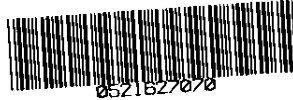


# UNOFFICIAL COPY

PREPARED BY AND WHEN  
RECORDED, RETURN TO:

Schulte Roth & Zabel LLP  
919 Third Avenue  
New York, New York 10022  
Attention: Julian M. Wise, Esq.  
Ref No.: 080011.0351



Doc#: 0521627070  
Eugene "Gene" Moore Fee: \$200.50  
Cook County Recorder of Deeds  
Date: 08/04/2005 12:35 PM Pg: 1 of 89

8264753-DA-TMS (A11)

Property of Cook County Clerk's Office

Above Space for Recorder's Use Only

MICHIGAN AVENUE RETAIL LLC  
(Mortgagor)

to

UBS REAL ESTATE INVESTMENTS INC.  
(Mortgagee)

**MORTGAGE, ASSIGNMENT OF LEASES AND RENTS AND  
SECURITY AGREEMENT**

August 1, 2005

THIS INSTRUMENT AFFECTS REAL AND PERSONAL PROPERTY COMMONLY KNOWN AS THE RETAIL PORTION OF THE BUILDING LOCATED AT 919 NORTH MICHIGAN AVENUE, SITUATED IN THE STATE OF ILLINOIS, COUNTY OF COOK, CITY OF CHICAGO AND HAVING THE PERMANENT INDEX NUMBER OF 17-03-213-018-0000.

THIS INSTRUMENT IS TO BE FILED AND INDEXED IN THE REAL ESTATE RECORDS AND IS ALSO TO BE INDEXED IN THE INDEX OF FINANCING STATEMENTS UNDER THE NAMES OF MORTGAGOR, AS "DEBTOR", AND MORTGAGEE, AS "SECURED PARTY".

# UNOFFICIAL COPY

## TABLE OF CONTENTS

		<u>Page</u>
	PART I GENERAL PROVISIONS.....	3
1.	Payment of Debt; Incorporation of Covenants, Conditions and Agreements.....	3
2.	Insurance.....	4
3.	Casualty/Application of Insurance Proceeds.....	7
4.	Payment of Taxes, Etc.....	9
5.	Tax and Insurance Escrow Fund.....	10
6.	Replacement Escrow Fund; Rollover Escrow Fund; Rent Abatement Escrow Fund; and Earn-Out Reserve.....	10
7.	General Provisions Applicable to Escrow Funds.....	15
8.	Condemnation.....	15
9.	Leases and Rents.....	16
10.	Representations, Warranties and Covenants Concerning Loan.....	19
11.	Single Purpose Entity/Separateness.....	26
12.	Maintenance of Mortgaged Property.....	30
13.	Transfer or Encumbrance of the Mortgaged Property.....	30
14.	Estoppel Certificates and No Default Affidavits.....	37
15.	Changes in Laws Regarding Taxation.....	37
16.	No Credits on Account of the Debt.....	37
17.	Financial Statements.....	37
18.	Further Acts, Etc.....	39
19.	Recording of Mortgage, Etc.....	39
20.	Events of Default.....	39
21.	Late Payment Charge.....	41
22.	Right To Cure Defaults.....	41

# UNOFFICIAL COPY

23.	Remedies.....	42
24.	Right of Entry .....	45
25.	Security Agreement .....	46
26.	Actions and Proceedings.....	46
27.	Contest of Certain Claims .....	46
28.	Marshalling and Other Matters .....	47
29.	Hazardous Substances.....	47
30.	Asbestos .....	49
31.	Environmental Monitoring.....	49
32.	Handicapped Access.....	50
33.	Indemnification.....	51
34.	Notices .....	51
35.	Non-Waiver.....	53
36.	No Oral Change .....	53
37.	Liability.....	53
38.	Inapplicable Provisions.....	53
39.	Headings, Etc .....	53
40.	Duplicate Originals .....	53
41.	Definitions.....	53
42.	Homestead.....	54
43.	Assignments .....	54
44.	Waiver of Jury Trial.....	54
45.	Miscellaneous. ....	54
46.	Limitation on Mortgagor's Liability .....	57
47.	Defeasance.....	57

# UNOFFICIAL COPY

48.	Yield Maintenance .....	60
49.	Cash Management Agreement .....	61
50.	Intentionally Omitted .....	61
51.	Sale of Notes and Securitization .....	61
52.	Securitization Indemnification .....	64
53.	Services .....	66
54.	Management of the Mortgaged Property .....	66
55.	Severance Documentation .....	66
56.	Further Representations, Warranties, Covenants and Agreements of Mortgagor as to the CC&R.....	67
57.	Provisions Applicable to Letter of Credit .....	69
PART II SPECIAL STATE PROVISIONS .....		70
1.	Illinois State Specific Provisions .....	70
2.	ILLINOIS STATUTORY WAIVERS .....	71

# UNOFFICIAL COPY

THIS MORTGAGE, ASSIGNMENT OF LEASES AND RENTS AND SECURITY AGREEMENT (the "Mortgage"), made as of August 1, 2005, by MICHIGAN AVENUE RETAIL LLC, a Delaware limited liability company, having its principal place of business at c/o Loeb & Loeb, LLP, 10100 Santa Monica Boulevard, Suite 2200, Los Angeles, California 90067, Attention: Governor Gray Davis ("Mortgagor"), to UBS REAL ESTATE INVESTMENTS INC., a Delaware corporation, having its principal place of business at 1285 Avenue of the Americas, 11<sup>th</sup> Floor, New York, New York 10019 ("Mortgagee").

## WITNESSETH:

To secure the payment of an indebtedness in the original principal sum of Fifty-Two Million Eight Hundred Thousand and No/100 Dollars (\$52,800,000.00) (the "Loan"), lawful money of the United States of America, to be paid with interest according to a certain mortgage note of even date herewith made by Mortgagor to Mortgagee (the promissory note together with all consolidations, extensions, renewals or modifications thereof being hereinafter collectively called the "Note") and all other sums due hereunder, under the other Loan Documents (hereinafter defined) and under the Note (said indebtedness and interest due under the Note and all other sums due hereunder, under the Note and under the other Loan Documents being hereinafter collectively referred to as the "Debt"), Mortgagor has mortgaged, given, granted, bargained, sold, alienated, enfeoffed, conveyed, confirmed, warranted, pledged, assigned, and hypothecated and by these presents does hereby mortgage, give, grant, bargain, sell, alien, enfeoff, convey, confirm, warrant, pledge, assign and hypothecate unto Mortgagee, all of Mortgagor's right, title and interest in and to that certain real property, including, without limitation, the retail parcel (the "Retail Parcel") of the building (the "Building"), located at 919 North Michigan Avenue, Chicago, Illinois and more particularly described on Exhibit A attached hereto and incorporated herein by this reference, together with the rights and easements benefiting the Retail Parcel as described in the CC&R (as hereinafter defined) of the Building (the Retail Parcel, together with all rights and easements described in the CC&R, is hereinafter collectively referred to as the "Premises"), and all right, title, interest and estate of Mortgagor now owned, or hereafter acquired, in and to the buildings, structures, fixtures, additions, enlargements, extensions, modifications, repairs, replacements and improvements now or hereafter located thereon (collectively, the "Improvements");

TOGETHER WITH all right, title, interest and estate of Mortgagor now owned, or hereafter acquired, in and to the following property, rights, interests and estates (the Premises, the Improvements, and the property, rights, interests and estates hereinafter described are collectively referred to herein as the "Mortgaged Property"):

(a) all easements, rights-of-way, strips and gores of land, streets, ways, alleys, passages, sewer rights, water, water courses, water rights and powers, air rights and development rights, all rights to oil, gas, minerals, coal and other substances of any kind or character, and all estates, rights, titles, interests, privileges, liberties, tenements, hereditaments and appurtenances of any nature whatsoever, in any way belonging, relating or pertaining to the Premises and the Improvements and the reversion and reversions, remainder and remainders, and all land lying in the bed of any street, road, highway, alley or avenue, opened, vacated or proposed, in front of or adjoining the Premises, to the center line thereof and all the estates, rights, titles, interests, dower and rights of dower, curtesy and rights of curtesy, property, possession, claim and demand

# UNOFFICIAL COPY

whatsoever, both at law and in equity, of Mortgagor of, in and to the Premises and the Improvements and every part and parcel thereof, with the appurtenances thereto;

(b) all machinery, furniture, furnishings, equipment, computer software and hardware, fixtures (including, without limitation, all heating, air conditioning, plumbing, lighting, communications and elevator fixtures) and other property of every kind and nature, whether tangible or intangible, whatsoever owned by Mortgagor, or in which Mortgagor has or shall have an interest, now or hereafter located upon the Premises and/or the Improvements, or appurtenant thereto, and usable in connection with the present or future operation and occupancy of the Premises and/or the Improvements, and all building equipment, materials and supplies of any nature whatsoever owned by Mortgagor, or in which Mortgagor has or shall have an interest, now or hereafter located upon the Premises and the Improvements, or appurtenant thereto, or usable in connection with the present or future operation, enjoyment and occupancy of the Premises and the Improvements (hereinafter collectively referred to as the "Equipment"), including any leases of any of the foregoing, any deposits existing at any time in connection with any of the foregoing, and the proceeds of any sale or transfer of the foregoing, and the right, title and interest of Mortgagor in and to any of the Equipment that may be subject to any "security interests" as defined in the Uniform Commercial Code, as adopted and enacted by the State or States where any of the Mortgaged Property is located (the "Uniform Commercial Code"), superior in lien to the lien of this Mortgage;

(c) all awards or payments, including interest thereon, that may heretofore and hereafter be made with respect to the Premises and/or the Improvements, whether from the exercise of the right of eminent domain or condemnation (including, without limitation, any transfer made in lieu of or in anticipation of the exercise of said rights, and any portion of any awards or payments made to the owners of the Building and payable to Mortgagor pursuant to the terms of the CC&R), or for a change of grade, or for any other injury to or decrease in the value of the Premises and/or Improvements;

(d) all leases, subleases and other agreements or arrangements heretofore or hereafter entered into affecting the use, enjoyment or occupancy of, or the conduct of any activity upon or in, the Premises and the Improvements, including any extensions, renewals, modifications or amendments thereof (hereinafter collectively referred to as the "Leases") and all rents, rent equivalents, moneys payable as damages or in lieu of rent or rent equivalents, royalties (including, without limitation, all oil and gas or other mineral royalties and bonuses), income, fees, receivables, receipts, revenues, deposits (including, without limitation, security, utility and other deposits), accounts, cash, issues, profits, charges for services rendered, and other payment and consideration of whatever form or nature received by or paid to or for the account of or benefit of Mortgagor or its agents or employees from any and all sources arising from or attributable to the Premises and the Improvements (hereinafter collectively referred to as the "Rents"), together with all proceeds from the sale or other disposition of the Leases and the right to receive and apply the Rents to the payment of the Debt;

(e) all proceeds of and any unearned premiums on any insurance policies covering the Mortgaged Property, including, without limitation, the right to receive and apply the proceeds of any insurance, judgments, or settlements made in lieu thereof, for damage to the Mortgaged Property;



# UNOFFICIAL COPY

(f) The right, in the name and on behalf of Mortgagor, to appear in and defend any action or proceeding brought with respect to the Mortgaged Property and to commence any action or proceeding to protect the interest of Mortgagee in the Mortgaged Property;

(g) all accounts (including, but not limited to, the Cash Collateral Account (as defined in the Cash Management Agreement) and the Clearing Account (as defined in the Cash Management Agreement)), escrows, documents, instruments, chattel paper, claims, deposits and general intangibles, as the foregoing terms are defined in the Uniform Commercial Code, and all franchises, trade names, trademarks, symbols, service marks, books, records, plans, specifications, designs, drawings, permits, consents, licenses, management agreements, contract rights (including, without limitation, any contract with any architect or engineer or with any other provider of goods or services for or in connection with any construction, repair, or other work upon the Mortgaged Property), approvals, actions, refunds of real estate taxes and assessments (and any other governmental impositions related to the Mortgaged Property), and causes of action that now or hereafter relate to, are derived from or are used in connection with the Mortgaged Property, or the use, operation, maintenance, occupancy or enjoyment thereof or the conduct of any business or activities thereon (hereinafter collectively referred to as the "Intangibles"); and

(h) all proceeds, products, offspring, rents and profits from any of the foregoing, including, without limitation, those from sale, exchange, transfer, collection, loss, damage, disposition, substitution or replacement of any of the foregoing.

TO HAVE AND TO HOLD the above granted and described Mortgaged Property unto Mortgagee and its successors and assigns, forever;

PROVIDED, HOWEVER, these presents are upon the express condition that, if Mortgagor shall pay to Mortgagee the Debt at the time and in the manner provided in the Note and this Mortgage and shall abide by and comply with each and every covenant and condition set forth herein, in the Note and in the other Loan Documents (hereinafter defined) in a timely manner, these presents and the estate hereby granted shall cease, terminate and be void;

AND Mortgagor represents and warrants to and covenants and agrees with Mortgagee as follows:

## PART I

### GENERAL PROVISIONS

1. Payment of Debt; Incorporation of Covenants, Conditions and Agreements. Mortgagor shall pay the Debt at the time and in the manner provided in the Note and in this Mortgage and the other Loan Documents. All the covenants, conditions and agreements contained in (a) the Note and (b) all and any of the documents including, without limitation, the Note, that certain Cash Management Agreement (hereinafter defined) and this Mortgage now or hereafter executed by Mortgagor and/or others and by or in favor of Mortgagee, which evidences, secures or guarantees all or any portion of the Debt or otherwise is executed and/or

# UNOFFICIAL COPY

delivered in connection with the Note and this Mortgage (collectively, the "Loan Documents") are hereby made a part of this Mortgage to the same extent and with the same force as if fully set forth herein.

## 2. Insurance.

(a) Mortgagor, at its sole cost and expense, shall obtain and maintain during the entire term of this Mortgage (the "Term") the following policies of insurance:

(i) Casualty insurance against loss or damage by fire, lightning and such other perils as are included in a standard "special form" policy (formerly known as an "all-risk" endorsement policy), and against loss or damage by all other risks and hazards covered by a standard extended coverage insurance policy including, without limitation, riot and civil commotion, terrorist actions, vandalism, malicious mischief, windstorm, burglary and theft in an amount equal to the greatest of (A) the then full replacement cost of the Improvements and Equipment, without deduction for physical depreciation, (B) the outstanding principal balance of the Loan, and (C) such amount that the insurer would not deem Mortgagor a co-insurer under said policies. The policies of insurance required under this Paragraph 2(a)(i) shall not provide for or permit co-insurance and shall contain a "Replacement Cost" endorsement with a waiver of depreciation and an "Agreed Amount" or "No Coinsurance" endorsement and shall have a deductible no greater than \$10,000.

(ii) Commercial General Liability insurance, including a broad form comprehensive general liability endorsement and coverages for broad form property damage, contractual damages and personal injuries (including death resulting therefrom) and containing minimum limits per occurrence of \$1,000,000.00 and \$2,000,000.00 in the aggregate for any policy year with no deductible. All liability policies must provide for claims to be made on an occurrence basis. In addition, at least \$10,000,000 excess and/or umbrella liability insurance shall be obtained and maintained for any and all claims, including all legal liability imposed upon Mortgagor and all court costs and attorneys' fees incurred in connection with the ownership, operation and maintenance of the Mortgaged Property.

(iii) Rental loss and/or business income interruption insurance (the "BI Insurance"): (A) with loss payable to Mortgagee; (B) covering all risks required to be covered by the insurance provided for in Paragraph 2(a)(i) above and covered by any other separate insurance required to be maintained hereunder with respect to windstorm, earthquake, terrorist acts and any other risks required to separately insured hereunder; (C) covering a period of restoration of eighteen (18) months in addition to containing an extended period of indemnity endorsement which provides that after the physical loss to the Improvements and personal property has been repaired and restored, the continued loss of income will be insured until such income either returns to the same level it was at prior to the loss, or the expiration of twelve (12) months from the date that the Mortgaged Property is repaired or replaced, whichever first occurs, and notwithstanding that the policy may expire prior to the end of such period, provided, however, that so long as that certain Payment Guaranty Agreement executed by RHK (as



# UNOFFICIAL COPY

hereinafter defined) is in full force and effect, Mortgagor may maintain BI Insurance covering a period of restoration of no less than twelve (12) months with no extended period of indemnity endorsement; and (D) the policy limits procured shall be at least equal to one hundred percent (100%) of the projected gross potential revenue for the Mortgaged Property for a period equal to at least thirty (30) months. The amount of such rental loss and/or business income interruption insurance shall be determined prior to the date hereof and at least once each year thereafter based on Mortgagor's reasonable estimate of the gross potential revenue from the Mortgaged Property for the succeeding thirty (30) month period;

(iv) Insurance against loss or damage from (A) leakage of sprinkler systems and (B) explosion of steam boilers, air conditioning equipment, high pressure piping, machinery and equipment, pressure vessels or similar apparatus now or hereafter installed in the Improvements (without exclusion for explosions), in an amount at least equal to the outstanding principal amount of the Note or \$2,000,000.00, whichever is less.

(v) If Mortgagor has employees, worker's compensation insurance with respect to any employees of Mortgagor, as required by any governmental authority or legal requirement.

(vi) Flood insurance if any part of the Mortgaged Property is located in an area identified by the Federal Emergency Management Agency as an area having special flood hazards in an amount at least equal to the outstanding principal amount of the Loan or such lesser amount as agreed to by Mortgagee in writing.

(vii) During any period of repair or restoration, builder's "all risk" insurance in an amount equal to not less than the full insurable value of the Mortgaged Property against such risks (including, without limitation, fire and extended coverage and collapse of the Improvements to agreed limits) as Mortgagee may request, in form and substance acceptable to Mortgagee.

(viii) If the Mortgaged Property is or ever becomes non-conforming with respect to zoning, ordinance or law coverage to compensate for loss of value or property resulting from operation of law and the cost of demolition and the increased cost of construction in amounts as requested by Mortgagee.

(ix) If the Mortgaged Property is located in a "seismic zone" of 3 or 4, earthquake insurance in an amount equal to the outstanding principal balance of the Loan or such lesser amount as agreed to by Mortgagee in writing.

(x) Windstorm insurance in an amount equal to the outstanding principal balance of the Loan or such lesser amount as agreed to by Mortgagee in writing.

(b) All policies of insurance (the "Policies") required pursuant to this Paragraph 2: (i) shall be issued by companies licensed to do business in the state where the Mortgaged Property is located, with a financial strength and claims paying ability rating of at least "AA" or better from Standard & Poor's Ratings Services ("S&P"), a division of the

# UNOFFICIAL COPY

McGraw-Hill Companies, Inc.; (ii) shall, with respect to all property insurance policies, name Mortgagee and its successors and/or assigns as their interest may appear as the mortgagee; (iii) shall, with respect to all property insurance policies and rental loss and/or business interruption insurance policies, contain a Standard Mortgagee Clause and a Lender's Loss Payable Endorsement, or their equivalents, naming Mortgagee as the person to which all payments made by such insurance company shall be paid; (iv) shall, with respect to all liability policies, name Mortgagee and its successors and/or assigns as an additional insured; (v) shall contain a waiver of subrogation against Mortgagee; (vi) shall contain such provisions as Mortgagee deems reasonably necessary or desirable to protect its interest including, without limitation, endorsements providing that neither Mortgagor, Mortgagee nor any other party shall be a co-insurer under said Policies and that Mortgagee shall receive at least thirty (30) days prior written notice of any modification, reduction or cancellation; and (vii) shall be satisfactory in form and substance to Mortgagee and shall be approved by Mortgagee as to amounts, form, risk coverage, deductibles, loss payees and insureds. Certified copies of the Policies shall be delivered to Mortgagee, c/o Wachovia Bank, National Association, as Servicer, PO Box 563956, Charlotte, North Carolina 28256-3956, within 30 days after the effective date thereof. Mortgagor shall pay to Mortgagee the cost of Mortgagee's review of the Policies and any certificates and renewals relating thereto. Mortgagor shall pay the annual premiums for such Policies (the "Insurance Premiums") in full in advance of each renewal date of the respective term of each Policy and shall furnish to Mortgagee evidence of the renewal of each of the Policies with receipts for the full payment of the entire annual Insurance Premiums or other evidence of such payment reasonably satisfactory to Mortgagee (provided, however, that Mortgagor shall not be required to furnish such evidence of payment to Mortgagee in the event that such Insurance Premiums have been paid by Mortgagee pursuant to Paragraph 5 hereof). In addition to the insurance coverages described in Paragraph 2(a) above, Mortgagor shall obtain such other insurance as may from time to time be reasonably required by Mortgagee in order to protect its interests provided that such other insurance is customarily required by institutional lenders in like transactions. Within thirty (30) days after request by Mortgagee, Mortgagor shall obtain such increases in the amounts of coverage required hereunder as may be reasonably requested by Mortgagee, taking into consideration changes in the value of money over time, changes in liability laws, changes in prudent customs and practices, and the like.

(c) It shall be an Event of Default if Mortgagor fails to maintain and keep in full force and effect all Policies in accordance with the terms and provisions of this Mortgage, and, in addition to any other remedies that Mortgagee shall have under this Mortgage in connection with any such Event of Default, Mortgagee shall also have the right (without any obligation), at the sole cost and expense of Mortgagor, to obtain and put into effect any such Policies not maintained by Mortgagor. The cost of the insurance Mortgagee obtains may be more than the cost of insurance Mortgagor may be able to obtain on its own. Any amounts paid by Mortgagee (including without limitation any Premiums and other costs incurred by Mortgagee with respect to the exercise of Mortgagee's rights hereunder) shall be paid by Mortgagor to Mortgagee within five (5) days after demand by Mortgagee together with interest thereon accrued from the date any such amounts are paid by Mortgagee until repaid to Mortgagee in full at the Default Rate (as defined in the Note). The exercise by Mortgagee of any rights hereunder to obtain any Policies shall not in any event cure or otherwise constitute any waiver with respect to any Event of Default arising because of Mortgagor's failure to maintain the Policies.

# UNOFFICIAL COPY

## 3. Casualty/Application of Insurance Proceeds.

(a) If the Mortgaged Property shall be damaged or destroyed, in whole or in part, by fire or other casualty (an "Insured Casualty"), Mortgagor shall give prompt notice thereof to Mortgagee. Following the occurrence of an Insured Casualty, Mortgagor, regardless of whether Insurance Proceeds (hereinafter defined) are available, shall promptly proceed to restore, repair, replace or rebuild the same to be of at least equal value and of substantially the same character as prior to such damage or destruction, all to be effected in accordance with applicable law. The reasonable expenses incurred by Mortgagee in the adjustment and collection of insurance proceeds shall become part of the Debt and be secured hereby and shall be reimbursed by Mortgagor to Mortgagee upon demand.

(b) Upon the occurrence of an Insured Casualty, Mortgagor shall (subject to the right of Mortgagee to elect to do so as set forth below in this clause (b)), promptly file a proof of loss with the respective insurance company or companies insuring such Insured Casualty and shall (subject to the right of Mortgagee to elect to do so as set forth below in this clause (b)), promptly and diligently in a competent and timely manner, proceed to settle and adjust any claims with respect to such Insured Casualty and agree with such company or companies on the amount of the Insurance Proceeds. In the event of an Insured Casualty where the damage to the Mortgaged Property does not exceed the lesser of (x) \$250,000 and (y) ten percent (10%) of the outstanding principal balance of the Note and no Event of Default shall have occurred, Mortgagor may settle and adjust any claim without the consent of Mortgagee and agree with the insurance company or companies on the amount to be paid upon the loss (any amounts so received, including without limitation any proceeds received from rental loss or business interruption coverages, the "Insurance Proceeds"); provided that such adjustment is carried out in a competent and timely manner. In such case, provided that no Event of Default (as hereinafter defined) shall have occurred and that the restoration or repair of the Mortgaged Property can be completed prior to the earlier to occur of (i) the date which is six (6) months following such Insured Casualty, and (ii) the date which is twelve (12) months prior to the Maturity Date (as defined in the Note), Mortgagor is hereby authorized to collect and receipt for any such Insurance Proceeds. In the event Mortgagor fails to promptly file a proof of loss with respect to any Insured Casualty or fails to promptly and diligently proceed to settle and adjust any claims with respect thereto as required in this clause (b), then Mortgagee shall, at the sole cost and expense of Mortgagor, have the right to file such proof of claim, settle and adjust such claim and agree with such insurance company or companies on the amount of the Insurance Proceeds, in the place and stead of Mortgagor without the consent of Mortgagor, and Mortgagor hereby irrevocably appoints Mortgagee as its attorney-in-fact, coupled with an interest, to do so. In the event of an Insured Casualty where the damage to the Mortgaged Property equals or exceeds the lesser of (x) \$250,000 and (y) 10% of the outstanding principal balance of the Note (a "Significant Casualty"), or if an Event of Default has occurred, then notwithstanding anything set forth herein to the contrary, at the sole cost and expense of Mortgagor, Mortgagee may elect to file the respective proof of loss, settle and adjust any claim without the consent of Mortgagor and agree with the insurance company or companies on the amount of the Insurance Proceeds, in the place and stead of Mortgagor without the consent of Mortgagor, and Mortgagor hereby irrevocably appoints Mortgagee as its attorney-in-fact, coupled with an interest, to do so. Any Insurance Proceeds in connection therewith (whether or not Mortgagee elects to settle and adjust the claim or Mortgagor settles such claim) shall be due and payable solely to Mortgagee and held

# UNOFFICIAL COPY

by Mortgagee in accordance with the terms of this Mortgage. In the event Mortgagor or any party other than Mortgagee is a payee on any check representing Insurance Proceeds with respect to any Significant Casualty (or with respect to any Insured Casualty, if an Event of Default has occurred), Mortgagor shall immediately endorse, and cause all such third parties to endorse, such check payable to the order of Mortgagee. Mortgagor hereby irrevocably appoints Mortgagee as its attorney-in-fact, coupled with an interest, to endorse any such check payable to the order of Mortgagee. The expenses incurred by Mortgagee in the adjustment and collection of Insurance Proceeds shall become part of the Debt and be secured hereby and shall be reimbursed by Mortgagor to Mortgagee upon demand. Mortgagor hereby releases Mortgagee from any liability with respect to the settlement and adjustment by Mortgagee of any Insured Casualty.

(c) In the event of loss or damages covered by any of the Policies, the following provisions shall apply with respect to application of Insurance Proceeds:

(i) In the event of an Insured Casualty where the loss is in an aggregate amount less than ten percent (10%) of the original principal balance of the Note and if, in the reasonable judgment of Mortgagee, the Mortgaged Property can be restored prior to the earlier to occur of (A) the date which is six (6) months following such Insured Casualty and (B) the date which is twelve (12) months prior to the Maturity Date, and after such restoration will adequately secure the outstanding balance of the Debt and will have a value at least equal to the value immediately prior to such Insured Casualty, then, if no Event of Default (as hereinafter defined) shall have occurred and be continuing, the Insurance Proceeds (not including any Insurance Proceeds paid in respect of the liability policies required under Paragraph 2(a)(ii) hereof, in respect of any rental loss or business interruption coverage, or in respect of any worker's compensation insurance), after reimbursement of any expenses incurred by Mortgagee shall be applied to reimburse Mortgagor for the cost of restoring, repairing, replacing or rebuilding the Mortgaged Property or part thereof subject to the Insured Casualty, in the manner set forth below. Mortgagor hereby covenants and agrees to commence and diligently to prosecute such restoring, repairing, replacing or rebuilding; provided always, that Mortgagor shall pay all costs (and if required by Mortgagee, Mortgagor shall deposit the total thereof with Mortgagee in advance) of such restoring, repairing, replacing or rebuilding in excess of the net Insurance Proceeds made available pursuant to the terms hereof.

(ii) Except as provided in Paragraph 3(c)(i) above, the Insurance Proceeds collected upon any Insured Casualty shall, at the option of Mortgagee in its sole discretion, be applied to the payment of the Debt or applied to reimburse Mortgagor for the cost of restoring, repairing, replacing or rebuilding the Mortgaged Property or part thereof subject to the Insured Casualty, in the manner set forth below. If Mortgagee elects to apply any proceeds of insurance to the payment of the Debt prior to the final sale of the Loan in a Secondary Market Transaction, Mortgagor shall immediately upon demand reimburse Mortgagee for any and all Hedge Losses (as hereinafter defined) resulting, either directly or indirectly, from that portion of the Debt so paid. Additionally, throughout the term of the Loan if an Event of Default, has occurred and is continuing, then the Mortgagor shall pay to Mortgagee, with respect to any payment of the Debt pursuant to this paragraph, an additional amount equal to the



# UNOFFICIAL COPY

Proportionate Yield Maintenance Premium (as defined in Paragraph 48 below); provided, however, that if an Event of Default has not occurred or is not then continuing, then the Proportionate Yield Maintenance Premium shall not be payable. Any such application to the Debt shall (A) be applied to those payments of principal and interest last due under the Note but shall not postpone any payments otherwise required pursuant to the Note other than such last due payments and (B) not cause or result in the Monthly Debt Service Payment Amount under the Note being re-cast. For purposes hereof, "Hedge Losses" shall mean all actual losses incurred by Mortgagee in connection with the hedge positions taken by Mortgagee in order to fix the Interest Rate (as defined in the Note) on the Loan. Mortgagor acknowledges that in order for Mortgagee to fix the Interest Rate on the Loan, Mortgagee entered into hedging transactions by selling U.S. Treasury securities, which hedging transactions would have to be "unwound" if all or any portion of the Loan is paid down.

(iii) In the event Mortgagor is entitled to reimbursement out of Insurance Proceeds held by Mortgagee, such Insurance Proceeds shall be disbursed from time to time upon Mortgagee being furnished with (1) evidence satisfactory to Mortgagee of the estimated cost of completion of the restoration, repair, replacement and rebuilding, (2) funds or, at Mortgagee's option, assurances satisfactory to Mortgagee that such funds are available, sufficient in addition to the Insurance Proceeds to complete the proposed restoration, repair, replacement and rebuilding, and (3) such architect's certificates, waivers of lien, contractor's sworn statements, title insurance endorsements, bonds, plats of survey and such other evidences of cost, payment and performance as Mortgagee may reasonably require and approve. Mortgagee may, in any event, require that all plans and specifications for such restoration, repair, replacement and rebuilding be submitted to and approved by Mortgagee prior to commencement of work. No payment made prior to the final completion of the restoration, repair, replacement and rebuilding shall exceed ninety percent (90%) of the value of the work performed from time to time; funds other than Insurance Proceeds shall be disbursed prior to disbursement of such Insurance Proceeds; and at all times, the undisbursed balance of such proceeds remaining in the hands of Mortgagee, together with funds deposited for that purpose or irrevocably committed to the satisfaction of Mortgagee by or on behalf of Mortgagor for that purpose, shall be at least sufficient in the reasonable judgment of Mortgagee to pay for the cost of completion of the restoration, repair, replacement or rebuilding, free and clear of all liens or claims for lien. Any surplus which may remain out of Insurance Proceeds held by Mortgagee after payment of such costs of restoration, repair, replacement or rebuilding (including, but not limited to, all Insurance Proceeds paid with respect to rental loss and/or business interruption insurance) shall be deposited by Mortgagee into one or more of the Escrow Funds, as determined by Mortgagee, and thereafter held and disbursed by Mortgagee in accordance with the terms of provisions of this Mortgage applicable to such Escrow Funds.

4. Payment of Taxes, Etc. Mortgagor shall pay all taxes, assessments, water rates and sewer rents, now or hereafter levied or assessed or imposed against (i) the Mortgaged Property or any part thereof and/or (ii) any permanent tax index number which affects the Mortgaged Property or any part thereof (collectively, the "Taxes") and all water rates, sewer rents, ground rents, maintenance charges, and other impositions and charges now or hereafter

# UNOFFICIAL COPY

levied or assessed or imposed against the Mortgaged Property or any part thereof and/or (ii) any permanent tax index number which affects the Mortgaged Property or any part thereof (collectively, the "Other Charges") as the same become due and payable. Mortgagor shall not suffer and shall promptly cause to be paid and discharged any lien or charge whatsoever which may be or become a lien or charge against the Mortgaged Property, and shall promptly pay for all utility services provided to the Mortgaged Property. Mortgagor shall furnish to Mortgagee receipts for the payment of the Taxes and the Other Charges prior to the date the same shall become delinquent (provided, however, that Mortgagor shall not be required to furnish such receipts for payment of Taxes in the event that such Taxes have been paid by Mortgagee pursuant to Paragraph 5 hereof).

5. Tax and Insurance Escrow Fund. Simultaneously with the execution hereof, Mortgagor shall deposit with Mortgagee the amount, as determined by Mortgagee, which, when added to the monthly payments subsequently required to be deposited with Mortgagee hereunder on account of Taxes and Insurance Premiums, will result in there being on deposit with Mortgagee an amount sufficient to pay the next due installment of Taxes on the Mortgaged Property at least thirty (30) days prior to the due date thereof and the next due annual Insurance Premiums with respect to the Mortgaged Property at least thirty (30) days prior to the due date thereof. In addition, Mortgagor shall pay to Mortgagee on each Payment Date (as defined in the Note) (i) one-twelfth of the Taxes that Mortgagee reasonably estimates will be payable during the next ensuing twelve (12) months in order to accumulate with Mortgagee sufficient funds to pay all such Taxes at least thirty (30) days prior to their respective due dates, and (ii) one-twelfth of the Insurance Premiums that Mortgagee estimates will be payable for the renewal of the coverage afforded by the Policies upon the expiration thereof in order to accumulate with Mortgagee sufficient funds to pay all such Insurance Premiums at least thirty (30) days prior to the expiration of the Policies (said initial deposit, together with the amounts in clauses (i) and (ii) above, being hereinafter called the "Tax and Insurance Escrow Fund"). Mortgagee will apply the Tax and Insurance Escrow Fund to payments of Taxes and Insurance Premiums required to be made by Mortgagor pursuant to Paragraphs 2 and 4 hereof. In making any payment relating to the Tax and Insurance Escrow Fund, Mortgagee may do so according to any bill, statement or estimate procured from the appropriate public office (with respect to Taxes) or insurer or agent (with respect to Insurance Premiums), without inquiry into the accuracy of such bill, statement or estimate or into the validity of any tax, assessment, sale, forfeiture, tax lien or title or claim thereof. If at any time Mortgagee determines that the Tax and Insurance Escrow Fund is not or will not be sufficient to pay the items set forth in clauses (i) and (ii) above, Mortgagee shall notify Mortgagor of such determination and Mortgagor shall increase its monthly payments to Mortgagee by the amount that Mortgagee estimates is sufficient to make up the deficiency at least thirty (30) days prior to delinquency of the Taxes and/or expiration of the Policies, as the case may be. If the amount of the Tax and Insurance Escrow Fund shall exceed the amounts due for Taxes and Insurance Premiums pursuant to Paragraphs 2 and 4 hereof, Mortgagee shall credit such excess against future payments to be made to the Tax and Insurance Escrow Fund, and all excess amounts remaining when the Debt has been satisfied shall be returned to Mortgagor.

6. Replacement Escrow Fund; Rollover Escrow Fund; Rent Abatement Escrow Fund; and Earn-Out Reserve.



# UNOFFICIAL COPY

(a) Mortgagor shall pay to Mortgagee on each Payment Date an amount equal to one-twelfth of the Annual Replacement Amount (as defined below) and such payments shall be held in escrow (the "Replacement Escrow Fund") and disbursed in accordance with the following provisions of this Paragraph 6. The "Annual Replacement Amount", which is based on Mortgagee's initial estimate of the annual amount for replacements and repairs of a capital nature required to be made to the Mortgaged Property, shall initially be \$7,522.00. Provided that no Event of Default shall have occurred, Mortgagee shall make disbursements from the Replacement Escrow Fund as requested by Mortgagor, and approved by Mortgagee in its reasonable discretion, on a monthly basis in increments of no less than \$1,000.00 upon delivery by Mortgagor of a draw request accompanied by (i) copies of paid invoices (or with respect to requests in excess of \$10,000.00, unpaid invoices) for the amounts requested, (ii) a brief description of the repair or replacement (including evidence that same is of a capital nature) and, if required by Mortgagee, (iii) lien waivers and releases from all parties furnishing materials and/or services in connection with the requested payment. Any disbursement by Mortgagee hereunder for a capital item in excess of \$10,000.00 and not already paid for by Mortgagor, shall be made by joint check, payable to Mortgagor and the applicable contractor, supplier, materialman, mechanic, subcontractor or other party to whom payment is due in connection with such capital item. Mortgagee may require an inspection of the Mortgaged Property at Mortgagor's expense, or other evidence as Mortgagee may in its reasonable discretion require, prior to making a monthly disbursement in order to verify compliance with the requirements of this Paragraph 6(a).

(b) Intentionally Omitted.

(c) Mortgagor shall pay to Mortgagee on each Payment Date one-twelfth of \$68,701.00 (the "Monthly Rollover Amount"), which shall be deposited with and held by Mortgagee for tenant improvement and leasing commission obligations incurred following the date hereof (the "Rollover Escrow Fund") until the amount in the Rollover Escrow Fund shall be equal to \$275,000.00 (the "Rollover Funding Limit") and, thereafter, in the event that at any time disbursements are made to Mortgagor from the Rollover Escrow Fund so as to reduce the amounts on deposit therein below the Rollover Funding Limit, Mortgagor shall be obligated, commencing with the next succeeding Payment Date, to resume payment of the Monthly Rollover Amount until the amounts on deposit in the Rollover Escrow Fund shall be equal to the Rollover Funding Limit. In addition, notwithstanding any limitations on the amount to be deposited in the Rollover Escrow Fund, Mortgagor shall pay to Mortgagee for deposit in the Rollover Escrow Fund all funds received by Mortgagor (x) from tenants in connection with the cancellation of any Leases, including, but not limited to, any cancellation fees, penalties, and payments relating to unamortized tenant improvements and leasing commissions and (y) relating to that certain Holdback Escrow Agreement among Mortgagor, Palmolive Building Retail, LLC and Chicago Title and Trust Company. Mortgagee may from time to time reassess its estimate of the monthly amount necessary to be deposited into the Rollover Escrow Fund and, upon notice to Mortgagor, Mortgagor shall be required to deposit into the Rollover Escrow Fund each month such reassessed amount. To the extent the Leases were not previously approved by Mortgagee, all such expenses shall be approved by Mortgagee in its sole discretion. Provided that no Event of Default shall exist and remain uncured, Mortgagee shall make disbursements as requested, in writing, by Mortgagor on a monthly basis in increments of no less than \$1,000.00 upon delivery by Mortgagor of copies of paid invoices (or with respect to any request in excess

# UNOFFICIAL COPY

of \$10,000, unpaid invoices) for the amounts requested for tenant improvements and leasing commissions, the newly executed Lease, extension, renewal, or modification, with terms commensurate with the expired Lease, a certification for tenant improvement disbursements from the Mortgagor stating (a) the nature and type of the related improvement, (b) that the related improvement has been completed in a good and workmanlike manner and (c) that the related improvement has been paid in full (or, with respect to any request in excess of \$10,000, will be paid for in full from the requested disbursement) or a certification for leasing commission disbursements stating that such leasing commission has been paid in full (or, with respect to requests in excess of \$10,000, will be paid for in full from the requested disbursement) and, if required by Mortgagee, lien waivers and releases from all parties furnishing materials and/or services in connection with the requested payment. Any disbursement by Mortgagee hereunder in excess of \$10,000 and not already paid for by Mortgagor, shall be made by joint check, payable to Mortgagor and the applicable contractor, supplier, materialman, mechanic, subcontractor, broker or other party to whom payment is due in connection with such disbursement. Mortgagee may require an inspection of the Mortgaged Property at Mortgagor's expense prior to making a disbursement in order to verify compliance with the requirements of this Paragraph 6(c).

(d) On the date hereof, Mortgagor shall deposit with Mortgagee the sum of \$71,028.53 to be held in escrow (the "Rent Abatement Escrow Fund") and disbursed in accordance with this Paragraph 6(d) with respect to the fixed rent abatement granted under that certain lease, as amended (the "Fiss Lease") dated as of April 19, 1994 between Mortgagor's predecessor-in-interest, as landlord and Dr. Benjamin S. Fiss, D.D.S., Ltd. ("Fiss"), as tenant. Provided that no Event of Default shall have occurred and be continuing, Mortgagee shall, on the date set forth under the heading "Rent Abatement Release Date" on Exhibit B attached hereto, disburse funds to Mortgagor from the Rent Abatement Escrow Fund in an amount equal to the amount set forth under the heading "Rent Abatement Release Amount" on Exhibit B.

(e) (i) On the date hereof, Mortgagor shall establish a reserve (the "Earn-Out Rent Reserve") in the amount of \$3,969,000.00. Provided the Release Conditions (as hereinafter defined) shall have been satisfied in full on the date that is not later than the fourth (4<sup>th</sup>) anniversary of the date hereof, Mortgagee shall release the funds on deposit in the Earn-Out Rent Reserve to Mortgagor. Subject to the terms and provisions of subparagraph (iii) below, if the Release Conditions have not been satisfied by the fourth (4<sup>th</sup>) anniversary of the date hereof, Mortgagee shall hold the funds then on deposit in the Earn-Out Rent Reserve as additional collateral for Mortgagor's obligations under the Note, this Mortgage and the other Loan Documents. The Earn-Out Rent Reserve shall be held in an interest bearing account but shall not, unless otherwise explicitly required by applicable law, be deemed to be escrow or trust funds, but, at Mortgagee's option and in Mortgagee's discretion, may either be held in a separate account or be commingled by Mortgagee with the general funds of Mortgagee. Interest on the funds contained in the Earn-Out Rent Reserve shall be credited to Mortgagor as provided in Paragraph 7 hereof. The Earn-Out Rent Reserve is solely for the protection of Mortgagee and entails no responsibility on Mortgagee's part beyond those set forth herein. Upon assignment of this Mortgage by Mortgagee, any funds then on deposit in the Earn-Out Rent Reserve shall be turned over to the assignee and any responsibility of Mortgagee, as assignor, with respect thereto shall terminate. Upon the occurrence of an Event of Default, Mortgagee shall have the right, at its option, to apply at any time the balance then remaining in the Earn-Out Rent Reserve to the

# UNOFFICIAL COPY

payment of the Debt in such order, proportion or priority as Mortgagee may determine in its sole and absolute discretion. Any such application to the Debt after an Event of Default shall be subject to the Proportionate Yield Maintenance Premium. On the Maturity Date, the funds in the Earn-Out Rent Reserve may be applied to reduce the Debt. No such application of the Earn-Out Rent Reserve shall be deemed to have cured any default or Event of Default hereunder.

(ii) "Release Conditions" shall mean that all of the following shall have occurred in Mortgagee's sole but good faith discretion: (1) no Event of Default shall have occurred and then be continuing; (2) Mortgagee's determination, exercised in its sole but good faith discretion, that the amount of the annual base rents for the Mortgaged Property has increased by not less than \$263,367.00 from the amount of the annual base rents for the Mortgaged Property as of the date hereof based on (x) Leases entered into after the date hereof in accordance with the terms of this Mortgage and (y) rent increases occurring after January 1, 2006 with respect to existing Leases (such leases described in clauses (x) and (y) above may be referred to individually and collectively as, the "Earn-Out Lease"; and such tenants under such Earn-Out Lease may be referred to individually and collectively as, the "Earn-Out Tenant"); and (3) all free rent and reduced rent periods under Leases (the "Free Rent") entered into after the date hereof with such Earn-Out Tenant shall have expired (provided, however, if all of the Release Conditions shall have been satisfied in full on the date that is not later than the fourth (4<sup>th</sup>) anniversary of the date hereof except that the Free Rent shall not have expired, Mortgagee shall release the funds on deposit in the Earn-Out Rent Reserve minus the amount equal to the Free Rent, it being acknowledged and agreed that upon the expiration of the Free Rent, Mortgagee shall release the amount equal to the Free Rent to Mortgagor), all landlord obligations relating to such leasing (such as, without limitations, tenant improvements obligations, leasing commissions, tenant allowance obligations and lease buy-out obligations) under the Earn-Out Lease have been fully satisfied, the Earn-Out Tenant is in actual physical occupancy of, and commenced the payment of full unabated rent for, the demised premises, and Mortgagor, and to the best knowledge of Mortgagor, the Earn-Out Tenant is not in default under the Earn-Out Lease, and to the extent the Earn-Out Lease is executed after the date hereof, the Earn-Out Tenant has delivered to Mortgagee, a duly executed tenant estoppel certificate in form and substance reasonably satisfactory to Mortgagee, stating, among other items, that the conditions set forth in the foregoing subclause (3) of this subparagraph (ii) have been fully satisfied. Any increase of the annual base rents for the Mortgaged Property from the amount of the annual base rents for the Mortgaged Property as of the date hereof based on (x) Leases entered into after the date hereof in accordance with the terms of this Mortgage and (y) rent increases occurring after January 1, 2006 with respect to existing Leases may be hereinafter referred to as the "Increased Annual Base Rent".

(iii) Mortgagor shall have the right (during the period from the date hereof until the fourth (4<sup>th</sup>) anniversary of the date hereof) (each such date, an "Earn-Out Recalculation Date"), to request partial releases (a "Partial Release") of the Earn-Out Rent Reserve and Mortgagee shall disburse funds from the Earn-Out Rent Reserve to Mortgagor upon Mortgagee's satisfaction (in its sole but good faith discretion) that Mortgagor has satisfied each of the following conditions: (1) Mortgagor shall deliver to Mortgagee a written request for disbursement from the Earn-Out Rent Reserve; (2) the

# UNOFFICIAL COPY

requested disbursement shall be in an amount equal to the Permitted Disbursement Amount (as hereinafter defined); (3) on the date such request is received by Mortgagee and on the date such disbursement is made, no Event of Default shall have occurred and be continuing; and (4) the Increased Annual Base Rent is not less than \$50,000.00 from the later date to occur of (i) the date hereof and (ii) the previous Earn-Out Recalculation Date, if any. A "Permitted Disbursement Amount" shall mean, as of any date of Mortgagee's determination, the amount of the Increased Annual Base Rent divided by 263,367 multiplied by 3,969,000.

(iv) Mortgagor may, at its option, elect to deliver to Mortgagee, a clean, irrevocable, unconditional and freely transferable letter of credit (the "Earn-Out Letter of Credit") in the amount of \$3,969,000.00 in satisfaction of its obligation to make the deposit into the Earn-Out Rent Reserve as set forth in clause (d)(i) above, provided that such letter of credit is a Satisfactory Letter of Credit (as hereinafter defined). Mortgagee shall promptly return the Earn-Out Letter of Credit to Mortgagor if all of the Release Conditions shall have been satisfied on the date that is not later than the fourth (4<sup>th</sup>) anniversary of the date hereof. Following any recalculation of the Earn-Out Rent Reserve as expressly provided above, Mortgagor may deliver a replacement Earn-Out Letter of Credit or an amendment to the Earn-Out Letter of Credit (each which shall be a Satisfactory Letter of Credit) evidencing the reduced amount as provided in (d)(iii) above and upon Mortgagee's receipt thereof, Mortgagee shall return the prior Earn-Out Letter of Credit to Mortgagor. If the Release Conditions have not been satisfied prior to the date that is the fourth (4<sup>th</sup>) anniversary of the date hereof, Mortgagee shall hold the Earn-Out Letter of Credit as additional collateral for Mortgagor's obligations under the Note, this Mortgage and the other Loan Documents. Upon the occurrence of an Event of Default, Mortgagee shall have the right, at its option, to draw on the Earn-Out Letter of Credit and to apply all or any part thereof to the payment of the Debt in such order, proportion or priority as Mortgagee may determine in its sole and absolute discretion. Any such application to the Debt after an Event of Default shall be subject to the Proportionate Yield Maintenance Premium.

(v) In addition to any other right Mortgagee may have to draw upon the Earn-Out Letter of Credit pursuant to the terms and conditions hereof, Mortgagee shall have the additional rights to draw in full upon the Earn-Out Letter of Credit: (w) if Mortgagee has received a notice from the issuing bank that the Earn-out Letter of Credit will not be renewed and a substitute Earn-Out Letter of Credit is not provided at least thirty (30) days prior to the date on which the outstanding Earn-Out Letter of Credit is scheduled to expire; (x) with respect to the Earn-Out Letter of Credit with a stated expiration date, if Mortgagee has not received a notice from the issuing bank that it has renewed the Earn-Out Letter of Credit at least thirty (30) days prior to the date on which the Earn-Out Letter of Credit is scheduled to expire and a substitute Earn-Out Letter of Credit is not provided at least thirty (30) days prior to the date on which the outstanding Earn-Out Letter of Credit is scheduled to expire; (y) upon receipt of notice from the issuing bank that the Earn-Out Letter of Credit will be terminated (except if the termination of the Earn-Out Letter of Credit is permitted pursuant to the terms and conditions hereof or a substitute Earn-Out Letter of Credit is provided); or (z) if Mortgagee has received notice that the bank issuing the Earn-out Letter of Credit shall



# UNOFFICIAL COPY

cease to be an Eligible Institution. Notwithstanding anything to the contrary contained in the above, Mortgagee is not obligated to draw upon the Earn-Out Letter of Credit upon the happening of an event specified in clauses (w), (x), (y) or (z) above and shall not be liable for any losses sustained by Mortgagor due to the insolvency of the bank issuing the Earn-Out Letter of Credit if Mortgagee has not drawn upon the Earn-Out Letter of Credit.

7. General Provisions Applicable to Escrow Funds. All monies on deposit in the Replacement Escrow Fund, the Rollover Escrow Fund, the Rent Abatement Escrow Fund, the Earn-Out Rent Reserve and the Tax and Insurance Escrow Fund (collectively, the "Escrow Funds") shall earn interest at a rate commensurate with the rate of interest paid from time to time on money market accounts at a commercial bank selected by Mortgagee in its sole discretion from time to time, with interest credited monthly to such Escrow Funds (with the exception of the Tax and Insurance Escrow Fund). All earnings or interest on each of the Escrow Funds (with the exception of the Tax and Insurance Escrow Fund) shall be and become part of the respective Escrow Fund and shall be disbursed as provided in the paragraph(s) of this Mortgage applicable to each such Escrow Fund. No earnings or interest on the Tax and Insurance Escrow Fund shall be payable to Mortgagor. Mortgagor hereby pledges to Mortgagee and grants to Mortgagee a first priority perfected security interest in any and all monies now or hereafter deposited in the Escrow Funds as additional security for the payment of the Debt. Upon the occurrence of an Event of Default, Mortgagee may apply any sums then present in the Escrow Funds to the payment of the Debt in any order in its sole discretion. The Escrow Funds shall not constitute a trust fund and may be commingled with other monies held by Mortgagee.

## 8. Condemnation.

(a) Mortgagor shall promptly give Mortgagee written notice of the actual or threatened commencement of any condemnation or eminent domain proceeding with respect to all or any portion of the Mortgaged Property (a "Condemnation") and shall deliver to Mortgagee copies of any and all papers served in connection with such Condemnation. Following the occurrence of a Condemnation, Mortgagor, regardless of whether an Award (hereinafter defined) is available, shall promptly proceed to restore, repair, replace or rebuild the same to the extent practicable to be of at least equal value and of substantially the same character as prior to such Condemnation, all to be effected in accordance with applicable law.

(b) Any and all awards or payments ("Award") for any taking accomplished through a Condemnation (a "Taking") are hereby assigned by Mortgagor to Mortgagee and Mortgagee is hereby authorized to make any compromise or settlement in connection with such Condemnation, subject to the provisions of this Mortgage.

(c) In the event of any Condemnation where the Award is in an aggregate amount less than five percent (5%) of the original principal balance of the Note, and if, in the reasonable judgment of Mortgagee, the Mortgaged Property can be restored prior to the earlier to occur of (i) the date which is six (6) months following such Taking and (ii) the date which is twelve (12) months prior to the Maturity Date (as defined in the Note), and after such restoration will adequately secure the outstanding balance of the Debt and will have a value at least equal to the value immediately prior to such Taking, then, if no Event of Default shall have occurred, the proceeds of the Award (after reimbursement of any expenses incurred by Mortgagee) shall be

# UNOFFICIAL COPY

applied to reimburse Mortgagor for the cost of restoring and rebuilding the Mortgaged Property, and such Award shall be disbursed in the same manner as provided in Paragraph 3(c)(iii) for the application of Insurance Proceeds. Mortgagor hereby covenants and agrees to commence and diligently to prosecute such restoring, repairing, replacing or rebuilding; provided always, that Mortgagor shall pay all costs (and if required by Mortgagee, Mortgagor shall deposit the total thereof with Mortgagee in advance) of such restoring, repairing, replacing or rebuilding in excess of the Award made available pursuant to the terms hereof. Any surplus which may remain out of the Award received by Mortgagee after payment of such costs of restoration, repair, replacement or rebuilding (including, but not limited to, all Insurance Proceeds paid with respect to rental loss and/or business interruption insurance) shall be deposited by Mortgagee into one or more of the Escrow Funds, as determined by Mortgagee, and thereafter held and disbursed by Mortgagee in accordance with the terms of provisions of this Mortgage applicable to such Escrow Funds.

(d) Except as provided in Paragraph 8(c) above, the Award collected upon any Condemnation shall, at the option of Mortgagee in its sole discretion, be applied to the payment of the Debt or applied to reimburse Mortgagor for the cost of restoring and rebuilding the Mortgaged Property in the same manner as provided in Paragraph 3(c)(iii) for the application of Insurance Proceeds. If Mortgagee elects to apply any portion of an Award to the payment of the Debt prior to the final sale of the Loan in a Secondary Market Transaction (as hereinafter defined), Mortgagor shall immediately upon demand reimburse Mortgagee for any and all Hedge Losses (as defined in Paragraph 3(c)(ii) above) resulting, either directly or indirectly, from that portion of the Debt so paid. Additionally, throughout the term of the Loan if an Event of Default has occurred and is continuing, then the Mortgagor shall pay to Mortgagee, with respect to any payment of the Debt pursuant to this paragraph, an additional amount equal to the Proportionate Yield Maintenance Premium in accordance with Paragraph 48 below; provided, however, that if an Event of Default has not occurred or is not then continuing, then the Proportionate Yield Maintenance Premium shall not be payable. Any such application to the Debt shall (i) be applied to those payments of principal and interest last due under the Note but shall not postpone or reduce any payments otherwise required pursuant to the Note other than such last due payments and (ii) not cause or result in the Monthly Debt Service Payment Amount under the Note to be re-cast based upon the reduction in the principal balance of the Loan and the number of months remaining until the Maturity Date. If the Mortgaged Property is sold, through foreclosure or otherwise, prior to the receipt by Mortgagee of such Award, Mortgagee shall have the right, whether or not a deficiency judgment on the Note shall be recoverable or shall have been sought, recovered or denied, to receive all or a portion of said Award sufficient to pay the Debt.

(e) Notwithstanding any Taking by any public or quasi-public authority (including, without limitation, any transfer made in lieu of or in anticipation of such a Taking), Mortgagor shall continue to pay the Debt at the time and in the manner provided for in the Note, in this Mortgage and the other Loan Documents and the Debt shall not be reduced unless and until any Award shall have been actually received and applied by Mortgagee to reasonable expenses of collecting the Award and to discharge of the Debt.

## 9. Leases and Rents.

(a) Mortgagor does hereby absolutely and unconditionally assign to Mortgagee, all Mortgagor's right, title and interest in all current and future Leases and Rents, it



# UNOFFICIAL COPY

being intended by Mortgagor that this assignment constitutes a present, absolute assignment and not an assignment for additional security only. Such assignment to Mortgagee shall not be construed to bind Mortgagee to the performance of any of the covenants, conditions or provisions contained in any such Lease or otherwise impose any obligation upon Mortgagee. Nevertheless, subject to the terms of this paragraph, Mortgagee grants to Mortgagor a revocable license to operate and manage the Mortgaged Property and to collect the Rents. Mortgagor shall hold the Rents, or a portion thereof, sufficient to discharge all current sums due on the Debt, in trust for the benefit of Mortgagee for use in the payment of such sums. Upon the occurrence of an Event of Default, without the need for notice or demand, the license granted to Mortgagor herein shall automatically be revoked, and Mortgagee shall immediately be entitled to possession of all Rents, whether or not Mortgagee enters upon or takes control of the Mortgaged Property. Mortgagee is hereby granted and assigned by Mortgagor the right, at its option, upon revocation of the license granted herein, to enter upon the Mortgaged Property in person, by agent or by court-appointed receiver to collect the Rents. Any Rents collected after the revocation of the license may be applied toward payment of the Debt in such priority and proportions as Mortgagee in its sole discretion shall deem proper.

(b) Subject to the provisions of Paragraph 9(d) below, all Leases entered into after the date hereof shall have been previously approved by Mortgagee, which consent shall not be unreasonably withheld. Upon request, Mortgagor shall furnish Mortgagee with executed copies of all Leases. No material changes may be made to any Mortgagee-approved lease without the prior written consent of Mortgagee, which consent shall not be unreasonably withheld provided such changes are commercially reasonable. In addition, all renewals of existing Leases and all proposed new leases shall provide for rental rates comparable to existing local market rates and shall be arms length transactions. All Leases entered into after the date hereof shall provide that they are subordinate to this Mortgage and that the tenant agrees to attorn to Mortgagee.

(c) Mortgagor (i) shall observe and perform in all material respects all the obligations imposed upon the lessor under the Leases and shall not do or permit to be done anything to impair the value of the Leases as security for the Debt; (ii) shall promptly send copies to Mortgagee of all notices of default which Mortgagor shall send or receive thereunder; (iii) shall enforce in a commercially reasonable manner all the terms, covenants and conditions contained in the Leases upon the part of the lessee thereunder to be observed or performed, (iv) shall not collect any of the Rents more than one (1) month in advance; (v) shall not execute any other assignment of the lessor's interest in the Leases or the Rents; and (vi) shall use commercially reasonable efforts to obtain and deliver to Mortgagee, upon request, tenant estoppel certificates obtained from each commercial tenant at the Mortgaged Property in form and substance reasonably satisfactory to Mortgagee, provided that Mortgagor shall not be required to deliver such certificates more frequently than once in any calendar year. Except to the extent Mortgagor is acting in the ordinary course of business and in a commercially reasonable manner, or Mortgagor has received the prior written consent of Mortgagee, Mortgagor shall not (A) alter, modify or change the terms of any Lease in any material respect; (B) consent to any assignment of or subletting under any Lease not in accordance with its terms; and (C) cancel or terminate any Lease or accept a surrender thereof, unless such tenant is in default thereunder; provided, however, that any Lease may be canceled if at the time of the

# UNOFFICIAL COPY

cancellation thereof a new Lease is entered into on substantially the same terms or more favorable terms as the canceled Lease.

(d) Mortgagor may enter into proposed new Leases and proposed renewals or extensions of existing Leases without the prior written consent of Mortgagee if such proposed Lease or extension: (i) covers less than five thousand (5,000) square feet of leasable area of the Mortgaged Property, or accounts for less than five percent (5%) of the total gross rental revenues of the Mortgaged Property; (ii) has an initial term of not less than three (3) years or greater than ten (10) years; (iii) provides for rental rates comparable to existing local market rates and is an arms-length transaction; (iv) does not contain any options for renewal or expansion by the tenant thereunder at rental rates which are either below comparable market levels or less than the rental rates paid by the tenant during the initial lease term; (v) is to a tenant which is experienced, creditworthy and reputable; and (vi) complies with the requirements of subparagraph (b) above. Mortgagor may enter into a proposed lease which does not satisfy all of the conditions set forth in clauses (i) through (vi) immediately above only with the prior written consent of Mortgagee, such consent not to be unreasonably withheld or delayed. Mortgagor expressly understands that any and all new or proposed leases are included in the definition of "Lease" or "Leases" as such terms may be used throughout this Mortgage and the other Loan Documents.

(e) All security Deposits of tenants, whether held in cash or any other form, shall: (x) not be commingled with any other funds of Mortgagor and, if cash, shall be deposited by Mortgagor at such commercial or savings bank or banks as may be reasonably satisfactory to Mortgagee; and (y) be applied by Mortgagor as required under the terms and provisions of the respective Lease and in accordance with applicable law. Any bond or other instrument which Mortgagor is permitted to hold in lieu of cash security deposits under any applicable legal requirements shall be maintained in full force and effect in the full amount of such deposits unless replaced by cash deposits as hereinabove described, shall be issued by an institution reasonably satisfactory to Mortgagee, shall name Mortgagee as payee or mortgagee thereunder (or at Mortgagee's option, be fully assignable to Mortgagee) and shall, in all respects, comply with any applicable legal requirements and otherwise be reasonably satisfactory to Mortgagee. Any security deposit of a tenant that is in excess of \$250,000 shall immediately be deposited with Mortgagee, to be held by Mortgagee subject to the terms of the Lease. Notwithstanding the immediately preceding sentence, it is acknowledged and agreed that the security deposit of St. John Apparel, LLC, successor-in-interest to St. John Knits, Inc. ("St. John") in the principal amount of \$500,000.00 (together with any interest accrued thereon) (the "St. John Security Deposit") shall be deposited in the Clearing Account (as defined in the Cash Management Agreement) and Mortgagee shall be a third party beneficiary thereunder. The failure to (i) deposit the St. John Security Deposit in the Clearing Account or (ii) maintain the St. John Security Deposit in the Clearing Account until disbursed pursuant to and in accordance with the terms and provisions of that certain lease dated as of May 1, 2002, between Mortgagor's predecessor-in-interest, as landlord, and St. John, as tenant, and in accordance with applicable law shall, at Mortgagee's option, constitute an Event of Default hereunder. Mortgagor shall, upon request, provide Mortgagee with evidence reasonably satisfactory to Mortgagee of Mortgagor's compliance with the foregoing. Following the occurrence and during the continuance of any Event of Default, Mortgagor shall, upon Mortgagee's request, if permitted by any applicable legal requirements, turn over to Mortgagee the security deposits (and any interest

# UNOFFICIAL COPY

thereof earned thereon) with respect to all or any portion of the Mortgaged Property, to be held by Mortgagee subject to the terms of the Leases.

10. Representations, Warranties and Covenants Concerning Loan. Mortgagor represents, warrants and covenants as follows:

(a) Organization and Existence. Mortgagor is duly organized and validly existing as a limited liability company in the State of Delaware and is in good standing under the laws of the State of Delaware and the State of Illinois and in all other jurisdictions in which Mortgagor is transacting business. Mortgagor has the power and authority to execute, deliver and perform the obligations imposed on it under the Loan Documents and to consummate the transactions contemplated by the Loan Documents.

(b) Authorization. Mortgagor has taken all necessary actions for the authorization of the borrowing on account of the Loan and for the execution and delivery of the Loan Documents, including, without limitation, that those members of Mortgagor whose approval is required by the terms of Mortgagor's organizational documents have duly approved the transactions contemplated by the Loan Documents and have authorized execution and delivery thereof by the respective signatories. No other consent by any local, state or federal agency is required in connection with the execution and delivery of the Loan Documents by Mortgagor. Mortgagor is not a "foreign person" within the meaning of Section 1445(f)(3) of the Internal Revenue Code of 1986, as amended and the related Treasury Department regulations, including temporary regulations.

(c) Valid Execution and Delivery. All of the Loan Documents requiring execution by Mortgagor have been duly and validly executed and delivered by Mortgagor.

(d) Enforceability. All of the Loan Documents executed by Mortgagor constitute valid, legal and binding obligations of Mortgagor and are fully enforceable against Mortgagor in accordance with their terms by Mortgagee and its successors, transferees and assigns, subject only to bankruptcy laws and general principles of equity.

(e) No Conflict/Violation of Law. The execution, delivery and performance of the Loan Documents by the Mortgagor will not cause or constitute a default under or conflict with the organizational documents of Mortgagor, any Guarantor or any general partner or managing member of Mortgagor or any Guarantor. The execution, delivery and performance of the obligations imposed on Mortgagor under the Loan Documents will not cause Mortgagor to be in default, including after due notice or lapse of time or both, under the provisions of any agreement, judgment or order to which Mortgagor is a party or by which Mortgagor is bound.

(f) Compliance with Applicable Laws and Regulations. All of the Improvements and the use of the Mortgaged Property comply with, and shall remain in compliance with, all applicable laws, zoning and subdivision ordinances (including, without limitation, parking requirements), rules, regulations, covenants and restrictions now or hereafter affecting or otherwise relating to the ownership, construction, occupancy, use or operation of the Mortgaged Property, including all applicable laws, rules and regulations pertaining to

# UNOFFICIAL COPY

requirements for equal opportunity, anti-discrimination, fair housing, environmental protection, zoning and land use, and Mortgagor has not received any notice of any violation of any of the foregoing. The Improvements comply with, and shall remain in compliance with, applicable health, fire and building codes. There is no evidence of any illegal activities relating to controlled substances on the Mortgaged Property. All certifications, permits, licenses, authorizations and approvals, including, without limitation, certificates of completion and occupancy permits required for the legal use, occupancy and operation of the Mortgaged Property as a retail project have been obtained and are in full force and effect (including, without limitation, any such certifications, permits, licenses, authorizations and approvals required with respect to the use of the Mortgaged Property by any tenants, franchisors or operators) and Mortgagor shall take all actions necessary to file, keep and maintain all such certification, permits, licenses, authorizations and approvals current and in full force and effect at all times and to obtain any other certifications, permits, licenses, authorizations and approvals that may hereafter be required for the legal use, occupancy and operation of the Mortgaged Property.

(g) Consents Obtained. All consents, approvals, authorizations, orders or filings with any court or governmental agency or body, if any, required for the execution, delivery and performance of the Loan Documents by Mortgagor have been obtained or made.

(h) No Litigation. There are no pending actions, suits or proceedings, arbitrations or governmental investigations against the Mortgagor, any Guarantor or, to the best of Mortgagor's knowledge, the Mortgaged Property: (i) except as previously fully disclosed in writing by Mortgagor to Mortgagee on a certification delivered by Mortgagor to Mortgagee on the date hereof; and (ii) an adverse outcome of which would affect, in any respect the value of the Mortgaged Property or the Mortgagor's performance under the Note, this Mortgage or the other Loan Documents or the Guarantor's performance under the Loan Documents to which the Guarantor is a party.

(i) Title. Mortgagor has good, marketable, and insurable title to the Mortgaged Property, possesses an unencumbered fee estate in the Premises and the Improvements and owns the Mortgaged Property free and clear of all liens, encumbrances and charges whatsoever except for those exceptions shown in the title insurance policy insuring the lien of this Mortgage (the "Permitted Exceptions"), including that certain Amended and Restated Declaration of Covenants, Conditions, Restrictions and Easements, dated as of June 11, 2003, and recorded on June 16, 2003 as document number 0316732050 in the County Recorder's Office of Cook County, Illinois (the "CC&R"), and this Mortgage is and will remain a valid and enforceable first lien on and security interest in the Mortgaged Property, subject only to said exceptions. Mortgagor is not a party to any outstanding contract or agreement providing for or requiring it to convey its interest in the Mortgaged Property to any person or entity, and no person or entity other than Mortgagor has any beneficial or equitable right, title or interest in the Mortgaged Property, or any part thereof. The possession of the Mortgaged Property has been peaceful and undisturbed and title thereto has not been disputed or questioned to the best of Mortgagor's knowledge. Mortgagor shall forever warrant, defend and preserve such title and the validity and priority of the lien of this Mortgage and shall forever warrant and defend the same to Mortgagee against the claims of all persons whomsoever.



# UNOFFICIAL COPY

(j) Permitted Exceptions. The Permitted Exceptions and the CC&R do not and will not materially and adversely affect (1) the ability of the Mortgagor to pay in full the principal and interest on the Note in a timely manner, (2) the use of the Mortgaged Property for the use currently being made thereof, the operation of the Mortgaged Property as currently being operated, or (3) the benefits of the security intended to be provided by this Mortgage.

(k) First Lien. Upon the execution by the Mortgagor and the recording of this Mortgage, and upon the execution and filing of UCC-1 financing statements or amendments thereto, the Mortgagee will have a valid first lien on the Mortgaged Property and a valid security interest in the Equipment subject to no liens, charges or encumbrances other than the Permitted Exceptions.

(l) ERISA. The Mortgagor has made and shall continue to make all required contributions to all employee benefit plans, if any, and the Mortgagor has no knowledge of any material liability which has been incurred by the Mortgagor which remains unsatisfied for any taxes or penalties with respect to any employee benefit plan or any multi-employer plan, and each such plan has been administered in compliance with its terms and the applicable provisions of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and any other federal or state law.

(m) Contingent Liabilities. The Mortgagor has no known material contingent liabilities.

(n) No Other Obligations. The Mortgagor has no material financial obligation under any indenture, mortgage, deed of trust, loan agreement or other agreement or instrument to which the Mortgagor is a party or by which the Mortgagor or the Mortgaged Property is otherwise bound, other than obligations incurred in the ordinary course of the operation of the Mortgaged Property and other than obligations under this Mortgage and the other Loan Documents.

(o) Fraudulent Conveyance. The Mortgagor (1) has not entered into the Loan or any Loan Document with the actual intent to hinder, delay, or defraud any creditor and (2) received reasonably equivalent value in exchange for its obligations under the Loan Documents. Giving effect to the Loan contemplated by the Loan Documents, the fair saleable value of the Mortgagor's assets exceed and will, immediately following the execution and delivery of the Loan Documents, exceed the Mortgagor's total liabilities, including, without limitation, subordinated, unliquidated, disputed or contingent liabilities. The fair saleable value of the Mortgagor's assets is and will, immediately following the execution and delivery of the Loan Documents, be greater than the Mortgagor's probable liabilities, including the maximum amount of its contingent liabilities or its debts as such debts become absolute and matured. The Mortgagor's assets do not and, immediately following the execution and delivery of the Loan Documents will not, constitute unreasonably small capital to carry out its business as conducted or as proposed to be conducted. The Mortgagor does not intend to, and does not believe that it will, incur debts and liabilities (including, without limitation, contingent liabilities and other commitments) beyond its ability to pay such debts as they mature (taking into account the timing and amounts to be payable on or in respect of obligations of the Mortgagor).

# UNOFFICIAL COPY

(p) Investment Company Act. The Mortgagor is not (1) an "investment company" or a company "controlled" by an "investment company," within the meaning of the Investment Company Act of 1940, as amended; (2) a "holding company" or a "subsidiary company" of a "holding company" or an "affiliate" of either a "holding company" or a "subsidiary company" within the meaning of the Public Utility Holding Company Act of 1935, as amended; or (3) subject to any other federal or state law or regulation which purports to restrict or regulate its ability to borrow money.

(q) Access/Utilities. To the best of Mortgagor's knowledge, (i) the Mortgaged Property has adequate rights of access to public ways and is served by adequate water, sewer, sanitary sewer and storm drain facilities, (ii) all public utilities necessary to the continued use and enjoyment of the Mortgaged Property as presently used and enjoyed are located in the public right-of-way abutting the Mortgaged Property, (iii) all such utilities are connected so as to serve the Mortgaged Property without passing over other property, and (iv) all roads necessary for the full utilization of the Mortgaged Property for its current purpose have been completed and dedicated to public use and accepted by all governmental authorities or are the subject of access easements for the benefit of the Mortgaged Property.

(r) Taxes Paid. Mortgagor has filed all federal, state, county and municipal tax returns required to have been filed by Mortgagor, and has paid all taxes which have become due pursuant to such returns or to any notice of assessment received by Mortgagor, and Mortgagor has no knowledge of any basis for additional assessment with respect to such taxes.

(s) Single Tax Lot; Subdivision. The Premises consists of a single tax lot or multiple tax lots; no portion of said tax lot(s) covers property other than the Premises or a portion of the Premises and no portion of the Premises lies in any other tax lot. The Premises consists of one or more legally subdivided lots.

(t) Special Assessments. Except as disclosed in the title insurance policy, there are no pending or, to the knowledge of the Mortgagor, proposed special or other assessments for public improvements or otherwise affecting the Mortgaged Property, nor, to the knowledge of the Mortgagor, are there any contemplated improvements to the Mortgaged Property that may result in such special or other assessments.

(u) Flood Zone. The Mortgaged Property is not located in a flood hazard area as defined by the Federal Insurance Administration.

(v) Seismic Exposure. The Premises are not located in Zone 3 or Zone 4 of the "Seismic Zone Map of the U.S."

(w) Misstatements of Fact. No statement of fact made by Mortgagor or RHK (as hereinafter defined) (the "Guarantor") in the Loan Documents contains any untrue statement of a material fact or omits to state any material fact necessary to make statements contained herein or therein not misleading. There is no fact presently known to the Mortgagor which has not been disclosed which adversely affects, nor as far as the Mortgagor can foresee, is



# UNOFFICIAL COPY

reasonably likely to adversely affect the business, operations or condition (financial or otherwise) of the representing party.

(x) Condition of Improvements. The Mortgaged Property has not been damaged by fire, water, wind or other cause of loss or any previous damage to the Mortgaged Property has been fully restored.

(y) No Insolvency or Judgment. Neither Mortgagor, nor any member of Mortgagor, nor any guarantor of the Loan is currently (a) the subject of or a party to any completed or pending bankruptcy, reorganization or insolvency proceeding; or (b) the subject of any judgment unsatisfied of record or docketed in any court of the state in which the Mortgaged Property is located or in any other court located in the United States. The Loan will not render the Mortgagor nor any member of Mortgagor insolvent. As used herein, the term "insolvent" means that the sum total of all of an entity's liabilities (whether secured or unsecured, contingent or fixed, or liquidated or unliquidated) is in excess of the value of all such entity's non-exempt assets, i.e., all of the assets of the entity that are available to satisfy claims of creditors.

(z) No Condemnation. No part of any property subject to this Mortgage has been taken in condemnation or other like proceeding nor is any proceeding pending, threatened or known to be contemplated for the partial or total condemnation or taking of the Mortgaged Property.

(aa) No Labor or Materialmen Claims. To the best of Mortgagor's knowledge, all parties furnishing labor and materials have been paid in full and, except for such liens or claims insured against by the policy of title insurance to be issued in connection with the Loan, and there are no mechanics', laborers' or materialmen's liens or claims outstanding for work, labor or materials affecting the Mortgaged Property, whether prior to, equal with or subordinate to the lien of this Mortgage.

(bb) No Purchase Options. No tenant, person, party, firm, corporation or other entity has an option to purchase the Mortgaged Property, any portion thereof or any interest therein.

(cc) Leases. The Mortgaged Property is not subject to any Leases other than the Leases described in the rent roll delivered to Mortgagee in connection with this Mortgage. No person has any possessory interest in the Mortgaged Property or right to occupy the same except under and pursuant to the provisions of the Leases. As of the date hereof, (i) the Mortgagor is the owner and holder of the landlord's interest under each Lease; (ii) there are no prior assignments of any Lease or any portion of Rents which are presently outstanding and have priority over the Assignment of Leases and Rents (the "Assignment of Leases and Rents"), dated the date hereof, given by Mortgagor to Mortgagee and intended to be duly recorded; (iii) copies of the Leases have been provided to Mortgagee and have not been modified or amended, except for modifications and amendments provided by Mortgagor to Mortgagee prior to the date hereof; (iv) each Lease is in full force and effect; (v) neither Mortgagor nor any tenant under any Lease is in default under any of the terms, covenants or provisions of the Lease, and Mortgagor knows of no event which, but for the passage of time or the giving of notice or both, would constitute an event of default under any Lease; (vi) there are no offsets or defenses to the payment of any

# UNOFFICIAL COPY

portion of the Rents; (vii) all Rents due and payable under each Lease have been paid in full and no said Rents have been paid more than one (1) month in advance of the due dates thereof; (viii) Mortgagor has not received any notice that any tenant of the Mortgaged Property intends to vacate their respective demised premises or otherwise cease operating at the Mortgaged Property and Mortgagor has no knowledge that any of the tenants of the Mortgaged Property intend to vacate their respective demised premises or otherwise cease operating at the Mortgaged Property; and (ix) none of the Leases at the Mortgaged Property are subject to any actions, whether voluntary or otherwise, against the tenants thereunder under the bankruptcy or insolvency laws of the United States or any state and, to Mortgagor's knowledge, no such actions have been threatened.

(dd) Appraisal. All requirements and conditions of the appraisal of the Property submitted to Mortgagee in connection with the Loan, upon which the value of the Mortgaged Property was conditioned, have been fully satisfied.

(ee) Boundary Lines. To the best of Mortgagor's knowledge, all of the Improvements which were included in determining the appraised value of the Mortgaged Property lie wholly within the boundaries and building restriction lines of the Mortgaged Property, and no improvements on adjoining properties encroach upon the Mortgaged Property, and no easements or other encumbrances upon the Premises encroach upon any of the Improvements, so as to affect the value or marketability of the Mortgaged Property except those which are insured against by title insurance.

(ff) Survey. The survey of the Mortgaged Property delivered to Mortgagee in connection with this Mortgage, has been performed by a duly licensed surveyor or registered professional engineer in the jurisdiction in which the Mortgaged Property is situated, is certified to the Mortgagee, its successors and assigns, and the title insurance company, and is in accordance with the most current minimum standards for title surveys as determined by the American Land Title Association, with the signature and seal of a licensed engineer or surveyor affixed thereto, and to Mortgagor's knowledge, does not fail to reflect any material matter affecting the Mortgaged Property or the title thereto.

(gg) Forfeiture. There has not been and shall never be committed by Mortgagor or, to the best of Mortgagor's knowledge, any other person in occupancy of or involved with the operation or use of the Mortgaged Property any act or omission affording the federal government or any state or local government the right of forfeiture as against the Mortgaged Property or any part thereof or any monies paid in performance of Mortgagor's obligations under any of the Loan Documents.

(hh) Management Agreement. The Management Agreement, dated as of the date hereof, (the "Management Agreement") between Mortgagor and Draper and Kramer, Incorporated ("Manager") pursuant to which Manager operates the Mortgaged Property is in full force and effect and there is no default or violation by any party thereunder. The fees payable to Manager under the Management Agreement, and the terms and provisions of the Management Agreement, are subordinate to this Mortgage and the Manager shall attorn to Mortgagee. The Management Agreement is the sole agreement relating to the management or operation of the Mortgaged Property as of the date hereof. Mortgagor shall not terminate, cancel, modify, renew

# UNOFFICIAL COPY

or extend the Management Agreement, or enter into any other agreement relating to the management or operation of the Mortgaged Property with Manager or any other party without the express written consent of Mortgagee, which consent shall not be unreasonably withheld and, in the case of any termination of the current Manager and/or appointment of a new Manager, shall be conditioned upon receipt by Mortgagee of a written confirmation from the Rating Agencies to the effect that such termination of the current Manager and/or appointment of a new Manager will not result in a requalification, reduction or withdrawal of any current securities rating assigned in a Securitization (as hereinafter defined). If at any time Mortgagee consents to the appointment of a new Manager, such new Manager and Mortgagor shall, as a condition of Mortgagee's consent, execute an Assignment and Subordination of Management Agreement in the form then used by Mortgagee. In no event shall any management fee for the Mortgaged Property exceed two percent percent (2%) of effective gross rental income; provided, however, if the Mortgaged Property is not being self-managed and the Manager is not an affiliate of Mortgagor, then Mortgagor may pay Manager an additional management fee (the "Additional Fee") equal to no more than one percent (1%) of effective gross rental income of the Mortgaged Property, provided, further, that the Additional Fee may only be paid from Excess Cash Flow (as defined in the Note)

(ii) No Defense/Default. The Note, this Mortgage and the other Loan Documents are not subject to any right of rescission, offset, abatement, set-off, counterclaim or defense, including the defense of usury, nor would the operation of any of the terms of the Note, this Mortgage and the other Loan Documents, or the exercise of any right thereunder, render this Mortgage unenforceable, in whole or in part, or subject to any right of rescission, offset, abatement, set-off, counterclaim or defense, including the defense of usury. The Loan complies with or is exempt from all applicable usury laws. No default, breach, violation or event of acceleration exists under this Mortgage or any other Loan Documents.

(jj) Patriot Act Compliance. (i) Mortgagor will use its good faith and commercially reasonable efforts to comply with the Patriot Act (as defined below) and all applicable requirements of governmental authorities having jurisdiction of the Mortgagor and the Mortgaged Property, including those relating to money laundering and terrorism. The Mortgagee shall have the right to audit the Mortgagor's compliance with the Patriot Act and all applicable requirements of governmental authorities having jurisdiction of the Mortgagor and the Mortgaged Property, including those relating to money laundering and terrorism. In the event that the Mortgagor fails to comply with the Patriot Act or any such requirements of governmental authorities, then the Mortgagee may, at its option, cause the Mortgagor to comply therewith and any and all reasonable costs and expenses incurred by the Mortgagee in connection therewith shall be secured by this Mortgage and the other Loan Documents and shall be immediately due and payable. For purposes hereof, the term "Patriot Act" means the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, as the same may be amended from time to time, and corresponding provisions of future laws.

(ii) Neither the Mortgagor nor any member in the Mortgagor or member of such member nor any owner of a direct or indirect interest in the Mortgagor (a) is listed on any Government Lists (as defined below), (b) is a person who has been determined by competent authority to be subject to the prohibitions contained in

# UNOFFICIAL COPY

Presidential Executive Order No. 13224 (Sept. 23, 2001) or any other similar prohibitions contained in the rules and regulations of OFAC (as defined below) or in any enabling legislation or other Presidential Executive Orders in respect thereof, (c) has been previously indicted for or convicted of any felony involving a crime or crimes of moral turpitude or for any Patriot Act Offense (as defined below), or (d) is currently under investigation by any governmental authority for alleged criminal activity. For purposes hereof, the term "Patriot Act Offense" means any violation of the criminal laws of the United States of America or of any of the several states, or that would be a criminal violation if committed within the jurisdiction of the United States of America or any of the several states, relating to terrorism or the laundering of monetary instruments, including any offense under (a) the criminal laws against terrorism; (b) the criminal laws against money laundering, (c) the Bank Secrecy Act, as amended, (d) the Money Laundering Control Act of 1986, as amended, or the (e) Patriot Act. "Patriot Act Offense" also includes the crimes of conspiracy to commit, or aiding and abetting another to commit, a Patriot Act Offense. For purposes hereof, the term "Government Lists" means (i) the Specially Designated Nationals and Blocked Persons Lists maintained by Office of Foreign Assets Control ("OFAC"), (ii) any other list of terrorists, terrorist organizations or narcotics traffickers maintained pursuant to any of the Rules and Regulations of OFAC that Mortgagee notified Mortgagor in writing is now included in "Governmental Lists", or (iii) any similar lists maintained by the United States Department of State, the United States Department of Commerce or any other government authority or pursuant to any Executive Order of the President of the United States of America that Mortgagee notified Mortgagor in writing is now included in "Governmental Lists".

(kk) Plans. As of the date hereof: (i) Mortgagor is not and does not maintain an "employee benefit plan" as defined in Section 3(3) of ERISA, which is subject to Title I of ERISA, or a "governmental plan" within the meaning of Section 3(32) of ERISA; (ii) none of the assets of Mortgagor constitute "plan assets" of a governmental plan for purposes of any state statutes regulating investments and fiduciary obligations with respect to governmental plans; and (iii) one or more of the following circumstances is true: A) equity interests in Mortgagor are publicly offered securities, within the meaning of 29 C.F.R. §2510.3-101(b)(2); (B) less than twenty-five percent (25%) of each outstanding class of equity interests in Mortgagor are held by "benefit plan investors" within the meaning of 29 C.F.R. §2510.3-101(f)(2); or (C) Mortgagor qualifies as an "operating company", a "venture capital operating company" or a "real estate operating company" within the meaning of 29 C.F.R. §2510.3-101(c), (d) or (e).

11. Single Purpose Entity/Separateness. Mortgagor represents, warrants and covenants as follows:

(a) Mortgagor has not owned, does not own and will not own any asset or property other than (i) the Mortgaged Property, and (ii) incidental personal property necessary for the ownership or operation of the Mortgaged Property.



# UNOFFICIAL COPY

(b) Mortgagor has not engaged and will not engage in any business other than the ownership, management and operation of the Mortgaged Property and Mortgagor will conduct and operate its business as presently conducted and operated.

(c) Mortgagor will not enter into any contract or agreement with any affiliate of the Mortgagor, any constituent party of Mortgagor, any guarantor of the Debt, Guarantor or any part thereof or any affiliate of any constituent party of Mortgagor or any Guarantor, except upon terms and conditions that are intrinsically fair and substantially similar to those that would be available on an arms-length basis with third parties other than any such party.

(d) Mortgagor has not incurred and will not incur any indebtedness, secured or unsecured, direct or indirect, absolute or contingent (including guaranteeing any obligation), other than the Debt except for trade payables incurred in the ordinary course of its business of owning and operating the Mortgaged Property, provided that such debt (i) is not evidenced by a note, (ii) is not outstanding for more than sixty (60) days from the date such trade payables were incurred, (iii) is with trade creditors and in amounts as are normal and reasonable under the circumstances, and (iv) does not exceed \$1,000,000.00 in the aggregate. No indebtedness other than the Debt may be secured (subordinate or pari passu) by the Mortgaged Property.

(e) Mortgagor has not made and will not make any loans or advances to any third party (including any affiliate or constituent party of Mortgagor, any Guarantor or any affiliate or constituent party of Guarantor), and shall not acquire obligations or securities of its affiliates or any constituent party.

(f) Mortgagor: (i) is solvent and agrees to give prompt notice to Mortgagee of the insolvency or bankruptcy filing of Mortgagor or any general partner, managing member or controlling shareholder of Mortgagor, or the death, insolvency or bankruptcy filing of any Guarantor; and (ii) will remain solvent.

(g) Mortgagor has done or caused to be done and will do all things necessary to observe organizational formalities and preserve its existence, and Mortgagor will not amend, modify or otherwise change the partnership certificate, partnership agreement, articles of incorporation and bylaws, articles of organization or operating agreement, trust or other organizational documents of Mortgagor.

(h) Mortgagor will maintain all of its books, records, financial statements and bank accounts separate from those of its affiliates and any constituent party of Mortgagor and Mortgagor will file its own tax returns if required by applicable law, or, if Mortgagor is part of a consolidated group for purposes of filing tax returns, to cause Mortgagor to be shown as a separate member of such group whose assets are not available to satisfy the obligations of any other member of such group. Mortgagor shall maintain its books, records, resolutions and agreements as official records.

(i) Mortgagor will be, and at all times will hold itself out to the public as, a legal entity separate and distinct from any other entity (including any affiliate of Mortgagor,

# UNOFFICIAL COPY

any constituent party of Mortgagor, any Guarantor or any affiliate of any such constituent party or Guarantor), shall correct any known misunderstanding regarding its status as a separate entity, shall conduct business in its own name, shall not identify itself or any of its affiliates as a division or part of the other and shall maintain and utilize separate stationery, invoices and checks.

(j) Mortgagor will maintain adequate capital for the normal obligations reasonably foreseeable in a business of its size and character and in light of its contemplated business operations.

(k) Neither Mortgagor nor any constituent party of Mortgagor will seek the dissolution, winding up, liquidation, consolidation or merger in whole or in part, of the Mortgagor.

(l) Mortgagor will not commingle the funds and other assets of Mortgagor with those of any affiliate or constituent party of Mortgagor, any Guarantor, or any affiliate of any constituent party or Guarantor, or any other person.

(m) Mortgagor has and will maintain its assets in such a manner that it will not be costly or difficult to segregate, ascertain or identify its individual assets from those of any affiliate or constituent party of Mortgagor, any Guarantor, or any affiliate of any constituent party or Guarantor, or any other person.

(n) Mortgagor does not and will not guarantee, become obligated for or hold itself out to be responsible for the debts or obligations of any other person or entity or the decisions or actions respecting the daily business or affairs of any other person or entity.

(o) Mortgagor will not permit any affiliate or constituent party of Mortgagor independent access to its bank accounts.

(p) Mortgagor shall pay the salaries of its own employees and maintain a sufficient number of employees in light of its contemplated business operations.

(q) The organizational documents of Mortgagor shall provide that the business and affairs of Mortgagor shall be managed by or under the direction of a board of one or more managers designated by Michigan Avenue Retail Holdings LLC, a Delaware limited liability company (the "Sole Member"), and at all times there shall be at least two (2) duly appointed individuals on the board of managers (individually an "Independent Manager" and collectively, the "Independent Managers") of the Mortgagor who are reasonably satisfactory to Mortgagee and who shall not have been at the time of such individual's appointment or at any time (except pursuant to an express provision in Mortgagor operating agreement providing for the appointment of such Independent Manager to become a "special member" upon the Sole Member ceasing to be a member of Mortgagor) while serving as an Independent Manager, and may not have been at any time during the preceding five (5) years (i) a stockholder, director (other than as an Independent Manager), officer, employee, partner, manager, member, attorney or counsel of Mortgagor or any affiliate of Mortgagor, (ii) a customer, supplier or other person who derives any of its purchases or revenues from its activities with Mortgagor or any affiliate of Mortgagor, (iii) a person or other entity controlling, controlled by or under common control with



# UNOFFICIAL COPY

any such stockholder, director, officer, employee, partner, manager, member, attorney, counsel, customer, supplier or other person, or (iv) a member of the immediate family of any such stockholder, director, officer, employee, partner, manager, member, attorney, counsel, customer, supplier or other person. As used in this definition, the term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management, policies or activities of such person, whether through ownership of voting securities, by contract or otherwise.

(r) The organizational documents of Mortgagor shall provide that the board of directors of Mortgagor shall not take any action which, under the terms of any certificate of formation or limited liability company operating agreement, requires an unanimous vote of the board of managers of Mortgagor unless at the time of such action there shall be at least two (2) members of the board of directors of Mortgagor who are Independent Managers (and such Independent Managers have participated in such vote). Mortgagor will not without the unanimous written consent of its board of directors, including the Independent Manager: (i) file or consent to the filing of any petition, either voluntary or involuntary, to take advantage of any applicable insolvency, bankruptcy, liquidation or reorganization statute, (ii) seek or consent to the appointment of a receiver, liquidator or any similar official, (iii) take any action that might cause such entity to become insolvent, or (iv) make an assignment for the benefit of creditors.

(s) The organizational documents of Mortgagor shall provide that, as long as any portion of the Debt remains outstanding, except as expressly permitted pursuant to the terms of this Mortgage, (i) the Sole Member of Mortgagor may not resign, and (ii) no additional member shall be admitted to Mortgagor.

(t) The organizational documents of Mortgagor shall provide that, as long as any portion of the Debt remains outstanding: (i) upon the occurrence of any event that causes the last remaining member of Mortgagor to cease to be a member of Mortgagor or that causes the Sole Member to cease to be a member of each Borrower (other than (A) upon an assignment by the Sole Member of all of its limited liability company interest in Mortgagor and the admission of the transferee, if permitted pursuant to the organizational documents of Mortgagor and the Loan Documents, or (B) the resignation of the Sole Member and the admission of an additional member of Mortgagor, if permitted pursuant to the organizational documents of Mortgagor and the Loan Documents), to the fullest extent permitted by law, the personal representative of such last remaining member shall be authorized to, and shall, within ninety (90) days after the occurrence of the event that terminated the continued membership of such member in Mortgagor, agree in writing (1) to continue the existence of Mortgagor, and (2) to the admission of the personal representative or its nominee or designee, as the case may be, as a substitute member of Mortgagor, effective as of the occurrence of the event that terminated the continued membership of such member in Mortgagor; (ii) the bankruptcy of the Sole Member shall not cause such Sole Member, to cease to be a member of Mortgagor and upon the occurrence of such an event, the business of Mortgagor shall continue without dissolution; and (iii) to the fullest extent permitted by law, the Sole Member shall irrevocably waive any right or power that they might have to cause Mortgagor or any of its assets to be partitioned, to cause the appointment of a receiver for all or any portion of the assets of Mortgagor, to compel any sale of all or any portion of the assets of Mortgagor pursuant to any applicable law or to file a complaint or to institute any

# UNOFFICIAL COPY

proceeding at law or in equity to cause the dissolution, liquidation, winding up or termination of Mortgagor.

(u) Mortgagor shall conduct its business and shall cause each Covered Party (as hereinafter defined) to conduct business so that the assumptions made with respect to each party (each, a "Covered Party") addressed in that certain opinion letter dated the date hereof (the "Insolvency Opinion") delivered by Loeb & Loeb, LLP in connection with the Loan shall be true and correct in all respects.

12. Maintenance of Mortgaged Property. Mortgagor shall cause the Mortgaged Property to be maintained in a good and safe condition and repair. The Improvements and the Equipment shall not be removed, demolished or materially altered or expanded (except for normal replacement of the Equipment) without the consent of Mortgagee and any other person (if any) required under the CC&R, which consent, with respect to Mortgagee, shall not be unreasonably withheld if such proposed removal, demolition, alteration or expansion is conducted in the ordinary course of business and does not detract from the economic value of the Mortgaged Property. Mortgagor shall promptly comply with all laws, orders and ordinances affecting the Mortgaged Property, or the use thereof. Mortgagor shall promptly repair, replace or rebuild any part of the Mortgaged Property that becomes damaged or worn. Mortgagor shall comply with all of the recommendations concerning the maintenance and repair of the Mortgaged Property which are contained in the inspection and engineering report which was delivered to Mortgagee in connection with the origination of the Loan.

### 13. Transfer or Encumbrance of the Mortgaged Property.

(a) (i) Mortgagor acknowledges that Mortgagee has examined and relied on the creditworthiness and experience of Mortgagor (and the creditworthiness and experience of the parties owning the direct and indirect interests in Mortgagor) in owning and operating properties such as the Mortgaged Property in agreeing to make the Loan, and that Mortgagee will continue to rely on Mortgagor's ownership of the Mortgaged Property (and on the ownership of the direct and indirect interests in Mortgagor) as a means of maintaining the value of the Mortgaged Property as security for repayment of the Debt. Mortgagor acknowledges that Mortgagee has a valid interest in maintaining the value of the Mortgaged Property so as to ensure that, should Mortgagor default in the repayment of the Debt, Mortgagee can recover the Debt by a sale of the Mortgaged Property. Mortgagor shall not, without the prior written consent of Mortgagee, sell, convey, alienate, mortgage, encumber, pledge or otherwise transfer (collectively, "Transfer") the Mortgaged Property or any part thereof or any direct or indirect interest therein or in Mortgagor or permit the Mortgaged Property or any part thereof or any direct or indirect interest therein or in Mortgagor to be transferred.

(ii) The death of any natural person which holds any direct or indirect interests in Mortgagor and/or the Mortgaged Property shall not constitute a "Transfer" so long as: (i) all of the direct and/or indirect interests of such decedent in the Mortgagor and/or the Mortgaged Property are held and remain the property of the legal representative (i.e., the administrator or the executor) of such decedent's estate; (ii) no Event of Default has occurred; (iii) the Mortgaged Property continues to be managed in a manner acceptable to Mortgagee; and (iv) within thirty (30) days of such death,

# UNOFFICIAL COPY

Mortgagor delivers notice thereof to Mortgagee and thereafter provides Mortgagee with such information as may be reasonably requested by Mortgagee as to the continued management of the Mortgaged Property. Any distribution or transfer by such legal representative of the decedent of any of the direct and/or indirect interests of the decedent in the Mortgagor and/or the Mortgaged Property (whether by operation of law, devise, bequest or otherwise) shall constitute a "Transfer" and shall be subject to the terms and provisions of this Paragraph 13 and the other applicable terms and provisions of the Loan Documents.

(b) A Transfer within the meaning of this Paragraph 13 shall be deemed to mean any voluntary or involuntary sale, hypothecation, assignment, pledge, transfer, grant of a security interest in or other encumbrance or conveyance of any direct or indirect ownership interest in Mortgagor or the Mortgaged Property, and shall include, without limitation, the following: (i) an installment sales agreement wherein Mortgagor agrees to sell the Mortgaged Property or any part thereof or any direct or indirect interest in Mortgagor for a price to be paid in installments; (ii) an agreement by Mortgagor leasing all or a substantial part of the Mortgaged Property for other than actual occupancy by a space tenant thereunder or any voluntary or involuntary sale, hypothecation, assignment, pledge, transfer, grant of a security interest in or other encumbrance or conveyance of, Mortgagor's right, title and interest in and to any Leases or any Rents; (iii) if Mortgagor, Guarantor, or any partner, member or shareholder of Mortgagor or Guarantor is a corporation, any voluntary or involuntary sale, hypothecation, assignment, pledge, transfer, grant of a security interest in or other encumbrance or conveyance of any direct or indirect interest in such corporation's stock or the creation or issuance of new stock in any of such entities (or in any entities holding any direct or indirect interests in such entities) in one or a series of transactions (including, without limitation, the creation of any preferred stock); and (iv) if Mortgagor, any Guarantor or any partner, member or shareholder of Mortgagor or any Guarantor is a limited or general partnership, joint venture or limited liability company, the voluntary or involuntary sale, hypothecation, assignment, pledge, transfer, grant of a security interest in or other encumbrance or conveyance of any direct or indirect interest in such partnership, joint venture or membership interests or the creation or issuance of new partnership, joint venture or membership interests in any of such entities (or in any entities holding any direct or indirect interests in such entities) in one or a series of transactions (including, without limitation, the creation of any preferred interests or preferred equity).

(c) Mortgagee shall not be required to demonstrate any actual impairment of its security or any increased risk of default hereunder in order to declare the Debt immediately due and payable upon a Transfer without Mortgagee's consent. This provision shall apply to every Transfer of the Mortgaged Property regardless of whether voluntary or not, or whether or not Mortgagee has consented to any previous Transfer of the Mortgaged Property.

(d) Mortgagee's consent to one Transfer of the Mortgaged Property shall not be deemed to be a waiver of Mortgagee's right to require such consent to any future Transfer. Any Transfer of the Mortgaged Property made in contravention of this paragraph shall be null and void and of no force and effect.

(e) Mortgagor agrees to bear and shall pay or reimburse Mortgagee on demand for all reasonable costs and expenses (including, without limitation, the reasonable cost

# UNOFFICIAL COPY

of any required counsel opinions relating to any requests made under this Paragraph 13, reasonable attorneys' fees and disbursements, title search costs and title insurance endorsement premiums) incurred by Mortgagee and Mortgagee's Servicer (hereinafter defined) in connection with the review, approval and documentation of any matters under this Paragraph 13 (including without limitation, the review of any matters which do not require approval of Mortgagor but which are required to be submitted to Mortgagee under this Paragraph 13).

(f) Mortgagee's consent to a Transfer will not be unreasonably withheld after consideration of all relevant factors, provided that:

(i) no Event of Default or event which with the giving of notice or the passage of time or both would constitute an Event of Default shall have occurred and remain uncured;

(ii) the proposed transferee ("Transferee") shall be a reputable entity or person of good character, creditworthy, with sufficient financial worth considering the obligations assumed and undertaken, as evidenced by financial statements and other information reasonably requested by Mortgagee, and the Transferee shall satisfy the Single Purpose Entity/Separateness requirements of Paragraph 11 above;

(iii) the Transferee and its property manager shall have sufficient experience in the ownership and management of properties similar to the Mortgaged Property, and Mortgagee shall be provided with reasonable evidence thereof (and Mortgagee reserves the right to approve the Transferee without approving the substitution of the property manager);

(iv) Mortgagee shall have received a non-consolidation opinion and confirmation in writing from the Rating Agencies (as hereinafter defined) to the effect that such transfer will not result in a re-qualification, reduction or withdrawal of any rating initially assigned or to be assigned in a Secondary Market Transaction (as hereinafter defined). The term "Rating Agencies" as used herein shall mean each of Standard & Poor's Ratings Group, a division of the McCraw-Hill Companies, Inc., Moody's Investors Service, Inc., Duff & Phelps Credit Rating Co. and Fitch Investors Service, L.P., or any other nationally-recognized statistical rating agency which has been approved by Mortgagee;

(v) the Transferee shall have executed and delivered to Mortgagee an assumption agreement in form and substance acceptable to Mortgagee, evidencing such Transferee's agreement to abide and be bound by the terms of the Note, this Mortgage and the other Loan Documents, together with such legal opinions and title insurance endorsements as may be reasonably requested by Mortgagee; and

(vi) Mortgagee shall have received an assumption fee equal to one percent (1%) of the Debt on the date of such assumption and the payment of, or reimbursement for, all costs and expenses incurred by Mortgagee in connection with such assumption (including, without limitation, reasonable attorney's fees and costs). Mortgagee may, as a condition to evaluating any requested consent to a Transfer, require



# UNOFFICIAL COPY

that Mortgagor post a cash deposit with Mortgagee in an amount equal to Mortgagee's anticipated costs and expenses in evaluating any such request for consent.

(g) Notwithstanding anything to the contrary contained in this Paragraph 13, holders of interests in Mortgagor (or holders of interests in any entity directly or indirectly holding an interest in Mortgagor) as of the date of this Mortgage (the "Interest Holders") shall have the right to transfer their interest in Mortgagor (or any entity directly or indirectly holding an interest in Mortgagor) to another person or entity who is not an Interest Holder, including, without limitation, to immediate family members for estate planning purposes, without Mortgagee's consent; provided, however, that:

(i) after taking into account any prior transfers pursuant to this Paragraph 13, whether to the proposed transferee or otherwise, no such transfer (or series of transfers) shall result in (x) the proposed transferee, together with all members of his/her immediate family or any affiliates thereof, owning in the aggregate (directly, indirectly or beneficially) more than 20% of the interests in Mortgagor (or any entity directly or indirectly holding an interest in Mortgagor), or (y) a transfer in the aggregate of more than 20% of the interests in Mortgagor as of the date hereof;

(ii) no such transfer of interest shall result in a change of control of Mortgagor (or its sole member) or the day to day operations of the Mortgaged Property;

(iii) Mortgagor shall give Mortgagee notice of such transfer together with copies of all instruments effecting such transfer not less than ten (10) days prior to the date of such transfer;

(iv) no Event of Default shall have occurred and remain uncured; and

(v) the legal and financial structure of Mortgagor and its shareholders, partners or members, and the single purpose nature and bankruptcy remoteness of Mortgagor and its shareholders, partners or members after such transfer, shall satisfy Mortgagee's then current applicable underwriting criteria and requirements, including, without limitation, the requirement, at the request of Mortgagee, to deliver written confirmations from the Rating Agencies that such transfer or series of transfers will not result in a qualification, downgrade or withdrawal of the then applicable ratings.

(h) In addition to the provisions of Paragraph 13(g) above, a transfer that occurs by inheritance, devise or bequest or by operation of law upon the death of a natural person who is an Interest Holder shall not require the consent of Mortgagee, provided that such transfer is to a member of the immediate family of such Interest Holder, or a trust established for the

# UNOFFICIAL COPY

benefit of such immediate family member, and provided further that each of the following transfer conditions (the "49% Transfer Conditions") are satisfied:

(i) after taking into account any prior transfers pursuant to this Paragraph 13, whether to the proposed transferee or otherwise, no such transfer (or series of transfers) shall result in (x) the proposed transferee, together with all members of his/her immediate family or any affiliates thereof, owning in the aggregate (directly, indirectly or beneficially) more than 49% of the interests in Mortgagor (or any entity directly or indirectly holding an interest in Mortgagor), or (y) a transfer in the aggregate of more than 49% of the interests in Mortgagor as of the date hereof;

(ii) no such transfer of interest shall result in a change of control of Mortgagor (or its sole member) or the day to day operations of the Mortgaged Property;

(iii) Mortgagor shall give Mortgagee notice of such transfer together with copies of all instruments effecting such transfer not less than ten (10) days prior to the date of such transfer;

(iv) no Event of Default shall have occurred and remain uncured; and

(v) the legal and financial structure of Mortgagor and its shareholders, partners or members, and the single purpose nature and bankruptcy remoteness of Mortgagor and its shareholders, partners or members after such transfer, shall satisfy Mortgagee's then current applicable underwriting criteria and requirements, including without limitation the requirement, at the request of Mortgagee, to deliver written confirmations from the Rating Agencies that such transfer or series of transfers will not result in a qualification, downgrade or withdrawal of the then applicable ratings.

(i) Notwithstanding anything to the contrary contained in this Paragraph 13, a transfer that occurs as a result of the death of either Ross Hilton Kemper ("RHK") and/or Linda R. Kemper ("LRK") (each, a "Major Interest Holder") shall not require the consent of Mortgagee provided that such transfer is to the then remaining living Major Interest Holder, and provided further that each of the following transfer conditions are satisfied:

(i) no such transfer of interest shall result in a change of the day to day operations of the Mortgaged Property;

(ii) Mortgagor shall give Mortgagee notice of the death of such Major Interest Holder and such transfer together with copies of all instruments effecting such transfer not less than thirty (30) business days following the date of the death of such Major Interest Holder;

# UNOFFICIAL COPY

(iii) no Event of Default shall have occurred and remain uncured;

(iv) the single purpose nature and bankruptcy remoteness of Mortgagor shall continue to satisfy the terms and provisions of this Mortgage; and

(v) in the event the transfer is as a result of the death of RHK, then (1) LRK shall assume all of RHK's obligations under that certain (x) Indemnity and Guaranty Agreement, (y) Hazardous Substances Indemnity Agreement and (z) Payment Guaranty Agreement, each dated as of the date hereof, made by RHK in favor of Mortgagee (collectively, the "Indemnity Agreements"), pursuant to assumption agreements acceptable to Mortgagee, in its sole but good faith discretion, and (2) Mortgagor shall provide to Mortgagee an opinion of counsel in form and substance and delivered by counsel reasonably satisfactory to Mortgagee stating, among other things, that such assumption agreements are enforceable against LRK in accordance with their terms and that the Indemnity Agreements and the other Loan Documents, as applicable, are enforceable against the LRK in accordance with their respective terms.

(j) Notwithstanding anything to the contrary contained in this Paragraph 13, in the event of the death of both Major Interest Holders, Mortgagee's consent to a Transfer will not be unreasonably withheld after consideration of all relevant factors, provided that:

(i) Mortgagor shall give Mortgagee notice of the death of the Major Interest Holders not less than thirty (30) business days following the date of the deaths of such Major Interest Holders;

(ii) no Event of Default or event which with the giving of notice or the passage of time or both would constitute an Event of Default shall have occurred and remain uncured;

(iii) the proposed transferee ("Transferee") shall be a reputable entity or person of good character, creditworthy, with sufficient financial worth considering the obligations assumed and undertaken, as evidenced by financial statements and other information reasonably requested by Mortgagee (provided if the Transferee is an immediate family member of RHK, and the Transferee delivers to Mortgagee a minimum net worth statement (of not less than \$10,000,000.00) certified by an accountant acceptable to Mortgagee, in its sole but good faith discretion, then no other financial statements shall be required in connection with this subclause (ii)), and the Transferee shall satisfy the Single Purpose Entity/Separateness requirements of Paragraph 11 above;

(iv) the Transferee and its property manager shall have sufficient experience in the ownership and management of properties similar to the Mortgaged Property (or Mortgagee may elect, in its sole but good faith discretion, not to require the Transferee to have experience in the ownership and management of properties similar to the Mortgaged Property provided that the property manager has been previously approved by the Mortgagee or Mortgagee is satisfied, in its sole but good faith

# UNOFFICIAL COPY

discretion, that the property manager has sufficient experience in the ownership and management of properties similar to the Mortgaged Property and such property manager is otherwise satisfactory to Mortgagee in its sole but good faith discretion), and Mortgagee shall be provided with reasonable evidence thereof (and Mortgagee reserves the right to approve the Transferee without approving the substitution of the property manager);

(v) Mortgagee shall have received a non-consolidation opinion and confirmation in writing from the Rating Agencies to the effect that such transfer will not result in a re-qualification, reduction or withdrawal of any rating initially assigned or to be assigned in a Secondary Market Transaction (as hereinafter defined);

(vi) the Transferee shall have executed and delivered to Mortgagee an assumption agreement in form and substance acceptable to Mortgagee, evidencing such Transferee's agreement to abide and be bound by the terms of the Note, this Mortgage and the other Loan Documents, together with such legal opinions and title insurance endorsements as may be reasonably requested by Mortgagee; and

(vii) (1) a Replacement Guarantor (as hereinafter defined) shall assume all of RHK's obligations under the Indemnity Agreements pursuant to assumption agreements acceptable to Mortgagee, in its sole but good faith discretion, and (2) Mortgagor shall provide to Mortgagee an opinion of counsel in form and substance and delivered by counsel reasonably satisfactory to Mortgagee stating, among other things, that such assumption agreements are enforceable against the Replacement Guarantor in accordance with their terms and that the Indemnity Agreements and the other Loan Documents, as applicable, are enforceable against the Replacement Guarantor in accordance with their respective terms. A "Replacement Guarantor" shall mean a reputable person of good character, creditworthy, with a minimum net worth of \$10,000,000, as evidenced by financial statements and other information requested by Mortgagee (all of which shall be determined by Mortgagee in its sole but good faith discretion); provided if the Replacement Guarantor is an immediate family member of RHK, and the Replacement Guarantor delivers to Mortgagee a minimum net worth statement (of not less than \$10,000,000.00) certified by an accountant acceptable to Mortgagee, in its sole but good faith discretion, then no other financial statements shall be required in connection with this subclause (vii).

(k) For purposes of this Paragraph 13(k) a change of control of Mortgagor (or its sole member) shall be deemed to have occurred if there is any change in the identity of the individual or entities or group of individuals or entities who have the right, by virtue of any partnership agreement, articles of incorporation, by-laws, articles of organization, operating agreement or any other agreement, with or without taking any formative action, to cause Mortgagor (or its sole member) to take some action or to prevent, restrict or impede Mortgagor from taking some action which, in either case, Mortgagor could take or could refrain from taking were it not for the rights of such individuals; and (ii) an "immediate family member" shall mean a spouse or a child of any Interest Holder.



# UNOFFICIAL COPY

14. Estoppel Certificates and No Default Affidavits. Mortgagor shall, within ten (10) days after request by Mortgagee, furnish Mortgagee with a statement, duly acknowledged and certified, setting forth (i) the original principal amount of the Note, (ii) the unpaid principal amount of the Note, (iii) the rate of interest of the Note, (iv) the date installments of interest and/or principal were last paid, (v) any offsets or defenses to the payment of the Debt, if any, and (vi) a statement that the Note, this Mortgage and the other Loan Documents are valid, legal and binding obligations and have not been modified or if modified, giving particulars of such modification. Mortgagor shall, within ten (10) days after request by Mortgagee, furnish Mortgagee with a certificate reaffirming all representations and warranties of Mortgagor set forth herein and in the other Loan Documents as of the date requested by Mortgagee or, to the extent of any changes to any such representations and warranties, so stating such changes.

15. Changes in Laws Regarding Taxation. If any law is enacted or adopted or amended after the date of this Mortgage which deducts the Debt from the value of the Mortgaged Property for the purpose of taxation or which imposes a tax, either directly or indirectly, on the Debt or Mortgagee's interest in the Mortgaged Property, Mortgagor will pay such tax, with interest and penalties thereon, if any. In the event Mortgagee is advised by counsel chosen by it that the payment of such tax or interest and penalties by Mortgagor would be unlawful or taxable to Mortgagee or unenforceable or provide the basis for a defense of usury, then in any such event, Mortgagee shall have the option, upon not less than ninety (90) days written notice to Mortgagor, to declare the Debt immediately due and payable.

16. No Credits on Account of the Debt. Mortgagor will not claim or demand or be entitled to any credit or credits on account of the Debt for any part of the Taxes or Other Charges assessed against the Mortgaged Property, or any part thereof, and no deduction shall otherwise be made or claimed from the assessed value of the Mortgaged Property, or any part thereof, for real estate tax purposes by reason of this Mortgage or the Debt. In the event such claim, credit or deduction shall be required by law, Mortgagee shall have the option, upon not less than ninety (90) days written notice to Mortgagor, to declare the Debt immediately due and payable.

## 17. Financial Statements.

(a) The financial statements heretofore furnished to Mortgagee are, as of the dates specified therein, complete and correct and fairly present the financial condition of the Mortgagor and any other persons or entities that are the subject of such financial statements, and are prepared in accordance with generally accepted accounting principles. Mortgagor does not have any contingent liabilities, liabilities for taxes, unusual forward or long-term commitments or unrealized or anticipated losses from any unfavorable commitments that are known to Mortgagor and reasonably likely to have a materially adverse effect on the Mortgaged Property or the operation thereof as a retail project, except as referred to or reflected in said financial statements. Since the date of such financial statements, there has been no materially adverse change in the financial condition, operation or business of Mortgagor from that set forth in said financial statements.

(b) Mortgagor will maintain full and accurate books of accounts and other records reflecting the results of the operations of the Mortgaged Property and will furnish to

# UNOFFICIAL COPY

Mortgagee on or before forty-five (45) days after the end of each calendar quarter the following items, each certified by Mortgagor as being true and correct: (i) a written statement (rent roll) dated as of the last day of each such calendar quarter identifying each of the Leases by the term, space occupied, rental required to be paid, security deposit paid, any rental concessions, and identifying any defaults or payment delinquencies thereunder; and (ii) monthly and year to date operating statements prepared for each calendar month during each such calendar quarter, noting Net Operating Income (as defined in the Cash Management Agreement), Gross Income from Operations (as defined in the Cash Management Agreement), and Operating Expenses (as defined in the Cash Management Agreement) each of which shall include an itemization of actual (not pro forma) capital expenditures and other information necessary and sufficient under generally accepted accounting practices to fairly represent the financial position and results of operation of the Mortgaged Property during such calendar month, all in form satisfactory to Mortgagee; (iii) a property balance sheet for each such calendar quarter; (iv) a comparison of the budgeted income and expenses and the actual income and expenses for each calendar quarter and year to date together with a detailed explanation of any variances of five percent (5%) or more between budgeted and actual amounts for such quarterly periods and year to date; and (v) a calculation reflecting the Debt Service Coverage Ratio (hereinafter defined) as of the last day of each such calendar quarter. Until the final sale of the Loan in a Secondary Market Transaction (hereinafter defined) has occurred, the Mortgagor shall furnish monthly each of the items listed in the immediately preceding sentence (collectively, the "Pre-Securitization Financials") within twenty (20) days after the end of such month. Within ninety (90) days following the end of each calendar year, Mortgagor shall furnish statements of its financial affairs and condition including a balance sheet and a statement of profit and loss for the Mortgagor in such detail as Mortgagee may request, and setting forth the financial condition and the income and expenses for the Mortgaged Property for the immediately preceding calendar year prepared and audited by an independent accounting firm or independent certified public accountant approved by Mortgagee (which approval shall not be unreasonably withheld). Mortgagor's annual financial statements shall be accompanied by: (x) a certificate executed by the chief financial officer of Mortgagor or the general partner of Mortgagor, as applicable, stating that each such annual financial statement presents fairly the financial condition of the Mortgaged Property being reported upon and has been prepared in accordance with generally accepted accounting principles consistently applied; and (y) payment to Mortgagee of an annual fee in the amount of \$250.00 in respect of Mortgagee's review of the financial statements delivered by Mortgagor pursuant to this Paragraph 17(b). At any time and from time to time Mortgagor shall deliver to Mortgagee or its agents such other financial data as Mortgagee or its agents shall reasonably request with respect to the ownership, maintenance, use and operation of the Mortgaged Property.

(c) In the event that Mortgagor fails to provide Mortgagee with Pre-Securitization Financials on or before the date they are due, and if such failure continues for five (5) business days following notice of same from Mortgagee, then, in addition to all other rights and remedies of Mortgagee hereunder, Mortgagor shall pay to Mortgagee, at Mortgagee's option and in its sole discretion, an amount equal to \$1,500 for each Pre-Securitization Financial that is not delivered.

# UNOFFICIAL COPY

## 18. Further Acts, Etc.

Mortgagor will, without expense to Mortgagee, do, execute, acknowledge and deliver all and every such further acts, deeds, conveyances, mortgages, assignments, subordinations, notices of assignment, Uniform Commercial Code financing statements or continuation statements, transfers and assurances as Mortgagee shall, from time to time, require, for the better assuring, conveying, assigning, transferring, and confirming unto Mortgagee the property and rights hereby mortgaged, given, granted, bargained, sold, alienated, enfeoffed, conveyed, confirmed, pledged, assigned and hypothecated or intended now or hereafter so to be, or which Mortgagor may be or may hereafter become bound to convey or assign to Mortgagee, or for carrying out the intention or facilitating the performance of the terms of this Mortgage or for filing, registering or recording this Mortgage or for facilitating the sale of the Loan and the Loan Documents as described in Paragraph 51 below.

19. Recording of Mortgage, Etc. Mortgagor forthwith upon the execution and delivery of this Mortgage and thereafter, from time to time, will cause this Mortgage, and any security instrument creating a lien or security interest or evidencing the lien hereof upon the Mortgaged Property and each instrument of further assurance to be filed, registered or recorded in such manner and in such places as may be required by any present or future law in order to publish notice of and fully to protect the lien or security interest hereof upon, and the interest of Mortgagee in, the Mortgaged Property. Mortgagor will pay all filing, registration or recording fees, and all expenses incident to the preparation, execution and acknowledgment of this Mortgage, any mortgage supplemental hereto, any security instrument with respect to the Mortgaged Property and any instrument of further assurance, and all federal, state, county and municipal taxes (including, without limitation, documentary stamp taxes), duties, imposts, assessments and charges arising out of or in connection with the execution and delivery of this Mortgage, any mortgage supplemental hereto, any security instrument with respect to the Mortgaged Property or any instrument of further assurance, except where prohibited by law so to do.

20. Events of Default. The Debt shall become immediately due and payable at the option of Mortgagee upon the happening of any one or more of the following events of default (each an "Event of Default"):

(a) if any portion of the Interest Payment Amount (as defined in the Note) or the Monthly Required Principal Amount (as defined in the Note) or any amount required to be paid to any of the Escrow Funds (collectively, the "Scheduled Payments") is not paid when due;

(b) for any payment other than a Scheduled Payment, if the same is not paid within five (5) days after the date on which such payment is due;

(c) subject to Mortgagor's right to contest as provided herein, if any of the Taxes or Other Charges are not paid when the same are due and payable;

(d) if (x) the Policies are not kept in full force and effect, or (y) the Policies are not delivered to Mortgagee within five (5) business days of request;

# UNOFFICIAL COPY

(e) if Mortgagor effects a Transfer without Mortgagee's prior written consent or otherwise violates Paragraph 13 hereof.

(f) if any representation, covenant or warranty of Mortgagor, or of any Guarantor, made herein or in any other Loan Document or in any certificate, report, financial statement or other instrument or document now or hereafter furnished to Mortgagee shall have been false or misleading in any material respect when made;

(g) if Mortgagor or any Guarantor shall make an assignment for the benefit of creditors or if Mortgagor shall generally not be paying its debts as they become due;

(h) if a receiver, liquidator or trustee of Mortgagor or of any Guarantor shall be appointed or if Mortgagor or any Guarantor shall be adjudicated a bankrupt or insolvent, or if any petition for bankruptcy, reorganization or arrangement pursuant to federal bankruptcy law, or any similar federal or state law, shall be filed by or against, consented to, or acquiesced in by, Mortgagor or any Guarantor or if any proceeding for the dissolution or liquidation of Mortgagor or any Guarantor shall be instituted; however, if such appointment, adjudication, petition or proceeding was involuntary and not consented to by Mortgagor or such Guarantor, upon the same not being discharged, stayed or dismissed within sixty (60) days;

(i) if Mortgagor shall be in default under any other mortgage or security agreement covering any part of the Mortgaged Property whether it be superior or junior in lien to this Mortgage;

(j) subject to Mortgagor's right to contest as provided herein, if the Mortgaged Property becomes subject to any mechanic's or materialman's lien which is due and payable or other lien except a lien for local real estate taxes and assessments not then due and payable;

(k) if Mortgagor fails to cure properly any violations of laws or ordinances affecting or which may be interpreted to affect the Mortgaged Property within thirty (30) days after Mortgagor first receives notice of any such violations; provided, however, if such violation of laws or ordinances is reasonably susceptible of cure, but not within such thirty (30) day period, then Mortgagor may be permitted up to an additional sixty (60) days (or such lesser period of time as required by applicable law) to cure such default provided that Mortgagor diligently and continuously pursues such cure and provided further that Mortgagor promptly provides Mortgagee with a written report and evidence reasonably satisfactory to Mortgagee of the progress of Mortgagor's cure efforts from time to time as requested by Mortgagee;

(l) except as permitted in this Mortgage, the alteration, improvement, demolition or removal of any of the Improvements without the prior consent of Mortgagee;

(m) if Mortgagor shall continue to be in default under any term, covenant, or provision of the Note or any of the other Loan Documents, beyond applicable cure periods contained in those documents;

(n) if Mortgagor fails to cure a default under any other term, covenant or provision of this Mortgage within thirty (30) days after Mortgagor first receives notice of any



# UNOFFICIAL COPY

such default; provided, however, if such default is reasonably susceptible of cure, but not within such thirty (30) day period, then Mortgagor may be permitted up to an additional sixty (60) days (but in no event beyond the Maturity Date (as defined in the Note) to cure such default provided that Mortgagor diligently and continuously pursues such cure and provided further that Mortgagor promptly provides Mortgagee with a written report and evidence reasonably satisfactory to Mortgagee of the progress of Mortgagor's cure efforts from time to time as requested by Mortgagee;

(o) if, without Mortgagee's prior written consent, (i) the Management Agreement is terminated by Mortgagor, (ii) there is a material change in the Management Agreement or (iii) if there shall be a material default by Mortgagor under the Management Agreement;

(p) if Mortgagor ceases to continuously operate the Mortgaged Property or any material portion thereof as a retail project for any reason whatsoever (other than temporary cessation in connection with any repair or renovation thereof undertaken with the consent of Mortgagee);

(q) if Mortgagor fails to reimburse Mortgagee in full, within ten (10) days of demand therefor, for Hedge Losses incurred as provided in Paragraph 3(c)(ii) or Paragraph 8(d) hereof;

(r) if Mortgagor fails to comply with the terms and provisions of Paragraph 11 hereof;

(s) if Mortgagor shall continue to be in default under any term, covenant or provision of the CC&R beyond any applicable cure periods; or

(t) if Mortgagor fails to comply with the terms and conditions of Paragraph 57 hereof.

21. Late Payment Charge. If (x) any portion of the Debt (excluding the principal sum which is due on the Maturity Date) is not paid on the date on which it is due, or (y) the principal sum which is due on the Maturity Date is not paid within ninety (90) days following the Maturity Date (provided, however, that the foregoing shall not in any way constitute any type of extension of the Maturity Date, it being acknowledged and agreed that the failure to make all payments due on the Maturity Date shall constitute an Event of Default) Mortgagor shall pay to Mortgagee upon demand an amount equal to the lesser of five percent (5%) of such unpaid portion of the Debt or the maximum amount permitted by applicable law in order to defray a portion of the expenses incurred by Mortgagee in handling and processing such delinquent payment and to compensate Mortgagee for the loss of the use of such delinquent payment, and such amount shall be secured by this Mortgage.

22. Right To Cure Defaults. Upon the occurrence of any Event of Default or if Mortgagor fails to make any payment or to do any act as herein provided, Mortgagee may, but without any obligation to do so and without notice to or demand on Mortgagor and without releasing Mortgagor from any obligation hereunder, make or do the same in such manner and to such extent as Mortgagee may deem necessary to protect the security hereof. Mortgagee may

# UNOFFICIAL COPY

pay for the account and on behalf of Mortgagor any amount which Mortgagor is obligated to pay, under the provisions of the CC&R upon default by Mortgagor in paying the same, and Mortgagee may perform any act, employ any person or entity, and cast any vote on behalf of Mortgagor which Mortgagor may or is obligated to do pursuant to the CC&R or any rules and regulations promulgated under the CC&R upon default by Mortgagor in doing the same. Mortgagee is authorized to enter upon the Mortgaged Property for such purposes or appear in, defend, or bring any action or proceeding to protect its interest in the Mortgaged Property or to foreclose this Mortgage or collect the Debt, and the cost and expense thereof (including reasonable attorneys' fees and disbursements to the extent permitted by law), with interest at the Default Rate (as defined in the Note) for the period after notice from Mortgagee that such cost or expense was incurred to the date of payment to Mortgagee, shall constitute a portion of the Debt, shall be secured by this Mortgage and the other Loan Documents and shall be due and payable to Mortgagee upon demand.

## 23. Remedies.

(a) Upon the occurrence of any Event of Default, Mortgagee may take such action, without notice or demand, as it deems advisable to protect and enforce its rights against Mortgagor and in and to the Mortgaged Property by Mortgagee itself or otherwise, including, without limitation, the following actions, each of which may be pursued concurrently or otherwise, at such time and in such order as Mortgagee may determine, in its sole discretion, without impairing or otherwise affecting the other rights and remedies of Mortgagee:

- (i) declare the entire Debt to be immediately due and payable;
- (ii) provided by applicable law, institute a proceeding or proceedings, judicial or nonjudicial, by advertisement or otherwise, for the complete foreclosure of this Mortgage in which case the Mortgaged Property or any interest therein may be sold for cash or upon credit in one or more parcels or in several interests or portions and in any order or manner;
- (iii) with or without entry, to the extent permitted and pursuant to the procedures provided by applicable law, institute proceedings for the partial foreclosure of this Mortgage for the portion of the Debt then due and payable, subject to the continuing lien of this Mortgage for the balance of the Debt not then due;
- (iv) sell for cash or upon credit the Mortgaged Property or any part thereof and all estate, claim, demand, right, title and interest of Mortgagor therein and rights of redemption thereof, pursuant to the power of sale or otherwise, at one or more sales, as an entirety or in parcels, at such time and place, upon such terms and after such notice thereof as may be required or permitted by law;
- (v) institute an action, suit or proceeding in equity for the specific performance of any covenant, condition or agreement contained herein, or in any of the other Loan Documents;
- (vi) recover judgment on the Note either before, during or after any proceedings for the enforcement of this Mortgage;

# UNOFFICIAL COPY

(vii) take action to recover the Debt, or any portion thereof, or to enforce any covenant hereof without prejudice to the right of Mortgagee thereafter to foreclose this Mortgage;

(viii) apply for the appointment of a trustee, receiver, liquidator or conservator of the Mortgaged Property, without notice and without regard for the adequacy of the security for the Debt and without regard for the solvency of the Mortgagor, any Guarantor or of any person, firm or other entity liable for the payment of the Debt;

(ix) enforce Mortgagee's interest in the Leases and Rents and enter into or upon the Mortgaged Property, either personally or by its agents, nominees or attorneys and dispossess Mortgagor and its agents and servants therefrom, and thereupon Mortgagee may (A) use, operate, manage, control, insure, maintain, repair, restore and otherwise deal with all and every part of the Mortgaged Property and conduct the business thereat; (B) complete any construction on the Mortgaged Property in such manner and form as Mortgagee deems advisable; (C) make alterations, additions, renewals, replacements and improvements to or on the Mortgaged Property; (D) exercise all rights and powers of Mortgagor with respect to the Mortgaged Property, whether in the name of Mortgagor or otherwise, including, without limitation, the right to make, cancel, enforce or modify Leases, obtain and evict tenants, and demand, sue for, collect and receive all Rents; and (E) apply the receipts from the Mortgaged Property to the payment of Debt, after deducting therefrom all reasonable expenses (including reasonable attorneys' fees and disbursements) incurred in connection with the aforesaid operations and all amounts necessary to pay the taxes, assessments, insurance and other charges in connection with the Mortgaged Property, as well as just and reasonable compensation for the services of Mortgagee, its counsel, agents and employees;

(x) require Mortgagor to pay monthly in advance to Mortgagee, or any receiver appointed to collect the Rents, the fair and reasonable rental value for the use and occupation of any portion of the Mortgaged Property occupied by Mortgagor or any related and/or affiliated party and require Mortgagor to vacate and surrender possession to Mortgagee of the Mortgaged Property or to such receiver and, in default thereof, evict Mortgagor or any related and/or affiliated party by summary proceedings or otherwise;

(xi) enforce Mortgagee's rights and remedies under the Cash Management Agreement;

(xii) pursue such other rights and remedies as may be available at law or in equity or under the Uniform Commercial Code; or

(xiii) exercise any right or remedy which Mortgagor may exercise under the CC&R.

In the event of a sale, by foreclosure or otherwise, of less than all of the Mortgaged Property, this Mortgage shall continue as a lien on the remaining portion of the Mortgaged Property.

# UNOFFICIAL COPY

(b) The proceeds of any sale made under or by virtue of this paragraph, together with any other sums which then may be held by Mortgagee under this Mortgage, whether under the provisions of this paragraph or otherwise, shall be applied by Mortgagee to the payment of the Debt in such priority and proportion as Mortgagee in its sole discretion shall deem proper.

(c) Mortgagee may adjourn from time to time any sale by it to be made under or by virtue of this Mortgage by announcement at the time and place appointed for such sale or for such adjourned sale or sales; and, except as otherwise provided by any applicable provision of law, Mortgagee, without further notice or publication, may make such sale at the time and place to which the same shall be so adjourned.

(d) Upon the completion of any sale or sales pursuant hereto, Mortgagee, or an officer of any court empowered to do so, shall execute and deliver to the accepted purchaser or purchasers a good and sufficient instrument, or good and sufficient instruments, conveying, assigning and transferring all estate, right, title and interest in and to the property and rights sold. Any sale or sales made under or by virtue of this paragraph, whether made under the power of sale herein granted or under or by virtue of judicial proceedings or of a judgment or decree of foreclosure and sale, shall operate to divest all the estate, right, title, interest, claim and demand whatsoever, whether at law or in equity, of Mortgagor in and to the properties and rights so sold, and shall be a perpetual bar both at law and in equity against Mortgagor and against any and all persons claiming or who may claim the same, or any part thereof from, through or under Mortgagor.

(e) Upon any sale made under or by virtue of this paragraph, whether made under a power of sale or under or by virtue of judicial proceedings or of a judgment or decree of foreclosure and sale, Mortgagee may bid for and acquire the Mortgaged Property or any part thereof and in lieu of paying cash therefor may make settlement for the purchase price by crediting upon the Debt the net sales price after deducting therefrom the expenses of the sale and costs of the action and any other sums which Mortgagee is authorized to deduct under this Mortgage.

(f) No recovery of any judgment by Mortgagee and no levy of an execution under any judgment upon the Mortgaged Property or upon any other property of Mortgagor shall affect in any manner or to any extent the lien of this Mortgage upon the Mortgaged Property or any part thereof, or any liens, rights, powers or remedies of Mortgagee hereunder, but such liens, rights, powers and remedies of Mortgagee shall continue unimpaired as before.

(g) Mortgagee may terminate or rescind any proceeding or other action brought in connection with its exercise of the remedies provided in this paragraph at any time before the conclusion thereof, as determined in Mortgagee's sole discretion and without prejudice to Mortgagee.

(h) The rights and remedies of Mortgagee under this Mortgage shall be separate, distinct and cumulative and none shall be given effect to the exclusion of the others. Mortgagee may resort to any remedies and the security given by the Note, this Mortgage or in



# UNOFFICIAL COPY

any of the other Loan Documents in whole or in part, and in such portions and in such order as determined by Mortgagee in its sole discretion. No such action shall in any way be considered a waiver or election of any rights, benefits or remedies evidenced or provided by the Note, this Mortgage or in any of the other Loan Documents. The failure of Mortgagee to exercise any right, remedy or option provided in the Note, this Mortgage or any of the other Loan Documents, shall not be deemed a waiver of such right, remedy or option or of any covenant or obligation secured by the Note, this Mortgage or any of the other Loan Documents. No acceptance by Mortgagee of any payment after the occurrence of any Event of Default and no payment by Mortgagee of any obligation for which Mortgagor is liable hereunder shall be deemed to waive or cure any Event of Default with respect to Mortgagor, or Mortgagor's liability to pay such obligation. No sale of all or any portion of the Mortgaged Property, no forbearance on the part of Mortgagee, and no extension of time for the payment of the whole or any portion of the Debt or any other indulgence given by Mortgagee to Mortgagor, shall operate to release or in any manner affect the interest of Mortgagee in the remaining Mortgaged Property or the liability of Mortgagor to pay the Debt. No waiver by Mortgagee shall be effective unless it is in writing and then only to the extent specifically stated. All reasonable costs and expenses of Mortgagee in exercising its rights and remedies under this Paragraph 23 (including reasonable attorneys' fees and disbursements to the extent permitted by law), shall be paid by Mortgagor immediately upon notice from Mortgagee, with interest at the Default Rate for the period after written demand therefor from Mortgagee and such costs and expenses shall constitute a portion of the Debt and shall be secured by this Mortgage.

(i) The interests and rights of Mortgagee under the Note, this Mortgage and the other Loan Documents shall not be impaired by any indulgence, including (i) any renewal, extension or modification which Mortgagee may grant with respect to any of the Debt, (ii) any surrender, compromise, release, renewal, extension, exchange or substitution which Mortgagee may grant with respect to the Mortgaged Property or any portion thereof; or (iii) any release or indulgence granted to any maker, endorser, Guarantor or surety of any of the Debt.

(j) In the event the Loan is repaid in whole or in part in connection with the exercise by Mortgagee of any of its remedies hereunder upon the occurrence of an Event of Default (including, without limitation, a foreclosure sale of the Property) and such repayment occurs prior to the Maturity Date, then Mortgagor shall be required to pay Mortgagee, in addition to such repayment, accrued interest and all other sums due under this Mortgage, the (i) Proportionate Yield Maintenance Premium, and (ii) if such repayment occurs prior to the final sale of the Loan in a Secondary Market Transaction, Hedge Losses (as defined in Paragraph 3(c)(ii)).

**24. Right of Entry.** In addition to any other rights or remedies granted under this Mortgage, Mortgagee and its agents shall have the right to enter and inspect the Mortgaged Property at any reasonable time during the Term. Mortgagor agrees to pay to Mortgagee within ten (10) days after demand, an annual inspection fee in the amount of \$250.00 in respect of annual inspections of the Mortgaged Property to be made by or on behalf of Mortgagee. Additionally, the cost of all inspections or audits shall be borne by Mortgagor should Mortgagee determine that an Event of Default exists, including the cost of all follow up or additional investigations or inquiries deemed reasonably necessary by Mortgagee. The cost of such

# UNOFFICIAL COPY

inspections, if not paid for by Mortgagor following demand, may be added to the Debt and shall bear interest thereafter until paid at the Default Rate.

25. Security Agreement. This Mortgage is both a real property mortgage and a "security agreement" within the meaning of the Uniform Commercial Code. The Mortgaged Property includes both real and personal property and all other rights and interests, whether tangible or intangible in nature, of Mortgagor in the Mortgaged Property. Mortgagor by executing and delivering this Mortgage has granted and hereby grants to Mortgagee, as security for the Debt, a security interest in the Mortgaged Property to the full extent that the Mortgaged Property may be subject to the Uniform Commercial Code (said portion of the Mortgaged Property so subject to the Uniform Commercial Code being called in this paragraph the "Collateral"). This Mortgage shall also constitute a "fixture filing" for the purposes of the Uniform Commercial Code. As such, this Mortgage covers all items of the Collateral that are or are to become fixtures. Information concerning the security interest herein granted may be obtained from the parties at the addresses of the parties set forth in the first paragraph of this Mortgage. If an Event of Default shall occur, Mortgagee, in addition to any other rights and remedies which it may have shall have and may exercise immediately and without demand, any and all rights and remedies granted to a secured party upon default under the Uniform Commercial Code, including, without limiting the generality of the foregoing, the right to take possession of the Collateral or any part thereof, and to take such other measures as Mortgagee may deem necessary for the care, protection and preservation of the Collateral. Upon request or demand of Mortgagee, Mortgagor shall at its expense assemble the Collateral and make it available to Mortgagee at a convenient place acceptable to Mortgagee. Mortgagor shall pay to Mortgagee on demand any and all actual expenses, including reasonable attorneys' fees and disbursements, incurred or paid by Mortgagee in protecting its interest in the Collateral and in enforcing the rights hereunder with respect to the Collateral. Any notice of sale, disposition or other intended action by Mortgagee with respect to the Collateral sent to Mortgagor in accordance with the provisions hereof at least five (5) days prior to such action, shall constitute commercially reasonable notice to Mortgagor. The proceeds of any disposition of the Collateral, or any part thereof, may be applied by Mortgagee to the payment of the Debt in such priority and proportions as Mortgagee in its sole discretion shall deem proper. Mortgagor hereby irrevocably appoints Mortgagee as its attorney-in-fact, coupled with an interest, to file with the appropriate public office on its behalf any financing or other statements signed only by Mortgagee, as secured party, in connection with the Collateral covered by this Mortgage.

26. Actions and Proceedings. Mortgagee has the right to appear in and defend any action or proceeding brought with respect to the Mortgaged Property and to bring any action or proceeding, in the name and on behalf of Mortgagor, which Mortgagee, in its sole discretion, decides should be brought to protect its interest in the Mortgaged Property. Mortgagee shall, at its option, be subrogated to the lien of any mortgage or other security instrument discharged in whole or in part by the Debt, and any such subrogation rights shall constitute additional security for the payment of the Debt.

27. Contest of Certain Claims. Notwithstanding the provisions of Paragraphs 4 and 20 hereof, Mortgagor shall not be in default for failure to pay or discharge Taxes, Other Charges or mechanic's or materialman's lien asserted against the Mortgaged Property if, and so long as, (a) Mortgagor shall have provided Mortgagee with written notice thereof within five (5)

# UNOFFICIAL COPY

days of obtaining knowledge thereof; (b) Mortgagor shall diligently and in good faith contest the same by appropriate legal proceedings which shall operate to prevent the enforcement or collection of the same and the sale of the Mortgaged Property or any part thereof, to satisfy the same; (c) Mortgagor shall have furnished to Mortgagee a cash deposit, an indemnity bond satisfactory to Mortgagee with a surety satisfactory to Mortgagee, or other security or assurance acceptable to Mortgagee in its sole discretion in the amount of the Taxes, Other Charges or mechanic's or materialman's lien claim, plus a reasonable additional sum to pay all costs, interest and penalties that may be imposed or incurred in connection therewith, to assure payment of the matters under contest and to prevent any sale or forfeiture of the Mortgaged Property or any part thereof; (d) Mortgagor shall promptly upon final determination thereof pay the amount of any such Taxes, Other Charges or claim so determined, together with all costs, interest and penalties which may be payable in connection therewith; (e) the failure to pay the Taxes, Other Charges or mechanic's or materialman's lien claim does not constitute a default under any other deed of trust, mortgage or security interest covering or affecting any part of the Mortgaged Property; and (f) notwithstanding the foregoing, Mortgagor shall immediately upon request of Mortgagee pay any such Taxes, Other Charges or claim (and if Mortgagor shall fail so to do, Mortgagee may, but shall not be required to, pay or cause to be discharged or bonded against), if in the opinion of Mortgagee, the Mortgaged Property or any part thereof or interest therein may be in danger of being sold, forfeited, foreclosed, terminated, cancelled or lost. Mortgagee may pay over any such cash deposit or part thereof to the claimant entitled thereto at any time when, in the judgment of Mortgagee, the entitlement of such claimant is established.

28. Marshalling and Other Matters. Mortgagor hereby waives, to the extent permitted by law, the benefit of all appraisal, valuation, stay, extension, reinstatement and redemption laws now or hereafter in force and all rights of marshalling in the event of any sale hereunder of the Mortgaged Property or any part thereof or any interest therein. Further, Mortgagor hereby expressly waives any and all rights of redemption from sale under any order or decree of foreclosure of this Mortgage on behalf of Mortgagor, and on behalf of each and every person acquiring any interest in or title to the Mortgaged Property subsequent to the date of this Mortgage and on behalf of all persons to the extent permitted by applicable law.

29. Hazardous Substances. Mortgagor hereby represents and warrants to Mortgagee that, to the best of Mortgagor's knowledge and except as disclosed in that certain Phase I Environmental Site Assessment dated June 10, 2005 prepared by LandAmerica (the "Environmental Report"): (a) the Mortgaged Property is not in violation of any local, state, federal or other governmental authority, statute, ordinance, code, order, decree, law, permits, rule or regulation pertaining to or imposing liability or standards of conduct concerning environmental regulation, contamination or clean-up including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act, as amended ("CERCLA"), the Resource Conservation and Recovery Act, as amended ("RCRA"), the Emergency Planning and Community Right-to-Know Act of 1986, as amended, the Hazardous Substances Transportation Act, as amended, the Solid Waste Disposal Act, as amended, the Clean Water Act, as amended, the Clean Air Act, as amended, the Toxic Substance Control Act, as amended, the Safe Drinking Water Act, as amended, the Occupational Safety and Health Act, as amended, any state super-lien and environmental clean-up statutes and all regulations adopted in respect to the foregoing laws (collectively, "Environmental Laws"); (b) the Mortgaged Property is not subject to any private or governmental lien or judicial or administrative notice or



# UNOFFICIAL COPY

action or inquiry, investigation, claim or threatened claim relating to hazardous and/or toxic, dangerous and/or regulated, substances, wastes, materials, raw materials which include hazardous constituents, pollutants or contaminants including without limitation, petroleum, tremolite, anthophyllite, actinolite or polychlorinated biphenyls and any other substances or materials which are included under or regulated by Environmental Laws or which are considered by scientific opinion to be otherwise dangerous in terms of the health, safety and welfare of humans (collectively, "Hazardous Substances"); (c) no Hazardous Substances are or have been (including the period prior to Mortgagor's acquisition of the Mortgaged Property), discharged, generated, treated, disposed of or stored on, incorporated in, or removed or transported from the Mortgaged Property other than in compliance with all Environmental Laws; (d) no Hazardous Substances are present in, on or under any nearby real property which could migrate to or otherwise affect the Mortgaged Property; (e) no underground storage tanks exist on any of the Mortgaged Property; and (f) no Mold is present in the indoor air of the Mortgaged Property at concentrations exceeding ambient air levels and no visible Mold is present on any building materials or surfaces at the Mortgaged Property for which the Guidelines (as defined below) recommends or requires removal thereof by remediation professionals, and Mortgagor is not aware of any conditions at the Mortgaged Property that are likely to result in the presence of Mold in the indoor air at concentrations that exceed ambient air levels or on building materials or surfaces that would require such removal. As used herein the term "Mold" shall mean fungi that reproduces through the release of spores or the splitting of cells or other means, including but not limited to mold, mildew, fungi, fungal spores, fragments and metabolites such as mycotoxins and microbial volatile organic compounds. So long as Mortgagor owns or is in possession of the Mortgaged Property, Mortgagor (i) shall keep or cause the Mortgaged Property to be kept free from Hazardous Substances and in compliance with all Environmental Laws including without limitation any and all environmental permits, (ii) shall not install or permit to be installed on the Premises any underground storage tank, (iii) shall remove such Hazardous Substances and/or cure such violations and/or remove such threats, as applicable, as required by law (or as shall be required by Mortgagee in the case of removal which is not required by law, but in response to the opinion of a licensed hydrogeologist, licensed environmental engineer or other qualified consultant engaged by Mortgagee), promptly after Mortgagor becomes aware of same, at Mortgagor's sole expense and (iv) shall comply with all of the recommendations contained in the Environmental Report. Nothing herein shall prevent Mortgagor from recovering such expenses from any other party that may be liable for such removal or cure. The obligations and liabilities of Mortgagor under this Paragraph 29 shall survive any termination, satisfaction, or assignment of this Mortgage and the exercise by Mortgagee of any of its rights or remedies hereunder, including, without limitation, the acquisition of the Mortgaged Property by foreclosure or a conveyance in lieu of foreclosure; provided, however, that so long as Mortgagor delivers to Mortgagee an Acceptable Environmental Assessment (as defined below) for the Mortgaged Property, then Mortgagor shall have no obligations or liabilities under this Paragraph 29 in connection with any condition that first arises from and after the date the Loan is paid in full. For purposes hereof, the term "Acceptable Environmental Assessment" shall mean a phase I environmental assessment or study of the entire Property (or such other form of environmental assessment or study reasonably acceptable to Mortgagee) performed by an environmental engineer or consulting firm reasonably approved by Mortgagee in writing, and which environmental assessment or study shall be in form and substance reasonably acceptable to Mortgagee and shall not indicate the presence or potential presence of any Hazardous Substances



# UNOFFICIAL COPY

or the violation or potential violation of any Environmental Laws or contain any recommendations for any environmental remediation or for any further environmental investigations or studies.

30. Asbestos. Mortgagor represents and warrants that, to the best of Mortgagor's knowledge and except as disclosed in the Environmental Report, no asbestos or any substance or material containing asbestos ("Asbestos") is located on the Mortgaged Property. Mortgagor (i) shall not install in the Mortgaged Property, nor permit to be installed in the Mortgaged Property, Asbestos, (ii) shall remove any friable Asbestos promptly upon discovery to the satisfaction of Mortgagee, at Mortgagor's sole expense, and (iii) shall in all instances comply with, and ensure compliance by all occupants of the Mortgaged Property with, all applicable federal, state and local laws, ordinances, rules and regulations with respect to Asbestos, and shall keep the Mortgaged Property free and clear of any liens imposed pursuant to such laws, ordinances, rules or regulations. The obligations and liabilities of Mortgagor under this Paragraph 30 shall survive any termination, satisfaction, or assignment of this Mortgage and the exercise by Mortgagee of any of its rights or remedies hereunder, including but not limited to, the acquisition of the Mortgaged Property by foreclosure or a conveyance in lieu of foreclosure.

31. Environmental Monitoring. Mortgagor shall give prompt written notices to Mortgagee: (a) if Mortgagor shall become aware of any Hazardous Substances on or near the Mortgaged Property and/or if Mortgagor shall become aware that the Mortgaged Property is in direct or indirect violation of any Environmental Laws and/or if Mortgagor shall become aware of any condition on or near the Mortgaged Property which shall pose a threat to the health, safety or welfare of humans, (b) of any proceeding or inquiry by any party with respect to the presence of any Hazardous Substance, Asbestos or Mold on, under, from or about the Mortgaged Property, (c) of all claims made or threatened by any third party against Mortgagor or the Mortgaged Property relating to any loss or injury resulting from any Hazardous Substance, Asbestos or Mold, and (d) of Mortgagor's discovery of any occurrence or condition on any real property adjoining or in the vicinity of the Mortgaged Property that could cause the Mortgaged Property to be subject to any investigation or cleanup pursuant to any Environmental Law. Mortgagor shall promptly provide to Mortgagee a copy of any written notice, order or other communication received by Mortgagor concerning or in connection with any actual or threatened claim, proceeding, investigation or inquiry involving Hazardous Materials, Asbestos and/or Mold on, under, in or near the Mortgaged Property. Mortgagor shall permit Mortgagee to join and participate in, as a party if it so elects, any legal proceedings or actions initiated with respect to the Mortgaged Property in connection with any Environmental Law or Hazardous Substance or Mold, and Mortgagor shall pay all reasonable attorneys' fees and disbursements incurred by Mortgagee in connection therewith. Upon Mortgagee's request, at any time and from time to time while this Mortgage is in effect, Mortgagor shall provide (i) an inspection or audit of the Mortgaged Property satisfactory in scope to the Mortgagee prepared by a licensed hydrogeologist or licensed environmental engineer approved by Mortgagee indicating the presence or absence of Hazardous Substances on, in or near the Mortgaged Property, and (ii) an inspection or audit of the Mortgaged Property satisfactory in scope to the Mortgagee and prepared by a duly qualified engineering or consulting firm approved by Mortgagee, indicating the presence or absence of Asbestos, Lead-Based Paint ("LBP") or Mold on the Mortgaged Property. The cost and expense of such audit or inspection shall be paid by Mortgagor not more frequently than once every five (5) calendar years after the final sale of the Loan in a Secondary

# UNOFFICIAL COPY

Market Transaction unless an Event of Default has occurred and is continuing or Mortgagee, in its good faith judgment, determines that reasonable cause exists for the performance of an environmental inspection or audit of the Mortgaged Property, then such inspections or audits described in the preceding sentence shall be at Mortgagor's sole expense. If Mortgagor fails to provide any inspection or audit required pursuant to this Paragraph 31 within thirty (30) days after such request, Mortgagee may order same, and Mortgagor hereby grants to Mortgagee and its employees and agents access to the Mortgaged Property and a license to undertake such inspection or audit. The cost of such inspection or audit may be added to the Debt and shall bear interest after written demand therefor until paid at the Default Rate. In the event that any environmental site assessment report prepared in connection with such inspection or audit recommends that an operations and maintenance plan be implemented for Asbestos, LBP or any Hazardous Substance, Mortgagor shall cause such operations and maintenance plan to be prepared and implemented at Mortgagor's expense upon request of Mortgagee. In the event that any investigation, site monitoring, containment cleanup, removal, restoration or other work of any kind is reasonably necessary or desirable under an applicable Environmental Law (the "Remedial Work"), Mortgagor shall commence and thereafter diligently prosecute to completion all such Remedial Work within thirty (30) days after written demand by Mortgagee for performance thereof (or such shorter period of time as may be required under applicable law). All Remedial Work shall be performed by contractors approved in advance by Mortgagee, and under the supervision of a consulting engineer approved by Mortgagee. All costs and expenses of such Remedial Work shall be paid by Mortgagor including, without limitation, Mortgagee's reasonable attorneys' fees and disbursements incurred in connection with monitoring or review of such Remedial Work. In the event that any environmental assessment report, inspection or audit reveals the presence of Mold at concentrations exceeding ambient air levels or the presence of Mold on any building materials or surfaces at the Mortgaged Property for which the EPA Mold Guidelines recommends or requires removal thereof by remediation professionals, Mortgagor shall immediately remediate the Mold and perform post-remedial clearance sampling in accordance with the guidelines set forth in "Mold Remediation in Schools and Commercial Buildings" prepared by the U.S. Environmental Protection Agency (the "EPA Mold Guidelines"). Following abatement of the Mold, Mortgagor shall prepare and implement an Operations and Maintenance Plan for Mold and Moisture acceptable to the Mortgagee and in accordance with the guidelines issued by the National Multi Housing Council.

## 32. Handicapped Access.

(a) Mortgagor agrees that the Mortgaged Property shall at all times strictly comply to the extent applicable with the requirements of the Americans with Disabilities Act of 1990, the Fair Housing Amendments Act of 1988 (if applicable), all state and local laws and ordinances related to handicapped access and all rules, regulations, and orders issued pursuant thereto including, without limitation, the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (collectively "Access Laws"). Mortgagor agrees to give prompt notice to Mortgagee of the receipt by Mortgagor of any written complaints related to violation of any Access Laws and of the commencement of any proceedings or investigations which relate to compliance with applicable Access Laws.

(b) Notwithstanding any provisions set forth herein or in any other document regarding Mortgagee's approval of alterations of the Mortgaged Property, Mortgagor

# UNOFFICIAL COPY

shall not alter the Mortgaged Property (including without limitation construction of tenant improvements by Mortgagor or any of its tenants) in any manner which would increase Mortgagor's responsibilities for compliance with the applicable Access Laws without the prior written approval of Mortgagee. Mortgagee may condition any such approval upon receipt of a certificate of compliance with Access Laws from an architect, engineer, or other person acceptable to Mortgagee.

33. Indemnification. In addition to any other indemnifications provided herein or in the other Loan Documents, Mortgagor shall protect, defend, indemnify and save harmless Mortgagee from and against all liabilities, obligations, claims, demands, damages, penalties, causes of action, losses, fines, costs and expenses (including, without limitation, reasonable attorneys' fees and disbursements), imposed upon or incurred by or asserted against Mortgagee by reason of (a) ownership of this Mortgage, the Mortgaged Property or any interest therein or receipt of any Rents; (b) any accident, injury to or death of persons or loss of or damage to property occurring in, on or about the Mortgaged Property or any part thereof or on the adjoining sidewalks, curbs, adjacent property or adjacent parking areas, streets or ways; (c) any use, nonuse or condition in, on or about the Mortgaged Property or any part thereof or on adjoining sidewalks, curbs, adjacent property or adjacent parking areas, streets or ways; (d) any failure on the part of Mortgagor to perform or comply with any of the terms of this Mortgage; (e) 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) the presence, disposal, escape, seepage, leakage, spillage, discharge, emission, release, or threatened release of any Hazardous Substance or Asbestos on, from, or affecting the Mortgaged Property; (g) any personal injury (including wrongful death) or property damage (real or personal) arising out of or related to such Hazardous Substance or Asbestos; (h) any lawsuit brought or threatened, settlement reached, or government order relating to such Hazardous Substance or Asbestos; (i) any violation of the Environmental Laws, which are based upon or in any way related to such Hazardous Substance or Asbestos including, without limitation, the costs and expenses of any Remedial Work, attorney and consultant fees and disbursements, investigation and laboratory fees, court costs, and litigation expenses; (j) any failure of the Mortgaged Property to comply with any Access Laws; (k) any representation or warranty made in the Note, this Mortgage or any of the other Loan Documents being false or misleading in any material respect as of the date such representation or warranty was made; (l) any claim by brokers, finders or similar persons claiming to be entitled to a commission in connection with any Lease or other transaction involving the Mortgaged Property or any part thereof under any legal requirement or any liability asserted against Mortgagee with respect thereto; and (m) the claims of any lessee of any or any portion of the Mortgaged Property or any person acting through or under any lessee or otherwise arising under or as a consequence of any Lease. Any amounts payable to Mortgagee by reason of the application of this paragraph shall be secured by this Mortgage and shall become immediately due and payable and shall bear interest at the Default Rate from the date loss or damage is sustained by Mortgagee until paid. The obligations and liabilities of Mortgagor under this Paragraph 33 shall survive the termination, satisfaction, or assignment of this Mortgage and the exercise by Mortgagee of any of its rights or remedies hereunder, including, but not limited to, the acquisition of the Mortgaged Property by foreclosure or a conveyance in lieu of foreclosure.

34. Notices. Any notice, report, demand or other instrument authorized or required to be given or furnished ("Notices") shall be in writing and shall be given as follows:

# UNOFFICIAL COPY

(a) by hand delivery; (b) by deposit in the United States mail as first class certified mail, return receipt requested, postage paid; (c) by overnight nationwide commercial courier service; or (d) by telecopy transmission (other than for notices of default) with a confirmation copy to be delivered by duplicate notice in accordance with any of clauses (a)-(c) above, in each case, addressed to the party intended to receive the same at the following address(es):

Mortgagee: UBS Real Estate Investments Inc.  
1285 Avenue of the Americas, 11th Floor  
New York, New York 10019  
Attention: Robert Pettinato  
Telecopier: (212) 713-4391

with copies to: Schulte Roth & Zabel LLP  
919 Third Avenue  
New York, New York 10022  
Attention: Bruce S. Cybul, Esq.  
Telecopier: (212) 593-5955

and: Wachovia Bank, National Association  
8739 Research Drive, URP4  
Charlotte, North Carolina 28285-1075  
Attention: David Tucker  
Telecopier: (704) 593-7735  
or any successor servicer of the Loan.

Mortgagor: Michigan Avenue Retail LLC  
c/o Loeb & Loeb, LLP  
10100 Santa Monica Boulevard, Suite 2200  
Los Angeles, California 90067  
Attention: Governor Gray Davis  
Telecopier: (310) 382-2200

with a copy to: Loeb & Loeb, LLP  
10100 Santa Monica Boulevard, Suite 2200  
Los Angeles, California 90067  
Attention: Susan V. Noonoo, Esq.  
Telecopier: (310) 282-2200

Any party may change the address to which any such Notice is to be delivered, by furnishing ten (10) days written notice of such change to the other parties in accordance with the provisions of this Paragraph 34. Notices shall be deemed to have been given on the date they are actually received; provided, that the inability to deliver Notices because of a changed address of which no Notice was given, or rejection or refusal to accept any Notice offered for delivery shall be deemed to be receipt of the Notice as of the date of such inability to deliver or rejection or refusal to accept delivery. Notice for either party may be given by its respective counsel. Additionally, notice from Mortgagee may also be given by the Servicer.



# UNOFFICIAL COPY

35. Non-Waiver. The failure of Mortgagee to insist upon strict performance of any term hereof shall not be deemed to be a waiver of any term of this Mortgage. Any consent or approval by Mortgagee in any single instance shall not be deemed or construed to be Mortgagee's consent or approval in any like matter arising at a subsequent date.

36. No Oral Change. This Mortgage, and any provisions hereof, may not be modified, amended, waived, extended, changed, discharged or terminated orally or by any act or failure to act on the part of Mortgagor or Mortgagee, but only by an agreement in writing signed by the party against whom enforcement of any modification, amendment, waiver, extension, change, discharge or termination is sought.

37. Liability. If Mortgagor consists of more than one person, the obligations and liabilities of each such person hereunder shall be joint and several. Subject to the provisions hereof requiring Mortgagee's consent to any Transfer, this Mortgage shall be binding upon and inure to the benefit of Mortgagor and Mortgagee and their respective successors and assigns forever.

38. Inapplicable Provisions. If any term, covenant or condition of the Note or this Mortgage is held to be invalid, illegal or unenforceable in any respect, the Note and this Mortgage shall be construed without such provision.

39. Headings, Etc. The headings and captions of various paragraphs of this Mortgage are for convenience of reference only and are not to be construed as defining or limiting, in any way, the scope or intent of the provisions hereof.

40. Duplicate Originals. This Mortgage may be executed in any number of duplicate originals and each such duplicate original shall be deemed to be an original.

41. Definitions. Unless the context clearly indicates a contrary intent or unless otherwise specifically provided herein, words used in this Mortgage may be used interchangeably in singular or plural form and the word "Mortgagor" shall mean "each Mortgagor and any subsequent owner or owners of the Mortgaged Property or any part thereof or any interest therein," the word "Mortgagee" shall mean "Mortgagee and any subsequent holder of the Note," the word "Note" shall mean "the Note and any other evidence of indebtedness secured by this Mortgage," the word "person" shall include an individual, corporation, limited liability company, partnership, trust, unincorporated association, government, governmental authority, and any other entity, the words "Mortgaged Property" shall include any portion of the Mortgaged Property and any interest therein and the words "attorneys' fees" shall include any and all attorneys' fees, paralegal and law clerk fees, including, without limitation, fees at the pre-trial, trial and appellate levels incurred or paid by Mortgagee in protecting its interest in the Mortgaged Property and Collateral and enforcing its rights hereunder. Whenever the context may require, any pronouns used herein shall include the corresponding masculine, feminine or neuter forms, and the singular form of nouns and pronouns shall include the plural and vice versa.

# UNOFFICIAL COPY

42. Homestead. Mortgagor hereby waives and renounces all homestead and exemption rights provided by the Constitution and the laws of the United States and of any state, in and to the Mortgaged Property as against the collection of the Debt, or any part hereof.

43. Assignments. Mortgagee shall have the right to assign or transfer its rights under this Mortgage without limitation. Any assignee or transferee shall be entitled to all the benefits afforded Mortgagee under this Mortgage.

44. Waiver of Jury Trial. **MORTGAGOR HEREBY AGREES NOT TO ELECT A TRIAL BY JURY OF ANY ISSUE TRIABLE OF RIGHT BY JURY, AND FOREVER WAIVES ANY RIGHT TO TRIAL BY JURY FULLY TO THE EXTENT THAT ANY SUCH RIGHT SHALL NOW OR HEREAFTER EXIST WITH REGARD TO THE NOTE, THIS MORTGAGE, OR THE OTHER LOAN DOCUMENTS, 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 MORTGAGOR, AND IS INTENDED TO ENCOMPASS INDIVIDUALLY EACH INSTANCE AND EACH ISSUE AS TO WHICH THE RIGHT TO A TRIAL BY JURY WOULD OTHERWISE ACCRUE. MORTGAGEE IS HEREBY AUTHORIZED TO FILE A COPY OF THIS PARAGRAPH IN ANY PROCEEDING AS CONCLUSIVE EVIDENCE OF THIS WAIVER BY MORTGAGOR.**

45. Miscellaneous.

(a) (i) Mortgagor covenants and agrees that during the Term, unless Mortgagee shall have previously consented in writing, (a) Mortgagor will take no action that would cause it to become an "employee benefit plan" as defined in 29 C.F.R. Section 2510.3-101, or "assets of a governmental plan" subject to regulation under the state statutes, and (b) Mortgagor will not sell, assign or transfer the Mortgaged Property, or any portion thereof or interest therein, to any transferee that does not execute and deliver to Mortgagee its written assumption of the obligations of this covenant. Mortgagor further covenants and agrees to protect, defend, indemnify and hold Mortgagee harmless from and against all loss, cost, damage and expense (including without limitation, all reasonable attorneys' fees and excise taxes, costs of correcting any prohibited transaction or obtaining an appropriate exemption) that Mortgagee may incur as a result of Mortgagor's breach of this covenant. This covenant and indemnity shall survive the extinguishment of the lien of this Mortgage by foreclosure or action in lieu thereof; furthermore, the foregoing indemnity shall supersede any limitations on Mortgagor's liability under any of the Loan Documents.

(ii) Mortgagor covenants and agrees to deliver to the Mortgagee, on the date hereof and from time to time throughout the term of the Loan, such certifications or other evidence as requested by the Mortgagee in its sole discretion, that (x) Mortgagor is not and does not maintain an "employee benefit plan" as defined in Section 3(3) of ERISA, which is subject to Title I of ERISA, or a "governmental plan" within the meaning of Section 3(32) of ERISA; (y) none of the assets of Mortgagor constitute "plan assets" of a governmental plan for purposes of any state statutes regulating investments and fiduciary obligations with respect to governmental plans; and (z) one or more of the following circumstances is true: (A) equity interests in

# UNOFFICIAL COPY

Mortgagor are publicly offered securities, within the meaning of 29 C.F.R. §2510.3-101(b)(2); (B) less than twenty-five percent (25%) of each outstanding class of equity interests in Mortgagor are held by "benefit plan investors" within the meaning of 29 C.F.R. §2510.3-101(f)(2); or (C) Mortgagor qualifies as an "operating company", a "venture capital operating company" or a "real estate operating company" within the meaning of 29 C.F.R. §2510.3-101(c), (d) or (e).

(iii) Mortgagor will not sell, assign or transfer the Mortgaged Property, or any portion thereof or interest therein, to any transferee that does not execute and deliver to Mortgagee its written assumption of the obligations of this covenant.

(iv) Mortgagor further covenants and agrees to protect, defend, indemnify and hold Mortgagee harmless from and against all loss, cost, damage and expense (including without limitation, all reasonable attorneys' fees and excise taxes, costs of correcting any prohibited transaction or obtaining an appropriate exemption) that Mortgagee may incur as a result of Mortgagor's breach of this covenant. This covenant and indemnity shall survive the extinguishment of the lien of this Mortgage by foreclosure or action in lieu thereof; furthermore, the foregoing indemnity shall supersede any limitations on Mortgagor's liability under any of the Loan Documents.

(b) The Loan Documents contain the entire agreement between Mortgagor and Mortgagee relating to or connected with the Loan. Any other agreements relating to or connected with the Loan not expressly set forth in the Loan Documents are null and void and superseded in their entirety by the provisions of the Loan Documents.

(c) Mortgagor represents and warrants to Mortgagee that there has not been committed by Mortgagor or any other person in occupancy of or involved with the operation or use of the Mortgaged Property any act or omission affording the federal government or any state or local government the right of forfeiture as against the Mortgaged Property or any part thereof or any monies paid in performance of Mortgagor's obligations under the Note or under any of the other Loan Documents. Mortgagor hereby covenants and agrees not to commit, permit or suffer to exist any act, omission or circumstance affording such right of forfeiture. In furtherance thereof, Mortgagor hereby indemnifies Mortgagee and agrees to defend and hold Mortgagee harmless from and against any loss, damage or injury by reason of the breach of the covenants and agreements or the representations and warranties set forth in this paragraph. Without limiting the generality of the foregoing, the filing of formal charges or the commencement of proceedings against Mortgagor or all or any part of the Mortgaged Property under any federal or state law for which forfeiture of the Mortgaged Property or any part thereof or of any monies paid in performance of Mortgagor's obligations under the Loan Documents is a potential result, shall, at the election of Mortgagee, constitute an Event of Default hereunder without notice or opportunity to cure.

(d) Mortgagor acknowledges that, with respect to the Loan, Mortgagor is relying solely on its own judgment and advisors in entering into the Loan without relying in any manner on any statements, representations or recommendations of Mortgagee or any parent, subsidiary or affiliate of Mortgagee. Mortgagor acknowledges that Mortgagee engages in the business of real estate financings and other real estate transactions and investments which may

# UNOFFICIAL COPY

be viewed as adverse to or competitive with the business of the Mortgagor or its affiliates. Mortgagor acknowledges that it is represented by competent counsel and has consulted counsel before executing the Loan Documents.

(e) Mortgagor covenants and agrees to pay Mortgagee upon receipt of written notice from Mortgagee, all reasonable costs and expenses (including, without limitation, reasonable attorneys' fees and disbursements and the costs and expenses of any title insurance company, appraisers, engineers or surveyors) incurred by Mortgagee in connection with (i) the preparation, negotiation, execution and delivery of this Mortgage and the other Loan Documents; (ii) Mortgagor's performance of and compliance with Mortgagor's respective agreements and covenants contained in this Mortgage and the other Loan Documents on its part to be performed or complied with after the date hereof; (iii) Mortgagee's performance and compliance with all agreements and conditions contained in this Mortgage and the other Loan Documents on its part to be performed or complied with after the date hereof; (iv) the negotiation, preparation, execution, delivery and administration of any consents, amendments, waivers or other modifications to this Mortgage and the other Loan Documents; (v) the filing and recording fees and expenses, title insurance fees and expenses, and other similar expenses incurred in creating and perfecting the lien in favor of Mortgagee pursuant to this Mortgage and the other Loan Documents; and (vi) the enforcement by Mortgagee of any right and/or remedies of Mortgagee under this Mortgage or under any of the other Loan Documents.

(f) This Mortgage shall be governed by and construed in accordance with the laws of the State in which the Premises are located and the applicable laws of the United States of America. This Mortgage has been negotiated by parties knowledgeable in the matters contained herein, with the advice of counsel, and is to be construed and interpreted in absolute parity, and shall not be construed or interpreted against any party by reason of such party's preparation of the initial or any subsequent draft of the Loan Documents or this Mortgage.

(g) This Mortgage may be executed in two or more counterparts, each of which shall constitute an original but all of which together shall constitute but one and the same instrument.

(h) Mortgagor represents to Mortgagee that: (i) Mortgagor has not dealt with any broker in connection with the Loan other than PH Capital ("Broker"); (ii) Mortgagor agrees to pay any and all amounts owed by Mortgagor to Broker in connection with the Loan; (iii) in the event the Mortgagor has engaged any brokers other than Broker, Mortgagor agrees to pay any and all amounts, including all commissions and other similar fees, owing to said brokers; and (iv) Mortgagor agrees to indemnify and defend Mortgagee from and against all costs and expenses incurred by Mortgagee as a result of a breach of any of the foregoing. Mortgagor acknowledges that Mortgagee may pay additional compensation, fees or other payments ("Fees") to PH Capital and/or other brokers, finders, correspondents or other parties (collectively, "Referrer") related to the origination, sale and/or securitization of the Loan, in addition to any other payments due from Mortgagor and that Mortgagor has had an opportunity to discuss the specifics of any such payments with Referrer as Mortgagor deemed necessary. Such Fees may include direct, one-time payments, payments based on volume of referrals, profit-sharing payments, and/or an ongoing financial interest in the Loan, however in no event shall such Fees with respect to the Loan exceed 1% of the original principal balance of the Loan. In



# UNOFFICIAL COPY

addition, the Referrer may act as a sub-servicer for the Loan and receive additional fees relating to that activity and Mortgagor consents to Referrer acting as sub-servicer for the Loan. Mortgagor acknowledges and agrees that: (1) the payment of such Fees may create a potential conflict of interest for the Referrer in its relationship with Mortgagor and Mortgagee is not responsible for any recommendation, services (sub-servicing or otherwise ) or advice given to Mortgagor by the Referrer, (2) no fiduciary or other special relationship exists or shall exist between Mortgagor and Mortgagee; and (3) Mortgagor has independently determined to proceed with the Loan because the Loan from Mortgagee is in its best interest and not because of any fee Mortgagee may have paid to Referrer. Nothing herein, whether expressed or implied, is intended to confer any rights or remedies upon any other person and shall not create any third party beneficiary rights whatsoever. Mortgagor acknowledges its agreement and consent to the foregoing by initialing here    AHK   .

46. Limitation on Mortgagor's Liability. Anything contained in this Mortgage to the contrary notwithstanding, the liability of Mortgagor for the Debt and for the performance of all other agreements, covenants and obligations contained herein and in the Loan Documents shall be limited as set forth in Paragraph 11 of the Note.

#### 47. Defeasance.

(a) Provided no Event of Default has occurred and is continuing, at any time after the date which (i) is two years after the "startup day," within the meaning of Section 860G(a)(9) of the Internal Revenue Code of 1986, as amended from time to time or any successor statute (the "Code"), of a "real estate mortgage investment conduit," within the meaning of Section 860D of the Code, that holds the Note or (ii) is three years after the date hereof, whichever shall first occur, and before the Maturity Date (as defined in the Note), Mortgagor may cause the release of the Mortgaged Property from the lien of this Mortgage and the other Loan Documents upon the satisfaction of the following conditions:

(i) not less than thirty (30) days prior written notice shall be given to Mortgagee specifying a date (the "Release Date") on which the Defeasance Collateral (as hereinafter defined) is to be delivered, such Release Date only to occur on a Payment Date (as defined in the Note);

(ii) all accrued and unpaid interest and all other sums due under the Note and under the other Loan Documents up to the Release Date, including, without limitation, all costs and expenses incurred by Mortgagee or its agents in connection with such release (including, without limitation, the fees and expenses incurred by attorneys and accountants in connection with the review of the proposed Defeasance Collateral and the preparation of the Defeasance Security Agreement (as hereinafter defined) and related documentation), shall be paid in full on or prior to the Release Date; and

# UNOFFICIAL COPY

(iii) Mortgagor shall deliver to Mortgagee on or prior to the Release Date:

(A) an amount equal to that which is sufficient to purchase direct, non-callable obligations of the United States of America (which must be government securities within the meaning of Treasury regulations section 1.860G-2(a)(8)(i)) that provide for payments (1) on or prior to, but as close as possible to, all successive scheduled Payment Dates after the Release Date through the Maturity Date, and (2) in amounts equal to or greater than the Monthly Debt Service Payment Amount required under the Note through the Maturity Date together with payment in full of the unpaid principal balance of the Note as of the Maturity Date (the "Defeasance Collateral"), each of which shall be duly endorsed by the holder thereof as directed by Mortgagee or accompanied by a written instrument of transfer in form and substance wholly satisfactory to Mortgagee (including, without limitation, such instruments as may be required by the depository institution holding such securities to effectuate book-entry transfers and pledges through the book-entry facilities of such institution) in order to create a first priority security interest therein in favor of the Mortgagee in conformity with all applicable state and federal laws governing granting of such security interests;

(B) a pledge and security agreement, in form and substance satisfactory to Mortgagee in its sole discretion, creating a first priority security interest in favor of Mortgagee in the Defeasance Collateral (the "Defeasance Security Agreement"), which shall provide, among other things, that any excess received by Mortgagee from the Defeasance Collateral over the amounts payable by Mortgagor hereunder shall be refunded to Mortgagor promptly after each Payment Date;

(C) a certificate of Mortgagor certifying that all of the requirements set forth in this Paragraph 47 have been satisfied;

(D) an opinion of counsel for Mortgagor in form and substance and delivered by counsel satisfactory to Mortgagee in its sole discretion stating, among other things, that (1) Mortgagee has a perfected first priority security interest in the Defeasance Collateral and that the Defeasance Security Agreement is enforceable against Mortgagor in accordance with its terms; and (2) that any REMIC Trust formed pursuant to a Securitization will not fail to maintain its status as a "real estate mortgage investment conduit" within the meaning of Section 860D of the Code as a result of such defeasance;

# UNOFFICIAL COPY

(E) Mortgagor shall deliver evidence in writing from the applicable Rating Agencies to the effect that the collateral substitution will not result in a downgrading, withdrawal or qualification of the respective ratings in effect immediately prior to such defeasance event for any securities issued in connection with the Securitization which are then outstanding;

(F) a certificate from a firm of independent public accountants acceptable to Mortgagee certifying that the Defeasance Collateral is sufficient to satisfy the provisions of subparagraph A above; and

(G) such other certificates, documents or instruments as Mortgagee may reasonably require.

In connection with the conditions set forth in subparagraph (a)(iii) above, Mortgagor hereby appoints Mortgagee as its agent and attorney in fact for the purpose of using the amounts delivered pursuant to Paragraph 47(a)(iii)(A) above to purchase the Defeasance Collateral.

(b) Upon compliance with the requirements of this paragraph, the Mortgaged Property shall be released from the lien of this Mortgage and the other Loan Documents, and the Defeasance Collateral shall constitute the only collateral which shall secure the Note and all other obligations under the Loan Documents. Mortgagee will, at Mortgagor's expense, execute and deliver any agreements reasonably requested by Mortgagor to release the lien of this Mortgage from the Mortgaged Property. Mortgagor, pursuant to the Defeasance Security Agreement, shall authorize and direct that the payments received from Defeasance Collateral be made directly to Mortgagee and applied to satisfy the obligations of the Mortgagor under the Note, including payment in full of the unpaid principal balance of the Note as of the Maturity Date. Mortgagor agrees to bear and shall pay or reimburse Mortgagee on demand for all costs and expenses (including, without limitation, reasonable attorneys' fees and disbursements) incurred by Mortgagee and/or Mortgagee's Service and/or agents in connection with any defeasance or proposed or attempted defeasance under this Paragraph 47.

(c) Upon the release of the Mortgaged Property in accordance with this paragraph, Mortgagor may, or at option of Mortgagee shall, assign all its obligations under the Note, together with the pledged Defeasance Collateral, to a successor entity designated by Mortgagor and approved by Mortgagee in its sole discretion. Such successor entity shall execute an assumption agreement in form and substance satisfactory to Mortgagee in its sole discretion pursuant to which it shall assume Mortgagor's obligations under the Note and the Defeasance Security Agreement. As conditions to such assignment and assumption, Mortgagor shall (i) deliver to Mortgagee an opinion of counsel in form and substance and delivered by counsel satisfactory to Mortgagee in its sole discretion stating, among other things, that such assumption agreement is enforceable against Mortgagor and such successor entity in accordance with its terms and that the Note, the Defeasance Security Agreement and the other Loan Documents, as so assumed, are enforceable against such successor entity in accordance with their respective terms, and (ii) pay all actual costs and expenses incurred by Mortgagee or its agents in connection with such assignment and assumption (including, without limitation, the review of

# UNOFFICIAL COPY

the proposed transferee and the preparation of the assumption agreement and related documentation). Upon such assumption, Mortgagor shall be relieved of its obligations hereunder, under the other Loan Documents and under the Defeasance Security Agreement other than those obligations which are specifically intended to survive the termination, satisfaction or assignment of this Mortgage or the exercise of Mortgagee's rights and remedies hereunder.

(d) Upon the release of the Mortgaged Property in accordance with this paragraph, Mortgagor shall have no further right to prepay the Note pursuant to the other provisions of this paragraph or otherwise. In connection with the conditions set forth in Paragraph (a)(iii)(A) above, Mortgagor hereby appoints Mortgagee as its agent and attorney-in-fact for the purpose of purchasing the Defeasance Collateral with funds provided by the Mortgagor. Mortgagor shall pay any and all expenses incurred in the purchase of the Defeasance Collateral and any revenue, documentary stamp or intangible taxes or any other tax or charge due in connection with the transfer of the Note or otherwise required to accomplish the agreements of this paragraph.

48. Yield Maintenance. In the event of an Unscheduled Loan Prepayment (as defined below) where Mortgagor is required, pursuant to the provisions of Paragraph 3(c)(ii), Paragraph 8(d) or Paragraph 3(j), to pay a Proportionate Yield Maintenance Premium, the following terms shall have the following meanings:

(a) "Proportionate Yield Maintenance Premium" shall mean the product of (a) the Yield Maintenance Premium multiplied by (b) the Prepayment Percentage.

(b) "Yield Maintenance Premium" shall mean, with respect to any Unscheduled Loan Prepayment (as defined below), an amount which, when added to the outstanding principal balance of the Note immediately prior to such Unscheduled Loan Prepayment, would be sufficient to purchase direct non-callable obligations of the United States of America which provide payments (a) on or prior to, but as close as possible to, all successive scheduled payment dates under the Note through the Maturity Date and (b) in amounts equal to the Monthly Debt Service Payment Amount required under the Note through the Maturity Date together with the outstanding principal balance of the Note as of the Maturity Date. In no event shall the Yield Maintenance Premium be less than zero.

(c) "Prepayment Percentage" shall mean, with respect to any Unscheduled Loan Prepayment, the percentage of the then current outstanding principal balance of the Note that is being prepaid.

(d) "Unscheduled Loan Prepayment" shall mean any principal prepayment of the Note prior to the Maturity Date other than the portion of each Monthly Debt Service Payment Amount (as defined in the Note) which comprises a principal payment. An Unscheduled Loan Prepayment shall include, without limitation, (i) a paydown of the Loan (in whole or in part) prior to the Maturity Date as a result of an Insured Casualty pursuant to Paragraph 3(c)(ii) of this Mortgage if an Event of Default, has occurred and is continuing (but not otherwise), (ii) a paydown of the Loan (in whole or in part) prior to the Maturity Date as a result of a Condemnation pursuant to Paragraph 8(d) of this Mortgage if an Event of Default has occurred and is continuing (but not otherwise) and (iii) a paydown of the Loan (in whole or in



# UNOFFICIAL COPY

part) in connection with the exercise by Mortgagee of any of its remedies under this Mortgage upon the occurrence of an Event of Default, including, without limitation, a foreclosure sale of the Mortgaged Property.

49. Cash Management Agreement. On or before the date hereof, Mortgagor covenants and agrees at Mortgagor's sole cost and expense to enter into one or more servicing account agreements, lockbox servicing agreements and/or cash management agreements acceptable to Mortgagee among Mortgagor, Manager, (as defined below) Mortgagee and, as applicable, one or more financial institutions (together with any modification, amendment, substitution or replacement thereof, hereinafter collectively referred to as the "Cash Management Agreement"). The Cash Management Agreement shall provide, among other things (i) when and in what manner all Rents and other sums collected from, or arising with respect to, the Mortgaged Property shall be deposited directly into a clearing account established in connection with such Cash Management Agreement, and (ii) the order and priority of the application of such funds.

50. Intentionally Omitted.

51. Sale of Notes and Securitization.

At the request of the holder of the Note and, to the extent not already required to be provided by Mortgagor under this Mortgage, Mortgagor shall use reasonable efforts to satisfy the market standards to which the holder of the Note customarily adheres or which may be reasonably required in the marketplace or by the Rating Agencies in connection with the sale of the Note or participation therein or the first successful securitization (such sale and/or securitization, the "Secondary Market Transaction" or "Securitization") of rated single or multi-class securities (the "Securities") secured by or evidencing ownership interests in the Note and this Mortgage, including, without limitation, to:

(a) (i) provide such financial and other information with respect to the Mortgaged Property, the Mortgagor and the Manager, (ii) provide budgets relating to the Mortgaged Property, (iii) perform or permit or cause to be performed or permitted such site inspection, appraisals, market studies, environmental reviews and reports (Phase I's and, if appropriate, Phase II's), engineering reports and other due diligence investigations of the Mortgaged Property, as may be reasonably requested by the holder of the Note or the Rating Agencies or as may be necessary or appropriate in connection with the Secondary Market Transaction, (iii) provide the trust agreement of the Sole Member and (iv) make such representations and warranties as of the closing date of the Secondary Market Transaction with respect to the Mortgaged Property, Mortgagor, and the Loan Documents as are customarily provided in securitization transactions and as may be reasonably requested by the holder of the Note or the Rating Agencies and consistent with the facts covered by such representations and warranties as they exist on the date thereof, including the representations and warranties made in the Loan Documents (collectively together with any information regarding Mortgagor or the Mortgaged Property delivered to or obtained by Mortgagee in connection with the origination of the Loan or pursuant to this Mortgage, the "Provided Information"), together, if customary, with appropriate verification and/or consents of the Provided Information through letters of auditors

# UNOFFICIAL COPY

or opinions of counsel of independent attorneys acceptable to the Mortgagee and the Rating Agencies;

(b) at Mortgagor's reasonable expense, cause counsel to render opinions, which may be relied upon by the holder of the Note, the Rating Agencies and their respective counsel, agents and representatives, as to non-consolidation, fraudulent conveyance, true sale, state law opinion with respect to substantive consolidation, or any other opinion customary in securitization transactions with respect to the Mortgaged Property and Mortgagor and its affiliates, which counsel and opinions shall be reasonably satisfactory to the holder of the Note and the Rating Agencies;

(c) execute such amendments to the Loan Documents and organizational documents, enter into a lockbox or similar arrangement with respect to the Rents and establish and fund such reserve funds (including, without limitation, reserve funds for deferred maintenance and capital improvements) as may be requested by the holder of the Note or the Rating Agencies or otherwise to effect the Secondary Market Transaction; provided, however, that the Mortgagor shall not be required to modify or amend any Loan Document if such modification or amendment would (i) change the interest rate, the stated maturity or the amortization of principal set forth in the Note, (ii) modify or amend any other material economic term of the Loan, or (iii) modify Mortgagor's rights and obligations in such a manner so as to materially decrease its rights or materially increase its obligations under this Mortgage or the other Loan Documents; and

(d) if requested by Mortgagee, Mortgagor shall provide Mortgagee with summaries of the following financial statements (all references to Regulation S-X in this Paragraph 51(d) referring to Regulation S-X of the Securities Act):

(A) As of the date hereof, a balance sheet with respect to the Mortgaged Property for the two most recent fiscal years, meeting the requirements of Section 210.3-01 of Regulation S-X, and statements of income and statements of cash flows with respect to the Property for the three most recent fiscal years, meeting the requirements of Section 210.3-02 of Regulation S-X, and, to the extent that such balance sheet is more than 135 days old as of the date hereof, interim financial statements of the Mortgaged Property meeting the requirements of Section 210.3-01 and 210.3-02 of Regulation S-X (all of such financial statements, collectively, the "Standard Statements"); provided, however, that if the Mortgaged Property would be deemed to constitute a business and not real estate under Regulation S-X that has been acquired by Mortgagor from an unaffiliated third party, as to which the other conditions set forth in Section 210.3-05 of Regulation S-X for provision of financial statements in accordance with such Section have been met, at Mortgagee's election in lieu of or in addition to the Standard Statements otherwise required by this Paragraph 51, Mortgagor shall instead provide the financial statements required by such Section 210.3-05 of Regulation S-X ("Acquired Property Statements").

(B) Not later than thirty (30) days after the end of each fiscal quarter following the date hereof, a balance sheet of the Mortgaged Property as of

# UNOFFICIAL COPY

the end of such fiscal quarter, meeting the requirements of Section 210.3-01 of Regulation S-X, and statements of income and statements of cash flows of the Mortgaged Property for the period commencing on the day following the last day of the most recent fiscal year and ending on the date of such balance sheet and for the corresponding period of the most recent fiscal year, meeting the requirements of Section 210.3-02 of Regulation S-X (provided, that if for such corresponding period of the most recent fiscal year acquired property statements were permitted to be provided hereunder pursuant to paragraph (i) above, Borrower shall instead provide acquired property statements for such corresponding period). If requested by Mortgagee, Mortgagor shall also provide "summarized financial information," as defined in Section 210.1-02(bb) of Regulation S-X, with respect to such quarterly financial statements.

(C) Not later than sixty (60) days after the end of each fiscal year following the date hereof, a balance sheet of the Mortgaged Property as of the end of such fiscal year, meeting the requirements of Section 210.3-01 of Regulation S-X, and statements of income and statements of cash flows of the Mortgaged Property for such fiscal year, meeting the requirements of Section 210.3-02 of Regulation S-X. If requested by Mortgagee, Mortgagor shall provide summarized financial information with respect to such annual financial statements.

(D) Upon ten (10) Business Days after notice from Mortgagee in connection with the Securitization of the Loan, such additional financial statements, such that, as of the date (each a "Disclosure Document Date") of each Disclosure Document, Mortgagor shall have provided Mortgagee with all financial statements as described above, provided that the fiscal year and interim periods for which such financial statements shall be provided shall be determined as of such Disclosure Document Date.

(E) In the event Mortgagee determines, in connection with a Securitization, that the financial statements required in order to comply with Regulation S-X or any Legal Requirements are other than as provided herein, then notwithstanding the provisions of this Paragraph 51(d), Mortgagee may request, and Mortgagor shall promptly provide, such combination of acquired property statements and/or standard statements as may be necessary for such compliance.

(F) Any other or additional financial statements, or financial, statistical or operating information, as shall be required pursuant to Regulation S-X or other Legal Requirements in connection with any Disclosure Document or any filing under or pursuant to the Exchange Act in connection with or relating to a Securitization (hereinafter an "Exchange Act Filing") or as shall otherwise be requested by Mortgagee to meet disclosure, rating agency or marketing requirements.

# UNOFFICIAL COPY

All reasonable third party costs and expenses incurred by Mortgagor in connection with Mortgagor's complying with requests made under this Section 51 shall be paid by the Mortgagor.

In the event that the provisions of this Mortgage or any Loan Documents require the receipt of written confirmation from each Rating Agency with respect to the ratings on the Securities, or, in accordance with the terms of the transaction documents relating to a Secondary Market Transaction, such a rating confirmation is required in order for the consent of the Mortgagee to be given, the Mortgagor shall pay all of the reasonable costs and expenses of the Mortgagee, Servicer and each Rating Agency in connection therewith, and, if applicable, shall pay any fees imposed by any Rating Agency as a condition to the delivery of such confirmation.

## 52. Securitization Indemnification.

(a) Mortgagor understands and agrees that certain of the Provided Information and the financial reports delivered to Mortgagee hereunder (collectively, the "Required Records") may be included in disclosure documents in connection with the Secondary Market Transaction, including, without limitation, a prospectus, prospectus supplement or private placement memorandum (each, a "Disclosure Document") and may also be included in filings with the Securities and Exchange Commission pursuant to the Securities Act of 1933, as amended (the "Securities Act"), or the Securities Exchange Act of 1934, as amended (the "Exchange Act"), or provided or made available to investors or prospective investors in the Securities, the Rating Agencies, and service providers relating to the Secondary Market Transaction. In the event that the Disclosure Document is required to be revised prior to the sale of all Securities, the Mortgagor will cooperate with the holder of the Note in updating the Disclosure Document by providing all current information necessary to keep the Disclosure Document accurate and complete in all respects.

(b) Mortgagor agrees to (i) indemnify Mortgagee (and for purposes of this Paragraph 52, Mortgagee hereunder shall include its officers and directors), the affiliate of each person or entity (the "Depositor") that has filed the registration statement relating to the Securitization (the "Registration Statement"), each of its directors, each of its officers who have signed the Registration Statement and each person or entity who controls the Depositor within the meaning of Section 15 of the Securities Act or Section 20 of the Exchange Act (collectively, the "Depositor Group") and each person or entity that acts as an underwriter and/or placement agent with respect to the Securities and each of their respective directors and each person who controls any such underwriter within the meaning of Section 15 of the Securities Act and Section 20 of the Exchange Act (collectively, the "Underwriter Group") for any losses, claims, damages or liabilities (the "Liabilities") to which Mortgagee, the Depositor, the Depositor Group, or the Underwriter Group may become subject insofar as the Liabilities arise out of or are based upon any untrue statement or alleged untrue statement of any material fact contained in the Provided Information or Required Records upon the omission or alleged omission to state in the Provided Information or Required Records a material fact required to be stated in the Provided Information or Required Records in order to make the statements in the Provided Information or Required Records, in light of the circumstances under which they were made not misleading and (ii) reimburse Mortgagee, the Depositor, the Depositor Group, or the Underwriter Group for any reasonable legal or other expenses reasonably incurred by Mortgagee, the Depositor, the



# UNOFFICIAL COPY

Depositor Group, or the Underwriter Group in connection with defending or investigating the Liabilities.

(c) Promptly after receipt by an indemnified party under this Paragraph 52 of notice of the commencement of any action, such indemnified party will, if a claim in respect thereof is to be made against the indemnifying party under this Paragraph 52, notify the indemnifying party in writing of the commencement thereof, but the omission to so notify the indemnifying party will not relieve the indemnifying party from any liability which the indemnifying party may have to any indemnified party hereunder except to the extent that failure to notify causes prejudice to the indemnifying party. In the event that any action is brought against any indemnified party, and it notifies the indemnifying party of the commencement thereof, the indemnifying party will be entitled, jointly with any other indemnifying party, to participate therein and, to the extent that it (or they) may elect by written notice delivered to the indemnified party promptly after receiving the aforesaid notice from such indemnified party, to assume the defense thereof with counsel satisfactory to such indemnified party. After notice from the indemnifying party to such indemnified party under this Paragraph 52 that such indemnifying party is assuming the defense of the action, the indemnifying party shall not be liable for any legal or other expenses subsequently incurred by such indemnified party in connection with the defense thereof other than reasonable costs of investigation; provided, however, that if the defendants in any such action include both the indemnified party and the indemnifying party and the indemnified party shall have reasonably concluded that there are any legal defenses available to it and/or other indemnified parties that are different from or additional to those available to the indemnifying party, the indemnified party or parties shall have the right to select separate counsel to assert such legal defenses and to otherwise participate in the defense of such action on behalf of such indemnified party or parties. The indemnifying party shall not be liable for the expenses of more than one separate counsel unless an indemnified party shall have reasonably concluded that there may be legal defenses available to it that are different from or additional to those available to another indemnified party.

(d) In order to provide for just and equitable contribution in circumstances in which the indemnity agreement provided for in Paragraph 52(b) or (c) is for any reason held to be unenforceable by an indemnified party in respect of any losses, claims, damages or liabilities (or action in respect thereof) referred to therein which would otherwise be indemnifiable under Paragraph 52(b) or (c), the indemnifying party shall contribute to the amount paid or payable by the indemnified party as a result of such losses, claims, damages or liabilities (or action in respect thereof); provided, however, that no person guilty of fraudulent misrepresentation (within the meaning of Section 11(f) of the Securities Act) shall be entitled to contribution from any person who was not guilty of such fraudulent misrepresentation. In determining the amount of contribution to which the respective parties are entitled, the following factors shall be considered: (i) the Depositor's and Mortgagor's relative knowledge and access to information concerning the matter with respect to which claim was asserted; (ii) the opportunity to correct and prevent any statement or omission; and (iii) any other equitable considerations appropriate in the circumstances. Mortgagee and Mortgagor hereby agree that it would not be equitable if the amount of such contribution were determined by pro rata or per capita allocation.

# UNOFFICIAL COPY

(e) The liabilities and obligations of both Mortgagor and Mortgagee under this Paragraph 52 shall survive the termination of this Mortgage and the satisfaction and discharge of the Debt.

53. Servicer. At the option of Mortgagee, the Loan may be serviced by a servicer/trustee (the "Servicer") selected by Mortgagee and Mortgagee may delegate all or any portion of its responsibilities under this Mortgage and the other Loan Documents to the Servicer pursuant to a servicing agreement (the "Servicing Agreement") between Mortgagee and Servicer. Mortgagor shall be responsible for any reasonable set-up fees or any other initial costs relating to or arising under the Servicing Agreement.

54. Management of the Mortgaged Property. Mortgagor shall maintain the Management Agreement, or any subsequent agreement relating to the operation and management of the Mortgaged Property approved by Mortgagee, in full force and effect and timely perform all of Mortgagor's obligations thereunder and enforce performance of all obligations of the Manager thereunder, and not permit the termination or amendment of such Management Agreement, or any subsequent agreement relating to the operation and management of the Mortgaged Property approved by Mortgagee, unless the prior written consent of Mortgagee is first obtained. Upon the occurrence of an Event of Default, Mortgagor at Mortgagee's request made at any time while such Event of Default continues, shall terminate the Management Agreement, or any subsequent agreement relating to the operation and management of the Mortgaged Property approved by Mortgagee and replace the Manager with a manager approved by Mortgagee. All references in this Mortgage and in the Loan Documents to "Debt Service Coverage Ratio" shall mean the debt service coverage ratio of the Mortgaged Property calculated by Mortgagee in its sole discretion by dividing the underwritten net cash flow of the Mortgaged Property (as determined by Mortgagee in its sole discretion based upon Mortgagee's then current underwriting standards and practices) by the actual annual principal and interest payable under the Note.

55. Severance Documentation. Mortgagee shall have the right, at any time (whether prior to or after any sale, participation or Securitization of all or any portion of the Loan), to modify the Loan in order to create one or more senior and subordinate notes (i.e., an A/B or A/B/C structure) and/or one or more additional components of the Note or Notes, reduce the number of components of the Note or Notes, revise the interest rate for each component, reallocate the principal balances of the Notes and/or the components, increase or decrease the monthly debt service payments for each component or eliminate the component structure and/or the multiple note structure of the Loan (including the elimination of the related allocations of principal and interest payments), provided that the outstanding principal balance of all components immediately after the effective date of such modification equals the outstanding principal balance immediately prior to such modification and the weighted average of the interest rates for all components immediately after the effective date of such modification equals the interest rate of the original Note immediately prior to such modification. At Mortgagee's election, each note comprising the Loan may be subject to one or more Securitizations. Mortgagee shall have the right to modify the Note and/or Notes and any components in accordance with this Paragraph 55 and, provided that such modification shall comply with the terms of this Paragraph 55, it shall become immediately effective. If requested by Mortgagee, Mortgagor shall promptly execute an amendment to the Loan Documents to evidence any such

# UNOFFICIAL COPY

modification provided any such changes/modifications required under this Paragraph 55 do not increase Mortgagor's obligations or reduce Mortgagor's rights other than in a de minimus amount and provided Mortgagor shall incur no material cost in connection with same.

56. Further Representations, Warranties, Covenants and Agreements of Mortgagor as to the CC&R. Mortgagor hereby represents and warrants that:

(a) The CC&R is a valid and subsisting declaration of easements, covenants, restrictions and obligations and is in full force and effect in accordance with the respective terms thereof and has not been modified or amended.

(b) In the event of a conflict or inconsistency between the terms of this Mortgage concerning the use and adjustment of insurance proceeds in the event of damage to the Premises, the Improvements and/or the Equipment, or the terms of this Mortgage concerning the use and adjustment of awards from condemnation or taking of the Premises and/or the Improvements, and the terms of the CC&R, and the powers and authority of the owners of the Building thereunder, regarding the same, the terms and provisions of the CC&R will control. In the event of damage or destruction to, or condemnation or taking of, all or any part of the Building which requires a vote of the owners of the Building to repair and restore the Building, Mortgagor hereby assigns to Mortgagee Mortgagor's full right and power to vote in such matters and hereby irrevocably appoints Mortgagee as Mortgagor's attorney-in-fact coupled with an interest to cast Mortgagor's vote in such matters as Mortgagee deems appropriate in its sole judgment.

(c) Except as disclosed in connection with the Loan Documents, all amounts required to be paid by Mortgagor or, to its knowledge, any prior owner of the Mortgaged Property under the CC&R have been paid, to the extent that they are payable on or prior to the date hereof. To Mortgagor's knowledge, all of the terms, conditions and agreements contained in the CC&R which are to be performed by Mortgagor or any prior owner of the Mortgaged Property prior to the date hereof have been performed.

(d) Neither Mortgagor, any affiliate of Mortgagor, nor to Mortgagor's knowledge, any prior owner of the Mortgaged Property or any affiliate of any prior owner of the Mortgaged Property has delivered or received any notice of default under the CC&R. Neither Mortgagor nor, to its knowledge, any prior owner of the Mortgaged Property is in default under any of the terms of the CC&R and there is no event which, with the passage of time or the giving of notice or both, would constitute a default under the CC&R.

(e) To Mortgagor's knowledge, no other party subject to or bound by the terms of the CC&R is in default under any of the terms of the CC&R on its part to be observed or performed, and, to Mortgagor's knowledge, there is no event which, with the passage of time or the giving of notice or both, would constitute such a default under the CC&R.

(f) Mortgagor has delivered to Mortgagee true, complete and correct copies of the CC&R.

(g) Mortgagor will pay when due and payable all amounts due and payable under the CC&R.

# UNOFFICIAL COPY

(h) Mortgagor will perform and observe all of the terms, covenants and conditions required to be performed and observed by Mortgagor under the CC&R, and will do all things necessary to preserve and to keep unimpaired its rights under such documents. Mortgagor will enforce the obligations of any other person subject to or bound by the CC&R to the end that Mortgagor may enjoy all of the rights and privileges granted to it thereunder.

(i) Mortgagor will (i) promptly notify Mortgagee of its receipt of any notice from any other party to the CC&R in connection with or in respect of the performance or observance of any of the terms, covenants or conditions of the CC&R and (ii) promptly cause a copy of any such notice received by Mortgagor from any such party to be delivered to Mortgagee.

(j) Mortgagor will promptly notify Mortgagee in writing of any request made by any party to the CC&R for arbitration proceedings pursuant to the CC&R and of the institution of any arbitration proceedings, and will promptly deliver to Mortgagee a copy of the determination of the arbitrators in each such arbitration proceeding.

(k) Mortgagor, immediately upon obtaining knowledge of a breach by any other person bound by or subject to the CC&R (or by any receiver, trustee, custodian or other party who succeeds to the rights of such person) or any inability of any such person (or any such receiver, trustee, custodian or other party) to perform under the terms and provisions of the CC&R, will notify Mortgagee in writing of any such breach or inability. Mortgagor hereby assigns to Mortgagee the proceeds of any claim that Mortgagor may have against the any such person (or any such receiver, trustee, custodian or other party) for any such breach or inability. Mortgagee shall have the sole right upon the failure of Mortgagor to do so to Mortgagee's satisfaction, to proceed, upon at least ten (10) days' prior written notice to Mortgagor, against any such person (or such receiver, trustee, custodian or other party) as if it were a party to the CC&R in Mortgagor's name or in Mortgagee's name as agent for Mortgagor, and Mortgagor agrees to cooperate with Mortgagee in such action and shall execute and/or deliver any and all documents reasonably required in furtherance of such action. Mortgagor shall, at its expense, diligently prosecute any such proceedings, shall deliver to Mortgagee copies of all papers served in connection therewith and shall consult and cooperate with Mortgagee and its attorneys and agents in carrying on the defense of any such proceedings; provided, that no settlement of any such proceeding shall be made by Mortgagor without Mortgagee's consent.

(l) Mortgagor will not, without the prior written consent of Mortgagee in each instance (which consent may be withheld in Mortgagee's sole and absolute discretion), (i) terminate, cancel, modify, amend, supplement or surrender, or suffer or permit any termination, cancellation, modification, supplementation or surrender of the CC&R, (ii) fail or refuse to take timely and appropriate action to enforce its rights under the CC&R, (iii) consent to, approve or permit, as provided in the CC&R, any action permitted or required to be taken by any person bound by or subject to the CC&R, except those in the ordinary course of business, or (iv) take or refuse to take any action permitted or required to be taken by Mortgagor under the CC&R, except those in the ordinary course of business.

(m) Mortgagor will deliver to Mortgagee, simultaneously with any delivery to any other person subject to or bound by the CC&R, copies of all notices, reports



# UNOFFICIAL COPY

and/or certifications that Mortgagor delivers to the any such persons pursuant to or in connection with the CC&R.

## 57. Provisions Applicable to Letter of Credit.

(a) For all purposes of this Mortgage, the term "Satisfactory Letter of Credit" shall mean a clean, irrevocable and unconditional letter of credit that satisfies all of the provisions of this Paragraph 57.

(b) The Satisfactory Letter of Credit shall be issued in favor of Mortgagee, its successors and/or assigns as Mortgagee, in the amount required by the applicable provision of this Mortgage, by (x) an issuer having a rating with respect thereto of "A" or better by Standard & Poor's Rating Group ("S&P") or (y) such other issuer as shall be approved by Mortgagee in its sole and absolute discretion (the "Issuing Bank").

(c) The Satisfactory Letter of Credit shall be drawable (with partial draws permitted) by Mortgagee solely upon the presentment to the Issuer of a sight draft, demanding such payment, and accompanying draw certificate in form satisfactory to Mortgagee.

(d) The Satisfactory Letter of Credit shall have an initial expiration date of at least one (1) year from the date of delivery to Mortgagee and shall provide that it shall be deemed automatically renewed, without amendment, for consecutive periods of one (1) year each thereafter through the date which is forty-five (45) days following the Maturity Date, unless the Issuing Bank sends a notice (the "Non-Renewal Notice") to Mortgagee by certified mail, return receipt requested, not less than thirty (30) days, nor more than sixty (60) days prior to the then-current expiration date of the Satisfactory Letter of Credit, stating that the Issuing Bank has elected not to renew the Satisfactory Letter of Credit. Mortgagee shall have the right, at any time following the receipt of a Non-Renewal Notice, to draw the full amount of the Satisfactory Letter of Credit, by sight draft on the Issuing Bank, and shall thereafter hold the cash proceeds of the Satisfactory Letter of Credit pursuant to the applicable terms of this Mortgage. Upon presentation by Mortgagor to Mortgagee of a replacement Satisfactory Letter of Credit meeting the requirements of this Paragraph 57, Mortgagee shall reasonably promptly refund such cash proceeds to Mortgagor. The Issuing Bank shall agree with all drawers, endorsers and bona fide holders that drafts drawn under and in compliance with the terms of the Satisfactory Letter of Credit will be duly honored upon presentation to the Issuing Bank (or its correspondent bank, on terms and conditions no less favorable to Mortgagee than would apply to such a draft drawn on the Issuing Bank) at an office location in New York, New York. The Satisfactory Letter of Credit shall be issued subject to the International Standby Practices 1998 or the most recent revision thereof or successor thereto which shall be in effect from time to time ("ISP 1998"), and, as to matters not expressly covered by ISP 98, by the law of the State of New York (including, without limitation, Article 5 of the New York Uniform Commercial Code, but excluding Section 5-102(4) thereof).

(e) The Satisfactory Letter of Credit shall be in form and substance satisfactory to Mortgagee in its sole but good faith discretion.

(f) Upon any assignment of the Loan, Mortgagee (and any assignee or transferee of the Loan) shall have the right to transfer the Satisfactory Letter of Credit to the

# UNOFFICIAL COPY

assignee or transferee. If upon any such transfer of the Satisfactory Letter of Credit any fees or charges shall be imposed, such fees or charges shall be payable solely by Mortgagor (and Mortgagor shall pay the same within ten (10) business days after receipt of demand therefor), but failure to pay such fees or charges shall not prevent or impair any such assignment and the Satisfactory Letter of Credit shall so provide. It shall constitute an Event of Default hereunder if such fees are not paid within such ten (10) business days. Within ten (10) days after notice from Mortgagee of any such anticipated assignment, Mortgagor, at its sole cost, shall arrange for the transfer of the Satisfactory Letter of Credit, as designated by Mortgagee in the foregoing notice, or to have the Letter of Credit amended to reflect the name of the assignee or transferee as Mortgagee thereunder, and thereafter Mortgagor shall look solely to the assignee or transferee for the return of the Satisfactory Letter of Credit.

(g) Mortgagor hereby pledges to Mortgagee the Satisfactory Letter of Credit and any proceeds thereof, as additional security for the payment of the Debt, including without limitation all expenses (including reasonable attorneys' fees and costs), taxes, and all transfer, recordings, filing and other damages in connection with or incidental to the custody, care, transfer or administration of the Satisfactory Letter of Credit or in any way relating to the enforcement, protection or preservation of the rights of remedies of Mortgagee pursuant to the Satisfactory Letter of Credit.

## PART II

### SPECIAL STATE PROVISIONS

#### 1. Illinois State Specific Provisions:

(a) Pursuant to the provisions of 165 ILCS 5/31.5, the mere recordation of this Mortgage entitles Mortgagee immediately to collect and receive Rents upon the occurrence of an Event of Default, as defined in Paragraph 20 hereof, without first taking any acts of enforcement under applicable law, including providing notice to Mortgagor, filing foreclosure proceedings, or seeking the appointment of a receiver. Further, Mortgagee's right to the Rents does not depend on whether or not Mortgagee takes possession of the Mortgaged Property as permitted under Paragraph 23 hereof. In Mortgagee's sole discretion, Mortgagee may choose to collect Rents either with or without taking possession of the Mortgaged Property.

(b) The powers of a receiver listed in 735 ILCS 5/15-1704 shall be added to all the powers of a receiver listed in this Mortgage.

(c) If any provision of this Mortgage is inconsistent with any applicable provision of the Illinois Mortgage Foreclosure Law, 735 ILCS 5/15-1101, et seq. (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 fairly be construed in a manner consistent with the Act.

(d) Without in any way limiting any of Mortgagee's rights, remedies, powers and authorities under this Mortgage, and in addition to all of such rights, remedies, powers, and authorities, the Mortgagee shall also have all rights, remedies, powers and

# UNOFFICIAL COPY

authorities permitted to the holder of a mortgage under the Act, as the same may be amended from time to time. If any provision of this Mortgage shall grant to Mortgagee any rights, remedies, powers or authorities upon default of the Mortgagor which are more limited than what would be vested in Mortgagee under the Act in the absence of said provision, Mortgagee shall have what would be vested under the Act.

(e) Without limitation, all expenses (including reasonable attorneys' fees and expenses) incurred by Mortgagee, to the extent reimbursable under 735 ILCS 5/15-1510, 5/15-1512, or any other provision of the Act, whether incurred before or after any judgment of foreclosure, shall be added to the indebtedness secured by this Mortgage and included in the judgment of foreclosure.

(f) In no event shall the principal indebtedness secured hereby exceed two (2) times the face amount of the Note.

2. ILLINOIS STATUTORY WAIVERS. THE MORTGAGOR, ON BEHALF OF ITSELF AND ALL PERSONS NOW OR HEREAFTER INTERESTED IN THE MORTGAGED PROPERTY, VOLUNTARILY AND KNOWINGLY HEREBY ACKNOWLEDGES THAT THE TRANSACTION OF WHICH THIS MORTGAGE IS A PART IS A TRANSACTION WHICH DOES NOT INCLUDE EITHER AGRICULTURAL REAL ESTATE (AS DEFINED IN THE ACT), OR RESIDENTIAL REAL ESTATE (AS DEFINED IN THE ACT). THE MORTGAGOR, ON ITS OWN BEHALF AND ON BEHALF OF EACH AND EVERY PERSON ACQUIRING ANY INTEREST IN OR TITLE TO THE MORTGAGED PROPERTY SUBSEQUENT TO THE DATE OF THIS MORTGAGE, HEREBY IRREVOCABLY WAIVES PURSUANT TO 735 ILCS 5/15-1601 OF THE ACT ANY AND ALL RIGHTS OF REINSTATEMENT (INCLUDING, WITHOUT LIMITATION, ALL RIGHTS OF REINSTATEMENT PROVIDED FOR IN 735 ILCS 5/15-1602) OR REDEMPTION FROM SALE OR FROM OR UNDER ANY ORDER, JUDGMENT OR DECREE OF FORECLOSURE OF THIS MORTGAGE (INCLUDING, WITHOUT LIMITATION, ALL RIGHTS OF REDEMPTION PROVIDED FOR IN 735 ILCS 5/15-1603) OR UNDER ANY POWER CONTAINED HEREIN OR UNDER ANY SALE PURSUANT TO ANY STATUTE, ORDER, DECREE OR JUDGMENT OF ANY COURT.

[No Further Text on this Page; Signature Page Follows]

# UNOFFICIAL COPY

IN WITNESS WHEREOF, Mortgagor has executed this Mortgage the day and year first above written.

THE MORTGAGOR HEREBY DECLARES AND ACKNOWLEDGES THAT THE MORTGAGOR HAS RECEIVED, WITHOUT CHARGE, A TRUE COPY OF THIS MORTGAGE.

MICHIGAN AVENUE RETAIL LLC  
a Delaware limited liability company

By: Ross Hilton Kemper  
Ross Hilton Kemper, President

Property of Cook County Clerk's Office



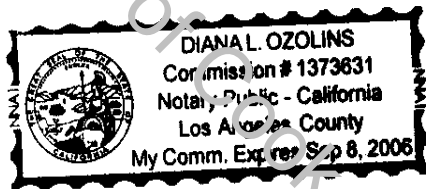
# UNOFFICIAL COPY

STATE OF CALIFORNIA            )  
   ) SS.  
 COUNTY OF LOS ANGELES        )

On July 1, 2005, before me, Diana L. Ozolins, a Notary Public, personally appeared Ross Hilton Kemper, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

*Diana L. Ozolins*  
 \_\_\_\_\_  
 Notary Public



[SEAL]

Property of Los Angeles County Clerk's Office

# UNOFFICIAL COPY

## EXHIBIT A

### LEGAL DESCRIPTION

PARCEL 1:

1ST FLOOR RETAIL INTERIOR

(INTERIOR SPACE DESCRIBED BY WALL CENTERLINE)

(1ST FLOOR RETAIL CENTERLINE OF EXTERIOR WALL)

ALL THE LAND, PROPERTY AND SPACE LYING BELOW A HORIZONTAL PLANE HAVING AN ELEVATION OF 28.58 FEET ABOVE CHICAGO CITY DATUM AND ABOVE A HORIZONTAL PLANE HAVING AN ELEVATION OF 13.35 FEET ABOVE CHICAGO CITY DATUM, AND WITHIN THE VERTICAL PROJECTION OF THE BOUNDARY LINE OF FOLLOWING DESCRIBED PARCEL OF LAND:

ALL THAT PART THE NORTH 1/2 OF LOTS 23 TO 31, BOTH INCLUSIVE, TAKEN AS A TRACT, IN ALLMENDINGER'S LAKE SHORE DRIVE ADDITION TO CHICAGO, A SUBDIVISION OF PART OF BLOCK 13 IN THE CANAL TRUSTEES' SUBDIVISION OF THE SOUTH FRACTIONAL 1/4 OF SECTION 3, TOWNSHIP 39 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS, DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHWEST CORNER OF LOT 29; THENCE EAST ALONG THE NORTH LINE OF THE NORTH 1/2 OF LOTS 23 TO 31, A DISTANCE OF 4.03 FEET; THENCE SOUTH ALONG A LINE PERPENDICULAR TO THE NORTH LINE OF THE NORTH 1/2 OF LOTS 23 TO 31, A DISTANCE OF 4.04 FEET TO THE POINT OF BEGINNING, POINT ALSO BEING ON THE CENTERLINE OF EXTERIOR WALL OF THE FIRST STORY SECTION OF THE BUILDING AT 919 N. MICHIGAN AVENUE, ALSO KNOWN AS THE PALMOLIVE BUILDING; THENCE EAST, A DISTANCE OF 3.60 FEET ALONG SAID CENTERLINE OF EXTERIOR WALL FOR THE FOLLOWING SIX (6) COURSES AND DISTANCES: THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 3.00 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 49.36 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 2.89 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 3.60 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, 0.82 OF A FOOT; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 71.02 FEET; THENCE SOUTH ALONG A LINE ON THE INTERIOR SURFACE OF SAID BUILDING, PERPENDICULAR TO SAID EXTERIOR SURFACE, A DISTANCE OF 52.67 FEET; THENCE WEST, PERPENDICULAR TO THE

# UNOFFICIAL COPY

LAST DESCRIBED LINE, A DISTANCE OF 33.10 FEET ALONG SAID INTERIOR LINE, FOR THE FOLLOWING FIVE (5) COURSES AND DISTANCES: THENCE SOUTH ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 9.00 FEET; THENCE EAST ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 31.30 FEET; THENCE SOUTH ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 11.90 FEET; THENCE WEST ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 22.88 FEET; THENCE SOUTH ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 27.12 FEET TO SAID CENTERLINE OF EXTERIOR WALL; THENCE WEST ALONG SAID CENTERLINE, HAVING AN ANGLE OF 89 DEGREES, 55 MINUTES, 50 SECONDS TO THE LEFT FROM THE LAST DESCRIBED LINE, A DISTANCE OF 106.87 FEET; THENCE NORTH ALONG SAID CENTERLINE, HAVING AN ANGLE OF 89 DEGREES, 44 MINUTES, 45 SECONDS TO THE LEFT FROM THE LAST DESCRIBED LINE, A DISTANCE OF 98.70 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 3.00 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 3.42 FEET TO SAID POINT OF BEGINNING.

## 2ND FLOOR RETAIL INTERIOR PARCEL

(SPACE DESCRIBED BY CENTERLINE OF EXTERIOR WALL)

ALL THE LAND, PROPERTY AND SPACE LYING BELOW A HORIZONTAL PLANE HAVING AN ELEVATION OF 43.34 FEET ABOVE CHICAGO CITY DATUM AND ABOVE A HORIZONTAL PLANE HAVING AN ELEVATION OF 28.58 FEET ABOVE CHICAGO CITY DATUM AND WITHIN THE VERTICAL PROJECTION OF THE BOUNDARY LINE OF FOLLOWING DESCRIBED PARCEL OF LAND:

ALL THAT PART THE NORTH 1/2 OF LOTS 23 TO 31, BOTH INCLUSIVE, TAKEN AS A TRACT, IN ALLMENDINGER'S LAKE SHORE DRIVE ADDITION TO CHICAGO, A SUBDIVISION OF PART OF BLOCK 13 IN THE CANAL TRUSTEES' SUBDIVISION OF THE SOUTH FRACTIONAL 1/4 OF SECTION 3, TOWNSHIP 39 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS, DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHWEST CORNER OF LOT 29; THENCE EAST ALONG THE NORTH LINE OF THE NORTH 1/2 OF LOTS 23 TO 31, A DISTANCE OF 4.03 FEET; THENCE SOUTH ALONG A LINE PERPENDICULAR TO THE NORTH LINE OF THE NORTH 1/2 OF LOTS 23 TO 31, A DISTANCE OF 4.04 FEET TO THE POINT OF BEGINNING, POINT ALSO BEING ON THE CENTERLINE OF EXTERIOR WALL OF THE SECOND STORY SECTION OF THE BUILDING AT 919 N. MICHIGAN AVENUE, ALSO KNOWN AS THE PALMOLIVE BUILDING; THENCE EAST, A DISTANCE OF 3.60

# UNOFFICIAL COPY

FEET ALONG SAID CENTERLINE OF EXTERIOR WALL FOR THE FOLLOWING SIX (6) COURSES AND DISTANCES:

THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 3.00 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 49.38 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 2.89 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 3.60 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 0.82 OF A FOOT; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 79.32 FEET; THENCE SOUTH ALONG A LINE ON THE INTERIOR SURFACE OF SAID BUILDING, PERPENDICULAR TO SAID EXTERIOR SURFACE, A DISTANCE OF 43.91 FEET; THENCE WEST, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 16.32 FEET, ALONG SAID INTERIOR LINE, FOR THE FOLLOWING 31 COURSES AND DISTANCES: THENCE SOUTH ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 4.62 FEET; THENCE EAST ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 0.86 OF A FOOT; THENCE SOUTH ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 0.50 OF A FOOT; THENCE EAST ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 0.98 OF A FOOT; THENCE SOUTH ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 0.88 OF A FOOT; THENCE WEST ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 0.28 OF A FOOT; THENCE SOUTH ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 19.50 FEET; THENCE WEST ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 9.42 FEET; THENCE NORTH ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.70 FEET; THENCE WEST ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.53 FEET; THENCE NORTH ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 8.70 FEET; THENCE EAST ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 2.70 FEET; THENCE NORTH ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 4.85 FEET; THENCE WEST ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 3.74 FEET; THENCE NORTH ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 3.56 FEET; THENCE WEST ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 4.80 FEET; THENCE SOUTH ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 3.45 FEET; THENCE WEST ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 9.43 FEET; THENCE SOUTH ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 9.51 FEET; THENCE WEST ALONG SAID



# UNOFFICIAL COPY

INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 32.35 FEET; THENCE NORTH ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 7.24 FEET; THENCE WEST ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 5.09 FEET; THENCE NORTH ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 2.40 FEET; THENCE WEST ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 2.09 FEET; THENCE NORTH ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 0.58 OF A FOOT; THENCE WEST ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 17.60 FEET; THENCE SOUTH ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 8.50 FEET; THENCE EAST ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 13.11 FEET; THENCE SOUTH ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 2.04 FEET; THENCE EAST ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 7.05 FEET; THENCE SOUTH ALONG SAID INTERIOR LINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 7.20 FEET TO THE CENTERLINE OF EXTERIOR WALL OF SAID BUILDING; THENCE WEST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.30 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 30.60 FEET; THENCE WEST ALONG SAID CENTERLINE, HAVING AN ANGLE OF 90 DEGREES, 14 MINUTES, 12 SECONDS TO THE LEFT TO THE LAST DESCRIBED LINE, A DISTANCE OF 59.52 FEET; THENCE NORTH ALONG SAID CENTERLINE, HAVING AN ANGLE OF 89 DEGREES, 44 MINUTES, 45 SECONDS TO THE LEFT TO THE LAST DESCRIBED LINE, A DISTANCE OF 98.70 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 3.00 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 3.42 FEET TO SAID POINT OF BEGINNING.

3RD FLOOR RETAIL INTERIOR PARCEL

(SPACE DESCRIBED BY WALL CENTERLINE)

(3RD FLOOR CENTERLINE OF EXTERIOR WALL)

ALL THE LAND, PROPERTY AND SPACE LYING BELOW A HORIZONTAL PLANE HAVING AN ELEVATION OF 53.83 FEET ABOVE CHICAGO CITY DATUM AND ABOVE A HORIZONTAL PLANE HAVING AN ELEVATION OF 43.34 FEET ABOVE CHICAGO CITY DATUM AND WITHIN THE VERTICAL PROJECTION OF THE BOUNDARY LINE OF FOLLOWING DESCRIBED PARCEL OF LAND:

# UNOFFICIAL COPY

ALL THAT PART THE NORTH 1/2 OF LOTS 23 TO 31, BOTH INCLUSIVE, TAKEN AS A TRACT, IN ALLMENDINGER'S LAKE SHORE DRIVE ADDITION TO CHICAGO, A SUBDIVISION OF PART OF BLOCK 13 IN THE CANAL TRUSTEES' SUBDIVISION OF THE SOUTH FRACTIONAL 1/4 OF SECTION 3, TOWNSHIP 39 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS, DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHWEST CORNER OF LOT 29; THENCE EAST ALONG THE NORTH LINE OF THE NORTH 1/2 OF LOTS 23 TO 31, A DISTANCE OF 4.59 FEET; THENCE SOUTH ALONG A LINE PERPENDICULAR TO THE NORTH LINE OF THE NORTH 1/2 OF LOTS 23 TO 31, A DISTANCE OF 4.46 FEET TO THE POINT OF BEGINNING, POINT ALSO BEING ON THE CENTERLINE OF EXTERIOR WALL OF THE THIRD STORY SECTION OF THE BUILDING AT 919 N. MICHIGAN AVENUE, ALSO KNOWN AS THE PALMOLIVE BUILDING; THENCE EAST, A DISTANCE OF 20.17 FEET ALONG SAID CENTERLINE OF EXTERIOR WALL FOR THE FOLLOWING 65 COURSES AND DISTANCES; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 16.16 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 20.17 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 17.19 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.27 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 16.80 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 18.50 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 16.82 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 18.50 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 16.80 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.27 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 17.20 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 20.18 FEET; THENCE SOUTH ALONG SAID

# UNOFFICIAL COPY

CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 16.16 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 20.18 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 17.11 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 22.39 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 54.00 FEET; THENCE WEST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 22.43 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 17.28 FEET; THENCE WEST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 20.14 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE WEST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 16.16 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE WEST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 20.15 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 17.22 FEET; THENCE WEST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.30 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE WEST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 16.80 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE WEST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 18.50 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE WEST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 16.82 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE WEST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 18.50 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE WEST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 16.80 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE WEST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.30 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 17.22 FEET; THENCE WEST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 20.17 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF

# UNOFFICIAL COPY

1.40 FEET; THENCE WEST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 16.16 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE WEST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.10 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 13.54 FEET; THENCE WEST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 19.07 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 31.92 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 16.80 FEET; THENCE WEST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 18.30 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 16.80 FEET; THENCE WEST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 18.30 FEET TO SAID POINT OF BEGINNING.

4TH FLOOR RETAIL INTERIOR PARCEL

(SPACE DESCRIBED BY WALL CENTERLINE)

(4TH FLOOR CENTERLINE OF EXTERIOR WALL)

ALL THE LAND, PROPERTY AND SPACE LYING BELOW A HORIZONTAL PLANE HAVING AN ELEVATION OF 65.63 FEET ABOVE CHICAGO CITY DATUM AND ABOVE A HORIZONTAL PLANE HAVING AN ELEVATION OF 53.82 FEET ABOVE CHICAGO CITY DATUM AND WITHIN THE VERTICAL PROJECTION OF THE BOUNDARY LINE OF FOLLOWING DESCRIBED PARCEL OF LAND:

ALL THAT PART THE NORTH 1/2 OF LOTS 23 TO 31, BOTH INCLUSIVE, TAKEN AS A TRACT, IN ALLMENDINGER'S LAKE SHORE DRIVE ADDITION TO CHICAGO, A SUBDIVISION OF PART OF BLOCK 13 IN THE CANAL TRUSTEES' SUBDIVISION OF THE SOUTH FRACTIONAL 1/4 OF SECTION 3, TOWNSHIP 39 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS, DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHWEST CORNER OF LOT 29; THENCE EAST ALONG THE NORTH LINE OF THE NORTH 1/2 OF LOTS 23 TO 31, A DISTANCE OF 4.59 FEET; THENCE SOUTH ALONG A LINE PERPENDICULAR TO THE NORTH LINE OF THE



# UNOFFICIAL COPY

NORTH 1/2 OF LOTS 23 TO 31, A DISTANCE OF 4.46 FEET TO THE POINT OF BEGINNING, POINT ALSO BEING ON THE CENTERLINE OF EXTERIOR WALL OF THE FOURTH STORY SECTION OF THE BUILDING AT 919 N. MICHIGAN AVENUE, ALSO KNOWN AS THE PALMOLIVE BUILDING; THENCE EAST, A DISTANCE OF 20.17 FEET ALONG SAID CENTERLINE OF EXTERIOR WALL FOR THE FOLLOWING 64 COURSES AND DISTANCES; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 16.16 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 20.17 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 17.19 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.27 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 16.80 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 18.50 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 16.82 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 18.50 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 16.80 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.27 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 17.20 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 20.18 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 16.16 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 20.18 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 17.11 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 22.39 FEET; THENCE SOUTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF



# UNOFFICIAL COPY

LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 18.30 FEET; THENCE EAST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 16.80 FEET; THENCE WEST ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 1.40 FEET; THENCE NORTH ALONG SAID CENTERLINE, PERPENDICULAR TO THE LAST DESCRIBED LINE, A DISTANCE OF 18.30 FEET TO SAID POINT OF BEGINNING.

## PARCEL 2:

EASEMENT FOR LIGHT, AIR AND VIEW FOR THE BENEFIT OF PARCEL 1 IN, OVER, ABOVE AND ACROSS THE FOLLOWING DESCRIBED AREA:

COMMENCING AT A HORIZONTAL PLANE PARALLEL TO AND 63 FEET ABOVE CHICAGO CITY DATUM AND EXTENDING VERTICALLY UPWARDS TO THE ZENITH BEGINNING AT A POINT ON THE SOUTH LINE OF PARCEL 1, 62 FEET EAST OF THE WESTERLY LINE OF SAID PARCEL 1; THENCE SOUTH ALONG A LINE PARALLEL TO AND 62 FEET EAST OF THE WESTERLY LINE OF LOTS 26 AND 27 IN ALLMENDINGER'S LAKE SHORE DRIVE ADDITION TO CHICAGO AFORESAID (SAID WESTERLY LINE OF LOTS 26 AND 27 AFORESAID BEING A CONTINUATION OF THE WESTERLY LINE OF PARCEL 1 EXTENDED SOUTH), A DISTANCE OF 25 FEET TO A POINT IN SAID LOT 26; THENCE EAST ALONG A LINE PARALLEL TO THE SOUTH LINE OF PARCEL 1, A DISTANCE OF 88 FEET EAST TO A POINT IN LOT 24, IN SAID ALLMENDINGER'S LAKE SHORE DRIVE ADDITION TO CHICAGO AFORESAID; THENCE NORTH ALONG A LINE PARALLEL TO THE WESTERLY LINE OF LOTS 26 AND 27 AFORESAID, A DISTANCE OF 25 FEET TO THE SOUTH LINE OF PARCEL 1; THENCE WEST ALONG THE SOUTH LINE OF PARCEL 1, A DISTANCE OF 88 FEET TO THE PLACE OF BEGINNING, AS CREATED BY AGREEMENT BETWEEN THE PALMOLIVE PEET COMPANY, A CORPORATION OF DELAWARE, AND CHICAGO TITLE AND TRUST COMPANY, A CORPORATION OF ILLINOIS, AS TRUSTEE UNDER TRUST AGREEMENT DATED JULY 25, 1927 AND KNOWN AS TRUST NUMBER 19104, DATED MARCH 31, 1928 AND RECORDED APRIL 30, 1928 AS DOCUMENT 10005790, AND ALSO RECORDED JUNE 21, 1932 AS DOCUMENT 11106014, AND AS CONTINUED AND PRESERVED BY INSTRUMENT DATED DECEMBER 26, 1958 AND RECORDED DECEMBER 26, 1958 AS DOCUMENT 17413316, IN COOK COUNTY, ILLINOIS.

## PARCEL 3:

PERPETUAL EASEMENT IN FAVOR OF PARCEL 1 AS CREATED BY THE AMENDED AND RESTATED DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS MADE BY AND BETWEEN PALMOLIVE TOWER CONDOMINIUMS, LLC, A DELAWARE LIMITED LIABILITY COMPANY, PALMOLIVE BUILDING

# UNOFFICIAL COPY

FACADE, LLC, A DELAWARE LIMITED LIABILITY COMPANY AND PALMOLIVE BUILDING RETAIL, LLC, A DELAWARE LIMITED LIABILITY COMPANY DATED JUNE 11,2003 AND RECORDED JUNE 16,2003 AS DOCUMENT 0316732050, FOR THE FOLLOWING PURPOSES:

INGRESS AND EGRESS IN, OVER, ON, ACROSS AND THROUGH PORTIONS OF THE "TOWER PROPERTY"; STRUCTURAL SUPPORT LOCATED IN OR CONSTITUTING A PART OF THE "TOWER PROPERTY"; USE OF FACILITIES LOCATED IN THE "TOWER PROPERTY"; USE AND MAINTENANCE OF THE RETAIL EASEMENT FACILITIES, AS DEFINED THEREIN; UTILITY PURPOSES IN CERTAIN AREAS OF THE "TOWER PROPERTY"; USE AND MAINTENANCE OF ANY OF THE FOLLOWING ROOMS: SYSTEM, GENERATOR, VALVE, MECHANICAL, MACHINE, ELECTRICAL, STAIR, SWITCHGEAR, PANEL METER, TRANSFER AREA, EQUIPMENT OR PUMP ROOMS LOCATED IN THE "TOWER PROPERTY"; PERMITTING THE EXISTENCE OF ENCROACHMENTS LOCATED WITHIN THE "TOWER PROPERTY"; USE AND ACCESS TO THE ROOF FOR EXTERIOR MAINTENANCE, WINDOW WASHING, AND FUTURE FACILITIES AS LOCATED IN THE "TOWER PROPERTY"; PERMITTING THE EXISTENCE, ATTACHMENT USE AND MAINTENANCE OF RETAIL OWNED FACILITIES OR FUTURE FACILITIES, AS DEFINED THEREIN; AND INSTALLATION, USE AND MAINTENANCE OF COMMUNICATION FACILITIES LOCATED ON THE ROOF OF THE "TOWER PROPERTY" AS DEFINED THEREIN.

FIRST AMENDMENT TO THE AMENDED AND RESTATED DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS DATED JULY 7,2005 BY AND AMONG PALMOLIVE TOWER CONDOMINIUMS, LLC (THE TOWER OWNER) AND PALMOLIVE RETAIL, LLC (THE RETAIL OWNER) AND PALMOLIVE FACADE, LLC (THE FACADE OWNER), RECORDED August 2, 2005, AS DOCUMENT 0521432093.

PARCEL 4:

PRO FORMA SPECIMEN ONLY NOT YET APPROVED

THE RIGHT TO THE USE OF FIVE PARKING RIGHTS TO HAVE A PASSENGER VEHICLE VALET PARKED IN THE PARKING AREA (AS DEFINED IN THAT CERTAIN DECLARATION OF CONDOMINIUM OWNERSHIP AND OF EASEMENTS, RESTRICTIONS, COVENANT AND BY-LAWS) FOR THE PALMOLIVE LANDMARK RESIDENCES, A CONDOMINIUM DATED \_\_\_\_\_, 2005, AS DOCUMENT \_\_\_\_\_, IN ACCORDANCE WITH SECTION 2.03 OF THE DECLARATION AND LOCATED AT THE PROPERTY COMMONLY KNOWN AS 159 EAST WALTON PLACE, CHICAGO, IL.



# UNOFFICIAL COPY

## EXHIBIT B

### RENT ABATEMENT ESCROW FUND SCHEDULE

Rent Abatement Release Date	Rent Abatement Release Amount
August 11, 2005	\$7,017.83
September 11, 2005	\$7,017.83
October 11, 2005	\$7,017.83
November 11, 2005	\$7,017.83
June 11, 2006	\$7,017.83
July 11, 2006	\$7,017.83
August 11, 2006	\$7,230.38
September 11, 2006	\$7,230.38
October 11, 2006	\$7,230.38
November 11, 2006	\$7,230.38