

UNOFFICIAL COPY

0030344105

5772/0136 11 031 Page 1 of 26

2003-03-12 12:42:57

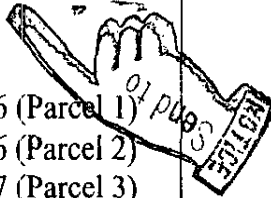
Cook County Recorder 74.50

THIS INSTRUMENT
PREPARED BY AND WHEN
RECORDED, RETURN TO:

Brian S. Short, Esq.
Winstead Sechrest & Minick P.C.
5400 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270



0030344105



- P.I.N.: 08-26-300-026 (Parcel 1)
- 08-26-300-016 (Parcel 2)
- 08-26-300-017 (Parcel 3)
- 08-26-300-027 (Parcel 4)
- 08-26-300-024 (Parcel 5)
- 08-26-300-028 (Parcel 6)
- 08-26-300-029 (Parcel 7)
- 08-22-403-015 (Parcel 8)

CONSENT AND AGREEMENT

26

Effective as of March 11, 2003, the undersigned (the "Undersigned") acknowledges an assignment of certain documents pursuant to that certain Mortgage, Security Agreement and Fixture Financing Statement (the "Mortgage") to be executed and delivered by **D&K ELK GROVE INDUSTRIAL II, LLC**, a Delaware limited liability company, and **DK ROLLING EXCHANGE, LLC**, a Delaware limited liability company, jointly and severally as tenants in common (collectively, "Borrower"), to **COLUMN FINANCIAL, INC.**, a Delaware corporation ("Lender"), in connection with that certain loan (the "Loan") of TWENTY-ONE MILLION AND NO/100 DOLLARS (\$21,000,000.00) being made by Lender to Borrower to finance certain real property and improvements located in Cook County, Illinois and more particularly described on Exhibit A attached hereto and incorporated herein by reference, said real property and improvements being hereinafter referred to as the "Premises." The Undersigned has agreed to perform or supply certain services in connection with the management of the Premises pursuant to that certain Management Agreement (the "Contract") attached hereto as Exhibit B and incorporated herein by reference for all purposes. The Undersigned does hereby (a) warrant and represent that the Contract contains all agreements between the Undersigned and Borrower relating to the Premises; and (b) acknowledge and consent to the assignment of the Contract as set forth in the Mortgage and to any further assignment thereof by Lender; and (c) warrant and represent that no default exists under the terms of the Contract between Borrower and the Undersigned; and (d) acknowledge that Borrower has satisfied all conditions precedent to commencement of performance by the Undersigned under the Contract. The Undersigned does hereby agree that: (i) in the event of any default by Borrower under the terms of the "Loan Documents" (as defined in the Mortgage), the Undersigned shall, upon receipt of written notice and demand of Lender, continue performance under the Contract on behalf of Lender, provided that the Undersigned is reimbursed for such performance rendered thereafter on behalf of Lender in accordance with the Contract; and (ii) in the event of any default by Borrower under the

Contract, the Undersigned shall deliver to Lender, by certified United States mail, postage prepaid, return receipt requested, addressed to:

Lender: Column Financial, Inc.
11 Madison Avenue
5th Floor
New York, New York 10010-3629
Attention: Edmund Taylor
Telecopier: (212) 325-8106
Re: Elk Grove Industrial II (Slough Portfolio),
Elk Grove Village, Illinois

with copies to: Credit Suisse First Boston Mortgage Capital LLC
Legal & Compliance Department
One Madison Avenue
New York, New York 10010
Attention: Pamela L. McCormack, Esq.
Telecopier: (917) 326-7805
Re: Elk Grove Industrial II (Slough Portfolio),
Elk Grove Village, Illinois

and: KeyCorp Real Estate Capital Markets, Inc.
911 Main Street
Suite 1500
Kansas City, Missouri 64105
Attention: Diane Haislip
Telecopier: (216) 357-6543
or any successor servicer of the Loan.
Re: Elk Grove Industrial II (Slough Portfolio),
Elk Grove Village, Illinois

written notice of such default and the action required to cure the same, and Lender shall have a reasonable time (but in no event less than thirty days after receipt of such notice) within which Lender shall have the right, but not the obligation, to cure such default, and the delivery of such notice of default and the failure of Lender to cure the same within such time allowed shall be conditions precedent to the exercise of any right or remedy of the Undersigned arising by reason of such default; and (iii) the Undersigned shall not enter into any modification of, or addition to, the Contract without the prior written consent of Lender; and (iv) in the event that Lender shall acquire title to the Premises by foreclosure or otherwise, the Contract shall be terminable at the option of Lender; and (v) the rights of the Undersigned under the Contract shall be and remain subordinate in all respects to the Loan Documents.

The Undersigned further acknowledges and agrees that (1) the Undersigned has reviewed Section 1.29 of the Mortgage, and (2) to the extent any of the circumstances described in such provision of the Mortgage occur which would enable Lender to require Borrower to terminate the Contract in accordance with such terms of the Mortgage, the Undersigned shall, upon receipt of notice that such termination has been so required by Lender, recognize that the Contract shall

UNOFFICIAL COPY

30344105

be deemed terminated in accordance with such terms of the Mortgage irrespective of any provisions to the contrary in the Contract; provided, however, Borrower shall be and remain responsible to the Undersigned for any property management or other fees owing to the Undersigned in accordance with the terms of the Contract and accruing prior to the date of such termination. By virtue of the execution of this Consent and Agreement, the Contract shall be deemed amended, to the extent necessary, to allow the effectiveness of the Undersigned's agreement in the immediately preceding sentence.

The Undersigned represents that it is looking to Borrower, and not to Lender, for payment under the Contract, except as provided in clause (i) of the first paragraph of this Consent and Agreement and the Undersigned waives any equitable lien which the Undersigned may now or hereafter have upon the proceeds of the Loan.

This Consent and Agreement is given by the Undersigned for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Undersigned, and is intended to induce Lender to make the Loan to Borrower.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

EXHIBIT A

Legal Description

Parcel 1:

Lot 1 in RBC Tech Center Subdivision in the North West 1/4 of the South West 1/4 of Section 26 Township 41 North, Range 11 East of the Third Principal Meridian, in Cook County, Illinois.

Parcel 2:

Lot 10 in SDK Subdivision No. 2 of parts of Lots 1 and 2 in Everding Subdivision of part of the South West 1/4 of Section 26 Township 41 North, Range 11 East of the Third Principal Meridian, in Cook County, Illinois.

Parcel 3:

Lot 11 in SDK Subdivision No. 2 of parts of Lots 1 and 2 in Everding Subdivision of part of the South West 1/4 of Section 26 Township 41 North, Range 11 East of the Third Principal Meridian, in Cook County, Illinois.

Parcel 4:

Lot 1 in RBC Tech Center Subdivision Unit 2, a resubdivision of Lot 2 in Everding Subdivision of part of the South West 1/4 of Section 26 Township 41 North, Range 11 East of the Third Principal Meridian (excepting therefrom the following described property taken by Condemnation Order entered in Case 02L50283: beginning at the southwest corner of Lot 1 aforesaid; thence on an assumed bearing of North 01 degrees 11 minutes 31 seconds West along the west line of said Lot 1, a distance of 25.00 feet; thence South 46 degrees 17 minutes 46 seconds East, 35.29 feet to the south line of Lot 1 aforesaid; thence South 88 degrees 36 minutes 00 seconds West along said south line of Lot 1, a distance of 25.00 feet to the point of beginning), in Cook County, Illinois.

Parcel 5:

Lot 2 in the resubdivision of Lots 12 to 16, both inclusive, in SDK Subdivision No. 2 of parts of Lot 1 and 2 in Everding Subdivision of part of the South West 1/4 of Section 26 Township 41 North, Range 11 East of the Third Principal Meridian, in Cook County, Illinois.

Parcel 6:

Lot 1 in Regent Business Center Parcel F, being a resubdivision of Lots 1 through 9, both inclusive, in SDK Subdivision No. 2 of parts of Lot 1 and 2 in Everding Subdivision of the South West 1/4 of Section 26 Township 41 North, Range 11 East of the Third Principal Meridian, in Cook County, Illinois.

Parcel 7:

Lot 2 in Regent Business Center Parcel F, being a resubdivision of Lots 1 through 9, both inclusive, in SDK Subdivision No. 2 of parts of Lot 1 and 2 in Everding Subdivision of the South West 1/4 of Section 26 Township 41 North, Range 11 East of the Third Principal Meridian, in Cook County, Illinois.

Parcel 8:

Lot 3 in Regent Office Center-Phase II, being a subdivision in the South East 1/4 of the South East 1/4 of Section 22, Township 41 North, Range 11 East of the Third Principal Meridian, in Cook County, Illinois.

Parcel 9:

Easement for the benefit of Parcel 8 created by Cross-Easement Agreement for Ingress and Egress recorded May 19, 1999 as Document 99485434 between LaSalle Bank National Association as Trustee under Trust No. 51005 and the Chicago Trust Company as Trustee under Trust No. 1107118 over the Higgins Driveway and the portion of the access drive located on the Chicago property as depicted on Exhibit C.

Street Address: 821-891 Busse Road and 1810-1860 Jarvis Avenue (Parcel 1)
873-895 Cambridge Drive (Parcel 2)
870-898 Cambridge Drive (Parcel 3)
901-985 Busse Road (Parcel 4)
1800 Landmeier Road (Parcel 5)
1001-1051 Cambridge Drive (Parcel 6)
901-951 Cambridge Drive (Parcel 7)
1500 Higgins Road (Parcel 8)
Elk Grove Village, Illinois

Permanent Tax Identification Numbers (P.I.N.): 08-26-300-026 (Parcel 1)
08-26-300-016 (Parcel 2)
08-26-300-017 (Parcel 3)
08-26-300-027 (Parcel 4)
08-26-300-024 (Parcel 5)
08-26-300-028 (Parcel 6)
08-26-300-029 (Parcel 7)
08-22-403-015 (Parcel 8)

DALLAS 1\3780643\1
3011-1021 03/05/2003

UNOFFICIAL COPY

30344105

EXHIBIT B

Management Agreement

Property of Cook County Clerk's Office

DALLAS_I\37630153
3011-1021 03/05/2003

EXHIBIT B, Management Agreement - Cover Page
3011-1021/Elk Grove Industrial II (Slough Portfolio)

MANAGEMENT AND LEASING AGREEMENT

This MANAGEMENT AND LEASING AGREEMENT (the "Agreement"), dated as of the date appearing on the signature page hereof, between the owners of the Property executing this Agreement (hereinafter referred to as "Owner") and Draper and Kramer, Incorporated (collectively hereinafter referred to as "Manager");

WHEREAS, the Owner holds legal title to, or a leasehold interest in, certain office rental property, described in Paragraph 1(c) hereof (hereinafter referred to as the "Property"); and

WHEREAS, the Owner wishes to appoint an exclusive managing and leasing agent qualified to render the management, leasing and operating services required for the Property; and

WHEREAS, Manager agrees to manage, lease and operate the Property in a first-class manner consistent with the best standards of operation for retail/office buildings and commercial properties in the area.

NOW, THEREFORE, the parties agree as follows:

I. Employment of Manager; Term; Defined Terms.

A. *Retention of Manager.*

Owner hereby exclusively employs Manager and Manager hereby accepts the employment, effective on the Effective Date (as set forth in Paragraph 1(c) hereof) upon the terms set forth herein, to manage, lease, and operate the Property and to cause the Property to be maintained.

B. *Term.*

The initial term ("Initial Term") of this Agreement shall be for the period specified in Paragraph 1(c) hereof commencing on the Effective Date; this Agreement shall continue thereafter on a year-to-year basis ("Renewal Term") unless (i) Owner wishes to terminate this Agreement, then Owner shall give notice of same to Manager, in writing, not less than ninety (90) days prior to termination of the Original Term or any Renewal Term of this Agreement or (ii) Manager wishes to terminate this Agreement, then Manager shall give notice of same to Owner, in writing, not less than ninety (90) days prior to termination of the Original Term or any Renewal Term.

C. *Defined Terms.*

The following are definitions of certain terms used in this Agreement:

Regent Business Center A, B, E, F, Tech I, Tech II and Regent Office Center II
Elk Grove Village, IL

Property: *Regent Business Center A at 870-898 Cambridge Drive, Regent Business Center B at 873-895 Cambridge Drive, Regent Business Center E at 1800 Landmeier Road, Regent Business Center F at 901-951 and 1001-1051 Cambridge Drive, Regent Business Center Tech Center I at 821-891 Busse Road and 1810-1860 Jarvis Avenue, Regent Business Center Tech Center II at 901-985 Busse Road, and Regent Office Center II at 1500 Higgins Road, all located in Elk Grove Village, Illinois.*

Effective Date: *March 11, 2003*

Initial Term: *One (1) year*

Working Capital Reserve: *not applicable*

Management Fee: *3.0% of Gross Receipts.*

Construction Supervision: *10% Construction Supervision fee.*

Tenant Improvement Percentage: *10% Construction Supervision fee.*

Owner: *D&K Elk Grove Industrial II, LLC.*

Owner's Address: *c/o Draper and Kramer, Incorporated, Attention: President, 33 West Monroe Street, Suite 1900, Chicago, IL 60603*

II. Duties of Manager.

Subject to the conditions and limitations set forth herein and at the expense of Owner, the Manager shall perform the following duties in a careful, diligent and prudent manner:

A. Operation in General.

Use its best efforts to manage and operate the Property in a first-class manner consistent with first-class office buildings and to lease and keep leased all space in the Property to desirable tenants.

B. Marketing and Leasing; Execution of Leases.

Manager shall have the exclusive right to lease the Property and shall use its best efforts to obtain suitable tenants. In connection therewith and in furtherance thereof, Manager shall do the following:

1. Plans and Budgets.

Manager shall develop, and submit for Owner's approval, marketing and advertising plans and budgets.

UNOFFICIAL COPY

30344105

D&K Elk Grove Industrial II, LLC

DK Rolling Exchange, LLC

Regent Business Center A, B, E, F, Tech I, Tech II and Regent Office Center II

Elk Grove Village, IL

2. Effectuation of Plans.

As approved by Owner, Manager shall cause the availability of the Property to be advertised or otherwise publicized in such journals and in such manner as to bring such availability to the attention of possible tenants. Manager shall use its best efforts to cause the costs of such advertising and promotion to remain within the budget.

3. Involvement of Other Brokers.

Manager shall make known to the brokerage community that the Property is available for disposition and shall work with such other brokers with a view towards securing a purchaser or tenant. In this regard, Owner shall direct all inquiries to Manager and shall cause and permit Manager to negotiate with other brokers.

4. Reports.

Manager shall submit periodic reports to Owner with respect to its marketing of the Property. Manager and Owner shall periodically review the plans and the budget with a view towards making appropriate modifications to improve the effectiveness of the leasing effort.

5. Terms of Leases; Execution Authority.

Manager shall negotiate, execute and deliver on behalf of Owner, leases in accordance with the schedule of rents and on forms of lease, approved by Owner.

C. No Discrimination.

IT IS ILLEGAL FOR OWNER OR MANAGER TO REFUSE TO DISPLAY, LEASE OR SELL TO ANY PERSON BECAUSE OF THEIR RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX OR PHYSICAL DISABILITY.

D. Tenant Relations.

Maintain business-like relations with tenants, whose service requests and complaints shall be received, logged, and acted upon in a systematic fashion. Complaints of a serious nature shall be immediately reported to the Owner and, after thorough investigation, appropriate recommendations for handling such complaints shall be submitted to Owner.

E. Collect Rent; Enforce Leases.

Collect all rent and other sums due to Owner under the terms of any lease or rental agreement currently in effect or hereafter entered into and deposit the same in a special bank account. The Manager may, with the approval of Owner, compromise claims for such rent or other sums and, at the expense of and with the approval of Owner, institute legal proceedings in its own name or in the name of the Owner to collect the same, to evict or dispossess tenants or others occupying space in the Property and otherwise to enforce the rights of Owner with respect thereto, and with Owner's consent compromise or settle any such proceedings.

F. Maintenance and Repair; Emergencies.

At the expense of Owner and in accordance with the Budget described in Paragraph 3 hereof, cause to be made such ordinary repairs and maintenance to the Property and purchase such supplies and equipment for the normal maintenance and operation thereof as Manager deems advisable or necessary; provided, however, that Manager will not incur expenses for repairs of any one item in excess of \$10,000 without the approval of Owner except in those cases where, in Manager's opinion, an emergency requires such action before approval of Owner can reasonably be obtained, provided further, however, that all such cases shall be reported to Owner with all reasonable promptness. In connection therewith Manager may, at Owner's expense, and with the prior approval of Owner, engage architects, engineers, or similar experts.

G. Utilities; Routine Outside Services.

Contract, at the expense of Owner and in accordance with the Budget, for gas, electricity, telephone, elevator, window cleaning, vermin extermination, and other services Manager deems appropriate in the operation and maintenance of the Property as provided herein; provided, however, that any such contract for a term in excess of one year shall require the prior approval of Owner. Copies of all contracts entered into pursuant hereto shall be delivered to Owner.

H. Building Manager.

Subject to Article IV-D, employ and have available at all relevant times a qualified, competent building manager who shall be in charge of the Property.

I. Licensing of Manager.

At Manager's expense, obtain and keep in effect during the term hereof, any licenses, permits or other governmental consents required to be held by a property manager in order for Manager to perform its duties and obligations hereunder.

J. Employees.

At Owner's expense, employ, supervise and use a sufficient kind and number of employees, servants and contractors to provide building services required in all leases and as may be necessary to provide physical operation and maintenance of the Property all of whom shall be employees, servants or contractors of Owner; subject, however, to Owner's right in its sole discretion to approve the number, qualifications, salaries and benefits (except as may be governed by law or union contracts) of employees and to require Manager to terminate or discharge any employee, servant or contractor for any reason whatsoever.

K. Security.

Consult with Owner concerning such security and security services and assist in implementation of such policies concerning security and security services for the Property as may be directed by Owner. Owner recognizes and acknowledges, however, that Manager is not, and does not hold itself out to be, an expert in security. Owner shall indemnify, defend and hold harmless Manager (and its agents, employees, officers and directors) against any and all loss, cost (including attorneys' fees), damages, suits and liability whatsoever arising from or in any way relating to security (or the lack, insufficiency or supervision thereof) and around the Property.

L. Payment of Certain Items: Mortgage, Taxes, Etc.

On behalf of Owner and at Owner's expense, Manager shall pay mortgage interest and amortization, ground rent, real estate taxes, water and sewer charges, and other assessments in respect to the Property, as Owner shall direct, from funds provided by Owner or received as revenue from the Property. Manager, with the prior approval of Owner, shall defend against or seek revision of, or appeal from, any assessment or charge which it deems excessive or improper and all such actions may be taken in the name of Owner or as Owner shall decide. In connection with such actions, Manager may, with the prior approval of Owner and at Owner's expense, employ real estate attorneys and real estate experts for appraisals and testimony, pay any such charges or assessments under protest and seek refunds thereof, and compromise any proceeding or claim with respect thereto.

M. Insurance.

Cause to be placed and kept in force, when authorized in writing by Owner and at Owner's expense, all forms of insurance required by law, required hereunder or reasonably required to adequately protect Owner and Manager.

N. Code Violations.

Manage the Property in a manner consistent with that of a first-class office and commercial buildings and use its best efforts to comply with all building codes, zoning and licensing requirements, and all other requirements of the duly constituted Federal, State and local governmental authorities. Promptly after receipt, Manager shall deliver to Owner a photostat of any notice of violation of any law, order, ordinance, rule, regulation or requirement of any governmental authority. Manager may, at its discretion and with the prior approval of Owner, appeal from any requirement Manager deems unwarranted, and may with like approval, compromise or settle any dispute regarding such requirements.

O. Use of Counsel.

Engage legal counsel, only with the prior approval of Owner, to advise on legal matters and conduct legal proceedings arising in the performance of Manager's duties hereunder.

P. Retention and Application of Funds.

Maintain a special bank account in which Manager will deposit funds received pursuant to this Agreement and pursuant to the terms hereof, make disbursements from such account to pay, at Owner's expense, Manager's compensation and all other accounts payable for the Property. Any funds received by Manager pursuant to this Agreement shall not be commingled with Manager's funds nor with funds held by Manager for others, except that Owner acknowledges that when received, such funds are deposited into a clearing account before being segregated into the separate account maintained for the Property. Manager shall maintain a separate bank account and segregate on its records security deposits, if any, received from tenants and same shall be accounted for as the funds of Owner except as may otherwise be provided by law.

Q. Fidelity Bond.

Manager and its employees who handle or are responsible for handling funds received by Manager pursuant to this Agreement shall be bonded, at Manager's expense, by a fidelity bond. Manager agrees to provide to Owner a certificate of insurance indicating such coverage.

R. Accounting Matters.

Maintain accurate cash records, in accordance with generally accepted property management accounting principles, of receipts and disbursements and tenant receivable balances with respect to all transactions concerning the Property. Manager agrees that upon reasonable notice from Owner, all such records shall be available during regular business hours for audit, inspection and copying by Owner's accountants and authorized representatives. Upon the termination or expiration of this Agreement, all such records (which shall include correspondence, leases, paid and unpaid bills, and all other records) shall be returned to Owner.

S. Reports.

Render to Owner within fifteen (15) days after the end of each month accurate reports of cash receipts and disbursements with respect to the Property together with originals of all invoices. The acceptance by Owner of any such reports shall be without prejudice to the rights of Owner.

T. Remission of Cash; Working Capital Reserves.

Remit to Owner with said reports the net balance due to Owner as reflected in said reports or in a summary of said reports, provided that Manager may retain such amount of working capital as specified in Paragraph 1(c) hereof. In the event cash in the hands of Manager is not sufficient to pay the obligations required to be paid by Owner, Owner shall promptly, after receipt of a written request therefor, furnish Manager with funds required to pay such obligations. Manager shall not be obliged to make any advances out of Manager's own funds to or for the benefit of Owner or the Property.

III. Budgets; Additional Cash Requirements.

A. Preliminary Budget.

At least sixty (60) days before the beginning of each new fiscal year of Owner, Manager shall submit a preliminary operating budget setting forth an itemized statement of the anticipated receipts and disbursements for the next fiscal year of Owner based upon the then current schedule of monthly rents, and taking into account the general condition of the Property and all anticipated increases in costs plus reserves for contingencies and necessary replacements. Until further notice from Owner, the fiscal year of Owner shall be the calendar year.

B. Final Budget.

Manager shall submit to Owner for Owner's approval, in final draft at least thirty (30) days prior to commencement of the fiscal year for which it has been prepared, each such Budget, together with a statement from Manager outlining a plan of operation and justifying the estimates made in every important particular. Manager agrees that prior to the expenditures by Manager of any funds pursuant to any such Budget, the Budget must be approved in writing by Owner; provided, however, that notwithstanding the absence of such approval Manager may pay normal, ongoing expenses of operating and maintaining the Property, including the compensation of Manager.

C. Additional Cash Needs.

Manager shall promptly notify Owner in the event disbursements required to operate and maintain the Property and to maintain reserves (including, but not limited to, the working capital reserve) are in excess of the revenues which Manager anticipates collecting from the Property on or before the time such disbursements must be made and Owner shall promptly provide such funds.

IV. Compensation of Manager.

A. Management Fee.

Commencing the Effective Date, as compensation for its management services under this Agreement, Manager shall be entitled to disburse to itself on or before the last day of each month the Management Fee (as set forth in Paragraph I.(C.) hereof).

1. Gross Receipts.

For the purposes of determining said monthly management fee, Gross Receipts is defined as all revenue derived from the Property (including, but not limited to, all lease income and all other revenue or receipts from tenants or others leasing or using space, all payments from contractors using the space, all rent settlements or liquidated damages of tenants on and in the Property, and all payments from concessionaires, vending machines, parking and the like) excluding any sums received from loans, mortgages, insurance proceeds (except proceeds of rent loss or similar insurance, if any), sale or taking by eminent domain of all or any portion of the Property, and security deposits until applied to rent.

2. Partial Months.

Appropriate apportionment shall be made in the monthly management fee for any partial months at the beginning and end of the term of this Agreement.

B. Leasing Commissions.

1. New Tenants.

With respect to any lease or right to occupy a portion of the Property effected with a "New Tenant" (being a person or entity which is not occupying a portion of the Property pursuant to a lease at the Effective Date), Manager shall receive a Full Commission (as defined in Paragraph F.1.(a) hereof).

00344105

UNOFFICIAL COPY

D&K Elk Grove Industrial II, LLC

DK Rolling Exchange, LLC

Regent Business Center A, B, E, F, Tech I, Tech II and Regent Office Center II

Elk Grove Village, IL

2. Existing Tenants.

a) Renewal.

When an "Existing Tenant" (being a person or entity occupying space on the Property pursuant to a lease) renews its lease, exercises an option to renew its lease or enters into a new lease for the identical demised premises, Manager shall receive a Renewal Commission (as defined in Paragraph F.1.(b) hereof).

b) Expansion.

When an Existing Tenant occupies or obtains the right to occupy a portion of the Property in addition to that demised under its then existing lease, Manager shall receive a Full Commission; provided, however, that if such occupancy of additional space is pursuant to exercise of a right granted in an existing lease and does not require the negotiation of rent or tenant improvements, then Manager's commission shall be a Renewal Commission.

c) Renewal and Expansion.

When an Existing Tenant simultaneously renews its right to occupy premises demised under a lease and obtains the right to occupy premises other than the demised premises, then Manager shall receive a Renewal Commission with respect to the continued occupancy of the demised premises and a Full Commission with respect to all other portions of the Property to be occupied.

3. Cooperating Brokers.

If a tenant is represented by a broker or indicates that a commission is due and payable to a broker, the Owner shall pay to such cooperating broker a Full Commission or a Renewal Commission, as is appropriate in the circumstances, and shall pay to Manager a commission equal to fifty percent (50%) of the commission which Manager would have received had a cooperating broker not been involved.

4. Timing of Payment.

Commissions shall be paid to the Manager upon execution of lease or exercise of renewal.

C. Construction Supervision.

1. Remodeling; Repair.

In the event that Manager is requested by Owner to oversee, supervise or assist in the effectuation of any construction, remodeling, rehabilitation, repair or the like with a cost in excess of \$20,000, Manager shall be paid an additional fee equal to ten percent (10%) of the aggregate cost of such work.

2. Tenant Improvements.

For overseeing and coordinating improvements, build-out, construction, remodeling or the like of demised premises, Manager shall be paid an additional fee equal to the Tenant Improvement Percentage (defined in Paragraph 1(c) hereof) of the aggregate cost of such work.

D. Salary Reimbursement.

Manager shall be reimbursed for 50% of the salary and employer costs of any applicable building manager and his/her assistant. It is hereby acknowledged that the current building manager is Kurt Kleinschmidt. Such reimbursement shall be billed to the Property.

E. Additional Services.

Manager shall be entitled to such additional compensation as may be approved by Owner in advance for performing services for Owner beyond the scope of services contemplated in this Agreement.

F. Certain Definitions.

1. Full Commission.

a) Gross Rent Lease.

The term "Full Commission" with respect to a "Gross Rent Lease" (being a lease which does not require any contribution by tenant toward operating expenses of, or real estate taxes upon, the Property), shall mean seven percent (7%) of the sum of 1st year's Average Annual Gross Rents (defined below) and two percent (2%) of the Remaining Aggregate Gross Rent (defined below).

b) Net Rent Lease.

With respect to a "Net Rent Lease" (being any lease other than a gross Rent Lease), a Full Commission shall mean eight percent (8%) of the sum of 1st year's Average Annual Gross Rents (defined below) and three percent (3%) of the Remaining Aggregate Gross Rent (defined below).

c) Average Annual Gross Rent.

The term Average Annual Rent shall mean the aggregate rent due under the lease over its entire term divided by the number of full calendar months in the initial term and then multiplied by 12.

d) Remaining Aggregate Gross Rent.

The term Remaining Aggregate Rent shall mean the aggregate rent due under the lease over its entire term reduced by the sum of Average Annual Gross Rents applicable to the first twelve months of the lease term.

2. Renewal Commission.

a) Gross Rent Lease.

The Renewal Commission for a Gross Rent Lease shall be two percent (2%) of the aggregate gross rent due over the renewal term of the lease.

b) Net Rent Lease.

The Renewal Commission with respect to a Net Rent Lease shall be three percent (3%) of the aggregate gross due over the renewal term of the lease.

V. Manager - Independent Contractor.

Manager acknowledges and agrees that its relationship to Owner is that of independent contractor. Manager will not represent to anyone its relationship to Owner is other than that of an independent contractor. This Agreement shall not be deemed to create a partnership or joint venture relationship between manager and Owner.

VI. Representations and Warranties of Owner.

A. Authority.

Owner warrants to Manager that it is the manager or lessee of the Property and has full authority to enter into this Agreement.

B. Absence of Hazardous Substances.

Owner represents and warrants that either (i) the Property does not contain, and has never been used for the transporting, manufacturing, treating, storage, emission, disposal of any Hazardous Substance (being any dangerous, toxic or hazardous pollutants, chemicals, gases, wastes or substances (solid, liquid or gaseous), including, but not limited to, asbestos, radon, urea or formaldehyde), or (ii) that the use, treatment, existence, emission or the like of any Hazardous Substance on the Property is in full compliance with all laws, rulings, regulations, statutes, orders, decisions or the like ("Law"). Owner covenants that it will not cause, or permit, any Hazardous Substance to be brought onto, or used in conjunction with, the Property or that it will cause the use, treatment, existence, emission or the like of same to be in accord with all Law. Owner shall indemnify, defend and hold Manager harmless with respect to any loss, costs, fee (including attorneys' fees), claim, damage or liability resulting from breach of the foregoing warranty and covenant.

VII. Insurance and Indemnification.

A. Insurance.

1. In General: Liability.

Owner shall carry, at its own expense, public liability, boiler, fire and extended coverage, comprehensive general liability, elevator liability (if elevators are part of the equipment of the Property), and workmen's compensation insurance, adequate to protect the interests of Manager and Owner and in form, substance and amount satisfactory to Manager. The Owner shall furnish to the Manager certificates evidencing the existence of such insurance. The workmen's compensation insurance shall have minimum limits of \$500,000 under coverage B; the comprehensive general liability insurance (including a personal injury liability endorsement) shall have a minimum combined single limit of at least \$5,000,000 and shall include broad form property damage, non-owned automobile, blanket contractual and personal injury coverages.

All insurance, including comprehensive general liability insurance, shall include Owner and Manager as named insureds; it is understood that Manager may not be includable as a named insured on the workmen's compensation insurance, but in such case, Manager shall be included as an additional employer. The company

with which the insurance is placed shall be given a Policyholder Rating of B and a Financial Category Rating of Class X by the A. M. Best Company. All insurance policies or certificates of insurance shall be deposited with Manager.

Each policy shall provide that in the event of cancellation thereof or reduction in coverage, the insurance company shall provide the Manager with at least ten (10) days' notice of such cancellation or reduction in coverage. If the Owner fails to place and maintain insurance for Manager as herein provided, the Manager may, but is not obligated to obtain such insurance, charge the Owner for same and make payment from funds of the Owner.

2. Property and Hazard.

Owner shall provide for the Property all-risk, full replacement cost property insurance coverage. All such policies shall contain a clause expressly providing that the insurance company waives all rights of subrogation against Manager and insuring Manager against claims of tenants or others resulting from a fire or other casualty. Owner hereby waives all rights and claims against Manager deriving from any damage to the Property and any related loss of rent, regardless of cause (including, but not limited to, negligence of Manager or its agents or employees); it being expressly understood that Owner shall insure against such risks.

B. Indemnification.

1. Of Manager.

Owner agrees to indemnify, defend and save Manager (and its agents and employees) harmless against any liability, damage, loss, claim, cost or expense (including reasonable attorney's fees) harmless against any liability, damage, loss, claim, cost or expense (including reasonable attorney's fees) asserted against, incurred or sustained by manager in connection with Owner, the Property, any tenant or management, leasing and operation of the Property except any liability, damage, loss, claim, cost or expense asserted against, incurred or sustained solely and directly as a result of Manager's or any of its agents' or employees' willful or grossly negligent acts or fraud.

2. Of Owner.

Manager agrees to indemnify, defend and hold Owner harmless against any liability, damage, loss, claim, cost or expense (including attorney's fees) incurred solely and directly by reason of Manager's or any of its agents' or employees' willful or grossly negligent acts or fraud.

VIII. Limitation on Assignment.

This Agreement may not be transferred, assigned, sold or, in any manner, pledged or hypothecated by Manager. Notwithstanding the above, Manager may without the prior consent of Owner, at Manager's expense, assign this Agreement or subcontract the performance of its duties hereunder to a parent, subsidiary or affiliated corporation of Manager licensed to do business in the state in which the Property is located.

IX. Termination.

A. Termination by Owner.

1. For Cause.

If Manager shall be in default in the performance in any of its duties or obligations hereunder, the Owner shall have the right to terminate this Agreement upon thirty (30) days' written notice to Manager specifying the particular act or acts of default; provided, however, that if such act or acts of default are of such nature that they can be cured, such termination shall not be effective unless and until Manager shall have failed to cure or commence to cure such act or acts of default within twenty (20) business days following the date of such notice. Owner shall have the right to terminate this Agreement immediately upon written notice without penalty in the event of bankruptcy, assignment for the benefit of creditors or dissolution of Manager.

2. Upon Sale.

Owner may terminate this Agreement effective upon sale of the Property to an unrelated third party upon thirty (30) days' written notice to Manager. If such termination occurs within the Initial Term hereof and Manager is not the exclusive listing broker, Owner shall pay Manager a termination fee equal to fifty percent (50%) of the fee which Manager would have received over the initial Term hereof. For purposes of determining the termination fee, the management fee earned with respect to the month preceding the effective date of Termination shall be deemed to be the monthly management fee which Manager would have earned over the balance of the term.

B. Termination by Manager.

1. Manager may terminate this Agreement on thirty (30) days' written notice of Owner fails to provide the necessary funds for operation of the

UNOFFICIAL COPY

D&K Elk Grove Industrial II, LLC

DK Rolling Exchange, LLC

Regent Business Center A, B, E, F, Tech I, Tech II and Regent Office Center II

Elk Grove Village, IL

Property in a manner consistent with the best standards of operation for similar type property or fails to provide the necessary funds to pay bills when they are due (except items disputed in good faith which are properly reserved for) or is in breach of this Agreement; provided, however, that if the Owner provides the necessary funds or cures such breach within said thirty (30) day period, then this Agreement shall continue in full force and effect.

2. Notwithstanding the provisions of Paragraph 8(b) (i) hereof, Manager shall have the right to cancel this Agreement at any time by written notice to the Owner of its election to do so, which cancellation shall be effective upon the service of such notice, in any of the following circumstances:

a) It is alleged or charged that, if Owner or Manager (in its reasonable judgment) believes that, the Property or any equipment therein or any act or failure to act by the Owner or the hiring of employees to manage it fails to comply with, or is in violation of, any of the requirements of any constitutional provision, statute, ordinance, law or regulation of any governmental body or any order or ruling of any public authority or official thereof having or claiming to have jurisdiction thereover, and the Manager in its sole and absolute discretion considers that the action or position of the Owner with respect thereto may result in damage or liability to the Manager of jeopardy to its real estate license.

b) Any required insurance shall not be maintained to the full extent required by this Agreement.

c) Owner shall be subject to any proceeding against it or initiated by it under any bankruptcy or creditor protection statute or the like.

C. Termination Fee.

In the event of termination pursuant to Paragraph 8(b) or a wrongful termination by Owner, Manager shall receive a management termination fee equal to seventy-five percent (75%) of the fee which Manager would receive over the remaining term hereof; for purposes of determining the management termination fee, the management fee earned with respect to the month preceding the effective date of Termination shall be deemed to be the monthly management fee which Manager would have earned over the balance of the term.

Manager shall, in such circumstances, be paid any other fees to which Manager would have been entitled pursuant hereto had this Agreement continued in effect until the end of the then current term.

D. Continuation of Indemnity and Certain Other Obligations.

It is expressly understood and agreed that any and all obligations to maintain insurance and all indemnifications set forth in this Agreement shall survive any termination or expiration of the Agreement. Termination of the Agreement shall not terminate any liability or obligation of the Owner to Manager for any indemnification, payment, reimbursement or other sum of money then due and payable or thereafter becoming due and payable to Manager. Upon termination of the Agreement, Owner automatically assumes all of Manager's obligations and responsibilities under the Agreement and all contracts, liabilities, indebtedness, obligations and the like relating to the Property.

E. Leasing Commissions.

Notwithstanding the termination or expiration of this Agreement, Owner shall pay Manager the leasing fees which Manager has earned at the time of such termination or expiration pursuant to Paragraph 4(b) of this Agreement when such fees are due and payable.

1. New Tenant (Terms Agreed); Additional Space; Renewal or Options.

For any lease to a New Tenant, for any lease (including, but not limited to, an amendment or addition to an existing lease), to an Existing Tenant for additional space, or for any renewal or option lease, which is being negotiated but has not yet been signed at the time of the expiration or termination of this Agreement, Manager shall also receive the fee which Manager would be entitled to receive pursuant to Paragraph 4(b) upon execution of such lease or exercise of any renewal in the following circumstances:

a) The terms of any such lease have been substantially agreed upon by Owner and the tenant before the expiration of this Agreement and,

b) (1) In the case of a renewal or option:

- (a) if any such lease shall have been fully executed and delivered within four (4) months after the end of this Agreement, or,
- (b) if the renewal or option term shall have commenced within six (6) months of the end of this Agreement.

- (2) In the case of a new lease or lease for additional space:
- (a) if any such lease shall have been fully executed and delivered within six (6) months after the end of this Agreement,
 - (b) if tenant shall have taken possession of the space covered by the lease within six (6) months after the end of the Agreement,
 - (c) or both.

2. New Tenant (Terms Not Agreed).

In the event that Manager has found a New Tenant, but the form and terms of the lease to the new tenant have not been substantially agreed upon by Owner and such new tenant before the expiration or termination of this Agreement and, a lease shall have been subsequently executed and delivered by Owner (who shall act in good faith) and the new tenant within six (6) months after the termination of expiration of this Agreement, then Manager shall be entitled to receive fifty percent (50%) of the fee which Manager would be entitled to receive pursuant to Paragraph 4(b) of this Agreement, as if said lease had been executed while this Agreement was in effect. Manager shall give Owner written notice of the names of any persons or entities for which Manager claims it may be entitled to receive a fee pursuant to this Paragraph within thirty (30) days after the termination or expiration of this Agreement and Manager shall be entitled to receive the fees in accordance with the terms of this Paragraph only for those persons or entities listed in said notice. Any fee payable to Manager pursuant to this Paragraph shall be paid within ten (10) days after the execution and delivery of any such lease.

X. Exclusive Sales Agreement. Intentionally Omitted

~~Owner hereby appoints Manager as Owner's exclusive Sales Broker if the Property is to be offered for sale during the term of this Agreement. Such appointment is at Manager's then currently quoted commission structure, on Manager's then current Listing Agreement and shall have an initial term of one year.~~

XI. Notices.

All notices shall be in writing and shall be sufficient if delivered personally or sent certified mail, return receipt requested, delivery limited to addressee only, postage prepaid, addressed:

If to Manager: Draper and Kramer, Incorporated
33 West Monroe
Chicago, Illinois 60603
Attention: Office & Industrial Management & Leasing Dept.

If to Owner: at the address specified in Paragraph 1(c) hereof.

D&K Elk Grove Industrial II, LLC
DK Rolling Exchange, LLC
Regent Business Center A, B, E, F, Tech I, Tech II and Regent Office Center II
Elk Grove Village, IL

Each party may change its address by notice to the other party. Any notice sent by mail in accordance with this Paragraph shall be deemed delivered on the second day following the mailing thereof.

XII. Management Office; Identification of Manager.

Owner shall provide space within the Property for use as an office for management and leasing of the Property and provide and pay for all necessary furnishings, equipment, supplies and all utilities, services and other costs of the operation of such office. The Owner hereby agrees to identify the Manager as the exclusive leasing and management agent for the Property during the term of this Management Agreement. Manager may erect a tasteful sign on the Property making such identification

XIII. Binding Effect.

This Agreement shall be binding upon the parties hereto and their respective successors, assigns, heirs, executors and administrators

UNOFFICIAL COPY

303744135
D&K Elk Grove Industrial II, LLC
DK Rolling Exchange, LLC
Regent Business Center A, B, E, F, Tech I, Tech II and Regent Office Center II
Elk Grove Village, IL

IN WITNESS WHEREOF, the parties have executed this Agreement as a sealed instrument as of the 11th day of March, 2003.

MANAGER:

DRAPER AND KRAMER, INCORPORATED

By: Forrest D Bailey
Name: Forrest D. Bailey
Its: President

OWNER:

D&K ELK GROVE INDUSTRIAL II, LLC
By: D&K Elk Grove Industrial Manager II, LLC, its Manager
By: Draper and Kramer, Incorporated, its Manager

By: Forrest D Bailey
Name: Forrest D. Bailey
Its: President

OWNER:

DK ROLLING EXCHANGE, LLC
By: DK Rolling Associates Limited Partnership, its sole member
By: D&K Rolling LLC, its managing general partner
By: Draper and Kramer, Incorporated, its sole member

By: Forrest D Bailey
Name: Forrest D. Bailey
Its: President