovery of Advances.

To the extent permitted by law, the Agent shall have the right, from time to time, to bring an appropriate action to recover any sums required to be paid by the Borrower under the terms of this Mortgage and/or the Note as they become due, without regard to whether the principal indebtedness evidenced by the Note or any other sums secured by this Mortgage shall be due, and, subject to the limitations imposed by law, without prejudice to the right of the Agent thereafter to bring an action of foreclosure, or any other action, for any default by the Borrower existing at the time the earlier action was commenced.

Section 13.4 Sale.

Upon the completion of any sale or sales of all or any portion of the Mortgaged Property by virtue of this Section 13, the Agent or any officer of any court empowered to do so, shall execute and deliver to the accepted purchaser or purchasers, good and sufficient instrument or instruments conveying assigning and transferring all estate, right, title and interest in and to the property and rights sold. To the extent permitted by law, any such sale or sales shall operate to divest all the estate, right, title, interest, claim and demand whatsoever, whether at law or in equity, of the Borrower in and to the properties, interests and rights so sold, and shall be a perpetual bar both at law and in equity against the Borrower and against any and all Persons claiming or who may claim the same, or any part thereof from, through or under the Borrower.

Section 13.5 Several Parcels.

To the extent permitted by Laws and Regulations, if any Event of Default shall have occurred and be continuing and the Note shall have been declared due and payable, the Agent shall have the right to sell all or any portion of the Mortgaged Property, and the right of sale hereunder shall not be exhausted by one or more sales, but to the extent permitted by Laws and Regulations successive sales may be had until all of the Mortgaged Property has been legally sold. To the extent permitted by Laws and Regulations, in the event any sale hereunder is not completed or is defective in the opinion of the Agent, such sale shall not exhaust the power of sale hereunder, and the Agent shall have the right to cause a subsequent sale or sales.

Section 13.6 The Agent Authorized to Execute Instruments.

The Borrower irrevocably appoints (which appointment is coupled with an interest) the Agent the true and lawful attorney-in-fact of the Borrower, in its name and stead and on its behalf, for the purpose of effectuating any sale, assignment, transfer or delivery for the enforcement of this Mortgage after the occurrence and during the continuance of an Event of Default, to execute and deliver all such deeds, assignments, bills of sale and other instruments (without recourse, warranty or representation of any kind) as the Agent may consider necessary or appropriate, with full power of substitution, the Borrower hereby ratifying and confirming all that such attorney or any substitutes thereof shall lawfully do by virtue hereof. Nevertheless, if so requested by the Agent or any purchaser, the Borrower shall ratify and confirm any such sale, assignment, transfer or delivery by executing and delivering to the Agent or such purchaser all deeds, assignments, bills of sale, releases and other proper instruments (which in each case shall

be without recourse to or representation or warranty by the Borrower) to effect such ratification and confirmation as may be designated in any such request.

Section 13.7 Purchase of Mortgaged Property by the Agent.

The Agent or any nominee of the Agent may be a purchaser of the Mortgaged Property or of any interest therein at any sale thereof, and may apply to the purchase price all or any part of the Debt secured hereby in lieu of payment in cash of the amount of such Debt applied. Any such purchaser shall, upon any such purchase, acquire good title to the property so purchased, free of the Lien of this Mortgage and free of all rights of redemption in the Borrower.

Section 13.8 Receipt a Sufficient Discharge to Purchaser.

Upon any sale of the Mortgaged Property after the Note becomes due and payable, whether at maturity, by declaration of acceleration or by automatic acceleration after the occurrence and continuation of an Event of Default or otherwise, the receipt of the Agent or the receipt of the officer making the sale under judicial proceedings shall, to the full extent legally permitted, be sufficient discharge to the purchaser for the purchase money, and such purchaser shall not be obligated to see to the application thereof.

Section 13.9 Waiver of Marshaling, Appraisement, Valuation.

The Borrower hereby waives all rights, legal and equitable, it may now or hereafter have to require marshaling of assets or to require upon foreclosure sales of assets in a particular order. Each successor and assign of the Borrower, including a holder of a Lien subordinate to the Lien created hereby (without implying that the Borrower has, except as expressly provided herein, a right to grant an interest in, or a subordinate Lien on, the Mortgaged Property or any part thereof), by acceptance of its interest or Lien agrees that it shall be bound by the above waiver, as if it gave the waiver itself. The Borrower also hereby waives, to the full extent it may lawfully do so, the benefit of all laws providing for rights of appraisement, valuation, stay or extension or of redemption now or hereafter in force. The Borrower acknowledges that, upon acquisition of the Mortgaged Property, the Mortgaged Property will not constitute agricultural real estate, as defined in Section 5/15-1201 of the Act or residential real estate, as defined in Section 5/15-1219 of the Act. To the fullest extent permitted by Laws and Regulations, the Borrower, on behalf of the Borrower and each and every person acquiring any interest in or title to the Mortgaged Property described herein subsequent to the date of this Mortgage, and on behalf of all other persons to the extent permitted by applicable Laws and Regulations, hereby voluntarily and knowingly waives any and all (i) rights of redemption pursuant to Section 5/15-1601(b) of the Act and (ii) rights or reinstatement.

Section 13.10 Sale Shall Be a Bar Against the Borrower.

The sale of all or any portion of the Mortgaged Property in connection with the exercise of remedies under this Mortgage after the Note becomes due and payable, whether at maturity, by declaration of acceleration or by automatic acceleration after the occurrence and continuation of an Event of Default or otherwise, shall, to the full extent legally permitted, forever be a perpetual bar against the Borrower's asserting any claim to title to such portion of the Mortgaged Property so sold.

UNOFFICIAL COPY

1006083g

Section 13.11 Application of Sale Proceeds.

After deducting all reasonable costs, fees and expenses of the Agent and of this Mortgage, including costs of evidence of title in connection with sale, the remaining proceeds of any sale made under or by virtue of this Section 13, together with any other sums which then may be held by the Agent under this Mortgage, whether under the provisions of this section or otherwise, shall be applied by the Agent in the following priority, to payment of: (a) first, all sums reasonably expended by the Agent under the terms hereof, not then repaid, with accrued interest at the Default Rate specified in the Loan Documents, (b) second, all other sums then secured hereby and (c) the remainder, if any, to the Borrower or other Person legally entitled thereto.

SECTION 14. APPOINTMENT OF RECEIVER.

If an Event of Default shall have occurred and be continuing, the Agent shall, to the fullest extent permitted by law, as a matter of right, be entitled to the appointment of a receiver for all or any part of the Mortgaged Property, to take possession of and to operate the Mortgaged Property whether such receivership be incidental to a proposed sale of the Mortgaged Property or otherwise, and the Borrower hereby consents to the appointment of such a receiver and will not oppose any such appointment. Such receiver shall have all of the rights and powers permitted under the rules of the state wherein the Mortgaged Property is located. The Borrower shall pay to the Agent upon demand all reasonable expenses, including receiver fees, reasonable attorneys' fee and disbursement costs and agent's compensation incurred pursuant to the provisions of this Section 14; and all such expenses shall be secured by this Mortgage and shall be, without limitation, repaid by the Borrower to the Agent with interest thereon at the Default Rate within ten (10) days of demand therefor.

SECTION 15. POSSESSION, MANAGEMENT AND INCOME UPON DEFAULT.

Section 15.1 Possession; Self Help.

If an Event of Default shall have occurred and be continuing, the Agent, with such notice, if any, to the Borrower as required by Laws and Regulations or as the Agent considers reasonable and appropriate in the circumstances, and subject to the rights of Tenants and the other parties to any Operating Agreements and the provisions of applicable Laws and Regulations, may immediately enter upon and take possession of the Premises by self-help, summary proceedings, ejectment or otherwise, and may remove the Borrower and all other Persons and any and all property therefrom, and may hold, operate and manage the same and receive all earnings, income, rents, issues and proceeds accruing with respect thereto. The Agent shall be under no liability for or by reason of any such taking of possession, entry, removal or holding, operation or management, except (a) for its gross negligence, fraud or wilful misconduct or (b) to the extent required by Laws and Regulations, and except that any amounts so received by the Agent shall be applied as set forth in the Section 13.11 hereof and in the Credit Agreement.

Section 15.2 Possession; Cooperation of the Borrower.

At the request of the Agent after any foreclosure of the Mortgaged Property, the Borrower shall promptly execute and deliver to the Agent such deeds, instruments of assignment and other documents as the Agent may deem necessary or advisable to enable the Agent or any agent or representative designated by the Agent, at such time or times and place or places as the Agent may reasonably specify, to obtain possession of all or any portion or portions of the Mortgaged Property to which the Agent shall at the time be entitled hereunder, subject to the rights of Tenants and the other parties to any Operating Agreements. If the Borrower shall fail for any reason to execute and deliver such instrument or document after such request by the Agent, the Agent, to the fullest extent permitted by law, may (a) obtain a judgment conferring on the Agent the right to immediate possession and requiring the Borrower to execute and deliver such instruments and documents to the Agent, which entry of judgment the Borrower, to the extent it may lawfully do so, hereby specifically consents and (b) pursue the Mortgaged Property wherever it may be found and to the extent lawfully permitted, take possession of and remove the same, subject to the rights of Tenants.

Section 15.3 Management.

Upon every taking of possession pursuant to this **Section 15**, the Agent may (but shall have no obligation to), from time to time, at the expense of the Borrower and such expenses to constitute additional indebtedness secured by the Mortgaged Property, make all such expenditures for maintenance, insurance, repairs, replacements, alterations, additions and improvements to and of the Premises, as it may deem proper in its reasonable judgment. In such case, the Agent, to the fullest extent permitted by law, shall have the right to manage, control, use, operate, store, lease or otherwise deal with the Mortgaged Property and to carry on the business and exercise all the rights and powers of the Borrower relating thereto, as the Agent shall, in its reasonable judgment, deem best, including the right to enter into any and all such instruments with respect to the management, cleaning, control, use, operation, storage, leasing of or otherwise dealing with the Mortgaged Property, or any part thereof as the Agent may determine; and, to the fullest extent permitted by applicable Laws and Regulations, the Agent shall be entitled to collect and receive all tolls, rents, revenues, issues, income, products and profits of the Mortgaged Property and every part thereof. Such tolls, rents, revenues, issues, income, products and profits may be applied to pay the expenses of the management, control, use, operation, storage, leasing of or otherwise dealing with the Premises and of conducting the business thereof, and of all maintenance, repairs, replacements, alterations, additions and improvements, and to make all payments which the Agent may be required or may elect to make, if any, for Taxes, Other Charges, assessments, insurance or other proper charges upon the Mortgaged Property or any part thereof (including the employment of engineers and accountants to examine, inspect and make reports), and all other payments which the Agent may be required or authorized to make under any provision of this Mortgage.

SECTION 16. RIGHT OF THE AGENT TO PERFORM THE BORROWER'S COVENANTS.

If the Borrower shall fail to make any payment or perform any act required to be made or performed hereunder or under any other Loan Document, the Agent, upon notice to the

UNOFFICIAL COPY

10060838

Borrower and upon the expiration of any applicable grace or cure period, if any (except in cases of emergency that threatens bodily injury or material damage to property, in which case the Agent will allow such notice and grace or cure period, if any, as is reasonable under the circumstances) and subject to the Borrower's Contest Right, but without waiving or releasing any obligation, Default or Event of Default, may (but shall be under no obligation to) at any time thereafter make such payment or perform such act for the account and at the expense of the Borrower, and, to the extent permitted by applicable law, may enter upon the Premises for such purpose and take all such action thereon as, in the judgment of the Agent, may be reasonably necessary or appropriate therefor, subject to the rights of Tenants and other parties under Operating Agreements. All sums so paid by the Agent and all reasonable costs and expenses (including all reasonable attorneys' fees and expenses) so incurred, together with interest thereon at the Default Rate from the date of payment by the Agent until paid, shall constitute additional indebtedness secured by this Mortgage and shall be paid by the Borrower to the Agent within thirty (30) days after demand therefor.

SECTION 17. REMEDIES CUMULATIVE.

To the extent permitted under applicable law, each right, power and remedy of the Agent provided for in this Mortgage or any other Loan Document now or hereafter existing at law or in equity or by statute or otherwise shall be cumulative and concurrent and shall be in addition to every other right, power or remedy provided for in this Mortgage or any other Loan Document now or hereafter existing at law or in equity or by statute (including the Uniform Commercial Code as enacted in the State where the Mortgaged Property is located) or otherwise, and the exercise or beginning of the exercise by the Agent of any one or more of the rights, powers or remedies provided for in this Mortgage or any other Loan Document or now or hereafter existing at law or in equity or by statute or otherwise shall not preclude the simultaneous or later exercise by the Agent, to the extent permitted by law, of any or all of such other rights, powers or remedies.

SECTION 18. ALTERATIONS AND WASTE; PLANS.

(a) Except as may be permitted, contemplated or required by the Credit Agreement, no Improvements will be materially altered or demolished or removed in whole or in part by the Borrower. The Borrower will not commit any material waste on the Mortgaged Property or make any alteration to, or change in the use of, the Mortgaged Property that will materially diminish the utility thereof for the operation of the business except as may be permitted, contemplated or required under the Credit Agreement or materially increase any ordinary fire or other hazard arising out of construction or operation, but in no event shall any such alteration or change be contrary to the terms of any insurance policy required to be kept pursuant to **Section 4** hereof. Once the Improvements have been Substantially Completed, the Borrower will maintain and operate the Improvements and Personal Property in good repair, working order and condition, reasonable wear and tear excepted.

(b) To the extent the same exist on the date hereof or are obtained in connection with future permitted, contemplated or required alterations, the Borrower shall maintain a complete set of final plans, specifications, blueprints and drawings for the Mortgaged Property either at the Mortgaged Property or in a particular office at the headquarters of the

UNOFFICIAL COPY

1006083g

Borrower to which the Agent shall have access upon reasonable advance notice and at reasonable times.

SECTION 19. GOVERNING LAW.

The creation, perfection and enforcement of the lien of this Mortgage shall be governed by the law of the State in which the Premises are located.

SECTION 20. NO WAIVER.

No failure by the Agent to insist upon the strict performance of any term hereof or to exercise any right, power or remedy consequent upon a breach thereof shall constitute a waiver of any such term or of any such breach. No waiver of any breach shall affect or alter this Mortgage, which shall continue in full force and effect, or shall affect or alter the rights of the Agent with respect to any other then-existing or subsequent breach. Neither the Borrower nor any other Person now or hereafter obligated to pay all or any part of the sums now or hereafter secured by this Mortgage shall be relieved of such obligation by reason of the failure of the Agent to comply with any request of the Borrower, or of any other Person so obligated, to take action to foreclose on this Mortgage or otherwise to enforce any provisions of this Mortgage or the Note or by reason of the release, regardless of consideration, of all or any part of the security held for the Debt secured by this Mortgage, or by reason of any agreement or stipulation between any subsequent owner of any of the Mortgaged Property and the Agent extending the time of payment or modifying the terms of this Mortgage or the Note, without first having obtained the consent of the Borrower or such other persons; and in the latter event the Borrower and all such other Persons shall continue to be liable to make payments according to the terms of any such extension or modification agreement, unless expressly released and discharged in writing by the Agent.

SECTION 21. SUCCESSORS AND ASSIGNS.

All of the grants, covenants, terms, provisions and conditions herein shall run with the Premises and the Improvements and shall apply to, bind and inure to, the benefit of the permitted successors and assigns of the Borrower and the successors and assigns of the Agent.

SECTION 22. ADDITIONAL SECURITY.

Without notice to or consent of the Borrower and without impairment of the Lien and rights created by this Mortgage, the Agent may accept (but the Borrower shall not be obligated to furnish unless otherwise required under the Loan Documents) from the Borrower or from any other Person, additional security for the Note.

SECTION 23. RELEASE.

The provisions of **Section 2.5** of the Credit Agreement shall apply with respect to the discharge, satisfaction and release of this Mortgage and are incorporated herein by this reference.

UNOFFICIAL COPY

10060838

SECTION 24. SECURITY AGREEMENT, ETC.

Section 24.1 Grant of Security.

This Mortgage is a security agreement within the meaning of the Uniform Commercial Code of the state where the Premises is located with respect to all personal property now or hereafter located at the Premises and owned by the Borrower as to which the creation and perfection of a security interest are subject to such Uniform Commercial Code (the "**Personal Property**"), and is also a mortgage as to those portions of the Mortgaged Property that are classified as real property. The Borrower hereby grants to the Agent a security interest in and to the Personal Property to secure the payment of the Note. Any completely executed counterpart of this instrument may be filed as a mortgage on real property or fixtures, as a security agreement or financing statement on personal property or as both. The address of the Borrower, as debtor, and the address of the Agent, as secured party, are shown in **Section 32** hereof.

Section 24.2 Financing Statements.

The Borrower shall, upon reasonable advance written notice from Agent, cause all financing and continuation statements and other instruments with respect to the Personal Property at all times to be kept recorded, filed or registered in such manner and in such places as may be required by law fully to evidence, perfect and secure the interests of the Agent in the Personal Property, and shall pay all filing fees in connection therewith. The Borrower hereby appoints the Agent as its attorney-in-fact, which appointment shall be effective in the event that ten (10) days after the Borrower's receipt of the Agent's demand to comply with the covenant in the immediately preceding sentence the Borrower has not so complied, to perform the obligations of the Borrower under this Section, at the expense of the Borrower, in the event the Borrower fails to do so.

Section 24.3 Multiple Remedies.

If an Event of Default shall have occurred and be continuing, the Agent shall have the option of proceeding, to the extent permitted under applicable Laws and Regulations, as to both real and personal property in accordance with its rights and remedies in respect of the real property as an alternative to proceeding in accordance with the provisions of the Uniform Commercial Code; and the Agent may exercise any and all of the other rights of a secured party under such Uniform Commercial Code.

Section 24.4 Waiver of Rights.

The Borrower waives all rights of redemption and all other rights and remedies of a debtor thereunder and all formalities prescribed by law relative to the sale or disposition of the Personal Property after the occurrence and during the continuance of an Event of Default hereunder and all other rights and remedies of the Borrower with respect thereto. In exercising its right to take possession of the Personal Property upon the occurrence and during the continuance of an Event of Default hereunder, the Agent, personally or by its agents or attorneys, and subject to the rights of any Tenant or other party to an Operating Agreement, may, to the extent permitted by law, enter upon any part of the Premises without being guilty of trespass or any wrongdoing, and without liability for damages thereby occasioned, except damages arising

from the Agent's gross negligence or willful misconduct. To the extent any notice of sale or other disposition of the Personal Property is required and cannot be waived, in the event the Agent elects to proceed with respect to the Personal Property separately from the real property, the Agent shall give at least ten (10) Business Days' notice of the sale of the Personal Property, which shall for all purposes be deemed to be commercially reasonable. All recitals in any instrument of assignment or any other instrument executed by the Agent incident to any sale, transfer, assignment, lease or other disposition or utilization of the Personal Property or any part thereof after the occurrence and continuation of an Event of Default shall be full proof of the matter stated therein and no other proof shall be required to establish full legal propriety of the sale or other action taken by the Agent or of any fact or condition incident thereto, all of which shall be deemed conclusively to have been performed or to have occurred.

Section 24.5 Expenses of Disposition of Personal Property.

To the extent permitted by Laws and Regulations, Borrower shall reimburse the Agent, within ten (10) days after demand, for all reasonable expenses of retaking, holding, preparing for sale, lease or other use or disposition, selling, leasing or otherwise using or disposing of the Personal Property that are incurred by the Agent in connection with its exercise of available remedies under this Section 25, including all reasonable attorneys' fees and expenses, and all such expenses shall be added to the Borrower's obligations to the Agent and shall be secured hereby.

Section 24.6 Suretyship Waivers.

A. To the extent permitted by Laws and Regulations, the Borrower hereby waives and agrees not to assert or take advantage of any defense based upon:

(a) except as provided in this Mortgage, the Credit Agreement or any other Loan Document, promptness, diligence, presentment, demand for payment, protest, notice of discharge, notice of acceptance of this Mortgage and any other notice with respect to this Mortgage or any of the Secured Obligations;

(b) any defense arising by reason of any claim or defense based upon an election of remedies by the Agent (including, without limitation, an election to nonjudicially foreclose on any real or personal property collateral) which in any manner impairs, reduces, releases or otherwise adversely affects its subrogation, reimbursement or contribution rights or other rights to proceed against any Person or any collateral;

(c) the benefit of any statute of limitations affecting the enforcement hereof;

(d) (i) the incapacity, lack of authority or disability of any Person, (ii) the revocation or repudiation of any Person (other than Agent), (iii) the failure of the Agent to file or enforce a claim against the estate (either in administration, bankruptcy or any other proceeding) of any Person, (iv) the lack of validity or unenforceability in whole or in part of any instrument, document or agreement referred to therein or herein, or (v) the Agent's election, in any proceeding instituted under the Bankruptcy Code, of the application of Section 1111(b)(2) of the Bankruptcy Code, or (vi) any defense based upon

any borrowing or any grant of a security interest under Section 364 of the Bankruptcy Code;

(e) any statute or rule of law which provides that the obligation of a surety must be neither larger in amount nor in any other respect more burdensome than that of a principal;

(f) any taking, modification or release of any collateral or guarantees for any Secured Obligation, or any failure to perfect any security interest in, or the taking of or failure to take any other action with respect to any collateral securing payment of the Secured Obligations; or

(g) an offset by the Borrower against any obligation now or hereafter owed to the Borrower by any Person (other than by the Agent or any Lender);

it being the intention hereof that the Borrower shall remain liable for the Secured Obligations as primary obligor until the full and timely payment and performance of the Secured Obligations notwithstanding any act, omission or thing which might otherwise operate as a legal or equitable discharge of a joint and several obligor.

SECTION 25. FINANCING STATEMENT.

This Mortgage shall be deemed to be and may be enforced from time to time as a mortgage, chattel mortgage, assignment, contract, security agreement, financing statement, or Lien on machinery or other Equipment situated on the Premises, and from time to time as any one or more thereof, and shall constitute a "fixture filing" for the purposes of Article 9 of the Uniform Commercial Code as enacted in the State where the Premises is located.

SECTION 26. EXPENSES OF THE AGENT.

Section 26.1 Expenses of Defending the Mortgage.

If any action, suit or other proceeding affecting the Mortgaged Property or any part thereof shall be commenced in which action, suit or proceeding the Agent is made a party or participates or in which the right to use the Mortgaged Property or any part thereof is threatened, or in which it becomes necessary in the reasonable judgment of the Agent to defend or uphold the interest of the Agent under this Mortgage (including any action, suit or proceeding to establish or uphold the compliance of the Improvements with any Legal Requirement), then all out-of-pocket amounts reasonably paid or incurred by the Agent for the expense of any such action, suit or other proceeding or to protect its rights therein (whether or not the Agent is made or becomes a party thereto) or otherwise to enforce or defend the rights and lien created by this Mortgage (including all reasonable attorneys' fees and expenses), shall be paid by the Borrower upon demand and, if not paid within fifteen (15) days of the giving of such demand, shall bear interest at the Default Rate from the date of the payment or incurring thereof, and any such amount and the interest thereon shall be a Lien on the Mortgaged Property, prior to any right, or right to, interest in, or claim upon the Mortgaged Property attaching or accruing subsequent to or otherwise subordinate to the Lien of this Mortgage, and the same shall be deemed to be indebtedness secured hereby.

Section 26.2 Expenses of Collection.

In the event this Mortgage or the Note is placed in the hands of counsel for collection of any amount payable hereunder or thereunder or for the enforcement of any of the provisions hereof or thereof and if an Event of Default shall have occurred and shall then be continuing, the Borrower agrees to pay all reasonable costs associated therewith incurred by the Agent, either with or without the institution of an action, suit or other proceeding, in addition to all reasonable costs, disbursements and allowances provided by law, all such costs to be paid upon demand, together with interest thereon at the Default Rate from the date of notice or incurring thereof, and the same shall be deemed to be part of the indebtedness secured hereby.

SECTION 27. NON-MERGER.

It is the intention and agreement of the Borrower and the Agent there shall be no merger of this Mortgage and any estate in the Premises, by reason of the fact that the same Person may own or hold the Premises and/or this Mortgage.

SECTION 28. ASSIGNMENT OF RENTS AND THE BORROWER'S INTEREST IN LEASES.

Section 28.1 Assignment of Leases, Operating Agreements and Tenant Guaranties.

During the term hereof, the Borrower hereby pledges, grants, sells, assigns, conveys, delivers, transfers, hypothecates and sets over to the Agent, to the extent permitted by law or the terms hereof and subject to the terms and conditions hereof and of the other Loan Documents and applicable Laws and Regulations, all of the Borrower's right, title and interest, now or hereafter acquired, in and to any and all existing Leases and Operating Agreements and any Leases and Operating Agreements that may hereafter be entered into by the Borrower or any Property Manager (acting on behalf of the Borrower), and any modifications, renewals, extensions, supplements or replacements thereof, and any guaranties of the Tenant's obligations under any Lease (each such guaranty, a "Tenant Guaranty" and, collectively, the "Tenant Guaranties") and all right, title and interest of the Borrower thereunder, including all claim, right and demand to receive, collect and retain all rents and all other amounts due thereunder and under any modifications, renewals, extensions, supplements or replacements thereof (collectively, the "Assigned Property"), including:

- (a) the immediate and continuing right to receive and collect all amounts payable by all Tenants, subtenants or other parties pursuant to the Leases, Operating Agreements and Tenant Guaranties, including:
 - (i) all rents (including all amounts payable to the Borrower on account of maintenance, repairs, taxes, insurance and common area charges or similar charges), income, revenues, issues, profits, insurance proceeds, condemnation awards and other payments, tenders and security payable to or receivable by the Borrower under the Leases, the Operating Agreements or the Tenant Guaranties;

(ii) all damages or other amounts payable in the event of any disposition, expiration or termination of any Lease, Operating Agreement or Tenant Guaranty pursuant to the terms thereof, by operation of law or otherwise;

(iii) any indemnification against, or reimbursement for, sums paid and costs and expenses incurred by the Borrower under any Lease, Operating Agreement, Tenant Guaranty or otherwise;

(iv) any award in the event of the bankruptcy of any Tenant, or any other party to any Operating Agreement or Tenant Guaranty; and

(v) any security deposits, other security instruments, other deposits or prepayments with respect to any such Lease, Operating Agreement or Tenant Guaranty;

(b) all claims, rights, powers, privileges and remedies of the Borrower, whether provided for in any Lease, Operating Agreement or Tenant Guaranty or arising by statute or at law or in equity or otherwise, consequent to any failure on the part of any Tenant to perform or comply with any term of any Lease or any other party to comply with any Operating Agreement or Tenant Guaranty;

(c) all right to take all action upon the happening of a default under any Lease, Operating Agreement or Tenant Guaranty as shall be permitted by any such Lease, Operating Agreement, Tenant Guaranty, or by law, including the commencement, conduct and consummation of proceedings at law or in equity; and

(d) the full power and authority, in the name of the Borrower or otherwise, to enforce, collect, receive and make receipt for any and all of the foregoing and to do any and all other acts and things whatsoever that the Borrower is or may be entitled to do under any Lease, Operating Agreement or Tenant Guaranty.

From and after the date hereof and, during the term hereof, subject to applicable Laws and Regulations, the Borrower shall use commercially reasonable efforts to negotiate Leases, Operating Agreements and Tenant Guaranties for space at the Mortgaged Property entered into after the date hereof that do not prohibit the assignment thereof and the amounts payable thereunder to the Agent pursuant to the terms of this Mortgage and the Assignment of Leases. In addition, each Property Management Agreement shall provide that the Property Manager shall use commercially reasonable efforts to negotiate Leases, Operating Agreements or Tenant Guaranties on behalf of Borrower that do not prohibit the collateral assignment thereof and the amounts payable thereunder to the Borrower to secure Property Manager's obligations under the applicable Property Management Agreement and the collateral assignment by the Borrower of the Borrower's security interest therein and in the amounts payable thereunder to the Agent to secure the Borrower's obligations hereunder.

Section 28.2 Application of Proceeds.

Except as otherwise required by applicable law or as provided for in the other Loan Documents to which Borrower is a party, any funds received by the Agent under this

Article may be applied by the Agent to the Secured Obligations (as defined in this Mortgage) in the following priority, to payment of: (a) first, all sums reasonably expended by the Agent under the terms hereof or of the other Loan Documents, not then repaid, with accrued interest at the Default Rate specified in the Loan Documents, (b) second, all other sums then secured hereby and (c) the remainder, if any, to the Borrower or other Person legally entitled thereto. The Agent shall be accountable to the Borrower only for monies actually received by the Agent or its agents pursuant hereto. Neither the collection of said funds and the application thereof as aforesaid nor any act done or omitted pursuant to the power and rights granted to the Agent hereunder, shall cure or waive any Default or Event of Default or waive, modify or affect any notice of Default or Event of Default or invalidate any act done pursuant to such notice, nor shall the same be a waiver of any of the Agent's rights and remedies under the Note, this Mortgage, the Credit Agreement or the other Loan Documents to which Borrower is a party.

Section 28.3 Present Assignment; License of the Borrower.

(a) This Article constitutes a present, absolute, effective, irrevocable and completed assignment by the Borrower to the Agent of the Assigned Property and the right, subject to applicable law, to collect all sums payable to the Borrower thereunder and apply the same in accordance with **Section 28.2** hereof, which is not conditioned upon the Agent being in possession of the Mortgaged Property. Notwithstanding the foregoing, so long as no Event of Default then exists, the Borrower shall have a license to enforce the obligations of Tenants under the Leases and of parties under the Operating Agreements and Tenant Guaranties, and to exercise all the rights and remedies of the landlord or owner of the Mortgaged Property, as applicable, under the Leases, the Operating Agreements and the Tenant Guaranties (including, without limitation, the right to receive all rents and other amounts described herein), and to receive all rights, benefits and privileges under all of the foregoing, subject, however, to compliance with the provisions of this Mortgage and the other Loan Documents to which Borrower is a party.

(b) If any Event of Default exists, the license granted in **Section 28.3(a)** hereof shall, to the extent permitted by Laws and Regulations, immediately cease and terminate, without waiver of such Event of Default, with or without notice, and without any action or proceeding or the intervention of a receiver appointed by a court, and the Agent or an agent or receiver appointed by the Agent may, to the extent permitted by Laws and Regulations, without regard for the adequacy of the security for the Secured Obligations (as defined in this Mortgage) and the Tenant Guaranties, the commission of waste or the solvency of the Borrower, without limiting any of the Agent's rights and remedies under any of the Loan Documents to which Borrower is a party or otherwise available at law or in equity and subject to applicable law and statutory requirements, if any, do any or all of the following (but is under no obligation to do any of the following):

(i) exercise any of the Borrower's rights under the Leases, Operating Agreements and Tenant Guaranties;

(ii) enforce the terms, conditions and obligations of the Leases, Operating Agreements and Tenant Guaranties;

(iii) demand, collect, sue for, attach, levy, recover, receive, compromise and adjust, and make, execute and deliver receipts and releases for all rents or other payments that may then be or may thereafter become due, owing or payable with respect to the Leases, Operating Agreements and Tenant Guaranties;

(iv) demand that any sums then held by the Borrower with respect to any Lease, Operating Agreement or Tenant Guaranty (including any security deposits, other deposits or prepayments) be promptly remitted to the Agent;

(v) generally do, execute and perform any other act, deed, matter or thing whatsoever that ought to be done, executed and performed in and about or with respect to the Leases, Operating Agreements and Tenant Guaranties; and

(vi) enter into possession of the Mortgaged Property in accordance with the terms of the Mortgage and the other Loan Documents for the purposes of exercising its rights under this Section 28.3(b).

(c) If an Event of Default shall then exist, Agent shall have the right to proceed in its own name or in the name of Borrower in respect of any claim, suit, action or proceeding permitted under applicable Laws and Regulations relating to any Mortgaged Property.

(d) After the cure of an Event of Default to Agent's satisfaction, (i) Borrower shall notify (such notification being countersigned by Agent) each third party to a Lease, Operating Agreement or Tenant Guaranty who had previously been directed that Agent would be the beneficiary of the applicable Lease, Operating Agreement or Tenant Guaranty instead of Borrower that Borrower would once again be the beneficiary thereof, and (ii) after such notice has been so duly executed and delivered to such third party, the license set forth in the second sentence of Section 28.3(a) hereof automatically shall be reinstated.

Section 28.4 Payment by Tenants.

(a) If an Event of Default shall then exist, then:

(i) the Borrower hereby irrevocably authorizes the Agent to notify each Tenant under a Lease, to the extent permitted by Laws and Regulations, and each other party under an Operating Agreement or Tenant Guaranty to pay by direct deposit to a deposit account (or such other account as the Agent may from time to time designate) all rents, issues and profits accruing or due from time to time under such Tenant's Lease or such other party's Operating Agreement or Tenant Guaranty;

(ii) the Borrower hereby irrevocably authorizes and directs each Tenant under a Lease, to the extent permitted by law, and each other party under an Operating Agreement or Tenant Guaranty, at the request of the Agent, to pay by direct deposit to a deposit account (or such other account as the Agent may from time to time designate) all rents, issues and profits accruing or due from time to time under such Tenant's Lease or such other party's Operating Agreement or Tenant Guaranty (and each such Tenant and party is an intended third-party beneficiary of this clause (ii)); and

(iii) the Borrower shall provide any confirming or separate notice to each such Tenant and other party as the Agent may reasonably request for the same purposes.

(b) Prior to receiving any notice of the Agent's exercise of its rights under clause (a)(i) above, the Borrower shall have the right to receive, or have Property Manager receive, payments from Tenants and any other party to any Operating Agreement or Tenant Guaranty, but only in accordance with and subject to the terms of the other Loan Documents.

Section 28.5 No Release.

The Borrower, at its expense, will prudently enforce in all material respects each of the Leases, Operating Agreements and Tenant Guaranties in accordance with their terms. Neither the execution and delivery of this Mortgage or any other Loan Document to which Borrower is a party, nor any action or inaction on the part of the Agent (unless agreed to in writing by the Agent) shall release (a) any Tenant from its Lease, (b) any party from its Operating Agreement, (c) any guarantor from any Tenant Guaranty or (d) the Borrower from any of its obligations under the Leases or the Operating Agreements, or constitute an assumption of any such obligation under the Leases or the Operating Agreements on the part of the Agent. No action or failure to act on the part of the Borrower shall adversely affect or limit the rights of the Agent under this Mortgage or the Assignment of Leases or, through this Mortgage or the Assignment of Leases, under the Leases, the Operating Agreements or the Tenant Guaranties.

Section 28.6 Rights, Powers and Privileges of the Agent Irrevocable.

During the term hereof, all rights, powers and privileges of the Agent herein set forth are coupled with an interest and are irrevocable, subject to the terms and conditions hereof, and the Borrower will not take any action under the Leases, the Operating Agreements, the Tenant Guaranties or otherwise that is in breach of the terms hereof or of any Assignment of Leases or of any other Loan Document to which Borrower is a party, and any such action in breach hereof or thereof, as well as any further assignment of any rents, issue or profits from the Mortgaged Property, shall be void. To the extent permitted by law, the Borrower hereby waives any requirement that the Agent commence any foreclosure proceeding with respect to any or all of the Mortgaged Property (as defined in this Mortgage) or to any or all of the other properties and collateral securing payment of the Secured Obligations prior to enforcement of any remedies pursuant to this Section 28, including the right to commence and prosecute an action to appoint a receiver for rents and all other amounts due under any Leases, Operating Agreements or Tenant Guaranties. The Borrower will, from time to time, upon request of the Agent, at the Borrower's sole cost and expense, execute all instruments and further assurances and all supplemental instruments and take all such action as the Agent from time to time may reasonably request in order to perfect, preserve and protect the interests intended to be assigned to the Agent hereby; provided that such instrument or further assurances shall not increase Borrower's obligations or liabilities, or decrease or limit Borrower's rights, under this Mortgage or any of the other Loan Documents to which Borrower is a party.

Section 28.7 No Subordination or Amendment.

The Borrower hereby agrees that, except as permitted in the Credit Agreement or otherwise with Agent's written consent, it will not, unilaterally or by agreement, subordinate, amend, modify, extend, discharge, terminate (unless, in the case of any such termination due to an event of default under a Lease or Operating Agreement, within a commercially reasonable period Borrower provides another lease or agreement that provides substantially equivalent benefits to Agent, on terms and conditions no worse to Borrower than the corresponding benefits, terms and conditions which applied under the lease or agreement replaced), surrender, waive or otherwise change any term of any of the Leases, Operating Agreements or Tenant Guaranties in any manner that would violate this Mortgage or any other Loan Document. If any of the Leases, Operating Agreements or Tenant Guaranties shall be amended as permitted thereby, they shall continue to be subject to the provisions hereof without the necessity of any further act by any of the parties hereto.

Section 28.8 Termination of Assignment.

Upon the payment of the provision, in accordance with the applicable provisions of the Credit Agreement, this Mortgage and the other provisions of the Loan Documents to which Borrower is a party, for payment in full, of the Secured Obligations, the assignment made in this Section 28 and all rights hereunder assigned to the Agent shall cease and terminate and shall revert to the Borrower. Further, upon the partial or full repayment of the Note and all other sums in an amount sufficient to cause the release of the Mortgaged Property from the Lien of this Mortgage pursuant to the terms of Section 2.5 of the Credit Agreement, the assignment made in this Section 28 and all rights hereunder assigned to the Agent in respect of the portion of the Mortgaged Property released shall cease and terminate and revert to the Borrower.

Section 28.9 The Agent Not Obligated Under Lease, Operating Agreement or Tenant Guaranty.

This Section 28 shall not be construed to bind the Agent to the performance of any of the covenants, conditions or provisions contained in any Lease, Operating Agreement or Tenant Guaranty or otherwise impose any obligation upon the Agent. This Section 28 shall neither operate to place any obligation or liability for the control, care, management or repair of the Mortgaged Property upon the Agent; nor shall it operate to make the Agent responsible or liable for any waste committed on the Mortgaged Property, including the presence of any Hazardous Substances (as defined in the Environmental Indemnity), or for any negligence by any person other than the Agent in the management, upkeep, repair or control of the Mortgaged Property resulting in loss or injury or death to any tenant, licensee, employee or third party. Nothing in this Section 28 shall be construed as constituting the Agent a "mortgagee in possession" in the absence of the taking of actual possession of the Mortgaged Property by the Agent.

Section 28.10 Subrogation.

If an Event of Default shall have occurred and be continuing, the Agent shall, to the extent permitted by law, have the right to proceed in its own name or in the name of the

UNOFFICIAL COPY

Borrower in respect of any claim, suit, action or proceeding relating to the rejection of any Lease, Operating Agreement or Tenant Guaranty by or on behalf of any lessee or other party thereunder, including the right to file and prosecute, to the exclusion of the Borrower, any proofs of claim, complaints, motions, applications, notices and other documents, in any case in respect of the lessee under such Lease or any other party under any Operating Agreement or Tenant Guaranty under the Bankruptcy Code.

Section 28.11 Bankruptcy.

If there shall be filed by or against the Borrower a petition under the Bankruptcy Code, and the Borrower, as lessor under any Lease or party to any Operating Agreement, shall determine to reject such Lease or Operating Agreement pursuant to Section 365(a) of the Bankruptcy Code, then the Borrower shall give the Agent not less than ten (10) days' prior notice of the date on which the Borrower shall apply to the bankruptcy court for authority to reject such Lease or Operating Agreement. The Agent shall have the right, but not the obligation, to serve upon the Borrower, within such ten-day period, a notice stating that

- (a) the Agent demands that the Borrower assume and assign such Lease or Operating Agreement to the Agent pursuant to Section 365 of the Bankruptcy Code, and
- (b) the Agent covenants to cure or provide adequate assurance of future performance under such Lease or Operating Agreement.

If the Agent serves upon the Borrower the notice described in the preceding sentence, the Borrower shall not seek to reject such Lease or Operating Agreement and shall comply with the demand provided for in **clause (a)** of the preceding sentence within thirty (30) days after the notice shall have been given, subject to the performance by the Agent of the covenant provided for in **clause (b)** of the preceding sentence.

SECTION 29. NOTICES.

All notices, consents, approvals and requests required or permitted hereunder shall be given in writing and shall be effective for all purposes if hand delivered or sent by (a) certified or registered United States mail, postage prepaid, (b) expedited overnight prepaid delivery service, either commercial or United States Postal Service, with proof of attempted delivery or (c) personal delivery addressed as follows (or at such other address and person as shall be designated from time to time by any party hereto, as the case may be, in a written notice to the other parties hereto in the manner provided for in this section):

If to the Agent:

Bayerische Hypo- Und Vereinsbank AG
 150 East 42nd Street
 New York, New York 10017-4679
 Attention: Real Estate Lending

with copies to:

UNOFFICIAL COPY

1006083_g

Bayerische Hypo- Und Vereinsbank AG
150 East 42nd Street
New York, New York 10017-4679
Attention: General Counsel

Shearman & Sterling
599 Lexington Avenue
New York, New York 10022
Attention: John L. Opar, Esq. (766/44)

If to the Borrower:

Dearborn Center, L.L.C.
c/o J. Paul Beitler Development Company
181 West Madison Street, Suite 3900
Chicago, Illinois 60602
Attention: Donald Shapiro

and

Prime Group Realty Trust
77 West Wacker Drive, Suite 3900
Chicago, Illinois 60601
Attention: Jeffrey A. Patterson and James Hoffman, Esq.

with a copy to:

Jenner & Block
One IBM Plaza
Chicago, Illinois 60611
Attention: Donald I Resnick, Esq.

A notice shall be deemed to have been given: in the case of hand delivery, at the time of delivery; in the case of registered or certified mail, two (2) Business Days after deposit in the mail, in the case of expedited overnight prepaid delivery, upon the first attempted delivery on a Business Day.

SECTION 30. WAIVER OF TRIAL BY JURY; WAIVER OF CLAIMS.

Section 30.1 Trial by Jury.

EACH OF THE AGENT AND THE BORROWER HEREBY AGREES NOT TO ELECT A TRIAL BY JURY OF ANY ISSUE TRIABLE OF RIGHT BY JURY, AND WAIVES ANY RIGHT TO TRIAL BY JURY FULLY TO THE EXTENT THAT ANY SUCH RIGHT SHALL NOW OR HEREAFTER EXIST WITH REGARD TO THIS MORTGAGE, 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 THE AGENT AND THE

BORROWER AND IS INTENDED TO ENCOMPASS INDIVIDUALLY EACH INSTANCE AND EACH ISSUE AS TO WHICH THE RIGHT TO A TRIAL BY JURY WOULD OTHERWISE ACCRUE. THE AGENT AND THE BORROWER ARE HEREBY AUTHORIZED TO FILE A COPY OF THIS PARAGRAPH IN ANY PROCEEDING AS CONCLUSIVE EVIDENCE OF THIS WAIVER.

Section 30.2 Claims.

The Borrower hereby waives any and all right to assert any setoff or counterclaim of any nature whatsoever with respect to the Secured Obligations in any action or proceeding by the Agent to collect the same, or any portion thereof, or to enforce and realize upon the Lien and security interest created by this Mortgage or any other Loan Documents, provided, however, that the Borrower expressly reserves the right to assert any such claim in a separate proceeding; and provided further that the Borrower expressly reserves the right to assert any claim in the same action commenced by the Agent if such claim is of a mandatory or compulsory nature or would be barred or materially impaired if not asserted in the action commenced by the Agent.

SECTION 31. SEVERABILITY.

In case any one or more of the provisions contained in this Mortgage shall be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby

Section 31.1 The Borrower covenants and agrees that, in accordance with the provisions of the Credit Agreement, all of the funds advanced and to be advanced thereunder have been and will be used exclusively for the purposes set forth in the Credit Agreement, and that this instrument constitutes a "Construction Mortgage" within the meaning of Section 9-313(1)(c) of the Illinois Uniform Commercial Code.

Section 31.2 This Mortgage is granted to secure future advances and loans from the Lenders to or for the benefit of the Borrower or the Premises, as provided in the Credit Agreement, and costs and expenses of enforcing the Borrower's obligations under this Mortgage, the Credit Agreement and the other Loan Documents. All advances, disbursements or other payments required by the Credit Agreement are obligatory advances up to the limits established therein and shall, to the fullest extent permitted by law, have priority over any and all mechanics' liens and other liens and encumbrances arising after this Mortgage is recorded. All future advances that may be subsequently made by the Lenders shall be made within twenty (20) years of the date hereof and have the same priority as advances made on the date hereof although there may be no advances made on the date hereof and although there may be no indebtedness outstanding at the time any future advance is made.

SECTION 32. LIMITATION ON LIABILITY.

Recourse against Borrower under this Mortgage shall be subject to the terms of Section 11.25 of the Credit Agreement and the terms thereof are hereby incorporated herein by reference and shall have the same force and effect as if fully set forth in full herein.

SECTION 33. COMPLIANCE WITH ILLINOIS MORTGAGE FORECLOSURE LAW.

Subject to the terms and conditions of the Credit Agreement:

- (a) In the event that any provision in this Mortgage shall be inconsistent with any provision of the Act, the provisions of the Act shall take precedence over the provisions of this Mortgage, but shall not invalidate or render unenforceable any other provision of this Mortgage that can be construed in a manner consistent with the Act.
- (b) If any provision of this Mortgage shall grant to the Agent any rights or remedies upon default of the Borrower which are more limited than the rights that would otherwise be vested in the Agent under the Act in the absence of said provision, the Agent shall be vested with the rights granted in the Act to the full extent permitted by law.
- (c) Without limiting the generality of the foregoing, all out of pocket expenses incurred by the Agent to the extent reimbursable under Sections 5/15-1510 and 5/15-1512 of the Act, whether incurred before or after any decree or judgment of foreclosure shall be added to the indebtedness secured by this Mortgage or by the judgment of foreclosure.

SECTION 34. PROTECTIVE ADVANCES. Subject to the terms and conditions of the Credit Agreement, all reasonable advances, disbursements and out-of-pocket expenditures made by the Agent before and during a foreclosure, and before and after judgment of foreclosure, and at any time prior to sale, and, where applicable, after sale, and during the pendency of any related proceedings, for the following purposes, in addition to those otherwise authorized by this Mortgage or by the Act (collectively "Protective Advances"), shall have the benefit of all applicable provisions of the Act, including those provisions of the Act hereinbelow referred to:

- (a) all advances by the Agent in accordance with the terms of this Mortgage to: (i) preserve or maintain, repair, restore or rebuild the Improvements; (ii) preserve the lien of this Mortgage or the priority thereof; or (iii) enforce this Mortgage, as referred to in Subsection (b) (5) of Section 5/15-1302 of the Act;
- (b) payments by the Agent of: (i) when due installments of principal, interest or other obligations in accordance with the terms of any senior mortgage or other prior Lien; (ii) when due installments of real estate taxes and assessments, general and special and all other taxes and assessments of any kind or nature whatsoever which are assessed or imposed upon the Mortgaged Property or any part thereof; (iii) other obligations authorized by this Mortgage; or (iv) with court approval, any other amounts in connection with other Liens or interests reasonably necessary to preserve the status of title, as referred to in Section 5/15-1505 of the Act;
- (c) advances by the Agent in settlement or compromise of any claims asserts by claimants under senior mortgages or any other prior liens;

UNOFFICIAL COPY

10060838

(d) reasonable attorneys' fees and other costs incurred: (i) in connection with the foreclosure of this Mortgage as referred to in Section 5/15-1504 (d)(2) and 5/15-1510 of the Act; (ii) in connection with any action, suit or proceeding brought by or against the Agent for the enforcement of this Mortgage or arising from the interest of the Agent hereunder; or (iii) in the preparation for the commencement or defense of any such foreclosure or other action;

(e) the Agent's fees and costs, including reasonable attorneys' fees, arising between the entry of judgment of foreclosure and the confirmation hearing as referred to in Subsection (b)(1) of Section 5/15-1508 of the Act;

(f) advances of any amount required to make up a deficiency in deposits for installments of taxes and assessments and insurance premiums as may be authorized by this Mortgage;

(g) expenses deductible from proceeds of sale as referred to in Subsections (a) and (b) of Section 5/15-1512 of the Act;

(h) expenses incurred and expenditures made by the Agent for any one or more of the following: (i) premiums for casualty and liability insurance paid by the Agent whether or not the Agent or a receiver is in possession, if reasonably required, in reasonable amounts, and all renewals thereof, without regard to the limitation to maintaining of existing insurance in effect at the time any receiver or mortgagee takes possession of the Mortgaged Property imposed by Subsection (c)(1) of Section 5/15-1704 of the Act; (ii) repair or restoration of damage or destruction in excess of available insurance proceeds or condemnation awards; (iii) payments required or deemed by the Agent to be for the benefit of the Mortgaged Property under any grant or declaration of easement, easement agreement, agreement with any adjoining land owners or instruments creating covenants or restrictions for the benefit of or affecting the Mortgaged Property; (iv) shared or common expense assessments payable to any association or corporation in which the owner of the Mortgaged Property is a member in any way affecting the Mortgaged Property; (v) pursuant to any Lease of the Mortgaged Property.

All Protective Advances shall be so much additional Indebtedness secured by this Mortgage, and shall become immediately due and payable with notice and with interest thereon from the date of the advance until paid at the Default Rate.

This Mortgage shall be a Lien for all Protective Advances as to subsequent purchasers and judgment creditors from the time this Mortgage is recorded pursuant to Subsection (b)(5) of Section 5/15-1302 of the Act.

All Protective Advances shall, except to the extent, if any, that any of the same is clearly contrary to or inconsistent with the provisions of the Act, apply to and be included in:

(i) determination of the amount of Indebtedness secured by this Mortgage at any time;

(ii) the Indebtedness found due and owing to the Agent in the judgment of foreclosure and any subsequent supplemental judgments, orders, adjudications or findings by the court of any additional indebtedness becoming due after such entry of judgment, it being agreed that in any foreclosure judgment, the court may reserve jurisdiction for such purpose;

(iii) determination of amounts deductible from sale proceeds pursuant to Section 5/15-1522 of the Act;

(iv) application of income in the hands of any receiver or the Agent in possession; and

(v) computation of any deficiency judgment pursuant to Subsections (a)(12) and (e) of Sections 5/15-1508 and Section 5/15-1511 of the Act.

SECTION 35. FUTURE ADVANCES. The Agent shall have the right, but not the obligation, to advance additional funds in excess of \$230,000,000.00 to the Borrower; and any sum or sums which may be so loaned or advanced by the Agent to the Borrower within ten (10) years from the date hereof, together with interest thereon at the rate agreed upon at the time of such loan or advance, shall be equally secured with and have the same priority as the original Indebtedness and be subject to all the terms and provisions of this Mortgage. Subject to the immediately preceding sentence, this Mortgage is further made to secure payment of all other amounts, with interest thereon, becoming due and payable to the Agent under the terms of the Note, this Mortgage or any other instruments securing the Note; provided, however, that the Indebtedness secured hereby shall in no event exceed \$460,000,000.00.

UNOFFICIAL COPY

10060838

IN WITNESS WHEREOF, the Borrower has caused this Mortgage to be duly executed and delivered as of the date first above written.

DEARBORN CENTER, L.L.C.

By: Prime/Beitler Development Company,
L.L.C., its sole member

By: Penny Beitler L.L.C., its managing
member

By: 

J. Paul Beitler
Manager

Property of Cook County Clerk's Office

UNOFFICIAL COPY

ACKNOWLEDGMENT

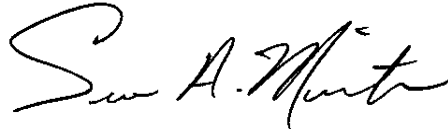
1006083_g

STATE OF ILLINOIS)

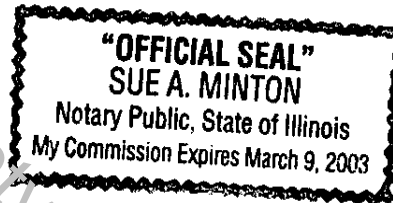
COUNTY OF COOK)

I, the undersigned, a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY that J. PAUL BEITLER, the manager of PENNY BEITLER L.L.C., the managing member of PRIME/BEITLER DEVELOPMENT COMPANY, L.L.C., the sole member of DEARBORN CENTER, L.L.C., who is personally known to me to be the same person whose name is subscribed to the foregoing instrument as such manager of said limited liability company, appeared before me this day in person and acknowledged that he signed and delivered the said instrument as his own free and voluntary act of said limited liability company, as manager, for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal this 5th day of January, 2001.



Notary Public



UNOFFICIAL COPY

1006083g

EXHIBIT A

Description of Land

LOTS 5, 6, 7 AND THAT PART OF LOT 8 LYING EAST OF THE EAST LINE OF DEARBORN STREET (EXCEPTING THEREFROM THE NORTH 9 FEET OF SAID LOTS TAKEN FOR ALLEY) IN BLOCK 141 IN SCHOOL SECTION ADDITION TO CHICAGO IN SECTION 16, TOWNSHIP 39 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN IN COOK COUNTY, ILLINOIS.

PIN No. S 17-16-213-012-0000, 17-16-213-013-0000,
17-16-213-014-0000, 17-16-213-015-0000, Vol.

Address: Vacant land on S. Dearborn, W Adams,
S. State and Milwaukee, Chicago, IL

511