

UNOFFICIAL COPY



Doc#: 0523516153 Fee: \$78.50
Eugene "Gene" Moore
Cook County Recorder of Deeds
Date: 08/23/2005 12:17 PM Pg: 1 of 28

MORTGAGE, ASSIGNMENT OF LEASES AND RENTS AND SECURITY AGREEMENT

by

CELL TOWER LEASE ACQUISITION LLC
("Mortgagor")

to and for the benefit of

CELL TOWER LEASE FUNDING LLC
("Mortgagee")

Dated: as of 08/23, 2005

Property Location: See Exhibit A

DOCUMENT PREPARED BY:

Robert W. Mouton, Esq.
Locke Liddell & Sapp LLP
601 Poydras Street, Suite 2400
New Orleans, LA 70130

File: #90924.00500

LTIC: #10646384

Unison Site: #228426

PIN# 22-14-400-037-0000

S-y
P-2
m-y
KW

UNOFFICIAL COPY

MORTGAGE, ASSIGNMENT OF LEASES AND RENTS AND SECURITY AGREEMENT

THIS MORTGAGE, ASSIGNMENT OF LEASES AND RENTS AND SECURITY AGREEMENT (as amended, restated, or otherwise modified from time to time, this "Mortgage") dated as of May 26, 2005, is executed and delivered by CELL TOWER LEASE ACQUISITION LLC, a Delaware limited liability company, ("Debtor"), for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged by Debtor, in favor of CELL TOWER LEASE FUNDING LLC, a Delaware limited liability company (together with its successors and assigns, "Secured Party").

ARTICLE 1

Certain Definitions; Granting Clauses; Secured Indebtedness

Section 1.1 Certain Definitions and Reference Terms. Unless otherwise defined herein, terms used herein shall have the meanings ascribed to them in the Credit Agreement (hereinafter defined). In addition to other terms defined herein, each of the following terms shall have the meaning assigned to it:

- (a) "Debtor": CELL TOWER LEASE ACQUISITION LLC, a Delaware limited liability company, whose address is 6809D Bowman's Crossing, Frederick, Maryland 21703-7150.
- (b) "Secured Party": CELL TOWER LEASE FUNDING LLC, a Delaware limited liability company, whose address is 6809D Bowman's Crossing, Frederick, Maryland 21703-7150.
- (c) "Credit Agreement": The Loan and Security Agreement dated as of June 22, 2004, between Debtor and Secured Party, pursuant to which the Notes and this Mortgage are executed, as such Credit Agreement may be amended, supplemented, renewed, extended, restated, or otherwise modified from time to time.
- (d) "Easement Agreement" means, whether one or more, the Easement and Assignment Agreement(s) entered into by and between the Site Owner and Unison Site Management, L.L.C., more particularly described on Exhibit "A" attached hereto and made a part hereof and as assigned to Debtor pursuant to that certain Assignment of Easement recorded contemporaneously with or just prior to recordation of this Mortgage.
- (e) "Site Owner" means, whether one or more, the fee owner(s) of the Land (as defined below), together with its successors and assigns, who executed the Easement Agreement described on Exhibit "A".

UNOFFICIAL COPY

(f) “State” means the state where the Land encumbered by the Easement Agreement is located.

Section 1.2 Mortgaged Property. Debtor, in order to secure the payment of the indebtedness hereinafter referred to and the performance of the obligations, covenants, agreements, warranties and undertakings of Debtor hereinafter described, does hereby IRREVOCABLY GRANT, BARGAIN, SELL, PLEDGE, WARRANT, ALIEN, REMISE, RELEASE, CONVEY, MORTGAGE, TRANSFER, ASSIGN, CONFIRM and SET OVER to Secured Party, all of Debtor’s present and future estate, right, title and interest in and to the following described property, whether such property is now or hereafter in existence:

(a) all rights, power and privileges of Debtor in the real estate (the “Land”) described in Exhibit “A” attached hereto and incorporated herein by reference, and all right, title and interest of Debtor in and to (i) all streets, roads, alleys, easements, rights-of-way, licenses, rights of ingress and egress, existing or proposed, abutting, adjacent, used in connection with or pertaining to the Land; (ii) any strips or gores between the Land and abutting or adjacent properties; and (iii) all additional lands, estates and development rights hereafter acquired by Debtor for use in connection with the Land and the development of the Land and all additional lands and estates therein which may, from time to time, by supplemental mortgage or otherwise be expressly made subject to the lien of this Mortgage (the Land, and the other rights, titles and interests referred to in this clause (a) sometimes collectively called the “Premises”); (b) to the extent of Debtor’s interest therein, all Debtor’s rights, but not liability for any breach by Debtor, under all commitments, insurance policies, management, leasing, and other contracts, if any, related to the Premises or the use or operation thereof; (c) all deposits (including Debtor’s rights in tenants’ security deposits, deposits with respect to utility services to the Premises, and any deposits or reserves under any Loan Document for taxes, insurance or otherwise), money, accounts, instruments, documents, notes and chattel paper arising from or by virtue of any transactions related to the Premises (without derogation of Article 3 hereof); (d) all permits, licenses, franchises, certificates, development rights, commitments and rights for utilities, and other rights and privileges obtained in connection with the Premises; (e) all leases, rents, royalties, bonuses, issues, profits, revenues and other benefits of the Premises (without derogation of Article 3 hereof); (f) all refunds, rebates or credits in connection with reduction in real estate taxes and assessments charged against the Mortgaged Property as a result of tax certiorari or any applications or proceedings for reduction; (g) upon the occurrence and continuance of a Default, the right, in the name and on behalf of Debtor, 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 interests of Secured Party in the Mortgaged Property; (h) all tradenames, trademarks, servicemarks, logos, copyrights, goodwill, books and records and all other general intangibles relating to or used in connection with the operation of the Mortgaged Property (as hereinafter defined); (i) all engineering, accounting, title, legal, and other technical or business data concerning the Mortgaged Property which are in the possession of Debtor or in which Debtor can otherwise grant a security interest; (j) all proceeds of or arising from the properties, rights, titles and interests referred to above in this Section 1.2, including but not limited to proceeds of any sale, lease or other disposition thereof, proceeds of each

UNOFFICIAL COPY

policy of insurance relating thereto (including premium refunds), proceeds of the taking thereof or of any rights appurtenant thereto, including change of grade of streets, curb cuts or other rights of access, by eminent domain or transfer in lieu thereof for public or quasi-public use under any law, and proceeds arising out of any damage thereto; (k) all other interests of every kind and character which Debtor now has or hereafter acquires in, to or for the benefit of the properties, rights, titles and interests referred to above in this Section 1.2 and all property used or useful in connection therewith, including but not limited to rights of ingress and egress and remainders, reversions and reversionary rights or interests; and (l) if the estate of Debtor in any of the property referred to above in this Section 1.2 is an easement estate, all estate, right, title, and interest of Debtor in, to, under, or derived from the Easement Agreement granting to Debtor an easement estate in and to all or a portion of the Land (the "Easement"), together with all amendments, supplements, consolidations, extensions, renewals, and other modifications of the Easement Agreement now or hereafter entered into in accordance with the provisions thereof; together with all other, further, additional or greater estate, right title, or interest of Debtor in, to, under, or derived from the easement that might at any time be acquired by Debtor by the terms of the Easement Agreement, by reason of the exercise of any option thereunder or otherwise, further, this Mortgage shall include, and the lien, security title and security interest created hereby shall encumber and extend to, all other or additional title, estates, interests or rights which are now owned or may hereafter be acquired by Debtor in or to the property demised under the Easement Agreement creating the easement estate.

Notwithstanding anything to the contrary contained in this Section 1.2, Debtor and Secured Party hereby acknowledge and agree that Debtor owns easement title to the Easement Land as created by virtue of the Easement Agreement and does not own fee title thereto.

TO HAVE AND TO HOLD the foregoing rights, interests and properties, and all rights, estates, powers and privileges appurtenant thereto (herein collectively called the "Mortgaged Property"), unto Secured Party, upon the terms, provisions and conditions herein set forth.

Section 1.3 Security Interest. In order to further secure the payment of the secured indebtedness hereinafter referred to, and the performance of the Obligations, covenants, agreements, warranties, and undertakings of Debtor hereinafter described, Debtor hereby grants to Secured Party a security interest in all of the Mortgaged Property which constitutes personal property or fixtures (herein sometimes collectively called the "Collateral"). In addition to its rights hereunder or otherwise, Secured Party shall have all of the rights of a secured party under the State Uniform Commercial Code, or under the Uniform Commercial Code in force in any other state to the extent the same is applicable law. If a Default shall occur and be continuing, Secured Party, 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 State Uniform Commercial Code, or under the Uniform Commercial Code in force in any other state to the extent the same is applicable law, including, without limiting the generality of the foregoing, the right to take possession of the Collateral or any part thereof, and to take such

UNOFFICIAL COPY

other measures as Secured Party may deem necessary for the care, protection and preservation of the Collateral. Upon request or demand of Secured Party after the occurrence and during the continuance of a Default, Debtor shall, at its expense, assemble the Collateral and make it available to Secured Party at a convenient place (at the Land if tangible property) reasonably acceptable to Secured Party. Debtor shall pay to Secured Party on demand any and all expenses, including reasonable legal expenses and attorneys' fees, incurred or paid by Secured Party in protecting its interest in the Collateral and in enforcing its rights hereunder with respect to the Collateral after the occurrence and during the continuance of a Default. Any notice of sale, disposition or other intended action by Secured Party with respect to the Collateral sent to Debtor in accordance with the provisions of the Credit Agreement at least ten (10) business days prior to such action, shall, except as otherwise provided by applicable law, constitute reasonable notice to Debtor. The proceeds of any disposition of the Collateral, or any part thereof, may, except as otherwise required by applicable law, be applied by Secured Party to the payment of the Obligations in such priority and proportions as Secured Party in its sole discretion shall deem proper.

Section 1.4 Notes, Loan Documents, Other Obligations. This Mortgage is made to secure and enforce the payment and performance of the following promissory notes, Obligations, indebtedness and liabilities, subject to the provisions of Section 6.25 hereof.

(a) Notes. The promissory note executed by Debtor pursuant to the Credit Agreement and all other notes given in substitution therefor or in modification, renewal, extension, increase, or consolidation thereof in whole or in part, as set forth in the Credit Agreement (such notes, as from time to time supplemented, amended, extended, modified, increased, or consolidated and all other notes given in substitution therefor, or in modification, renewal, extension, increase or consolidation thereof, in whole or in part, being hereinafter called the "Notes");

(b) Credit Agreement. All indebtedness and other Obligations of Debtor under the Credit Agreement;

(c) Loan Documents. All indebtedness and other obligations of Debtor, including without limitation, the Obligations owed to Secured Party, now or hereafter incurred or arising pursuant to or permitted by the provisions of the Notes, this Mortgage, the other Loan Documents (as defined in the Credit Agreement) or any other instrument now or hereafter evidencing, governing, guaranteeing or securing the "secured indebtedness", as hereinafter defined, or any part thereof or otherwise executed in connection with the loan evidenced or governed by the Notes, this Mortgage, the Credit Agreement or other Loan Documents (the Notes, the Credit Agreement, the Loan Documents, this Mortgage and such other documents executed in connection herewith or therewith, as they or any of them may have been or may be from time to time supplemented, amended or modified, being herein sometimes collectively called the "Loan Documents"); and

(d) Other Obligations. All other loans and future advances made by Secured Party to Debtor and all other debts, obligations and liabilities of Debtor of every kind and character now or hereafter existing in favor of Secured Party, whether direct or indirect,

UNOFFICIAL COPY

primary or secondary, joint or several, fixed or contingent, secured or unsecured, and whether originally payable to Secured Party or to a third party and subsequently acquired by Secured Party, if the written evidence of such loans, debts, obligations and liabilities specifically provide that they are secured by this Mortgage, it being contemplated that Debtor may hereafter become indebted to Secured Party for such further debts, obligations and liabilities; provided, however, and notwithstanding the foregoing provisions of this paragraph (d), this Mortgage shall not secure any such other loan, advance, debt, obligation or liability with respect to which Secured Party is by applicable law prohibited from obtaining a lien on real estate.

Each amount due and owing by Debtor to Secured Party pursuant to this Mortgage or any other Loan Document shall, except to the extent otherwise specified in the document evidencing the indebtedness, bear interest from the date of such expenditure or payment until paid, at the rate per annum provided in the Credit Agreement for interest on past due principal owed on the Notes; and all such amounts, together with such interest thereon, shall be a part of the secured indebtedness and shall be secured by this Mortgage. The amount and nature of any such expense and the time when paid shall be fully established by the certificate of Secured Party or any of Secured Party's officers or agents.

Section 1.5 Secured Indebtedness. The indebtedness referred to in Section 1.4, and all renewals, extensions and modifications thereof, and all substitutions therefor, in whole or in part, are hereinafter sometimes referred to as the "secured indebtedness" or the "indebtedness secured hereby."

ARTICLE 2

Representations, Warranties and Covenants

Section 2.1 Debtor represents, warrants, and covenants as follows:

(a) Title and Permitted Encumbrances. Debtor has, in Debtor's own right, and Debtor covenants to maintain, lawful, good and indefeasible title to the Mortgaged Property, free and clear of all liens, charges, claims, security interests, and encumbrances except for (i) the matters, if any, set forth in the loan policy of title insurance to be provided to Secured Party in connection herewith; (ii) the security interests evidenced by this Mortgage and any financing statements in favor of Secured Party; (iii) statutory liens on the Mortgaged Property for ad valorem taxes and standby fees which are not yet delinquent; (iv) Liens otherwise permitted pursuant to the Credit Agreement; and (v) other liens, security title and security interests (if any) in favor of Secured Party (the matters described in the foregoing clauses (i), (ii), (iii), (iv) and (v) being herein called the "Permitted Encumbrances"). Debtor, and Debtor's successors and assigns, will warrant and forever defend title to the Mortgaged Property, subject as aforesaid against the claims and demands of all Persons claiming or to claim the same or any part thereof by, through or under Debtor, but not otherwise. Debtor will punctually pay, perform, observe and keep all covenants, obligations and conditions in or pursuant to any Permitted Encumbrance, except to the extent that a failure to do so would not

UNOFFICIAL COPY

cause a material adverse effect upon Debtor. No part of the Mortgaged Property constitutes all or any part of the homestead of Debtor.

(b) No Transfers or Encumbrances. Reference is made to the Credit Agreement for provisions regarding Defaults upon certain transfers of, and encumbrances against, the Mortgaged Property, Debtor's interest therein, and interests in Debtor.

(c) Payment of Obligations. Debtor will pay the Obligations at the time and in the manner provided in the Credit Agreement, the Notes and this Mortgage.

(d) Other Loan Documents. Reference is made to (i) the Credit Agreement, (ii) the Notes and (iii) all and any of the other Loan Documents, for additional covenants, conditions, and agreements.

(e) Insurance. Debtor shall obtain and maintain, or cause to be maintained, in full force and effect at all times insurance coverage as required pursuant to the Credit Agreement.

(f) Maintenance of Mortgaged Property. Debtor shall cause the Mortgaged Property to be maintained in a good and safe condition and repair in accordance with the Credit Agreement.

(g) Waste. Debtor shall not commit or suffer any waste of the Mortgaged Property or make any change in the use of the Mortgaged Property which will in any way materially increase the risk of fire or other hazard arising out of the operation of the Mortgaged Property, or take any action that might invalidate or allow the cancellation of any insurance policy maintained by the Debtor pursuant to the Credit Agreement, or do or permit to be done thereon anything that may in any way materially impair the value of the Mortgaged Property or the security of this Mortgage.

ARTICLE 3

Assignment of Leases and Rents

Section 3.1 Assignment. As additional security for the indebtedness secured hereby, Debtor hereby absolutely and unconditionally assigns to Secured Party all Rents (hereinafter defined) and all of Debtor's rights in and under all Leases (hereinafter defined); it being intended by Debtor that this assignment constitutes a present, absolute assignment and not an assignment for additional security only. Upon the occurrence and during the continuance of a Default hereunder, Secured Party shall have the right, power and privilege (but shall be under no duty) to demand possession of the Rents, which demand shall to the fullest extent permitted by applicable law be sufficient action by Secured Party to entitle Secured Party to immediate and direct payment of the Rents (including delivery to Secured Party of Rents collected for the period in which the demand occurs and for any subsequent period), for application as provided in this Mortgage, all without the necessity of any further action by Secured Party, including, without limitation, any action to obtain possession of the

UNOFFICIAL COPY

Land, or any other portion of the Mortgaged Property. Debtor hereby authorizes and directs the tenants under the Leases, upon the occurrence and during the continuance of a Default hereunder, to pay Rents to Secured Party upon written demand by Secured Party, without further consent of Debtor, without any obligation to determine whether a Default has in fact occurred and regardless of whether Secured Party has taken possession of any portion of the Mortgaged Property, and the tenants may rely upon any written statement delivered by Secured Party to the tenants. Any such payment to Secured Party shall constitute payment to Debtor under the Leases, and Debtor hereby appoints Secured Party as Debtor's lawful attorney-in-fact for giving, and Secured Party is hereby empowered to give, acquittance to any tenants for such payments to Secured Party upon the occurrence and during the continuation of a Default. The assignment contained in this Section shall become null and void upon the release of this Mortgage. As used herein (i) "Lease" means each existing or future lease, license, sublease (to the extent of Debtor's rights thereunder) or other agreement under the terms of which any person has or acquires any right to occupy or use the Mortgaged Property, or any part thereof, or interest therein, and each existing or future guaranty of payment or performance thereunder, and all extensions, renewals, modifications and replacements of each such lease, sublease, agreement or guaranty; and (ii) "Rents" means all of the current and future rents, revenue, issues, income, profits and proceeds derived and to be derived from the Mortgaged Property or arising from the use or enjoyment of any portion thereof or from any Lease including but not limited to liquidated damages following default under any such Lease, security deposits paid in connection with any such Lease, all proceeds payable under any policy of insurance covering loss of rents resulting from untenability caused by damage to any part of the Mortgaged Property, all of Debtor's rights to recover monetary amounts from any tenant in bankruptcy including, without limitation, rights of recovery for use and occupancy and damage claims arising out of Lease defaults, including rejections, under any applicable debtor relief law.

Section 3.2 Covenants, Representations and Warranties Concerning Leases and Rents. Debtor covenants, represents and warrants that: (i) upon execution thereof, Debtor will have good title to, and will be the owner of the entire landlord's interest in, the Leases and Rents hereby assigned and Debtor has authority to assign them, subject to rent-sharing agreements with lessors that may arise from time to time; (ii) unless otherwise stated in a Permitted Encumbrance, no Rents or Leases have been or will be assigned, mortgaged, pledged or otherwise encumbered and no other person has or will acquire any right, title or interest in such Rents or Leases, except for rent-sharing or escrow agreements with the Site Owner that may arise from time to time; (iv) no Rents have been, or will be waived, released, discounted, set off or compromised except in the ordinary course of business, in the exercise of Debtor's sound business judgment; (v) except as stated in the Leases or as otherwise disclosed to Secured Party in writing prior to the date hereof, Debtor has not received any funds or deposits from any tenant for which credit has not already been made on account of accrued Rents; (vi) Debtor shall perform all of its obligations under the Leases and enforce the tenants' obligations under the Leases to the extent enforcement is prudent under the circumstances; (vii) Debtor will not without the prior written consent of Secured Party, enter into any lease after the date hereof other than a written Lease, or waive, release, discount, set off, compromise, reduce or defer any Rent (except in the ordinary course of business, in the

UNOFFICIAL COPY

exercise of Debtor's sound business judgment; (viii) Debtor will not execute any Lease except in accordance with the Loan Documents and for actual occupancy by the tenant; (ix) Debtor shall defend, at Debtor's expense, any proceeding pertaining to any Lease, including, if Secured Party so requests, any such proceeding to which Secured Party is a party; and (x) Secured Party may at any time and from time to time by specific written instrument intended for the purpose, unilaterally subordinate the lien of this Mortgage to any Lease, without joinder or consent of, or notice to, Debtor, any tenant or any other person, and notice is hereby given to each tenant under a Lease of such right to subordinate. No such subordination shall constitute a subordination to any Lien or other encumbrance, whenever arising, or improve the right of any junior lienholder; and nothing herein shall be construed as subordinating this Mortgage to any Lease.

Section 3.3 No Liability of Secured Party. Secured Party's acceptance of this assignment shall not be deemed to constitute Secured Party a "mortgagee in possession," nor obligate Secured Party to appear in or defend any proceeding relating to any Lease or to the Mortgaged Property, or to take any action hereunder, expend any money, incur any expenses, or perform any obligation or liability under any Lease, or assume any obligation for any deposit delivered to Debtor by any tenant and not as such delivered to and accepted by Secured Party. Secured Party shall not be liable for any injury or damage to person or property in or about the Mortgaged Property, or for Secured Party's failure to collect or to exercise diligence in collecting Rents, but shall be accountable only for Rents that it shall actually receive. Neither the assignment of Leases and Rents nor enforcement of Secured Party's right regarding Leases and Rents (including collection of Rents) nor possession of the Mortgaged Property by Secured Party nor Secured Party's consent to or approval of any Lease (nor all of the same), shall render Secured Party liable on any obligation under or with respect to any Lease or constitute affirmation of, or any subordination to, any Lease, occupancy, use or option. If Secured Party seeks or obtains any judicial relief regarding Rents or Leases, the same shall in no way prevent the concurrent or subsequent employment of any other appropriate rights or remedies nor shall same constitute an election of judicial relief for any foreclosure or any other purpose. Secured Party neither has nor assumes any obligations as lessor or landlord with respect to any Lease. The rights of Secured Party under this Article 3 shall be cumulative of all other rights of Secured Party under the Loan Documents or otherwise.

Section 3.4 No Merger of Fee and Easement Estates; Releases. So long as any portion of the secured indebtedness shall remain unpaid, unless Secured Party shall otherwise consent, the fee title to the Mortgaged Property and the easement estate therein created pursuant to the provisions of the Easement Agreement shall not merge but shall always be kept separate and distinct, notwithstanding the union of such estates in Debtor, Secured Party, or in any other person by purchase, operation of law or otherwise. Secured Party reserves the right, at any time, to release portions of the Mortgaged Property, including, but not limited to, the easement estate created by the Easement Agreement, with or without consideration, at Secured Party's election, without waiving or affecting any of its rights hereunder or under the Notes or the other Loan Documents and any such release shall not

UNOFFICIAL COPY

affect Secured Party's rights in connection with the portion of the Mortgaged Property not so released.

Section 3.5 Debtor's Acquisition of Fee Estate. In the event that Debtor, so long as any portion of the secured indebtedness remains unpaid, shall be the owner and holder of the fee title to the Mortgaged Property, the lien of this Mortgage shall be spread to cover Debtor's fee title to the Mortgaged Property and said fee title shall be deemed to be included in the Mortgaged Property. Debtor agrees, at its sole cost and expense, including without limitation Secured Party's reasonable attorneys' fees, to (a) execute any and all documents or instruments necessary to subject its fee title to the Mortgaged Property to the lien of this Mortgage; and (b) provide a title insurance policy which shall insure that the lien of this Mortgage is a first lien on Debtor's fee title to the Mortgaged Property. Notwithstanding the foregoing, if the Easement Agreement is for any reason whatsoever terminated prior to the natural expiration of its term, and if, pursuant to any provisions of the Easement Agreement or otherwise, Secured Party or its designee shall acquire from the Site Owner thereunder another easement or lease with respect to the Mortgaged Property, Debtor shall have no right, title or interest in or to such other lease or the easement estate created thereby.

ARTICLE 4

Default

Section 4.1 Events of Default. The term "Default" means (i) the occurrence of an Event of Default under the Credit Agreement and (ii) the failure of Debtor to timely and properly observe, keep or perform any covenant, agreement or condition required in this Mortgage after the expiration of any applicable notice and cure periods set forth in the Loan Documents.

ARTICLE 5

Remedies

Section 5.1 Certain Remedies. If a Default shall occur and is continuing, Secured Party may exercise any one or more of the following remedies, without notice (unless notice is required by applicable statute):

(a) Upon the occurrence of a Default, subject to the terms of the Credit Agreement, Secured Party shall have the option of declaring all secured indebtedness in its entirety to be immediately due and payable, and the liens and security interests evidenced hereby shall be subject to foreclosure in any manner provided for herein or provided for by law as Secured Party may elect.

(b) Upon the occurrence of a Default, subject to the terms of the Credit Agreement, Secured Party is authorized prior or subsequent to the institution of any foreclosure proceedings to enter upon the Mortgaged Property, or any part thereof, and to take

UNOFFICIAL COPY

possession of the Mortgaged Property and of all books, records and accounts relating thereto and to exercise without interference from Debtor any and all rights which Debtor has with respect to the management, possession, operation, protection or preservation of the Mortgaged Property, including the right to rent the same for the account of Debtor and to deduct from such rents all reasonable costs, expenses and liabilities of every character incurred by Secured Party in collecting such rents and in managing, operating, maintaining, protecting or preserving the Mortgaged Property and to apply the remainder of such rents on the secured indebtedness in such manner as Secured Party may elect. All such costs, expenses and liabilities incurred by Secured Party in collecting such rents and in managing, operating, maintaining, protecting or preserving the Mortgaged Property, if not paid out of rents as hereinabove provided, shall constitute a demand obligation owing by Debtor and shall bear interest from the date of expenditure until paid at a rate of interest per annum as provided in the Credit Agreement for interest on past due principal owed on the Notes. If necessary to obtain the possession provided for above, Secured Party may invoke any and all legal remedies to dispossess Debtor, including specifically one or more actions for forcible entry and detainer, trespass to try title and restitution. In connection with any action taken by Secured Party pursuant to this Section 5.1(b), Secured Party shall not be liable for any loss sustained by Debtor resulting from any failure to let the Mortgaged Property, or any part thereof, or from any other act or omission of Secured Party in managing the Mortgaged Property, unless such loss is caused by the negligence or willful misconduct of Secured Party, and Secured Party shall not be obligated to perform or discharge any obligation, duty or liability under any lease agreement covering the Mortgaged Property or any part thereof or under or by reason of this instrument or the exercise of rights or remedies hereunder. Should Secured Party incur any such liability, the amount thereof, including reasonable costs, expenses and reasonable attorneys' fees, shall be secured hereby, and Debtor shall reimburse Secured Party therefor immediately upon demand. Nothing in this Section 5.1(b) shall impose any duty, obligation or responsibility upon Secured Party for the control, care, management or repair of the Mortgaged Property, or shall operate to make Secured Party responsible or liable for any waste committed on the Mortgaged Property or by any other parties or for any dangerous or defective condition of the Mortgaged Property, or for any negligence in the management, upkeep, operation, repair or control of the Mortgaged Property resulting in loss or injury or death to any tenant, licensee, employee or stranger, unless such waste, dangerous or defective condition or injury or death is directly a result of negligence or willful misconduct by Secured Party. Debtor hereby assents to, ratifies and confirms any and all actions of Secured Party with respect to the Mortgaged Property taken under this Section 5.1(b).

(c) Upon the occurrence of a Default, this instrument may be foreclosed as to any of the Mortgaged Property in any manner permitted by the laws of the State or of any other state in which any part of the Mortgaged Property is situated, or as may be permitted in equity.

(d) In addition to all other remedies herein provided for, Debtor agrees that upon the occurrence of a Default, Secured Party shall as a matter of right be entitled to the appointment of a receiver or receivers for all or any part of the Mortgaged Property, whether such receivership be incident to a proposed sale of such Mortgaged Property or otherwise, and

UNOFFICIAL COPY

without regard to the value of the Mortgaged Property or the solvency of any person or persons liable for the payment of the secured indebtedness, and Debtor does hereby consent to the appointment of such receiver or receivers, waives any and all defenses to such appointment and agrees not to oppose any application therefor by Secured Party, but nothing herein is to be construed to deprive Secured Party of any other right, remedy or privilege it may now or hereafter have under the law to have a receiver appointed; provided, however, that the appointment of such receiver, trustee or other appointee by virtue of any court order, statute or regulation shall not impair or in any manner prejudice the rights of Secured Party to receive payment of the lease payments, rents, room rents, deposits for lodging and income from the Mortgaged Property. Any money advanced by Secured Party in connection with any such receivership shall be a demand obligation owing by Debtor to Secured Party and shall bear interest from the date of making such advancement by Secured Party until paid at a rate of interest per annum as provided in the Credit Agreement for interest on past due principal owed on the Notes.

(e) The proceeds of any sale held by Secured Party or any receiver or public officer in foreclosure of the liens evidenced hereby shall be applied:

first, to the payment of all necessary costs and expenses incident to such foreclosure sale, including but not limited to all court costs and charges of every character in the event foreclosed by suit;

second, to the payment in full of the secured indebtedness.

third, the remainder, if any, shall be paid to Debtor or other party legally entitled thereto.

(f) Secured Party shall have the right to become the purchaser at any sale held by any receiver or public officer, and Secured Party purchasing at such sale shall have the right to credit upon the amount of the bid made therefor, to the extent necessary to satisfy such bid, the secured indebtedness owing to Secured Party.

(g) Upon the occurrence of a Default, Secured Party may exercise its rights of enforcement with respect to the personal property under the State Uniform Commercial Code, as amended, and in conjunction with, in addition to or in substitution for those rights and remedies, and all rights and remedies granted to Secured Party under any Loan Documents executed by Debtor governing security interests in personal property of Debtor. Any sale made pursuant to the provisions of this Section 5.1(g) shall be deemed to have been a public sale conducted in a commercially reasonable manner if held contemporaneously with the sale of the Mortgaged Property in foreclosure as provided herein upon giving the same notice with respect to the sale of the personal property hereunder as is required for such foreclosure of the Mortgaged Property. Any and all statements of fact or other recitals made in any bill of sale or assignment or other instrument evidencing any foreclosure sale hereunder as to nonpayment of the secured indebtedness, or as to the occurrence of any Default, or as to Secured Party having declared all of such indebtedness to be due and payable, or as to notice of time, place and terms of sale and of the properties to be sold having been duly given, or as

UNOFFICIAL COPY

to any other act or thing having been duly done by Secured Party, shall be taken as prima facie evidence of the truth of the facts so stated and recited. Secured Party may appoint or delegate any one or more persons as agent to perform any act or acts necessary or incident to any sale held by Secured Party, including the sending of notices and the conduct of the sale, but in the name and on behalf of Secured Party.

(h) In the event of a default in the payment of any part of the secured indebtedness, Secured Party shall have the right to proceed with foreclosure of the liens and security interests evidenced hereby without declaring the entire secured indebtedness due, and in such event any such foreclosure sale may be made subject to the unmatured part of the secured indebtedness; and any such sale shall not in any manner affect the unmatured part of the secured indebtedness, but as to such unmatured part this Mortgage shall remain in full force and effect just as though no sale had been made. The proceeds of any such sale shall be applied as provided in Section 5.1(e) except that the amount paid under subparagraph second thereof shall be only the matured portion of the secured indebtedness and any proceeds of such sale in excess of those provided for in subparagraphs first and second (modified as provided above) shall be applied to installments of principal of and interest on the Notes in the inverse order of maturity. Several sales may be made hereunder without exhausting the right of sale for any unmatured part of the secured indebtedness.

(i) All remedies herein expressly provided for are cumulative of any and all other remedies existing at law or in equity and are cumulative of any and all other remedies provided for in any other instrument securing the payment of the secured indebtedness, or any part thereof, or otherwise benefiting Secured Party, and Secured Party shall, in addition to the remedies herein provided, be entitled to avail itself of all such other remedies as may now or hereafter exist at law or in equity for the collection of the secured indebtedness and the enforcement of the covenants herein and the foreclosure of the liens and security interests evidenced hereby, and the resort to any remedy provided for hereunder or under any such other instrument or provided for by law shall not prevent the concurrent or subsequent employment of any other appropriate remedy or remedies.

(j) Secured Party may resort to any security given by this Mortgage or to any other security now existing or hereafter given to secure the payment of the secured indebtedness, in whole or in part, and in such portions and in such order as may seem best to Secured Party in its sole and uncontrolled discretion, and any such action shall not in anywise be considered as a waiver of any of the rights, benefits, liens or security interests evidenced by this Mortgage.

(k) To the full extent Debtor may do so, Debtor agrees that Debtor will not at any time insist upon, plead, claim or take the benefit or advantage of any law now or hereafter in force pertaining to the rights and remedies of sureties or providing for any appraisalment, valuation, stay, extension or redemption, and Debtor, for Debtor and Debtor's heirs, devisees, representatives, successors and assigns, and for any and all persons ever claiming any interest in the Mortgaged Property, to the extent permitted by law, hereby waives and releases all rights of redemption, valuation, appraisalment, stay of execution, notice of intention to mature or declare due the whole of the secured indebtedness and all rights to a

UNOFFICIAL COPY

marshaling of the assets of Debtor, including the Mortgaged Property, or to a sale in inverse order of alienation in the event of foreclosure of the liens and security interests hereby created. Debtor shall not have or assert any right under any statute or rule of law pertaining to the marshaling of assets, sale in inverse order of alienation, the exemption of homestead, the administration of estates of decedents or other matters whatever to defeat, reduce or affect the rights of Secured Party under the terms of this Mortgage to a sale of the Mortgaged Property for the collection of the secured indebtedness without any prior or different resort for collection, or the rights of Secured Party under the terms of this Mortgage to the payment of such indebtedness out of the proceeds of sale of the Mortgaged Property in preference to every other claimant whatever. If the Mortgaged Property is sold for an amount less than the secured indebtedness, the deficiency shall be determined by the purchase price at the sale or sales.

(l) If, following the occurrence of a Default and the acceleration of the secured indebtedness but prior to the foreclosure of this Mortgage against the Mortgaged Property, Debtor shall tender to Secured Party payment of an amount sufficient to pay the entire secured indebtedness, such tender shall be deemed to be a voluntary prepayment and, consequently, Debtor shall also pay to Secured Party any charge or premium required to be paid in order to prepay principal and, if such principal payment is made during any period when prepayment is prohibited by this Mortgage, or the Loan Documents, the applicable charge or premium shall be the maximum prepayment penalty provided for in the Loan Documents; provided, however, that in no event shall any amount payable under this Section 5.1(l), when added to the interest otherwise payable on the secured indebtedness, exceed the maximum interest permitted under applicable law.

(m) Upon any foreclosure of the Mortgaged Property pursuant to this Mortgage, Secured Party shall have the right to cancel any policy of insurance covering all or any part of the Mortgaged Property and shall be entitled to receive any unearned premiums from such policy. The unearned premiums received by Secured Party shall be applied in the same manner as provided in Section 5.1(e) above regarding the application of proceeds of sale of the Mortgaged Property.

ARTICLE 6

Miscellaneous

Section 6.1 Scope of Mortgage. This Mortgage is a mortgage and security interest of both real and personal property, a security agreement, a financing statement and an assignment, and also covers proceeds and fixtures.

Section 6.2 Effective as a Financing Statement. This Mortgage shall be effective as a financing statement filed as a fixture filing covering all goods which are or are to become fixtures included within the Mortgaged Property and is to be filed for record in the real estate records of each county where any part of the Mortgaged Property (including said fixtures) is situated. The record owner of the real property described in Exhibit "A" attached

UNOFFICIAL COPY

hereto is Site Owner as set forth in Section 1.1(e) of the Mortgage. This Mortgage is to be filed for record in the real estate records of each county where any part of the Mortgaged Property is situated. This Mortgage shall also be effective as a financing statement covering any other Mortgaged Property and may be filed in any other appropriate filing or recording office. The name, mailing address, type of organization, and jurisdiction of organization of the Debtor for purposes of this financing statement is as set forth for the Debtor in Section 1.1 of Article I hereof, and the name and mailing address of the Secured Party for purposes of this financing statement is as set forth for the Secured Party in the definition of "Secured Party" in Section 1.1 of Article I hereof.

Section 6.3 Reproduction of Mortgage as Financing Statement. A carbon, photographic or other reproduction of this Mortgage or of any financing statement relating to this Mortgage shall be sufficient as a financing statement for any of the purposes referred to in Section 6.2.

Section 6.4 Notice to Account Debtors. In addition to the rights granted elsewhere in this Mortgage, Secured Party may at any time during the existence of a Default, or event which with the giving of notice or passage of time, or both, could become a Default notify the account debtors or obligors of any accounts, chattel paper, negotiable instruments or other evidences of indebtedness included in the Collateral to pay Secured Party directly.

Section 6.5 Waiver by Secured Party. Secured Party may at any time and from time to time by a specific writing interded for the purpose: (a) waive compliance by Debtor with any covenant herein made by Debtor to the extent and in the manner specified in such writing; (b) consent to Debtor's doing any act which hereunder Debtor is prohibited from doing, or to Debtor's failing to do any act which hereunder Debtor is required to do, to the extent and in the manner specified in such writing; (c) release any part of the Mortgaged Property or any interest therein from the lien and security interest of this Mortgage; or (d) release any party liable, either directly or indirectly, for the secured indebtedness or for any covenant herein or in any other Loan Document, without impairing or releasing the liability of any other party. No such act shall in any way affect the rights or powers of Secured Party hereunder except to the extent specifically agreed to by Secured Party in such writing.

Section 6.6 No Impairment of Security. The lien, security interest and other security rights of Secured Party hereunder shall not be impaired by any indulgence, moratorium or release granted by Secured Party including, but not limited to, any renewal, extension or modification which Secured Party may grant with respect to any secured indebtedness, or any surrender, compromise, release, renewal, extension, exchange or substitution which Secured Party may grant in respect of the Mortgaged Property, or any part thereof or any interest therein, or any release or indulgence granted to any endorser, guarantor or surety of any secured indebtedness. The taking of additional security by Secured Party shall not release or impair the lien, security interest or other security rights of Secured Party hereunder or affect the liability of Debtor or of any endorser, guarantor or surety, or improve the right of any junior lienholder in the Mortgaged Property (without implying hereby Secured Party's consent to any junior lien).

UNOFFICIAL COPY

Section 6.7 Acts Not Constituting Waiver by Secured Party. Secured Party may waive any Default without waiving any other prior or subsequent Default. Secured Party may remedy any Default without waiving the default remedied. Neither failure by Secured Party to exercise, nor delay by Secured Party in exercising, any right, power or remedy upon any Default shall be construed as a waiver of such Default or as a waiver of the right to exercise any such right, power or remedy at a later date. No single or partial exercise by Secured Party of any right, power or remedy hereunder shall exhaust the same or shall preclude any other or further exercise thereof, and every such right, power or remedy hereunder may be exercised at any time and from time to time. No modification or waiver of any provision hereof nor consent to any departure by Debtor therefrom shall in any event be effective unless the same shall be in writing and signed by Secured Party and then such waiver or consent shall be effective only in the specific instance, for the purpose for which given and to the extent therein specified. No notice to nor demand on Debtor in any case shall of itself entitle Debtor to any other or further notice or demand in similar or other circumstances. Remittances in payment of any part of the secured indebtedness other than in the required amount in immediately available U.S. funds shall not, regardless of any receipt or credit issued therefor, constitute payment until the required amount is actually received by Secured Party in immediately available U.S. funds and shall be made and accepted subject to the condition that any check or draft may be handled for collection in accordance with the practice of the collecting bank or banks. Acceptance by Secured Party of any payment in an amount less than the amount then due on any secured indebtedness shall be deemed an acceptance on account only and shall not in any way excuse the existence of a Default hereunder.

Section 6.8 Debtor's Successors. If the ownership of the Mortgaged Property or any part thereof becomes vested in a person other than Debtor, Secured Party may, without notice to Debtor, deal with such successor or successors in interest with reference to this Mortgage and to the indebtedness secured hereby in the same manner as with Debtor, without in any way vitiating or discharging Debtor's liability hereunder or for the payment of the indebtedness or performance of the obligations secured hereby. No transfer of the Mortgaged Property, no forbearance on the part of Secured Party, and no extension of the time for the payment of the indebtedness secured hereby given by Secured Party shall operate to release, discharge, modify, change or affect, in whole or in part, the liability of Debtor hereunder for the payment of the indebtedness or performance of the obligations secured hereby or the liability of any other person hereunder for the payment of the indebtedness secured hereby. Debtor agrees that it shall be bound by any modification of this Mortgage or any of the other Loan Documents made by Secured Party and any subsequent owner of the Mortgaged Property, with or without notice to Debtor, and no such modifications shall impair the obligations of Debtor under this Mortgage or any other Loan Document. Nothing in this Section shall be construed to imply Secured Party's consent to any transfer of the Mortgaged Property.

Section 6.9 Place of Payment; Forum. All secured indebtedness which may be owing hereunder at any time by Debtor shall be payable at the place designated in the Notes (or if no such designation is made, at the address of Secured Party indicated at the end of this Mortgage). Debtor hereby irrevocably submits generally and unconditionally for itself

UNOFFICIAL COPY

and in respect of its property to the non-exclusive jurisdiction of any court of the State, or any United States federal court sitting in the State, and to the non-exclusive jurisdiction of any state or United States federal court sitting in the state in which any of the Mortgaged Property is located, over any suit, action or proceeding arising out of or relating to this Mortgage or the secured indebtedness. Debtor hereby agrees and consents that, in addition to any methods of service of process provided for under applicable law, all service of process in any such suit, action or proceeding in any court of the State, or any United States federal court sitting in the State may be made pursuant to the notice provisions of the Credit Agreement.

Section 6.10 Subrogation to Existing Liens. To the extent that proceeds of the Notes are used to pay indebtedness secured by any outstanding lien, security interest, charge or prior encumbrance against the Mortgaged Property, such proceeds have been advanced by Secured Party at Debtor's request, and Secured Party shall be subrogated to any and all rights, security interests and liens owned by any owner or holder of such outstanding liens, security interests, charges or encumbrances, however remote, irrespective of whether said liens, security interests, charges or encumbrances are released, and all of the same are recognized as valid and subsisting and are renewed and continued and merged herein to secure the secured indebtedness, but the terms and provisions of this Mortgage shall govern and control the manner and terms of enforcement of the liens, security interests, charges and encumbrances to which Secured Party is subrogated hereunder. It is expressly understood that, in consideration of the payment of such indebtedness by Secured Party, Debtor hereby waives and releases all demands and causes of action for offsets and payments in connection with the said indebtedness.

Section 6.11 Application of Payments to Certain Indebtedness. If any part of the secured indebtedness cannot be lawfully secured by this Mortgage or if any part of the Mortgaged Property cannot be lawfully subject to the lien and security interest hereof to the full extent of such indebtedness, then all payments made shall be applied on said indebtedness first in discharge of that portion thereof which is not secured by this Mortgage.

Section 6.12 Compliance with Usury Laws. It is the intent of Debtor and Secured Party and all other parties to the Loan Documents to conform to and contract in strict compliance with applicable usury law from time to time in effect. All agreements between Secured Party and Debtor (or any other party liable with respect to any indebtedness under the Loan Documents) are hereby limited by the provisions of this Section which shall override and control all such agreements, whether now existing or hereafter arising and whether written or oral. In no way, nor in any event or contingency (including but not limited to prepayment, default, demand for payment, or acceleration of the maturity of any obligation), shall the interest taken, reserved, contracted for, charged or received under this Mortgage, the Notes or otherwise, exceed the maximum amount permissible under applicable law. If, from any possible construction of any document, interest would otherwise be payable in excess of the maximum lawful amount, any such construction shall be subject to the provisions of this Section and such document shall be automatically reformed and the interest payable shall be automatically reduced to the maximum amount permitted under applicable law, without the necessity of execution of any amendment or new document. If Secured Party shall ever receive anything of value which is characterized as interest under applicable law and which

UNOFFICIAL COPY

would apart from this provision be in excess of the maximum lawful amount, an amount equal to the amount which would have been excessive interest shall, without penalty, be applied to the reduction of the principal amount owing on the secured indebtedness in the inverse order of its maturity and not to the payment of interest, or refunded to Debtor or the other payor thereof if and to the extent such amount which would have been excessive exceeds such unpaid principal. The right to accelerate maturity of the Notes or any other secured indebtedness does not include the right to accelerate any interest which has not otherwise accrued on the date of such acceleration, and Secured Party does not intend to charge or receive any unearned interest in the event of acceleration. All interest paid or agreed to be paid to Secured Party shall, to the extent permitted by applicable law, be amortized, prorated, allocated and spread throughout the full stated term (including any renewal or extension) of such indebtedness so that the amount of interest on account of such indebtedness does not exceed the maximum permitted by applicable law. As used in this Section, the term "applicable law" shall mean the laws of the State or the federal laws of the United States applicable to this transaction, whichever laws allow the greater interest, as such laws now exist or may be changed or amended or come into effect in the future.

Section 6.13 Release of Mortgage. If all of the secured indebtedness be paid and all of the covenants, warranties, undertakings and agreements made in this Mortgage are performed, and all obligations, if any, of Secured Party for further advances have been terminated, then, and in that event only, all rights under this Mortgage shall terminate (except to the extent expressly provided herein with respect to indemnifications and other rights which are to continue following the release hereof) and the Mortgaged Property shall become wholly clear of the liens, security interests, conveyances and assignments evidenced hereby, and such liens and security interests shall be released by Secured Party in due form at Debtor's cost. Without limitation, all provisions herein for indemnity of Secured Party shall survive discharge of the secured indebtedness and any foreclosure, release or termination of this Mortgage.

Section 6.14 Notices. All notices, requests and demands to or upon the respective parties hereto to be effective shall be in writing and shall be deemed to have been duly given or made when delivered as specified in the notice provisions of the Credit Agreement.

Section 6.15 Invalidity of Certain Provisions. A determination that any provision of this Mortgage is unenforceable or invalid shall not affect the enforceability or validity of any other provision and the determination that the application of any provision of this Mortgage to any person or circumstance is illegal or unenforceable shall not affect the enforceability or validity of such provision as it may apply to other persons or circumstances.

Section 6.16 Gender; Titles; Construction; Capitalized Terms. Within this Mortgage, words of any gender shall be held and construed to include any other gender, and words in the singular number shall be held and construed to include the plural, unless the context otherwise requires. Titles appearing at the beginning of any subdivisions hereof are for convenience only, do not constitute any part of such subdivisions, and shall be disregarded in construing the language contained in such subdivisions. The use of the words "herein,"

UNOFFICIAL COPY

“hereof,” “hereunder” and other similar compounds of the word “here” shall refer to this entire Mortgage and not to any particular Article, Section, paragraph or provision. Words importing persons shall include firms, associations, partnerships (including limited partnerships), limited liability companies, joint ventures, trusts, corporations and other legal entities, including public or governmental bodies, agencies or instrumentalities, as well as natural persons. All capitalized terms used in this Mortgage, but not defined herein shall possess the same meaning as they were given in the Credit Agreement.

Section 6.17 Recording. Debtor forthwith upon the execution and delivery of this Mortgage and thereafter, from time to time, will cause this Mortgage and any of the other Loan Documents 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 and perfect the lien or security interest hereof upon, and the interest of Secured Party in, the Mortgaged Property. Debtor will pay all taxes, filing, registration or recording fees, and all expenses incident to the preparation, execution, acknowledgment and/or recording of the Notes, this Mortgage, the other Loan Documents, any note, deed of trust or mortgage supplemental hereto, any security instrument with respect to the Mortgaged Property and any instrument of further assurance, and any modification or amendment of the foregoing documents, and, with the exception of income, franchise or similar taxes, all federal, state, county and municipal taxes, duties, imposts, assessments and charges arising out of or in connection with the execution and delivery of this Mortgage, any deed of trust or mortgage supplemental hereto, any security instrument with respect to the Mortgaged Property or any instrument of further assurance, and any modification or amendment of the foregoing documents, except where prohibited by law so to do.

Section 6.18 Secured Party as Mortgagee. All persons dealing with the Mortgaged Property (other than Debtor) shall be entitled to assume that Secured Party is the only Mortgagee, and may deal with Secured Party (including without limitation accepting from or relying upon full or partial releases hereof executed by Secured Party only) without further inquiry as to the existence of other mortgagees, until given actual notice of facts to the contrary or until this Mortgage is supplemented or amended of record to show the existence of other mortgagees.

Section 6.19 Reporting Compliance. Debtor agrees to comply with any and all reporting requirements applicable to the transaction evidenced by the Notes and secured by this Mortgage which are set forth in any law, statute, ordinance, rule, regulation, order or determination of any governmental authority, including but not limited to The International Investment Survey Act of 1976, The Agricultural Foreign Investment Disclosure Act of 1978, The Foreign Investment in Real Property Tax Act of 1980 and the Tax Reform Act of 1984 and further agrees upon request of Secured Party to furnish Secured Party with evidence of such compliance.

Section 6.20 Debtor. Unless the context clearly indicates otherwise, as used in this Mortgage, “Debtor” means the grantor(s) named in Section 1.1 hereof or any of them. The obligations of Debtor hereunder (if Debtor consists of more than one person) shall be joint

UNOFFICIAL COPY

and several. If any mortgagor, or any signatory who signs on behalf of any Debtor, is a corporation, partnership, limited liability company or other legal entity, Debtor and any such signatory, and the person or persons signing for it, represent and warrant to Secured Party that this instrument is executed, acknowledged and delivered by Debtor's duly authorized representatives. If Debtor is an individual, no power of attorney granted by mortgagor herein shall terminate on Debtor's disability.

Section 6.21 Execution. This Mortgage may have been executed in several counterparts, all of which are identical, and all of which counterparts together shall constitute one and the same instrument. The date or dates reflected in the acknowledgments hereto indicate the date or dates of actual execution of this Mortgage, but such execution is as of the date shown on the first page hereof, and for purposes of identification and reference the date of this Mortgage shall be deemed to be the date reflected on the first page hereof.

Section 6.22 Successors and Assigns. The terms, provisions, covenants and conditions hereof shall be binding upon Debtor, and the heirs, devisees, representatives, successors and assigns of Debtor, and shall inure to the benefit of Secured Party and its successors, substitutes and assigns and shall constitute covenants running with the Land. All references in this Mortgage to Debtor or Secured Party shall be deemed to include all such heirs, devisees, representatives, successors, substitutes and assigns.

Section 6.23 Modification or Termination. The Loan Documents may only be modified or terminated by a written instrument or instruments intended for that purpose and executed by the Party against which enforcement of the modification or termination is asserted. Any alleged modification or termination which is not so documented shall not be effective as to any Party.

Section 6.24 No Partnership. The relationship between Secured Party and Debtor is solely that of lender and mortgagor. Secured Party has no fiduciary relationship with Debtor. Nothing contained in the Loan Documents is intended to create any partnership, joint venture, association or special relationship between Debtor and Secured Party or in any way make Secured Party a co-principal with Debtor with reference to the Mortgaged Property. Any inferences to the contrary of any of the foregoing are hereby expressly negated.

Section 6.25 Future Advances.

(a) This Mortgage secures (i) all present and future loan disbursements made by the Secured Party under the Notes, the Credit Agreement and any other Loan Documents, including, but not limited to periodic advances and re-advances on a revolving basis which will be made from time to time, and all other sums from time to time owing to the Secured Party by the Debtor under the Loan Documents and (ii) such future or additional advances (in addition to the principal amount under the Notes) as may be made by the Secured Party, at its exclusive option, to Debtor or its successors or assigns for any purpose. Notwithstanding any provision to the contrary set forth herein, the maximum principal amount which may be secured hereby at any one time is Two Hundred Million and No/One-Hundredth Dollars (\$200,000,000.00), plus interest and any disbursements made for the

UNOFFICIAL COPY

payment of taxes, levies or insurance on the Mortgaged Property, and for maintenance, repair, protection, and preservation of the Mortgaged Property, with interest on those disbursements, plus any increase in the principal balance as the result of negative amortization or deferred interest. This Mortgage shall secure such future advances as may be made by Secured Party, at its option and for any purpose, within twenty (20) years from the date of this Mortgage. All such future advances shall be included within the terms "secured indebtedness" and "indebtedness secured hereby", shall be secured to the same extent as if made on the date of the execution of this Mortgage, and shall take priority as to third persons without actual notice from the time this Mortgage is filed for record as provided by law.

(b) Without the prior written consent of Secured Party, which Secured Party may grant or withhold in its sole discretion, Debtor shall not file for record any notice limiting the maximum principal amount that may be secured by this Mortgage to a sum less than the maximum principal amount set forth in this Section.

Section 6.26 Time of Essence. Time shall be of the essence in this Mortgage with respect to all of Debtor's obligations hereunder.

Section 6.27 Applicable Law. **This mortgage, and its validity, enforcement and interpretation, shall be governed by the law of the State (without regard to any conflict of laws principles) and applicable federal law.**

Section 6.28 Entire Agreement. The Loan Documents constitute the entire understanding and agreement between Debtor and Secured Party with respect to the transactions arising in connection with the indebtedness secured hereby and supersede all prior written or oral understandings and agreements between Debtor and Secured Party with respect to the matters addressed in the Loan Documents. Debtor hereby acknowledges that, except as incorporated in writing in the Loan Documents, there are not, and were not, and no persons are or were authorized by Secured Party to make, any representations, understandings, stipulations, agreements or promises, oral or written, with respect to the matters addressed in such Loan Documents.

THE WRITTEN LOAN DOCUMENTS REPRESENT THE FINAL AGREEMENT BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES. THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES.

Section 6.29 Headings. The headings and captions of various Sections 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.

Section 6.30 Limitation on Agent's Responsibility. No provision of this Mortgage shall operate to place any obligation or liability for the control, care, management or repair of the Mortgaged Property upon the Secured Party nor shall it operate to make the Secured Party responsible or liable for any waste committed on the Mortgaged Property by the

UNOFFICIAL COPY

tenants or any other Person, or for any dangerous or defective condition of the Mortgaged Property, or for any negligence in the management, upkeep, repair or control of the Mortgaged Property resulting in loss or injury or death to any tenant, licensee, employee or stranger. Nothing herein contained shall be construed as constituting Secured Party a "mortgagee in possession."

Section 6.31 Additional Security Instruments. THIS MORTGAGE IS MADE IN ADDITION TO OTHER DEEDS OF TRUSTS AND MORTGAGES (THE "ADDITIONAL SECURITY INSTRUMENTS") GIVEN OR TO BE GIVEN BY DEBTOR TO THE SECURED PARTY OR A TRUSTEE FOR THE BENEFIT OF THE SECURED PARTY, COVERING PROPERTY LOCATED IN THIS STATE AND SEVERAL OTHER STATES. The Additional Security Instruments further secure the Obligations of Debtor to the Secured Party under the Credit Agreement. Upon the occurrence of a Default, Secured Party may proceed under this Mortgage and/or the Additional Security Instruments against any of such property and/or the Mortgaged Property in one or more parcels and in such manner and order as Secured Party shall elect. Debtor hereby irrevocably waives and releases, to the extent permitted by law, and whether now or hereafter in force, any right to have the Mortgaged Property and/or the property covered by the Additional Security Instruments marshalled upon any foreclosure of this Mortgage or the Additional Security Instruments.

Section 6.32 Changes in Tax, Obligations, Credit and Documentary Stamp.

(a) If any law is enacted or adopted or amended after the date of this Mortgage which deducts the Obligations from the value of the Mortgaged Property for the purpose of taxation or which imposes a tax, either directly or indirectly, on the Obligations or the Secured Party's interest in the Mortgaged Property, Debtor will pay the tax, with interest and penalties thereon, if any. If Secured Party is advised by counsel chosen by it that the payment of tax by Debtor would be unlawful or taxable to Secured Party or unenforceable or provide the basis for a defense of usury then Secured Party shall have the option by written notice of not less than one hundred twenty (120) days to declare the Obligations immediately due and payable.

(b) Debtor will not claim or demand or be entitled to any credit or credits on account of the Obligations for any part of property taxes or charges assessed by any Governmental Authority 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 Obligations. If such claim, credit or deduction shall be required by law, Secured Party shall have the option, by written notice of not less than one hundred twenty (120) days, to declare the Obligations immediately due and payable.

(c) If at any time the United States of America, any State thereof or any subdivision of any such State shall require revenue or other stamps to be affixed to the Notes, this Mortgage, or any of the other Loan Documents or impose any other tax or charge on the same, Debtor will pay for the same, with interest and penalties thereon, if any.

UNOFFICIAL COPY

Section 6.33 Splitting of Mortgage. This Mortgage and the Notes shall, at any time until the same shall be fully paid and satisfied, at the sole election of Secured Party, be split or divided into two or more notes and two or more security instruments, each of which shall cover all or a portion of the Mortgaged Property to be more particularly described therein. To that end, Debtor, upon written request of Secured Party, shall execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered by the then owner of the Mortgaged Property, to Secured Party and/or its designee or designees substitute notes and security instruments in such principal amounts, aggregating not more than the then unpaid principal amount of this Mortgage, and containing terms, provisions and clauses similar to those contained herein and in the Notes, and such other documents and instruments as may be required by Secured Party.

Section 6.34 Replacement Documents. Upon receipt of an affidavit of an officer of Secured Party as to the loss, theft, destruction or mutilation of any of the Notes or any other Loan Document which is not of public record, and, in the case of any such mutilation, upon surrender and cancellation of such Note(s) or other Loan Document, Debtor will issue, in lieu thereof, a replacement Note or other Loan Document, dated the date of such lost, stolen, destroyed or mutilated Note or other Loan Document in the same principal amount thereof and otherwise of like tenor.

Section 6.35 Waiver of Notice. To the extent permitted by applicable law, Debtor shall not be entitled to any notices of any nature whatsoever from Secured Party except with respect to matters for which this Mortgage or the other Loan Documents specifically and expressly provide for the giving of notice by Secured Party to Debtor and except with respect to matters for which Secured Party is required by applicable law to give notice, and Debtor hereby expressly waives the right to receive any notice from Secured Party with respect to any matter for which this Mortgage does not specifically and expressly provide for the giving of notice by Secured Party to Debtor.

Section 6.36 Waiver of Statute of Limitations. To the extent permitted by applicable law, Debtor hereby expressly waives and releases to the fullest extent permitted by law, the pleading of any statute of limitations as a defense to payment and performance of its Obligations.

ARTICLE 7

Local Law Provisions

Section 7.1 Credit Agreement. This Mortgage is subject to all of the terms, covenants and conditions of the Credit Agreement, which Credit Agreement and all of the terms, covenants and conditions thereof are by this reference incorporated herein and made a part hereof with the same force and effect as if set forth at length herein. The proceeds of the loan secured hereby are to be advanced by Secured Party to Debtor in accordance with the provisions of the Credit Agreement. Debtor shall observe and perform all of the terms, covenants and conditions of the Credit Agreement on Debtor's part to be observed or

UNOFFICIAL COPY

performed. The Credit Agreement contemplates a revolving credit facility whereby future advances shall be made to Debtor, repayments of all or portions of the credit facility may be made by Debtor and re-advances may be made by Secured Party to Debtor, all pursuant to the terms set forth in the Credit Agreement. It is intended that the portion of the indebtedness to be secured by this Mortgage shall constitute the portions of the credit facility advanced to Debtor under the Credit Agreement which are not repaid or readvanced, so that only those portions of the credit facility advanced that remain outstanding and for as long as such sums shall remain outstanding, shall be secured by this Mortgage. The indebtedness secured by this Mortgage shall therefore be the last dollars repaid by Debtor under the Credit Agreement.

Section 7.2 Waiver of Right of Redemption and Reinstatement. Debtor acknowledges and represents and warrants that the Mortgaged Property does not include agricultural real estate or residential real estate as those terms are defined in 735 ILCS 5/15-1201 and 5/15-1219. Pursuant to 735 ILCS 5/15-1601(b), Debtor waives any and all rights of redemption from sale under any order of foreclosure of this Mortgage, or other rights of redemption which may run to Debtor or any other Owner of Redemption, as that term is defined in 735 ILCS 5/15-1212. Debtor waives all rights of reinstatement under 735 ILCS 5/15-1602 to the fullest extent permitted by law.

Section 7.3 Maximum Indebtedness. Notwithstanding any provision of this Mortgage, the Note or any other Loan Documents which permits additional sums to be advanced on or after the date of this Mortgage, whether as additional loans or for any payments authorized by this Mortgage or any other loan document, the total amount of the principal component of the Obligations secured hereby, including the amounts described in Section 6.25, shall not at any time exceed \$100,000,000.00.

Section 7.4 Conformance with Illinois Mortgage Foreclosure Law. If any provision of this Mortgage is inconsistent with any applicable provision of the Illinois Mortgage Foreclosure Law, 735 ILCS 5/15-101, et. seq. (the "Act"), the provisions of the Act shall take precedence over the provisions of this Mortgage, but the Act shall not invalidate or render unenforceable any other provision of this Mortgage that can be fairly construed in a manner consistent with the Act. Without in any way limiting any of the Secured Party's rights, remedies, powers and authorities provided in this Mortgage or otherwise, and in addition to all of such rights, remedies, powers and authorities, the Secured Party shall also have all rights, remedies, powers and 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 Secured Party any rights, remedies, powers or authorities upon default of the Debtor which are more limited than what would be vested in the Secured Party under the Act in the absence of said provision the Secured Party shall have such rights, remedies, powers and authorities that would be otherwise vested in it under the Act. Without limitation, all expenses (including reasonable attorneys' fees and costs) incurred by the Secured Party 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.

UNOFFICIAL COPY

Section 7.4 Hazardous Materials. Debtor acknowledges and represents and warrants that the Mortgaged Property is not subject to the disclosure requirements of the Illinois Responsible Property Transfer Act because no portion of the Mortgaged Property contains any facilities which are subject to reporting under Section 312 of the Federal Emergency Planning and Community Right to Know Act of 1986 (42 USC Section 11022) and the federal regulations promulgated thereunder, or has any underground storage tanks which require notification under the Solid Waste Disposal Act (42 USC Sections 690 et seq.), all as set forth in the Illinois Responsible Property Transfer Act.

[THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK]

UNOFFICIAL COPY

IN WITNESS WHEREOF, this instrument is executed by Debtor as of the date first written on page 1 hereof.


Signed, sealed and delivered in the presence of:


Print Name: **Denise Reaves**


Print Name: **Charle Land**

DEBTOR:

CELL TOWER LEASE ACQUISITION LLC,
a Delaware limited liability company

By: 
Name: James R. Holmes
Its: Vice President/Secretary

The address of Debtor is :

CELL TOWER LEASE ACQUISITION LLC
6809D Bowman's Crossing
Frederick, Maryland 21703-7150
1-646-452-5455

The address of Secured Party is:

CELL TOWER LEASE FUNDING LLC
6809D Bowman's Crossing
Frederick, Maryland 21703-7150
1-646-452-5455

Office of Cook County Clerk's Office

UNOFFICIAL COPY

STATE OF NEW YORK)
) ss.
 COUNTY OF NEW YORK)

On the 26th day of May in the year of 2005, before me, the undersigned, a Notary Public in and for said state, personally appeared James R. Holmes, Vice President/Secretary of Cell Tower Lease Acquisition LLC, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the individual or the entity upon behalf of which the individual acted, executed the instrument.

WITNESS my hand and official seal.

Signature: _____
 My Commission Expires: _____
 Commission Number: _____

ALEXIS IHNATOLYA
 Notary Public, State of New York
 No. 01H4824185
 Qualified in Kings County
 Commission Expires May 6, 2007

UNOFFICIAL COPY

EXHIBIT A

Description of Easement

(Location, Cook County, Illinois)

That certain Easement and Assignment Agreement dated as of May 26, 2005 by and between Bencsik Family Limited Partnership, as site owner, and Unison Site Management, L.L.C., as grantee, recorded in/under 0515117123 of the records of Cook County, State of Illinois, encumbering all or part of the following described real property:

The West half of the East 1/4 of the North West 1/4 of the South East 1/4 of Section 14, Township 37 North, Range 11, East of the Third Principal Meridian, in Cook County, Illinois

Together with and subject to the access for ingress and egress, as conveyed in document dated May 11, 1978 and recorded October 2, 1978 as Document No. 24653752 in the property records of Cook County, Illinois.