

UNOFFICIAL COPY



Doc#: 0601742041 Fee: \$74.00
Eugene "Gene" Moore RHSP Fee: \$10.00
Cook County Recorder of Deeds
Date: 01/17/2006 08:03 AM Pg: 1 of 26

This instrument prepared by
and after recording return to:

Eric M. Roberson
Chapman and Cutler LLP
Harris Bank Building, 17th Floor
111 West Monroe
Chicago, Illinois 60603

SPACE ABOVE THIS LINE RESERVED FOR RECORDER'S USE ONLY

MORTGAGE AND SECURITY AGREEMENT

BY

JCG INDUSTRIES, INC., MORTGAGOR

AND

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, MORTGAGEE

Loan No. 158613

zc 4 of 5 8284932/25664770

28
A

BOX 333-C11

UNOFFICIAL COPY

TABLE OF CONTENTS

	Page #
ARTICLE I. THE OBLIGATIONS	2
Section 1.01. The Indebtedness Secured by this Mortgage	2
Section 1.02. Other Matters Secured by this Mortgage	3
Section 1.03. First Lien Status	3
ARTICLE II. REPRESENTATIONS, COVENANTS AND AGREEMENTS OF MORTGAGOR	3
Section 2.01. Title	3
Section 2.02. Payment of Secured Indebtedness	3
Section 2.03. Sale or Conveyance	4
Section 2.04. Junior Mortgages	7
Section 2.05. Compliance with Laws	7
Section 2.06. Further Instruments	7
Section 2.07. No Liens	8
ARTICLE III. LEASES AND Absolute ASSIGNMENT OF RENTS AND PROFITS	8
Section 3.01. Absolute Assignment of Rents and Profits	8
Section 3.02. Covenants Regarding Performance of Lessor's Obligations	8
Section 3.03. Negative Covenants Regarding Lease(s)	8
Section 3.04. Breaches Regarding Lease(s) or Assignments(s) Thereof	9
Section 3.05. Oil, Gas or Mineral Leases	9
Section 3.06. Estoppel Certificates	9
Section 3.07. Future Leases	9
Section 3.08. Application of Rents and Other Income	9
Section 3.09. Priority of Application	9
Section 3.10. Accountability for Rents	9
Section 3.11. Liability for Agents	10
Section 3.12. Liability for Premises	10
Section 3.13. Status of Lease(s)/Notice of Default	10
Section 3.14. Mortgagee's Right to Perform for Mortgagor/Lessor	10
Section 3.15. Subleases Included	10
Section 3.16. <i>Leases in the Normal Course of Business</i>	10
ARTICLE IV. DEFAULTS AND REMEDIES	11
Section 4.01. Events of Default	11
Section 4.02. Remedies	12
Section 4.03. Secured Party Remedies	14
Section 4.04. Receiver	15
Section 4.05. Retention of Possession	15
Section 4.06. Remedies Not Exclusive	15
Section 4.07. Forbearance, etc. Not a Waiver	16
Section 4.08. Additional Amount Due After Acceleration	16
ARTICLE V. SECURITY AGREEMENT	16
Section 5.01. Personal Property to be Covered as Part of Real Property; Fixtures; Mortgage to also Constitute Security Agreement as to Personal Property Deemed Not to be Affixed to Real Property or Adapted to the Use Thereof	16
Section 5.02. Creation of Security Interest	16
Section 5.03. Representations and Covenants	16
ARTICLE VI. MISCELLANEOUS	17
Section 6.01. Certain Additional Powers of Mortgagee; Sale No Effect on Liability	17
Section 6.02. Mortgagor's Duty to Defend and Pay Expenses	17
Section 6.03. Documentary or Internal Revenue Stamps	18
Section 6.04. Tax on Mortgage	18
Section 6.05. Filing and Recording Fees	18
Section 6.06. Notices	18
Section 6.07. Waiver of Rights by Mortgagor	19

UNOFFICIAL COPY

Section 6.08. Joint and Several Liability..... 19

Section 6.09. Severability..... 19

Section 6.10. Covenants "To Run With Land"; Successors and Assigns. 19

Section 6.11. Definitions..... 19

Section 6.12. Governing Law 19

Section 6.13. Modification Procedure 20

Section 6.14. Captions..... 20

Section 6.15. Business Purpose..... 20

Section 6.16. JURISDICTION..... 20

Section 6.17. WAIVER OF TRIAL BY JURY..... 20

Section 6.18. No Personal Liability on Debt..... 20

Section 6.19. *Right of First Offer.* 20

Section 6.20. *Cross-Collateralization and Cross Default.* 20

EXHIBIT A Legal Description 23

Property of Cook County Clerk's Office

UNOFFICIAL COPY

Loan No. **158613**

MORTGAGE AND SECURITY AGREEMENT

THIS INDENTURE, herein referred to as "Mortgage" made as of this **19th day of December, 2005**, between **JCG INDUSTRIES, INC., an Illinois corporation, whose address is Attn: Joseph C. Grendys, 1300 West Higgins Road, Park Ridge, Illinois 60068** ("Mortgagor") and **THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, an Indiana corporation**, whose notice address is c/o Delaware Investment Advisers, 1300 South Clinton Street, Fort Wayne, Indiana 46802, Attention: Loan Servicing, Loan No. **158613** ("Mortgagee").

THAT WHEREAS, Mortgagor is justly indebted to Mortgagee in the principal sum of **Five Million Twenty-Five Thousand and No/100 Dollars (\$5,025,000.00)**, evidenced by one or more notes of even date herewith (such note(s) and any notes issued in exchange therefor or in replacement thereof and any modifications, extensions, and renewals thereof, herein called the "Note") of Mortgagor, made payable to the order of and delivered to Mortgagee, in and by which said Note Mortgagor promises to pay at the place designated in said Note, the said principal sum and interest at the rate and in installments as provided in said Note, with a final payment of the balance due on **January 10, 2016**.

NOW THEREFORE, Mortgagor to secure the payment of said principal sum of money and said interest in accordance with the terms, provisions and limitations of this Mortgage, and of the Note secured hereby, and the performance of the covenants and agreements herein contained, by Mortgagor to be performed, and also in consideration of the sum of One Dollar (\$1.00) in hand paid, the receipt and sufficiency whereof are hereby acknowledged, does by these presents, MORTGAGE, GRANT, REMISE, ALIEN, CONVEY, ASSIGN, AND GRANT A SECURITY INTEREST IN, unto Mortgagee and to its successors and assigns:

ALL that certain piece or lot of land, and all issues and profits therefrom (the "Real Property"), situated in **Cook County, State of Illinois**, described on **EXHIBIT A ATTACHED HERETO AND MADE A PART HEREOF BY THIS REFERENCE**.

TOGETHER WITH all and singular the tenements, hereditaments, easements, riparian or other rights and appurtenances thereto belonging or in anywise appertaining, including all rights and privileges of ingress and egress for the benefit thereof, and the reversion or reversions, remainder and remainders thereof; and all the estate, right, title, interest, property, claim and demand whatsoever of Mortgagor, of, in and to the same and of, in and to every part and parcel thereof.

TOGETHER WITH all right, title and interest of, Mortgagor in and to all structures, buildings and other improvements now upon or which may hereafter be put upon the Real Property, including all building equipment and fixtures of every kind and nature (hereinafter referred to as the "Improvements").

TOGETHER WITH all right, title and interest of Mortgagor in and to all fixtures and personal property now or hereafter attached to, or used or adapted for use in the operation of, the Real Property or the Improvements, including but without being limited to, all inventory, machinery, apparatus, equipment, fittings, fixtures (except *any* personal property and trade fixtures belonging to any tenant), whether actually or constructively attached to the Real Property or the Improvements and including all domestic and ornamental fixtures, and articles of personal property of every kind and nature whatsoever (hereinafter collectively called "Personal Property"), now or hereafter located in, upon or under the Real Property or the Improvements or any part thereof and used or useable in connection with any present or future operation of the Real Property or the Improvements, including but not limiting the generality of the foregoing, all heating, air conditioning, sprinklers, freezing, lighting, laundry, incinerating and dynamo and generating equipment; engines, pipes, pumps, tanks, motors, conduits; switchboards, plumbing and plumbing fixtures; lifting, cleaning, fire prevention, fire extinguishing, refrigerating, ventilating and communications apparatus; boilers, ranges, furnaces, oil burners or units thereof; appliances; vacuum cleaning systems; elevators, escalators; shades, awnings, screens; storm doors and windows; stoves; refrigerators; cooking apparatus and mechanical equipment, gas and electric fixtures; electrical and water distribution systems; water purification systems, partitions, furniture of any public spaces, halls and lobbies; attached cabinets; partitions; ducts and compressors; rugs and carpets; draperies, furniture and furnishings used in the operation of the Real Property or the Improvements; together with all additions thereto and replacements thereof (Mortgagor hereby agreeing with respect to all additions and replacements, to execute and deliver from time to time such further instruments as may be

UNOFFICIAL COPY

requested by Mortgagee to confirm the conveyance, transfer and assignment of and granting of a security interest in any of the foregoing); and including also all interest of any owner of the Real Property or the Improvements in any of such items hereafter at any time acquired under conditional sale contract, chattel mortgage or other title retaining or security instrument, all of which property mentioned in this paragraph shall be deemed a part of the realty and not severable wholly or in part without material injury to the freehold.

TOGETHER WITH all right, title and interest of Mortgagor in all materials intended for construction, reconstruction, alteration or repair of the improvements, such materials to be deemed included in the Real Property and the Improvements immediately upon delivery to the Real Property.

TOGETHER WITH any and all right, title and interest of Mortgagor ~~to the proceeds of all insurance in effect~~ **subject to Section 4.05 of the Loan Agreement** with respect to the Premises (as hereinafter defined) and to any and all awards or payments, including interest thereon, and the right to receive the same, which may be made with respect to the Premises (as hereinafter defined) as a result of (a) the exercise of the right of eminent domain, (b) alteration of the grade of any street, or (c) any other injury to or decrease in the value of the Premises, to the extent of all amounts which may be secured by this Mortgage at the date of receipt of any such award or payment by Mortgagee, and of the reasonable counsel fees, costs and disbursements incurred by Mortgagee in connection with the collection of such proceeds, award or payment. Mortgagor agrees to execute and deliver, from time to time, such further instruments as may be requested by Mortgagee to confirm such assignment to Mortgagee of any such proceeds, award or payment.

TOGETHER WITH all right, title and interest of Mortgagor, now owned or hereafter acquired, in and to the land lying in the bed or within the right of way of any street, road or avenue, opened or proposed, in front of or adjoining the Real Property to the center line thereof and all water and water rights pertaining to the Real Property.

TOGETHER WITH all the rents, issues and profits thereof under present or future leases, or otherwise with respect to the Real Property, including without limitation, all cash, accounts, accounts receivable, book debts and other forms of obligation belonging to or owing to Mortgagor, whether arising from goods sold or services rendered by Mortgagor, or from any other transactions, and all claims, choses in action, proceeds, improvements, betterments, renewals, substitutes, replacements and additions arising from or relating to the Premises which are hereby specifically assigned, transferred and set over to Mortgagee.

TOGETHER WITH all leasehold estate, right, title and interest of Mortgagor in any ground lease(s) covering the above-described Real Property or any portion thereof, now or hereafter existing or entered into, as well as to any after-acquired fee.

TOGETHER WITH all leases of the Real Property, Improvements or Personal Property now or hereafter entered into and all right, title and interest of Mortgagor thereunder, including, without limitation, cash or securities deposited thereunder to secure performance by the lessees of their obligations thereunder, whether such cash or securities are to be held until the expiration of the terms of such leases or applied to one or more of the installments of rent coming due immediately prior to the expiration of such terms, including, further, the right upon the happening of a Default (as hereinafter defined), to receive and collect the rents thereunder.

TO HAVE AND TO HOLD all of the foregoing with the appurtenances thereunto belonging, all of which are collectively referred to herein as the "Premises", unto Mortgagee, its successors and assigns forever subject to the Permitted Exceptions (as hereinafter defined) for the purposes and uses herein set forth.

ARTICLE I. THE OBLIGATIONS

Section 1.01. **The Indebtedness Secured by this Mortgage.** This Mortgage delivered by Mortgagor and accepted by Mortgagee, and all rights, title, interests, liens, security interests, powers and privileges created hereby or arising by virtue hereof are given to secure the payment of the loan (the "Loan") in the principal amount of ***Five Million Twenty-Five Thousand and No/100 Dollars (\$5,025,000.00)***, evidenced by the Note, made by Mortgagor, payable to the order of Mortgagee, the terms of which are incorporated herein by this reference, and to secure the payment of all interest payable as set forth therein.

UNOFFICIAL COPY

The Note provides for the payment of attorneys' fees and expenses and costs of collection, in certain events, all of which are secured hereby and provides for the acceleration of payments at the option of the holder in certain contingencies.

Section 1.02. Other Matters Secured by this Mortgage. This Mortgage further secures:

- (a) Payment and performance of the obligations, covenants and agreements contained in the Note,
- (b) Payment and performance of the obligations, covenants and agreements contained in that certain Loan Agreement of even date herewith, made and entered into by and between Mortgagor and Mortgagee (the "Loan Agreement"), the terms and conditions of said Loan Agreement being incorporated herein by this reference,
- (c) Payment of all other sums (including, without limitation, any advances made by Mortgagee or Trustee for or on account of Mortgagor not exceeding twice the principal sum specified in the Note) becoming due or payable under, and the performance of all other obligations, covenants and agreements contained in (i) the Note; (ii) this Mortgage, or (iii) any other instrument given as security for the Note or entered into with respect to the Loan, including without limitation, the Loan Agreement, the Commitment, and the Environmental Indemnity Agreements (all as defined in the Loan Agreement) (such other instruments being collectively referred to herein as the "Collateral Loan Documents"), together with interest thereon after Default, and on any other sums not paid when due at an interest rate equal to the Default Rate (as defined in the Note), and
- (d) Payment of such additional sums (not exceeding twice the principal sum specified in the Note) and interest thereon which may hereinafter be loaned to Mortgagor, or its successors or assigns, by Mortgagee, whether or not evidenced by a promissory note or note.

The obligations set forth in Sections 1.01 and 1.02, together with any other sums now or hereafter secured hereby, are sometimes collectively referred to herein as the "Secured Indebtedness."

Section 1.03. First Lien Status. The lien and security interest created hereby secure the payment of the Secured Indebtedness, including the indebtedness evidenced by the Note, interest, attorneys' fees, and monies advanced, if any, for the use of Mortgagor under any provision hereof, regardless of the date of delivery, transfer or maturity, and shall be and remain a first and prior lien and security interest encumbering the Premises.

ARTICLE II.

REPRESENTATIONS, COVENANTS AND AGREEMENTS OF MORTGAGOR

TO PROTECT AND MAINTAIN THE SECURITY OF THIS MORTGAGE, Mortgagor represents, covenants and agrees to and with Mortgagee as follows:

Section 2.01. Title. Mortgagor has good and marketable fee simple title to the Real Property and the Improvements (and clear title to the Personal Property), and is lawfully seized and possessed of the same, and has the full power, authority and right to convey the same and to execute and deliver this Mortgage; the Premises are unencumbered except as may be herein expressly provided (and except for those title exceptions which have been approved by Mortgagee and which appear as exceptions under Schedule B of the loan title insurance policy issued to Mortgagee insuring this Mortgage (the "Permitted Exceptions")); and Mortgagor will forever warrant and defend the title to the Premises unto Mortgagee against the claims of all persons whomsoever. The Permitted Exceptions do not and will not materially and adversely affect (a) the ability of the Mortgagor to pay in full the Secured Indebtedness in a timely manner; or (b) the use of the Premises for the use currently being made thereof, the operation of the Premises as currently being operated or the value of the Premises.

Section 2.02. Payment of Secured Indebtedness. Mortgagor will punctually pay, in lawful money of the United States, all sums due Mortgagee at the time and in the manner mentioned in the Note, this Mortgage, and the Collateral Loan Documents, or any document evidencing a future advance or any other instrument evidencing and/or securing the Secured Indebtedness.

UNOFFICIAL COPY

Section 2.03. Sale or Conveyance. Mortgagor agrees that Mortgagee's willingness to enter into the financial transaction represented by the Note and secured by this Mortgage is expressly based in part upon Mortgagor's financial strength and creditworthiness (and if the Loan is nonrecourse, in light of, among other things, the exceptions to exculpation set out in Section 17 of the Note), together with Mortgagor's ability to develop, improve, lease, operate and manage the business to be conducted upon the Premises. Mortgagor agrees that these considerations are material to Mortgagee. Therefore, any Transfer (as defined below) of (i) all or any part of the Premises or any interest therein; or (ii) any interest (including but not limited to beneficial interests) in Mortgagor, whether voluntarily, involuntarily or by operation of law, shall be prohibited. Any Transfer in violation of this Mortgage shall constitute a Default, and in addition to any remedies available to Mortgagee on account of such Default, Mortgagee may, at Mortgagee's option (which it may exercise at any time and in its sole and absolute discretion), declare any Transfer made without Mortgagee's prior written consent null and void.

If the Mortgagee in its sole and absolute discretion does not declare a Default, but instead consents to a Transfer, it is expressly acknowledged and agreed by Mortgagor that, among other things: (i) Mortgagee may condition any consent to a Transfer upon payment to Mortgagee of a transfer fee equal to one percent (1%) of the principal balance of the Loan at the time of Transfer (which shall be calculated prior to any principal reduction Mortgagee may require in connection with such Transfer) (*the "Transfer Fee"*), together with *an Administrative fee of Five Thousand Dollars and NO/100 (\$5,000.00) (the "Administrative Fee")*; (ii) Mortgagee will require the transferee to assume in writing all of Mortgagor's obligations under the Note, this Mortgage, and the Collateral Loan Documents; (iii) Mortgagee will require Mortgagor and transferee to execute any and all revisions or amendments to the Note, this Mortgage, or the Collateral Loan Documents to conform to the then current form of Mortgagee's standard loan documents and to execute any additional documents requested by Mortgagee; (iv) Mortgagee will require that Mortgagor submit all information necessary for Mortgagee to confirm that none of the transferee, any new guarantor, any affiliate of transferee or any new guarantor, or any person owning an interest in any of the foregoing is in violation of any Anti-terrorism Laws (as defined in the Loan Agreement), including but not limited to being a "Specially Designated National" or a "Blocked Person" as those terms are defined in the Office of Foreign Asset Control Regulations (31 CFR Section 500 et seq.), as the same may be modified or amended; (v) Mortgagee will require an endorsement to its title insurance policy and the hazard insurance policy on the Premises in form satisfactory to it; (vi) parties other than Mortgagee shall pay all expenses arising from such Transfer (including but not limited to the reasonable fees of Mortgagee's outside counsel); and (vii) if securities have been issued or are to be issued in reliance upon the Loan, Mortgagee may condition any consent to Transfer upon (A) there being no withdrawal, downgrade or qualification of the then current rating of any such securities; (B) the transferee meeting the single purpose entity requirements set forth in the Loan Agreement, if any; (C) receipt of a non-consolidation opinion concerning the transferee and the beneficial owners thereof, in form and content acceptable to Lender; and (D) such other requirements as may be imposed by the applicable rating agencies. If Mortgagee shall consent to any one such Transfer and assumption, such consent shall not constitute a waiver of Mortgagee's rights hereunder as to any future or successive Transfers, and the same shall not operate to release Mortgagor or any guarantor or surety of any of the Secured Indebtedness, from any obligation hereunder, under the Note or the Collateral Loan Documents or under any guaranty of the Secured Indebtedness unless they are specifically released by a release instrument executed by Mortgagee.

As used herein, "Transfer" shall mean the following:

- (i) The sale, option to sell, contract to sell, agreement to sell, transfer, conveyance, assignment, disposal, sale by installment purchase contract of the Premises, or any portion thereof, or any interest therein, whether voluntary or involuntary (except by eminent domain), by operation of law or otherwise;
- (ii) The lease (except leases expressly permitted in Article III) of all or any portion of the Premises;
- (iii) The transfer of any interest in Mortgagor (including but not limited to transfers of partnership or member interest, transfers of stock, mergers and consolidations) or any interest in the Premises, whether beneficial or otherwise, and whether voluntarily, involuntarily or by operation of law;
- (iv) The transfer of any interest in any general or limited partnership, corporation, limited liability company, trust or other legal entity that is a general partner in, managing member of or parent company of Mortgagor (including but not limited to a merger or consolidation), whether beneficial or otherwise, and whether voluntarily, involuntarily or by operation of law;

UNOFFICIAL COPY

(v) A change in the management of the Premises to a person or entity other than Mortgagor or a manager approved by Mortgagee;

(vi) Any change in the character or use of the Premises (*except that Mortgagor shall have the right to approve reasonable changes in the character or use of the Premises as allowed pursuant to the lease of the Premises by and between Mortgagor and Koch Foods Incorporated*); and

(vii) Any change in the legal or equitable title of the Premises or in the status or right(s) to occupy the Premises whether pursuant to leases, licenses, easements, or other instruments whether or not of record and whether or not for consideration.

Any change described in (iii) or (iv) with respect to any transferee of the Premises that has *not* been previously approved by Mortgagee shall automatically terminate such approval.

Notwithstanding the foregoing, Mortgagee agrees that Mortgagor and Grendys (as defined herein) or a Grendys Entity (as defined herein) shall have the one (1) time right to Transfer any interest of any kind in the Premises, with the prior written consent of Mortgagee, which consent may be given or withheld in Mortgagee's sole discretion. It is expressly acknowledged and agreed by Mortgagor that, among other things, Mortgagee may condition any consent to a Transfer upon (a) receipt of at least sixty (60) days prior written notice of the requested Transfer, (b) satisfaction of subsections (i) through (vii) of the second paragraph of this Section 2.03(a); and (c) reduction of the principal balance then outstanding under the Note such that the outstanding principal balance shall not be more than seventy percent (70%) of the purchase price received by Mortgagor for such Transfer, with such reduction to be subject to the then applicable prepayment premium set forth in the Note, provided, however, in the event such reduction occurs during a period in which the Note is closed to prepayment, the five percent (5%) minimum premium provided in Section 12 of the Note shall be reduced to one percent (1%) of the amount of such reduction. Notwithstanding the foregoing, in the event such transfer of the Premises is made to Koch Foods Incorporated ("Koch") or Joseph C. Grendys ("Grendys"), or an entity in which Grendys controls a managing interest ("Grendys Entity"), such transfer shall not require the consent of Mortgagee; however such transfer shall be subject to the other requirements set forth herein. Notwithstanding the foregoing, (i) no reduction of the principal balance then outstanding under the Note shall be required in connection with a transfer of the Premises to Koch, Grendys or a Grendys Entity and (ii) no Transfer Fee shall be charged in connection with a transfer of the Premises to Koch, Grendys or a Grendys Entity.

In addition to the foregoing one-time right to transfer the Premises, Mortgagee agrees that Mortgagor shall have the right to transfer fee title to the Premises to a partnership or limited liability company of which Joseph C. Grendys ("Grendys") controls a managing interest (any such entity being a "Affiliate Controlled Entity"). The transfer of the Premises to an Affiliate Controlled Entity shall not require the consent of Mortgagee; however such transfer shall be subject to the other requirements set forth herein. Notwithstanding the foregoing, (i) no reduction of the principal balance then outstanding under the Note shall be required in connection with a transfer of the Premises to an Affiliate Controlled Entity and (ii) no Transfer Fee shall be charged in connection with a transfer of the Premises to an Affiliate Controlled Entity, and (iii) the Administrative Fee applicable to such transfer shall be One Thousand Dollars (\$1,000.00) if occurring in years one (1) through five (5) of the Loan and Two Thousand Dollars (\$2,000.00) if occurring in years six (6) through ten (10) of the Loan.

UNOFFICIAL COPY

The foregoing shall be deemed an exception and not a waiver of the restrictions on Transfers set forth in this Section 2.03 of this Mortgage, and any Transfer after the one (1) time Transfer described herein shall be prohibited.

If the Premises are sold after Mortgagee has approved the purchaser thereof pursuant to this Section 2.03(a) and the purchaser has assumed all obligations of Mortgagor under the Note, this Mortgage, and the Collateral Loan Documents (including, without limitation, the liability for obligations set forth in Section 17 of the Note), then Mortgagor and Guarantor shall be released from all future liability thereunder and the Environmental Indemnity except for matters that occurred or were in existence during the time Mortgagor owned the Premises. Additionally, if the Premises are sold to an Affiliate Controlled Entity, Koch, Grendys or a Grendys Entity in accordance with this Section, then Mortgagor shall be released from all future liability thereunder except for matters that occurred or were in existence during the time Mortgagor owned the Premises.

Notwithstanding the foregoing, provided no Default or Default Condition (as defined in the Loan Agreement) shall have occurred and remain outstanding, Mortgagor shall have the right to make the following transfers ("Permitted Transfers") (a) the transfer of stock in Mortgagor provided that after said transfer, Grendys is an officer, general partner, manager or managing member in the transferee or the manager of the transferee's manager; (b) that no more than 49% of the interest is transferred therein, or to an Affiliate Controlled Entity; or (c) the transfer of any stock in Mortgagor to (i) the owners of Mortgagor, in trust, as trustee, or to any third party trustee, for the benefit of said owners or for the benefit of their families, or (ii) by testamentary transfer or transfer to a conservator on behalf of said owners. Mortgagee acknowledges that officers of Mortgagor may be designated, replaced or appointed, as the case may be, in accordance with the terms of Mortgagor's bylaws with Mortgagee's prior consent and subject to Mortgagee's legal review in the case where Grendys continues to control Mortgagor. While such Permitted Transfer shall not require the prior written approval of Mortgagee, it is required that Mortgagee be notified in writing of same and be furnished with all items which it requires to effect such transfer. Such Permitted Transfers shall not be subject to a Transfer Fee, but shall be subject to an Administrative Fee of One Thousand Dollars (\$1,000.00) if occurring in years one (1) through five (5) of the Loan and Two Thousand Dollars \$2,000.00 if occurring in years six (6) through ten (10) of the Loan, plus actual third party costs. All expenses arising from such transfer shall be paid by parties other than the Mortgagee.

(b) Without limitation on the rights and remedies of Mortgagee arising under this Mortgage, in the event that Mortgagor or any subsequent owner of the Premises or any part thereof shall at any time sell, convey or transfer or attempt to sell, convey or transfer the Premises or any part thereof, directly or indirectly, voluntarily or involuntarily, in violation of the provisions of paragraph 2.05(b) (concerning "ERISA") of this Mortgage, then Mortgagee shall, in addition to any other rights and remedies it may have at law or in equity or under this Mortgage, be entitled to a decree or order restraining and enjoining such sale, conveyance or transfer, and Mortgagor or such subsequent owner shall not plead in defense thereof that there would be an adequate remedy at law (it being hereby expressly acknowledged and agreed that damages at law would be an inadequate remedy for breach or threatened breach of the provisions of paragraph 2.05(b)(iii) of this Mortgage).

(c) Mortgagor agrees that it shall pay all costs and expenses, including reasonable attorneys' fees, appraisal fees, recording costs, the cost of any title insurance policies or endorsements, surveys, environmental assessments and studies, modifications to loan documents, and legal opinions incurred or required by Mortgagee or its attorneys in connection with any of the transactions set forth in this Section 2.03. Said payment shall be due and payable on demand and the obligation to make said payment shall be secured hereby and shall be enforceable whether or not such transaction is consummated.

UNOFFICIAL COPY

(d) If Mortgagor shall make any Transfer prohibited by this Section 2.03, the Mortgagee shall have the right to deliver notices to, receive payments from, give waivers or consents to, and otherwise deal with the assignee or transferee of such interest with reference to this Mortgage and the Note as though the assignee or transferee were the Mortgagor hereunder, but without discharging Mortgagor from any liability hereunder or under the Note, and Mortgagor shall remain primarily liable, as principal and not as a surety, for the payment of the Note and the performance of its obligations hereunder, and Mortgagor hereby waives all suretyship or similar defenses which might otherwise be available to it. Any such dealing with a transferee shall not be a waiver by the Mortgagee of its rights contained in this Section 2.03.

Section 2.04. Junior Mortgages. Except for this Mortgage, Mortgagor will not execute or deliver any pledge, security agreement, mortgage or deed of trust covering all or any portion of the Premises. It is understood and agreed that Mortgagee shall be under no obligation whatsoever to consent to any proposed encumbrance. ***Notwithstanding anything herein to the contrary, with Mortgagee's review and reasonable approval, Mortgagee shall permit the collateral assignment, pledge or hypothecation of stock in Mortgagor as security for additional financing, provided, however, that any such collateral assignment, pledge or hypothecation shall not encumber the Premises with any lien or rights which would survive foreclosure by Mortgagee.***

Section 2.05. Compliance with Laws.

(a) Mortgagor represents that to date it has fully complied with all laws, ordinances, rulings, regulations, and orders of all governmental authorities affecting the Premises (including but not limited to zoning, land use and environmental laws, ordinances, rulings, regulations and/or orders) and has obtained all necessary and proper permits and licenses for development use and operation of the Premises. Mortgagor warrants (i) that the Premises currently comply with the Americans with Disabilities Act of 1990 (the "ADA") and the Fair Housing Act of 1988 (the "FHA") to the extent applicable, and (ii) that Mortgagor will maintain the Premises and perform all alterations, modifications and additions to the Premises in compliance with the ADA and the FHA, as the same may be amended from time to time. Mortgagor further covenants and agrees that it will comply with or cause to be complied with all present and future laws, statutes, ordinances, rulings, regulations, orders and requirements of all federal, state, municipal, county, and other governmental agencies and authorities applicable to Mortgagor or to the Premises, as well as all covenants, conditions, and restrictions affecting same.

(b) Mortgagor covenants and represents that (i) no assets of any employee benefit plan (as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as now or hereafter amended) will be used in the satisfaction, exercise or performance of any of the obligations, rights or transactions specified or contemplated herein or in the Note or in any of the Collateral Loan Documents; (ii) the Premises do not now, and without the prior written consent of Mortgagee will not, constitute an asset of any such employee benefit plan; and (iii) notwithstanding any other provisions of this Mortgage, Mortgagor will not sell, convey or transfer the Premises, or any part thereof, to any person or entity which at the time of such transfer does not satisfy the representations set forth in clauses (i) and (ii) above regardless of whether any of the above-described conditions arises by operation of law or otherwise.

(c) Contemporaneously with the execution and delivery of this Mortgage, Mortgagor has delivered to Mortgagee a sworn affidavit that Mortgagor is a United States person (as defined by Section 7701(a)(30) of the Internal Revenue Code of 1986, as amended) (the "Code") and that Mortgagor is not a foreign person, foreign corporation, foreign partnership, foreign trust or foreign estate within the meaning of Section 1445(f)(3) of the Code. The sale, conveyance or transfer of the Premises, or any part thereof, to any foreign person, foreign corporation, foreign partnership, foreign trust or foreign estate within the meaning of Section 1445(f) of the Code, without the prior written consent of Mortgagee, shall constitute a Default hereunder, and Mortgagor further covenants, represents and warrants that Mortgagor shall notify Mortgagee within ten (10) days after any event or occurrence which would cause or result in the representations and certifications made to Mortgagee in such affidavit to become untrue, invalid or incorrect.

Section 2.06. Further Instruments. Mortgagor shall execute and deliver (and pay the costs of preparation and recording thereof) to Mortgagee and to any subsequent holder of the Secured Indebtedness, from time to time, upon demand, any further instrument or instruments, including, but not limited to, deeds of trust, mortgages, security agreements, financing statements, continuation statements, leases, assignments, and renewal and

UNOFFICIAL COPY

substitution notes, so as to reaffirm, to correct and to perfect the evidence of the obligations hereby secured and the lien, security interest and title of Mortgagee to all or any part of the Premises intended to be hereby conveyed, whether now conveyed, later substituted for, or acquired subsequent to the date of this Mortgage and extensions or modifications thereof.

Section 2.07. No Liens. Mortgagor shall not permit any mechanics', merchants', laborers' or materialmen's liens to stand against the Premises. If any such lien shall at any time be recorded against the Premises, then Mortgagor shall (i) give written notice thereof promptly to Mortgagee and (ii) cause the same to be discharged of record within thirty (30) days after the date of recording of the same, either by payment, deposit or bond. If Mortgagor fails to discharge any such lien within such period, then Mortgagee, in addition to any other right or remedy hereunder, shall have the option (but not the obligation) to procure the discharge of such lien either by payment of the amount claimed, by depositing the amount claimed to be due in court, or by bonding. Any amount paid or deposited by Mortgagee to discharge such lien, and all costs and other expenses, including all reasonable attorneys' fees, incurred in defending any action to foreclose such lien, shall be deemed a part of the Secured Indebtedness and shall be immediately due and payable, without demand.

ARTICLE III.

LEASES AND ABSOLUTE ASSIGNMENT OF RENTS AND PROFITS

Section 3.01. Absolute Assignment of Rents and Profits. In addition to any assignment or security interest in such items granted herein, Mortgagor hereby absolutely, unconditionally and irrevocably, transfers, conveys and assigns to Mortgagee all the rents, issues and profits (now or hereafter created) from the Premises including, without limitation, all cash, accounts, accounts receivable, book debt, all other obligations owing to or belonging to Mortgagor and other funds paid or payable to Mortgagor in connection with the Premises, whether by tenants or otherwise, and all of Mortgagor's rights in and to any security deposits, letters of credit and other collateral securing the obligation of tenants, and hereby gives to and confers upon Mortgagee the right, power, and authority to collect such rents, issues and profits. Mortgagor irrevocably appoints Mortgagee its true and lawful attorney or agent in fact, coupled with an interest, at the option of Mortgagee at any time and from time to time, to demand, receive and enforce payment, to give receipts, releases and satisfactions and to sue, in the name of Mortgagor or Mortgagee, for and otherwise collect all such rents, issues and profits and apply the same in Mortgagee's discretion; provided, however, that Mortgagee hereby grants Mortgagor a revocable license to collect such rents, issues and profits, but not more than one (1) month in advance, prior to or at any time there is not a Default under the Note, this Mortgage, or any of the Collateral Loan Documents. Mortgagor acknowledges that Mortgagee shall have no obligation to exercise any of such rights hereunder. The assignment of the rents, issues and profits from the Premises in this Article III is intended to be a present and absolute assignment from Mortgagor to Mortgagee and not merely the passing of a security interest. The rents, issues and profits are hereby assigned absolutely by Mortgagor to Mortgagee. From time to time, upon Mortgagee's request, Mortgagor shall execute, acknowledge and deliver to Mortgagee further assignments of leases, rents, issues and profits and deliver to Mortgagee fully executed originals of all leases affecting the Premises.

Section 3.02. Covenants Regarding Performance of Lessor's Obligations. Pursuant to that certain Assignment of Leases, Rents and Profits of even date herewith, Mortgagor has assigned, and Mortgagor may hereafter assign to Mortgagee, a certain lease or leases of all or of portions of the Premises. Mortgagor shall perform promptly each and every covenant and agreement of any such lease that is to be kept or performed by the lessor, and neither do nor neglect to do, nor permit to be done, anything which may cause the termination of such leases, or any of them, except with the prior written consent duly issued by Mortgagee, or which may diminish or impair their value, or the rents provided for therein or the interest of Mortgagee therein.

Section 3.03. Negative Covenants Regarding Lease(s). Mortgagor will not (i) execute any further assignment of any of its right, title or interest in the leases or rents and profits with respect to the Premises (except to Mortgagee); or (ii) terminate or consent to the cancellation or surrender of any lease of the Premises or of any part thereof, now existing or hereafter to be made, without the prior written consent of Mortgagee, or (iii) modify any lease of the Premises without the prior written consent of Mortgagee; or (iv) accept prepayments of any installments of rent to become due under any of said leases, except prepayments in the nature of security for the performance by a lessee of its obligations thereunder; or (v) in any other manner impair the value of the Premises or leases; or (vi) execute any lease of all or a substantial portion of the Premises except for actual occupancy by the lessee thereunder; or (vii) permit any lease of the Premises or any part thereof to become subordinate to any lien other than

UNOFFICIAL COPY

the lien of this Mortgage. All leases of the Premises or any part thereof are subject to the prior approval of Mortgagee.

Section 3.04. Breaches Regarding Lease(s) or Assignments(s) Thereof. Any violation on Mortgagor's part of any covenant or agreement in any such lease that is to be kept or performed by Mortgagor as lessor, which violation is not cured within the notice and cure period, if any, provided under the applicable lease, by assignor set out in any such assignment of any such lease shall constitute a Default of this Mortgage and thereupon Mortgagee may, at its option, without notice, declare the entire Secured Indebtedness immediately due and payable and exercise its other rights and remedies set out in Article IV herein.

Section 3.05. Oil, Gas or Mineral Leases. As an additional source for the payment of the Secured Indebtedness, Mortgagor hereby assigns to Mortgagee all of the bonus, rents, royalties, rights and benefits accruing under all oil, gas or mineral leases affecting the Premises, or which may hereafter affect the Premises, including all water and riparian rights, and the lessee or assignee or sublessee is hereby directed upon production of a certified copy hereof, to pay said bonus, rents, royalties, rights, and benefits to Mortgagee.

Section 3.06. Estoppel Certificates. *Subject to the terms of the Lease*, Mortgagor shall procure and deliver to Mortgagee at any time within twenty (20) days after notice and demand estoppels from each lessee, in form satisfactory to Mortgagee.

Section 3.07. Future Leases. Mortgagor will advise Mortgagee promptly of the execution hereafter of any lease of any part of the Premises and, upon Mortgagee's written request, it will submit to Mortgagee for examination and approval any such lease and, if Mortgagee so requests, Mortgagor will assign such lease to Mortgagee, such assignment to be in form satisfactory to Mortgagee; and it is further agreed that the provisions of this Mortgage with regard to Mortgagor's obligations and Mortgagee's rights with respect to leases and assignments of such leases shall apply to all such additional leases and assignments thereof.

Section 3.08. Application of Rents and Other Income. All earnings, revenues, issues, profits, income and rents collected by Mortgagor, whether arising under any lease of the Premises, vending operations, television, movie or telephone rentals or service charges, or otherwise with respect to the Premises shall be applied in the following manner:

First, to the payment of all prior charges and lien assessments levied against the Premises or any part thereof;

Second, to the payment of ground rents, if any, payable with respect to the Premises if the Premises are a leasehold estate;

Third, (i) to the payment of reasonable compensation for Mortgagee's legal services, Mortgagee's agents, clerks, servants and other employees engaged or employed in respect to the Premises and any costs incurred by Mortgagee in enforcing its rights under the Note, this Mortgage or the Collateral Loan Documents, including but not limited to costs of receivership and foreclosure on the Premises; and (ii) any amounts due and owing to Mortgagee under the terms of the Note and/or obligations secured hereby;

Fourth, to the payment of current operating costs and expenses (including repairs, maintenance, renewals, replacements, alterations, security, improvements and necessary acquisitions of property) and expenditures for capital improvements arising in connection with the Premises;

Fifth, any amount not applied as above provided may be retained by Mortgagor.

Section 3.09. Priority of Application. All rents collected by Mortgagee may be applied in any manner that Mortgagee deems advisable and without regard to the aforesaid priorities. Receipt by Mortgagee of such rents, issues, and profits shall not constitute a waiver of any right or remedy that Mortgagee may enjoy under this Mortgage or under the laws of the state in which the Premises are located, nor shall the receipt and application thereof cure any Default hereunder nor affect any foreclosure proceeding or any sale authorized by this Mortgage and the laws of the state in which the Premises are located.

Section 3.10. Accountability for Rents. Mortgagee shall have no liability for failure to rent the Premises or any part thereof, or for failure to make collections of rentals, or for failure to do any of the things which are authorized herein. This provision is Mortgagor's express agreement to grant all of its rights and privileges to

UNOFFICIAL COPY

Mortgagee and shall not be held to create any duties or liabilities except as herein expressly set forth. For the purpose of accounting, the books and records of Mortgagee shall be deemed prima facie correct.

Section 3.11. Liability for Agents. Mortgagee shall not be liable for the act or omission of any agent and/or manager, if Mortgagee shall have used reasonable care in the selection of such agent or manager.

Section 3.12. Liability for Premises. Mortgagee may elect, but shall in no event be obligated to, in the exercise of its control and management of the Premises, be deemed the agent of Mortgagor and, regardless of whether or not Mortgagee shall make such election, it shall not be liable for any damage to any person or property, where such damage arises out of the operation of, or in connection with, the said Premises.

Section 3.13. Status of Lease(s)/Notice of Default. Mortgagor represents and warrants that any and all leases covering all or a portion of the Premises are in full force and effect, rent has not been paid more than one month in advance, and Mortgagor and the lessees thereof are in all respects in good standing thereunder and that neither Mortgagor nor said lessees are in default with respect to any provisions thereof. Mortgagor covenants and agrees that in the event Mortgagor shall receive from any of the lessees of said leases notice of any default by Mortgagor under the terms or provisions of any of said leases, or receive from any of said lessees or from any other party any notice or communication in any way respecting a default or alleged default or failure of performance which could become a default after lapse of time, or otherwise, under said leases, or relating to Mortgagor's good standing with respect thereto, Mortgagor shall immediately, and not later than one business day after receipt of such notice or communication, or obtaining knowledge of a default, real or claimed, advise or mail (overnight delivery by a nationally recognized overnight courier in the case of a notice of default), postage prepaid, or deliver in person to Mortgagee a true, exact and full copy of said notice or communication.

Section 3.14. Mortgagee's Right to Perform for Mortgagor/Lessor. Mortgagor agrees that for the purpose of curing any Default under any lease Mortgagee may, but shall not be obligated to, do any act, pay any sum or execute any document in the name of Mortgagor or as its attorney-in-fact, as well as in Mortgagee's own name, as Mortgagee in its discretion may determine, and Mortgagee hereby irrevocably appoints Mortgagee its true and lawful attorney-in-fact, in its name or otherwise, coupled with an interest to do any and all acts, pay any sum and/or to execute any and all documents that may in the opinion of Mortgagee be necessary or desirable to cure any such Default or preserve any right of Mortgagor under any of said leases, or to preserve any rights of Mortgagor whatsoever, or to protect Mortgagee's right hereunder. If Mortgagee, acting under its authority herein granted, should pay, suffer or incur any expense, costs, charge, fee, obligation, damage or liability of any nature, or be a party to any action or proceeding, whether any of the same be for the purpose of curing any such Default or protecting Mortgagee's rights hereunder or the rights of Mortgagor under any of said leases, or otherwise, all of the same and all sums paid by Mortgagee for prosecution or defense of such actions or proceedings, including in any case all costs and expenses associated with court and/or administrative proceedings through the appellate level and reasonable attorneys' fees, shall be payable by Mortgagor to Mortgagee immediately, without demand, together with interest thereon at the Default Rate, as provided in the Note until paid, and the same, if not paid, shall be added to the Secured Indebtedness.

Section 3.15. Subleases Included. The term "lease" (or "leases") as used in this Article III and throughout other articles of this Mortgage is intended to include any sublease (or subleases).

Section 3.16. Leases in the Normal Course of Business. *Notwithstanding anything to the contrary contained in this Article III or in any of the Collateral Loan Documents, so long as Mortgagor is not in Default, Mortgagor shall have the right to enter into new leases, terminate, modify and otherwise deal with leases and the tenants under said leases in its normal course of business without obtaining Mortgagee's prior written approval of any such action; provided:*

(a) *All new or replacement leases shall be on the form previously approved by Mortgagee without deviation therefrom;*

(b) *Mortgagor shall fully inform Mortgagee in writing of such action within ten (10) days after taking same;*

(c) *Mortgagor shall promptly furnish Mortgagee with copies of all appropriate documents pertaining to such action taken with regard to existing leases; and*

UNOFFICIAL COPY

(d) *If execution of a new or replacement lease is involved, the rent payable under such lease shall be not less than the rent shown on the rent roll or pro forma approved by Mortgagee as of the date hereof.*

The provisions of this Section shall only apply to leases of less than ten thousand (10,000) square feet.

ARTICLE IV. DEFAULTS AND REMEDIES

Section 4.01. Events of Default. Time is of the essence hereof. The term "Default," as used in this Mortgage, shall mean the occurrence of any one or more of the following events:

(a) The failure of Mortgagor to make any payment according to the tenor and effect of the Note, or any part thereof, or any failure to make any other payment of the principal, interest, or premium, if any, on the Note, or any portion of the Secured Indebtedness, including but not limited to taxes and insurance premiums, when and as the same shall become due and payable, whether at maturity, by acceleration, or otherwise, as provided in the Note, any Collateral Loan Document, or this Mortgage;

(b) The filing of notice of any lien or the institution of proceedings to enforce any other lien upon the Premises that is not dismissed, removed or bonded to the satisfaction of Mortgagee within thirty (30) days of the date of such filing or institution of such proceeding;

(c) The filing of a proceeding in bankruptcy or arrangement or reorganization with respect to Mortgagor or any guarantor or surety of the Secured Indebtedness pursuant to the United States Bankruptcy Code or any similar law, federal or state, including but not limited to:

(i) Mortgagor or any guarantor or surety of the Secured Indebtedness shall file a voluntary petition in bankruptcy or shall be adjudicated bankrupt or insolvent, or shall file any petition or answer seeking or acquiescing in any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief for itself under any present or future federal, state, or other statute, law or regulation relating to bankruptcy, insolvency or other relief for debtors, or shall seek or consent to or acquiesce in the appointment of any trustee, receiver or liquidator of Mortgagor or any such guarantor or surety or of all or any part of the Premises or of any or all of the royalties, revenues, rents, issues or profits thereof, or shall make any general assignment for the benefit of creditors, or shall admit in writing its inability to pay or shall fail to pay its debts generally as they become due; or

(ii) A court of competent jurisdiction shall enter an order, judgment or decree approving a petition filed against Mortgagor or any such guarantor or surety of the Secured Indebtedness seeking any reorganization, dissolution or similar relief under any present or future federal, state, or other statute, law or regulation relating to bankruptcy, insolvency or other relief for debtors or Mortgagor or any such guarantor or surety shall be the subject of an order for relief entered by such a court, and such order, judgment or decree shall remain unvacated and unstayed for an aggregate of sixty (60) days (whether or not consecutive) from the date of entry thereof, or any trustee, receiver, custodian or liquidator of Mortgagor or any such guarantor or surety or of all or any part of the Premises or of any or all of the royalties, revenues, rents, issues or profits thereof shall be appointed without the consent or acquiescence of Mortgagor or any such guarantor or surety and such appointment shall remain unvacated and unstayed for an aggregate of sixty (60) days (whether or not consecutive);

(d) A writ of execution or attachment or any similar process shall be issued or levied against all or any part of or interest in the Premises, and such execution, attachment or similar process is not released, bonded, satisfied, vacated or stayed within sixty (60) days after its entry or levy;

(e) The abandonment of any part of the Premises by ~~Mortgagor~~ **Koch Foods Incorporated**;

(f) If Mortgagee determines that any representation or warranty of Mortgagor set forth in this Mortgage, the Note, or any of the Collateral Loan Documents delivered by Mortgagor to Mortgagee in connection herewith or as required from time to time hereby is false, misleading or erroneous in any material respect as of the date thereof;

UNOFFICIAL COPY

- (g) Mortgagor's failure as lessor, or assignor, to observe, comply or adhere to and/or perform any agreement of Mortgagor in any lease or assignment thereof to Mortgagee relating to the Premises;
- (h) The violation by Mortgagor of any covenants or agreements to be kept or performed by Mortgagor under any ground lease affecting the Premises;
- (i) Mortgagor's challenge or contest of the validity or enforceability of the Note, this Mortgage, or any Collateral Loan Document, or the validity, priority or perfection of any security interest created hereunder or thereunder, in any action, suit or proceeding;
- (j) The conviction of Mortgagor, any guarantor or surety of the Secured Indebtedness or any principal of Mortgagor under federal, state or local law of a felony or the violation of any other criminal statute involving fraud or misrepresentation;
- (k) Any sale, conveyance, assignment, transfer, lease or other disposition or further encumbrance of the Premises or any part thereof, or any interest therein or any partnership or membership interest in Mortgagor if Mortgagor is a partnership or a limited liability company or any of the issued and outstanding voting stock of Mortgagor if Mortgagor is a corporation, except as may be expressly permitted hereunder, without the prior written consent of Mortgagee, in violation of Section 2.03 of Article II above;
- (l) The failure by Mortgagor or any other party punctually and properly to perform such party's obligations under the Environmental Indemnity Agreements (as defined in the Loan Agreement); or
- (m) The failure of Mortgagor or any guarantor or surety of the Secured Indebtedness punctually and properly to perform any other covenant condition or agreement contained in this Mortgage, the Note, or any of the Collateral Loan Documents.
- (n) *The failure of Koch Foods Incorporated to perform any of its obligations under the Notice of Assignment of Lease, Easement Certificate and Negative Pledge Agreement.*

Provided that in the case of the occurrence of any failure, event or condition described in subparagraphs (f), (g), (h), (i), (k), (l) or (m) of this Section 4.01 which is curable and which does not also constitute a monetary Default (any such failure, event or condition being herein called a "Non-Monetary Default"), a Default shall not be deemed to have occurred unless the Non-Monetary Default in question shall continue after the expiration of thirty (30) days after the date on which Mortgagee shall have given written notice of the Non-Monetary Default to Mortgagor; provided that Mortgagor shall be entitled to such notice and may avail itself of said cure period for Non-Monetary Defaults no more than once in any twelve (12) month period.

If such Non-Monetary Default cannot by its nature be fully cured within said thirty (30) day period, Mortgagor shall have a reasonable additional period to cure same (not to exceed sixty (60) days) provided (1) Mortgagor continuously prosecutes the curing action with diligence, and (2) the granting of such additional curing period does not, in Mortgagee's opinion, jeopardize its vital interests.

The period Mortgagor is permitted to cure any Non-Monetary Default, as set forth in this Section 4.01 shall not be more than (nor shall it be considered to be in addition to) any other period to cure any breach or Default as may be provided in this Mortgage, the Note, or the Collateral Loan Documents.

Section 4.02. Remedies. If any Default shall have occurred and be continuing, Mortgagee shall have, in addition to any rights at law or in equity, each and all of the following rights and remedies, which may be exercised individually, collectively or cumulatively:

- (a) Mortgagee may, at its option, without presentment, demand, protest, notice of protest, or dishonor, or other notice to Mortgagor, declare immediately due and payable the entire Secured Indebtedness, and upon any such declaration the principal of the Note, together with accrued and unpaid interest and premium (if any), shall become and be immediately due and payable, anything to the contrary contained in this Mortgage, the Collateral

UNOFFICIAL COPY

Loan Documents, or the Note notwithstanding, and any notice of intent to accelerate and notice of acceleration being expressed, waived by Mortgagor. The principal debt and interest from and after the date of acceleration shall bear interest at the Default Rate, but no failure to make such declaration shall waive or affect Mortgagee's right so to do at any later time or for any other Default. Mortgagee may proceed with foreclosure in satisfaction of such item either through the courts or under a full foreclosure, conducting the sale as herein provided.

(b) To the extent permitted by law, Mortgagee may, with or without bringing any action or proceeding, and without regard to the adequacy of any security for the Secured Indebtedness, in person or by agent or employee, or by a receiver appointed by a court of competent jurisdiction, enter upon and take possession of all or any part of the Premises, excluding Mortgagor and its agents and servants wholly therefrom; Mortgagor shall on demand peaceably surrender possession thereof to Mortgagee. Upon every such entry, Mortgagee, personally or by its agents or in the name of Mortgagor, at the expense of Mortgagor, from time to time, may maintain and restore the Premises, whereof it shall become possessed as aforesaid; and likewise, from time to time, at the expense of Mortgagor, Mortgagee may make all necessary or proper repairs, renewals and replacements and such useful alterations, additions, betterments and improvements thereto and thereon as to it may deem advisable or necessary to preserve the value, marketability or rentability of the Premises; and in every such case Mortgagee shall have the right to manage, control and operate the Premises and may make, cancel, modify or enforce leases, obtain and evict tenants, rent and lease the same to such persons, for such periods of time, and on such terms and conditions as Mortgagee in its sole discretion may determine, and with or without taking possession of the Premises, may sue for or otherwise collect any and all of the rents, issues and profits thereof, including those past due and unpaid and apply same, less costs and expenses of management, operation and collection, including reasonable attorneys' fees, in Mortgagee's discretion. In dealing with the Premises as a Mortgagee in, or not in, possession, Mortgagee shall be without any liability, charge, or obligation therefor to Mortgagor other than for willful misconduct or gross negligence, and shall be entitled to operate any business then being conducted or which could be conducted thereon or therewith at the expense of and for the account of Mortgagor (and all net losses, costs and expenses thereby incurred shall be advancements, and will be immediately due and payable and if not paid become part of the Secured Indebtedness), to the same extent as the owner thereof could do. The entering upon and taking possession of the Premises, the collection of such rents, issues and profits and the application thereof as aforesaid shall not cure or waive any Default or notice of Default under this Mortgage or invalidate any act done in response to any such Default or pursuant to any such notice and, notwithstanding the continuance in possession of the issues and profits, Mortgagee shall be entitled to enforce every right and exercise every remedy provided for in any of the Collateral Loan Documents or by law. Any of the actions referred to in this paragraph may be taken by Mortgagee at such time as Mortgagee is so entitled, without regard to the adequacy of any security for the Secured Indebtedness.

(c) In the event of the noncompliance of or with any duty or duties required of Mortgagor under the terms of this Mortgage or the occurrence of any event which, in the judgment of Mortgagee, in its sole and absolute discretion, impairs or may impair the value of the Premises herein taken as security for the Secured Indebtedness, Mortgagee reserves the right, at its own election, to advance sufficient funds to accomplish said performance or maintain such security, which sums shall also be secured hereby and shall bear interest at the Default Rate. Said sums, upon the giving of notice by Mortgagee to Mortgagor, shall become immediately due and payable to Mortgagee.

(d) To the extent permitted by applicable law, Mortgagee, with or without entry, personally or by its agents or attorneys, insofar as applicable may institute proceedings for the complete or partial foreclosure of this Mortgage and, at its election, cause to be sold the Premises and all estate, right, title, interest, claim and demand therein and right of redemption thereof, at one or more public sales to satisfy the obligations hereof. Notice of sale shall be given as then required by law, and not less than the time then required by law having elapsed, Mortgagee, without demand on Mortgagor, shall sell, or cause to be sold, the Premises at the time and place fixed in said notice of sale, either as a whole or in separate parcels and in such order as it may determine, at public auction to the highest bidder for cash in lawful money of the United States, payable at time of sale. Purchaser will receive a deed conveying the Real Property and Improvements so sold, but without any covenant or warranty express or implied. The recitals in such deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Mortgagor or Mortgagee, may purchase at such sale. In any suit to foreclose the lien hereof, there shall be allowed and included, as additional indebtedness in the decree for sale, all expenditures and expenses which may be paid or incurred by or on behalf of Mortgagee for attorneys' fees, appraisers' fees, outlays for documentary and expert evidence, stenographers' charges, publication costs and costs (which may be estimated as to costs to be expended after entry of the decree) of procuring all such abstracts of title, title searches and examinations, title

UNOFFICIAL COPY

insurance policies, Torrens certificates and similar data and assurances with respect to title, as Mortgagee may deem to be reasonably necessary either to prosecute such suit or to evidence to bidders at any sale pursuant thereto the true condition of the title to or the value of the Premises. All expenditures and expenses of the nature in this clause mentioned shall become a part of the Secured Indebtedness and immediately due and payable with interest thereon at the Default Rate, as provided in the Note, on advances from the date of the expenditure until paid. After deducting all costs, fees and expenses of sale, including cost of evidence of title and reasonable attorneys' fees (if permitted by law) in connection with sale, the proceeds of sale shall be applied to payment of: all sums expended under the terms hereof, not then repaid, with accrued interest at the Default Rate; all other sums then secured hereby; and the remainder, if any, to the person or persons legally entitled thereto.

(e) To the extent permitted by law, Mortgagee is hereby appointed the true and lawful attorney of Mortgagor, in its name and stead or in the name of Mortgagee, to make all necessary conveyances, assignments, transfers and deliveries of the property rights so sold, and, for that purpose, Mortgagee may execute all necessary deeds and instruments of assignment and transfer, and may substitute one or more persons with like power. Mortgagor hereby ratifies and confirms all that its said attorney or attorneys or such substitute or substitutes shall lawfully do by virtue hereof. Mortgagor shall, nevertheless if so requested in writing by Mortgagee, ratify and confirm any such sale or sales by executing and delivering to Mortgagee or to such purchaser or purchasers all such instruments as may be advisable, in the judgment of Mortgagee, for the purposes and as may be designated in such request. Any such sale or sales made under or by virtue of this Article IV shall operate to divest all the estate, right, title, interest, claim and demand, whether at law or in equity, of Mortgagor in and to the property and rights so sold, and shall be a perpetual bar both at law and in equity against Mortgagor and its successors and assigns.

(f) Mortgagee shall have the right from time to time to enforce any legal or equitable remedy against Mortgagor and to sue for any sums whether interest, damages for failure to pay principal or any installment thereof, taxes, installments of principal, or any other sums required to be paid under the terms of the Note, this Mortgage, or any of the Collateral Loan Documents, as the same become due, without regard to whether or not the principal sum secured or any other sums evidenced by the Note or secured by this Mortgage shall be due and without prejudice to the right of Mortgagee thereafter to enforce any appropriate remedy against Mortgagor including an action of foreclosure or any other action, for a Default or Defaults of Mortgagor existing at the time such earlier action was commenced.

(g) Mortgagee may enforce its rights, whether by action, suit or proceeding in equity or at law for the specific performance of any covenant, condition or agreement in the Note or in this Mortgage contained, or in aid of the execution of any power herein granted, or for any foreclosure hereunder, or for the enforcement of any other appropriate legal or equitable remedy or otherwise as Mortgagee shall deem most advisable to protect and enforce any of its rights hereunder or under the Note or any of the Collateral Loan Documents. Mortgagee, at its option, shall have the power of sale, if any, provided for by statute or otherwise permitted under the laws of the *State of Illinois*.

(h) Mortgagee, at its sole option, if permitted by applicable law, may send notifications to any and all lessees and tenants of the Premises that future payments under or relating to the leases shall be made to Mortgagee.

Section 4.03. Secured Party Remedies. Upon occurrence of a Default, Mortgagee, at its sole option, shall also have the right to exercise any or all of the remedies available to a secured party under the Uniform Commercial Code as adopted in the *State of Illinois* as of the date hereof and as may be hereafter amended (hereinafter referred to as the "UCC"), including, but not limited to:

(a) Either personally or by means of a court appointed receiver, take possession of all or any of the Personal Property and exclude therefrom Mortgagor and all others claiming under Mortgagor and thereafter hold, store, use, operate, manage, maintain and control, make repairs, replacements, alterations, additions and improvements to and exercise all rights and powers of Mortgagor with respect to the Personal Property or any part thereof. In the event Mortgagee demands or attempts to take possession of the Personal Property in the exercise of any rights hereunder, under the Note, or any of the Collateral Loan Documents, Mortgagor promises and agrees to promptly turn over and deliver complete possession thereof to Mortgagee,

(b) Without notice to or demand upon Mortgagor, make such payments and do such acts as Mortgagee may deem necessary to protect its security interest in the Personal Property, including, without limitation, paying, purchasing, contesting or compromising any encumbrance, charge or lien which is prior to or

UNOFFICIAL COPY

superior to the security interest granted hereunder, and in exercising any such powers or authority to pay all expenses incurred in connection therewith,

(c) Require Mortgagor to assemble the Personal Property or any portion thereof at a place designated by Mortgagee and reasonably convenient to both parties and promptly to deliver such Personal Property to Mortgagee or an agent or representative designated by it. Mortgagee, and its agents and representatives, shall have the right to enter upon any or all of Mortgagor's Premises and Property to exercise Mortgagee's rights hereunder,

(d) Sell, lease or otherwise dispose of the Personal Property at public or private sale, with or without having the Personal Property at the place of sale, and upon such terms and in such manner as Mortgagee may determine. Mortgagee may be a purchaser at any such sale, and

(e) Unless the Personal Property is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, Mortgagee shall give Mortgagor at least ten (10) days' prior written notice of the time and place of any public sale of the Personal Property or other intended disposition thereof. Such notice may be mailed to Mortgagor at the address set forth at the beginning of this Mortgage.

Mortgagee reserves the option, pursuant to the appropriate provisions of the UCC, to proceed with respect to the Personal Property (which, for purposes of this paragraph, is instead referred to as the "Collateral") as part of the Real Property in accordance with its rights and remedies with respect to the Real Property, in which event the default provisions of the UCC shall not apply. If Mortgagee shall elect to proceed with respect to the Collateral separately from the Real Property, ten (10) days' notice of the sale of the Collateral shall be deemed to be reasonable notice.

Section 4.04. Receiver. If a Default occurs and is continuing, Mortgagee, as a matter of right and without notice to Mortgagor or anyone claiming under Mortgagor, and without regard to the then value of the Premises or the interest of Mortgagor therein, shall have the right to apply to any court having jurisdiction to appoint a receiver or receivers of the Premises, and Mortgagor hereby irrevocably consents to such appointment and waives notice of any application therefor. Any such receiver or receivers shall have all the usual powers and duties of receivers in like or similar cases including the power to collect the rents, issues and profits of the Premises during the pendency of a foreclosure suit, and in case of a sale and a deficiency during the full statutory period of redemption, whether there be redemption or not, as well as during any further times when Mortgagor, except for the intervention of such receiver, would be entitled to collect such rents, issues and profits. The court having jurisdiction may authorize the receiver to apply the net income in his hands to payment in whole or in part to (a) the Secured Indebtedness, or by any decree foreclosing this Mortgage, or any tax, special assessment or other lien which may be or become superior to the lien hereof or such decree; provided such application is made prior to foreclosure sale; and (b) to the deficiency in case of a sale and deficiency. Said receiver shall continue as such and exercise all such powers until the date of sale of the Premises, unless such receivership is sooner terminated.

Section 4.05. Retention of Possession. Notwithstanding the appointment of any receiver, liquidator or trustee of Mortgagor, or of the Premises or any part thereof, Mortgagee shall be entitled to retain possession and control of all property now or hereafter granted, bargained, sold, mortgaged, warranted, conveyed, pledged and/or assigned to or held by Mortgagor under this Mortgage.

Section 4.06. Remedies Not Exclusive. The cumulative rights of Mortgagee arising under the clauses and covenants contained in this Mortgage shall be separate, distinct and cumulative and none of them shall be construed to be exclusive nor an election to proceed under any one provision herein to the exclusion of any other provision, anything herein or otherwise to the contrary notwithstanding. In addition to any remedies provided herein for Default hereof, Mortgagee shall have all other remedies allowed under the laws of the *State of Illinois*, and the laws of the United States. No failure on the part of Mortgagee to exercise any of its rights hereunder arising upon any Default shall be construed to prejudice its rights in the event of any other or subsequent Default. No delay on the part of Mortgagee in exercising any of such rights shall be construed to preclude it from the exercise thereof at any time during the continuance of such Default. Mortgagee may enforce any one or more remedies or rights hereunder in such order and manner as it may determine, successively or concurrently at its option. By accepting payment or partial payment of any sums secured hereby after the due date thereof, Mortgagee shall not make an accommodation or thereby waive the agreement herein contained that time is of the essence, nor shall Mortgagee waive either any of its remedies or options or its right to require prompt payment when due of all sums secured or to consider failure so to pay a Default hereunder. Neither the acceptance of this Mortgage nor its enforcement,

UNOFFICIAL COPY

whether by court action or pursuant to other powers herein contained, shall prejudice or in any manner affect Mortgagee's right to realize upon or enforce any other security now or hereafter held by Mortgagee.

Section 4.07. Forbearance, etc. Not a Waiver. Failure to accelerate the maturity of all or any portion of the Secured Indebtedness upon the occurrence of any Default hereunder, or acceptance of any sum after the same is due, or acceptance of any sum less than the amount then due, or failure to demand strict performance by Mortgagor of the provisions of this Mortgage or any forbearance by Mortgagee in exercising any right or remedy hereunder or otherwise afforded by law shall not constitute a waiver by Mortgagee of any provision of this Mortgage nor nullify the effect of any previous exercise of any such option to accelerate or other right or remedy.

Section 4.08. Additional Amount Due After Acceleration. Upon the occurrence of any Default and following the acceleration of maturity of the Secured Indebtedness as herein provided, there shall be due and payable, in addition to all other amounts due, an additional amount calculated as provided in the Note.

ARTICLE V. SECURITY AGREEMENT

Section 5.01. Personal Property to be Covered as Part of Real Property; Fixtures; Mortgage to also Constitute Security Agreement as to Personal Property Deemed Not to be Affixed to Real Property or Adapted to the Use Thereof. It is mutually intended, agreed and declared that all Personal Property (described in the granting clauses of this Mortgage), shall, to the full extent permitted by law, be deemed to form a part of the Real Property and for the purposes of this Mortgage to be considered Real Property, and as such secured by this Mortgage. While the foregoing is intended to apply to all items of Personal Property described in the granting clause of this Mortgage, it is particularly intended to apply to those items of Personal Property which now are or hereafter shall become physically affixed or adapted to the Real Property (which for purposes hereof are commonly referred to as "fixtures"). If any such Personal Property shall for any reason be deemed not to be affixed or adapted to the Real Property, and/or if a separate fixture filing is necessary or appropriate regarding same, then this Mortgage shall constitute a Security Agreement with respect to any and all such Personal Property, to be perfected by the filing hereof or by filing financing statement(s), if required, in the appropriate records of the county in which the Premises are located and with the office of the Secretary of State of the *State of Illinois*.

Section 5.02. Creation of Security Interest. As to any of the Personal Property which cannot qualify as part of the Real Property pursuant to the provisions of Section 5.01, this Mortgage shall constitute a Security Agreement within the meaning of the UCC for purposes of creating hereby a security interest in such property; and Mortgagor hereby grants to Mortgagee as Secured Party (as defined in the UCC) a security interest in (i) any and all sums at any time on deposit for the benefit of Mortgagee or held by Mortgagee (whether deposited by or on behalf of Mortgagor or any one else) pursuant to any of the provisions of this Mortgage ("Deposits"), (ii) with respect to any Personal Property included in the granting clauses of this Mortgage, which Personal Property may not be deemed to form a part of the Premises or may not constitute a "fixture" (within the meaning of Section 9-102(41) of the UCC), and all replacements, substitutes and additions thereto and the proceeds thereof and (iii) all other now owned or hereafter acquired personal property (tangible and intangible) arising from or relating to the Premises including, but not limited to all Inventory, Equipment, Accounts, General Intangibles, Fixtures, Documents, Instruments, Investment Property, Letter of Credit Rights, Money, Chattel Paper, As-Extracted Collateral, Deposit Accounts and Supporting Obligations (all as defined in the UCC) arising from or relating to the Premises (being sometimes hereinafter collectively referred to as the "Collateral"), and that a security interest in and to the Collateral and the Deposits and all of Mortgagor's right, title and interest therein are hereby assigned to Mortgagee, all to secure payment of the indebtedness and to secure performance by Mortgagor of the terms, covenants and provisions hereof. In the event of a Default, Mortgagee shall have the option of exercising any or all of the "Secured Party Remedies" as set forth in Section 4.03 above. The reasonable expenses of retaking, holding, preparing for sale, selling and the like incurred by Mortgagee shall include, but not be limited to, reasonable attorneys' fees and legal expenses incurred by Mortgagee. Mortgagor shall, from time to time, upon request of Mortgagee, deliver to Mortgagee a current inventory of the Personal Property in reasonable detail.

Section 5.03. Representations and Covenants. Mortgagor hereby represents and covenants as follows:

(a) Except for the security interest granted hereby, Mortgagor is, and as to portions of the Personal Property to be acquired after the date hereof will be, the sole owner of the Personal Property, free from any adverse

UNOFFICIAL COPY

lien, security interest, encumbrance or adverse claims thereon of any kind whatsoever. Mortgagor will notify Mortgagee of, and will defend the Personal Property against, all claims and demands of all persons at any time claiming the same or any interest therein.

(b) Mortgagor will not lease, sell, convey or in any manner transfer the Personal Property without the prior written consent of Mortgagee.

(c) The Personal Property is not used or bought for Mortgagor's personal, family or household purposes.

(d) The Personal Property will be kept on or at the Premises and Mortgagor will not remove the Personal Property from the Premises without the prior written consent of Mortgagee, except that so long as Mortgagor is not in Default hereunder, Mortgagor shall be permitted to dispose of such portions or items of Personal Property which are consumed or worn out in ordinary usage, all of which shall be promptly replaced by Mortgagor with property of like kind and quality and at least equal in value to that replaced and in such manner so that said new Personal Property shall be subject to the security interest created hereby and so that the security interest of Mortgagee shall be first in priority, it being expressly understood that all replacements of the Personal Property and any additions to the Personal Property shall be and become immediately subject to the security interest of this Mortgage and be covered hereby.

(e) At the request of Mortgagee, Mortgagor will join Mortgagee in executing one or more financing statements and renewals and amendments thereof as well as any continuation statements pursuant to the UCC in form satisfactory to Mortgagee, and will pay the cost of filing the same in all public offices wherever filing is deemed by Mortgagee to be necessary or desirable to perfect the security interest created by this Mortgage. Mortgagor authorizes Mortgagee to file financing and continuation statements, and amendments and supplements thereto relating to the equipment, fixtures and Personal Property signed only by Mortgagee.

(f) Mortgagor will do all acts and things as Mortgagee may require or as may be necessary or appropriate to establish and maintain a first perfected security interest in the Personal Property, subject to no liens, encumbrances or security interests of others.

(g) All covenants and obligations of Mortgagor contained in this Mortgage shall be deemed to apply to the Personal Property whether or not expressly referred to herein.

(h) This Mortgage constitutes a Security Agreement (and Financing Statement) for all purposes under the UCC.

(i) Mortgagor hereby authorizes Mortgagee to record all Financing Statements necessary to perfect the security interests granted in this Mortgage or any of the Collateral Loan Documents. To the extent Mortgagee has recorded any Financing Statement with respect to the Loan that may predate the execution of this authorization, Mortgagor hereby ratifies such filing.

ARTICLE VI. MISCELLANEOUS

Section 6.01. Certain Additional Powers of Mortgagee; Sale No Effect on Liability. Without affecting the liability of any other person liable for the payment or performance of any obligation secured hereby and without affecting the lien or charge of this Mortgage upon any portion of the Premises not then or theretofore released as security for all unpaid or unperformed obligations secured hereby, Mortgagee may from time to time and without notice (a) release any person so liable, (b) extend the maturity or alter any of the terms of any such obligation, (c) grant other indulgences, (d) release or reconvey, or cause to be released or reconveyed any parcel, portion or all of the Premises, (e) take or release any other or additional security for any such obligations, or (f) make compositions or other arrangements with debtors in relation thereto. No sale of the Premises shall in anywise affect the liability of any party to the Note, or any person liable or to become liable with respect to the Secured Indebtedness.

Section 6.02. Mortgagor's Duty to Defend and Pay Expenses. Mortgagor at its sole expense, will appear in and affirmatively defend all actions or proceedings purporting to affect the security hereof or any right or power of Mortgagee hereunder. Mortgagor shall save Mortgagee harmless from all costs and expenses, including

UNOFFICIAL COPY

but not limited to all costs and expenses associated with court and/or administrative proceedings through the appellate level, reasonable attorneys' fees, costs of title search, continuation of abstract(s) and preparation of survey incurred by reason of any action, suit, proceeding, hearing, motion or application before any court or administrative body in which Mortgagee may be or become a party by reason of the Note, this Mortgage, or any Collateral Loan Document, including but not limited to condemnation, bankruptcy, and administrative proceedings, as well as any other of the foregoing where a proof of claim is by law required to be filed, or in which it becomes necessary to defend or uphold the terms or lien of this Mortgage. Mortgagee, in its sole discretion, may appear in and defend any such action or proceeding, and Mortgagee is authorized to pay, purchase or compromise on behalf of Mortgagor any encumbrance or claim which in its judgment appears to or purports to affect the security hereof or to be superior hereto. Mortgagor will pay on demand all sums so expended and all costs and expenses, including reasonable attorneys' fees, incurred in any such action by Mortgagee, with interest thereon from the date of expenditure at the Default Rate. Mortgagor shall also pay all expenses incurred by Mortgagee on matters arising after the date hereof where Mortgagor (or other parties with the consent of Mortgagor) seek accommodation from Mortgagee, including but not limited to extensions, partial releases or consents to sales, secondary financing, tenant substitutions, etc. The foregoing shall not in any way be deemed to obligate Mortgagee to make any requested accommodation. All expenditures and expenses of the nature in this paragraph mentioned and collection efforts regarding payments owing under this Mortgage, the Note, or the Collateral Loan Documents as well as recordkeeping costs resulting therefrom and such expenses and fees as may be incurred in the protection of said Premises and the maintenance of the lien of this Mortgage, including the reasonable fees of any attorneys employed by Mortgagee in any pending or threatened litigation or proceeding affecting this Mortgage, the Note, any of the Collateral Loan Documents, or the Premises, including appellate, probate and bankruptcy proceedings, or in preparation for the commencement or defense of any proceeding or threatened suit or proceeding shall be immediately due and payable by Mortgagor. All sums expended or costs incurred by Mortgagee referred to in this section, if not repaid on demand, shall with interest at the Default Rate be deemed a part of the Secured Indebtedness.

Section 6.03. Documentary or Internal Revenue Stamps. If at any time the *State of Illinois* shall determine that the documentary stamps affixed to the Note are insufficient or if no documentary stamps have been affixed for lawful reasons, that such stamps should thereafter be affixed, Mortgagor shall pay for the same, together with any interest or penalties imposed in connection with such determination and the amount of money needed to pay for such stamps and penalties shall, until such stamps are purchased and affixed, be a portion of the Secured Indebtedness. The same provisions and obligations shall apply with respect to any Internal Revenue Stamps or similar stamps that may be required at any time regarding this Mortgage, the Note, or any Collateral Loan Documents.

Section 6.04. Tax on Mortgage. In the event of the passage of any state, federal, municipal or other governmental law, order, rule or regulation (prior to or subsequent to the date hereof), in any manner changing or modifying the laws now in force governing the taxation of deeds of trust or debts secured by deeds of trust or the manner of collecting taxes so as to affect adversely Mortgagee, the entire balance of the Secured Indebtedness shall without notice become due and payable forthwith at the option of Mortgagee, without prepayment premium. Notwithstanding the foregoing language of this paragraph, if Mortgagor is permitted by law to pay any such tax or imposition (and provided such payment will not make the Loan usurious), then and so long as Mortgagor does in fact pay and continue to pay same to Mortgagee's satisfaction, Mortgagee agrees not to exercise its option under this Section 6.04 to accelerate the Secured Indebtedness. Notwithstanding the foregoing, it is understood and agreed that Mortgagor is not obligated to pay any portion of Mortgagee's federal or state income taxes.

Section 6.05. Filing and Recording Fees. Mortgagor will pay all filing, registration or recording fees, and all expenses incident to the execution and acknowledgment of this Mortgage and federal, state, county and municipal taxes, and other taxes, duties, imposts, assessments and charges arising out of or in connection with the execution and delivery of the Note, this Mortgage, and the Collateral Loan Documents.

Section 6.06. Notices. Whenever Mortgagee or Mortgagor desires to give or serve any notice, demand, request or other communication with respect to this Mortgage, each such notice, demand, request or other communication shall be in writing and shall be effective only if the same is (1) delivered by personal service, (2) mailed by certified mail, postage prepaid, return receipt requested, or (3) delivered by nationwide overnight delivery service (with charges prepaid). For the purposes hereof, the date a notice shall be deemed to be given shall be (a) the date of delivery if given by personal service, (b) the date of mailing if given by certified mail, and (c) the date of delivery if given by overnight delivery service. All notices must be addressed to the address set forth at the

UNOFFICIAL COPY

beginning of this Mortgage. Any party may at any time change its address for such notices by delivering or mailing to the other parties hereto, as aforesaid, a notice of such change. However, nothing in this Section 6.06 shall be construed as requiring Mortgagee to give any notice of Default or notice of intent to accelerate.

Section 6.07. Waiver of Rights by Mortgagor. To the extent permitted by applicable law, Mortgagor waives the benefit of all laws now existing or that hereafter may be enacted providing for (a) any appraisal before sale of any portion of the Premises, or (b) extension of the time for the enforcement or collection of the Note or the indebtedness evidenced thereby, or (c) creation of an extension of the period of redemption from or a moratorium on any sale made pursuant to this Mortgage. To the full extent Mortgagor may do so, Mortgagor agrees that Mortgagor will not at any time insist upon, plead, claim or take the benefit or advantage of any law now or hereafter in force providing for any appraisal, valuation, stay, extension, redemption or moratorium, and Mortgagor for Mortgagor, Mortgagor's successors and assigns, and for any and all persons ever claiming any interest in the Premises, to the extent permitted by law, hereby waives and releases all rights of redemption, both statutory rights of redemption and equity of redemption, valuation, appraisal, moratorium, stay of execution, notice of election to mature or declare due the whole of the Secured Indebtedness and marshaling in the event of foreclosure of the lien hereby created. If any law referred to in this Section 6.07 and now in force, of which Mortgagor, Mortgagor's successors and assigns or other person might take advantage despite this Section 6.07, shall hereafter be repealed or cease to be in force, such law shall not thereafter be deemed to preclude the application of this Section 6.07. Mortgagor expressly waives and relinquishes any and all rights and remedies which Mortgagor may have or be able to assert by reason of the laws pertaining to the rights and remedies of sureties. Mortgagor waives, to the full extent permitted by law, all statutes of limitations as a defense to this Mortgage and any obligation secured by this Mortgage. Mortgagor for itself and all who may claim through or under it waives any and all right to have the Premises marshaled upon any foreclosure of the lien hereof and agrees that any court having jurisdiction to foreclose such lien may order the Premises sold as an entirety. Mortgagor hereby expressly waives any and all rights of redemption from sale under any order or decree of foreclosure, pursuant to rights herein granted, on behalf of Mortgagor, the trust estate and all persons beneficially interested therein if Mortgagor is a land trust, and each and every person acquiring any interest in, or title to, the Premises described herein subsequent to the date of this Mortgage, and on behalf of all other persons to the extent permitted by the provisions of the Illinois Compiled Statutes, including, without limitation, 735 ILCS 5/15-1601.

Section 6.08. Joint and Several Liability. If Mortgagor consists of more than one party, such Mortgagors shall be jointly and severally liable under any and all obligations, covenants and agreements of Mortgagor contained herein.

Section 6.09. Severability. In case any one or more of the covenants, agreements, terms or provisions contained herein, in the Note, or in any of the Collateral Loan Documents, shall be invalid, illegal or unenforceable in any respect, the validity of the remaining covenants, agreements, terms or provisions shall in no way be affected, prejudiced or disturbed thereby, and to this end the provisions of the loan documents are declared to be severable.

Section 6.10. Covenants "To Run With Land"; Successors and Assigns. This Mortgage and all the terms, covenants, conditions, agreements and requirements hereof, whether stated herein at length or incorporated herein by reference, shall be covenants running with the land so long as this Mortgage is in effect and shall be binding upon and inure to the benefit of the heirs, executors, administrators, successors and assigns of Mortgagor and Mortgagee.

Section 6.11. Definitions. Wherever used in this Mortgage, unless the context clearly indicates a contrary intent or unless otherwise specifically provided herein, the word "Mortgagor," shall mean "Mortgagor and/or any subsequent owner or owners of the Premises," the word "Mortgagee" shall mean "Mortgagee or any subsequent holder or holders of this Mortgage," the word "Note" shall mean "note of even date herewith secured by this Mortgage and any additional note or notes at any time secured by this Mortgage," the word "person" shall mean "an individual, corporation, partnership or unincorporated association," and pronouns of any gender shall include the other genders, and either the singular or plural shall include the other.

Section 6.12. Governing Law. This Mortgage has been executed and delivered in the *State of Illinois* and is to be construed and enforced according to and governed by the laws of the *State of Illinois*. Any provision of this Mortgage which provides, in substance, that any advance, expense or other payment by Mortgagor shall bear interest at the maximum rate permitted by applicable law shall be deemed to mean the Default Rate.

UNOFFICIAL COPY

Section 6.13. **Modification Procedure.** This Mortgage, the Note, and the Collateral Loan Documents cannot be modified except by an instrument in writing executed by both Mortgagor and Mortgagee. No requirement of this Mortgage, the Note, or any Collateral Loan Document can be waived at any time except by a writing signed by Mortgagee, nor shall any waiver be deemed a waiver of any subsequent breach or Default of Mortgagor.

Section 6.14. **Captions.** The headings or captions of the Articles, sections, paragraphs, and subdivisions of this Mortgage are for convenience of reference only, are not to be construed a part hereof, and shall not limit or otherwise affect any of the terms hereof.

Section 6.15. **Business Purpose.** Mortgagor represents and has been advised by Beneficiary that the proceeds of the loan secured by this Mortgage will be used for the purpose specified in 815 ILCS 205/4 (1)(c), and that the principal obligations secured hereby constitutes a "business loan" which comes within the purview of said section.

Section 6.16. **JURISDICTION.** TO THE EXTENT PERMITTED BY APPLICABLE LAW, MORTGAGOR HEREBY IRREVOCABLY SUBMITS TO PERSONAL JURISDICTION IN THE **STATE OF ILLINOIS** AND OF THE UNITED STATES DISTRICT COURT FOR THE **NORTHERN DISTRICT OF ILLINOIS** FOR THE ENFORCEMENT OF MORTGAGOR'S OBLIGATIONS HEREUNDER, UNDER THE NOTE, AND UNDER THE COLLATERAL LOAN DOCUMENTS, AND WAIVES ANY AND ALL PERSONAL RIGHTS UNDER THE LAW OF ANY OTHER STATE TO OBJECT TO JURISDICTION WITHIN **ILLINOIS** FOR THE PURPOSES OF LITIGATION TO ENFORCE SUCH OBLIGATIONS. FURTHERMORE, TO THE EXTENT PERMITTED BY APPLICABLE LAW, MORTGAGOR HEREBY WAIVES PERSONAL SERVICE OF THE SUMMONS AND COMPLAINT OR OTHER PROCESS OF THE PAPERS ISSUED IN CONNECTION WITH SUCH LITIGATION AND AGREES THAT SERVICE MAY BE MADE BY REGISTERED OR CERTIFIED MAIL ADDRESSED TO THE MORTGAGOR AT THE ADDRESS SET FORTH HEREIN.

Section 6.17. **WAIVER OF TRIAL BY JURY.** TO THE EXTENT PERMITTED BY APPLICABLE LAW, MORTGAGOR HEREBY WAIVES ANY RIGHT IT MAY HAVE TO TRIAL BY JURY IN ANY ACTION OR PROCEEDING OF ANY KIND OR NATURE, IN ANY COURT IN WHICH AN ACTION MAY BE COMMENCED, ARISING OUT OF OR IN CONNECTION WITH THE NOTE, THIS MORTGAGE, ANY COLLATERAL LOAN DOCUMENT, OR ANY OTHER MATTERS RELATED THERETO.

Section 6.18. **No Personal Liability on Debt.** Notwithstanding any provision in this Mortgage to the contrary, the terms and conditions of the exculpation provision set forth in Section 17 of the Note are incorporated herein by this reference and shall supersede any inconsistent provision herein, in the Note, or in any of the Collateral Loan Documents.

Section 6.19. **Right of First Offer.** *If the Mortgagor elects to further expand the subject building on the Premises, Mortgagee shall have a right of first offer to provide financing for the proposed expansion. In the event Mortgagee elects not to provide such financing, then Mortgagee shall permit the collateral assignment, pledge or hypothecation of stock in the Mortgagor or interests of the members of Mortgagor, subject to Section 2.04 hereof, as security for the financing of the building expansion. In addition, in the event Mortgagee elects not to provide such financing, or its terms are not acceptable to Mortgagor, the Mortgagee will require a party wall agreement and will grant a reciprocal easement agreement, if necessary, in connection with the proposed expansion; provided that both agreements are acceptable to Mortgagee and its counsel. Any costs, including, but not limited to, reasonable legal fees shall be borne by the Mortgagor in connection with the foregoing.*

Section 6.20. **Cross-Collateralization and Cross Default.** *This Mortgage also secures a loan by Mortgagee to Rose FP LLC, an Illinois limited liability company (the "Phase I Loan"). Said loan is in the original principal amount of Six Million Five Hundred Thousand and No/100 Dollars (\$6,500,000.00), is evidenced by a note dated June 12, 2002, executed by Rose FP LLC (the "Phase I Note"), and is secured by a Mortgage and Security Agreement, dated June 12, 2002, in favor of Mortgagee (the "Phase I Mortgage") conveying certain real property located in Cook*

UNOFFICIAL COPY

County, Illinois, known as the Phase I Koch Foods Cold Storage Building, as more particularly described in the Phase I Mortgage. All sums evidenced by the Phase I Note or secured by the Phase I Mortgage shall be a part of the Secured Indebtedness hereunder. Further, any Default, as defined in the Phase I Mortgage, shall also be a Default under this Mortgage. Notwithstanding that separate Real Property and the revenue sources therefrom shall be pledged to secure the Loan, Mortgagor acknowledges that it has received adequate consideration and economic benefit by reason of Mortgagee closing and funding the Loan. The Loan is for all purposes a single transaction, and, in the event of a Default, Mortgagor waives any right to require Beneficiary to marshal assets of Mortgagor or Rose FP LLC nor shall Mortgagor have the right to have any of the Premises sold or applied in any particular order to satisfy the Loan.

Any amount paid by Mortgagor to Mortgagee that is less than the total amount due under the Note and the Phase I Note may, at Mortgagee's option, be allocated to the amounts then due under each of such notes in whatever order, proportion and priority Mortgagee may elect, in its sole discretion. Mortgagor hereby waives any right it may have to designate the order and priority of the application of any payments that are either less than or greater than the total amount then due under the Note and the Phase I Note, and Mortgagee's application of such payments shall be binding on Mortgagor regardless of any designation to the contrary by Mortgagor. Upon payment in full of either the Secured Indebtedness or the Phase I, Mortgagee shall release the cross-collateralization and cross-default provisions set forth in this Section 6.20.

THE CONDITION OF THIS MORTGAGE IS SUCH, that whereas Mortgagor has executed and delivered unto Mortgagee the Note, payable to the order of Mortgagee for the principal sum of *Five Million Twenty-Five Thousand and No/100 Dollars (\$5,025,000.00)*, said principal sum being payable as set forth in the Note with interest at the rate set forth therein, the balance of said principal sum with interest thereon maturing and being due and payable on *January 10, 2016*, all according to the terms and provisions of the Note;

NOW, THEREFORE, if Mortgagor shall well and truly pay the indebtedness evidenced by the Note, or any extensions or renewals thereof, and the interest thereon to Mortgagee, its successors or assigns, and if Mortgagor shall well and truly perform and keep the several covenants, conditions and agreements herein set forth, then this Mortgage shall be void and shall be released as provided by law, and if permitted by applicable law, at the expense of Mortgagor; otherwise, the same shall remain in full force and effect.

UNOFFICIAL COPY

IN WITNESS WHEREOF, this Instrument has been duly signed, acknowledged and delivered under seal by the undersigned the day and year first above written.

JCG INDUSTRIES, INC.,
an Illinois corporation

By: Mary Kaminsky

Title: Secretary

STATE OF ILLINOIS)
COUNTY OF COOK) SS.

The foregoing instrument was acknowledged before me this 19TH day of DECEMBER, 2005, by MARK KAMINSKY, the SECRETARY of JCG Industries, Inc., an Illinois corporation, on behalf of said corporation.

Carol A. Feo
Notary Public

My commission expires: 9-8-09



UNOFFICIAL COPY

EXHIBIT A
LEGAL DESCRIPTION

Lot 2 in Koch Poultry Subdivision, being a subdivision of the North Three-Quarters of the West 1/2 of the West 1/2 of the Northwest 1/4 of Section 34, Township 40 North, Range 12 East of the Third Principal Meridian, according to the plat thereof recorded November 8, 2001 as Document 0011050901, in Cook County, Illinois.

Property Address: 2155 North Rose Street
Franklin Park, Illinois
PIN(s): 12-34-100-048

Property of Cook County Clerk's Office