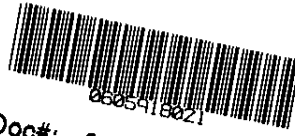


RECORDING REQUESTED BY
AND WHEN RECORDED RETURN TO:

CAPSTONE REALTY ADVISORS, LLC
1120 CHESTER AVENUE, STE 300
CLEVELAND, OHIO 44114
ATTN: MARTY CLANCY



Doc#: 0605918021 Fee: \$100.00
Eugene "Gene" Moore RHSP Fee: \$10.00
Cook County Recorder of Deeds
Date: 02/28/2006 10:47 AM Pg: 1 of 39

D2 MS

Property of Cook County Clerk's Office

(SPACE ABOVE THIS LINE FOR RECORDER'S USE)

**MORTGAGE AND ABSOLUTE ASSIGNMENT OF RENTS AND LEASES
AND SECURITY AGREEMENT (AND FIXTURE FILING)**

*MORTGAGOR: BROADWAY FESTIVAL, L.L.C., an Illinois limited liability company
MORTGAGEE: CAPSTONE REALTY ADVISORS, LLC, an Ohio limited liability company

THIS INSTRUMENT IS EFFECTIVE AND SHALL REMAIN EFFECTIVE AS A FINANCING STATEMENT FILED AS A FIXTURE FILING WITH RESPECT TO ALL GOODS WHICH ARE OR ARE TO BECOME FIXTURES ON THE REAL ESTATE HEREIN DESCRIBED AND IS TO BE FILED FOR RECORD OR REGISTERED IN THE REAL ESTATE RECORDS OF COOK COUNTY, ILLINOIS. THE MAILING ADDRESS OF MORTGAGEE AND THE ADDRESS OF MORTGAGOR ARE SET FORTH WITHIN. A PHOTOGRAPHIC OR OTHER REPRODUCTION OF THIS INSTRUMENT OR ANY FINANCING STATEMENT RELATING TO THIS INSTRUMENT SHALL BE SUFFICIENT AS A FINANCING STATEMENT.

Street Address of Property: 5300-5322 North Broadway Street, Chicago, Illinois 60640

Tax Parcel Numbers:
Lot 10: 14-08-121-032-0000.
Lots 11 and 12: 14-08-121-022-0000
Lot 13: 14-08-121-023-0000
Lot 14: 14-08-121-024-0000
Lots 15 and 16: 14-08-121-025-0000
Lot 17, 18 & 19: 14-08-121-026-0000
Lots 20, 21, 22, 23 & 24: 14-08-121-027-0000

8297892

Box 400-CTCC

UNOFFICIAL COPY

MORTGAGE AND ABSOLUTE ASSIGNMENT OF RENTS AND LEASES AND SECURITY AGREEMENT (AND FIXTURE FILING)

The parties to this MORTGAGE AND ABSOLUTE ASSIGNMENT OF RENTS AND LEASES AND SECURITY AGREEMENT (AND FIXTURE FILING) ("**Mortgage**"), dated as of February 21, 2006 are BROADWAY FESTIVAL, L.L.C., an Illinois limited liability company ("**Mortgagor**"), with a mailing address at 3730 West Devon, Lincolnwood, Illinois 60712 and CAPSTONE REALTY ADVISORS, LLC, an Ohio limited liability company ("**Mortgagee**"), with a mailing address at 1120 Chester Avenue, Suite 300, Cleveland, Ohio 44114.

RECITALS

A. Mortgagor proposes to borrow from Mortgagee, and Mortgagee proposes to lend to Mortgagor the principal sum of FOUR MILLION SIX HUNDRED EIGHTY FIVE THOUSAND AND 00/100 DOLLARS (\$4,685,000.00) ("**Loan**"). The loan is evidenced by that certain Promissory Note Secured by Mortgage (which note, together with all notes issued and accepted in substitution or exchange therefor, and as any of the foregoing may from time to time be modified or extended, is hereinafter referred to as the "**Note**") executed by Mortgagor, dated the date of this Mortgage, payable to the order of Mortgagee in the principal sum of FOUR MILLION SIX HUNDRED EIGHTY FIVE THOUSAND AND 00/100 DOLLARS (\$4,685,000.00). The Note provides, among other things, for final payment of principal and interest under the Note, if not sooner paid or payable as provided therein, to be due on March 1, 2013, the Note by this reference thereto being incorporated herein.

B. Mortgagee is desirous of securing the prompt payment of the Note together with interest and prepayment fees, if any, thereon in accordance with the terms of the Note, and any additional indebtedness accruing to Mortgagee on account of any future payments, advances or expenditures made by Mortgagee pursuant to the Note or this Mortgage.

C. The loan documents include this Mortgage, the Note and the other documents described in the Note as Loan Documents ("**Loan Documents**").

ARTICLE 1 MORTGAGE

1.1 **Grant.** For the purposes of and upon the terms and conditions of this Mortgage, Mortgagor has mortgaged, given, granted, bargained, sold, alienated, enfeoffed, conveyed, confirmed, warranted, pledged, assigned and hypothecated and by these presents does hereby mortgage, give, grant, bargain, sell, alien, enfeoff, convey, confirm, warrant, pledge, assign and hypothecate unto Mortgagee all estate, right, title and interest which Mortgagor now has or may hereafter acquire in, to, under or derived from any or all of the following:

(a) That real property ("**Land**") located in Cook County, Illinois, and more particularly described on **Exhibit "A"** attached hereto;

(b) All appurtenances, easements, rights of way, water and water rights, pumps, pipes, flumes and ditches and ditch rights, water stock, ditch and/or reservoir stock or interests, royalties, development rights and credits, air rights, minerals, oil rights, and gas rights, now or later used or useful in connection with, appurtenant to or related to the Land;

(c) All buildings, structures, facilities, other improvements and fixtures now or hereafter located on the Land;

UNOFFICIAL COPY

(d) All apparatus, equipment, machinery and appliances and all accessions thereto and renewals and replacements thereof and substitutions therefor used in the operation or occupancy of the Land, it being intended by the parties that all such items shall be conclusively considered to be a part of the Land, whether or not attached or affixed to the Land;

(e) All land lying in the right-of-way of any street, road, avenue, alley or right-of-way opened, proposed or vacated, and all sidewalks, strips and gores of land adjacent to or used in connection with the Land;

(f) All additions and accretions to the property described above;

(g) All licenses, authorizations, certificates, variances, consents, approvals and other permits now or hereafter pertaining to the Land and all estate, right, title and interest of Mortgagor in, to, under or derived from all trade names or business names relating to the Land or the present or future development, construction, operation or use of the Land; and

(h) All proceeds of any of the foregoing.

All of the property described above is hereinafter collectively defined as the "**Property**". The listing of specific rights or property shall not be interpreted as a limitation of general terms.

TO HAVE AND TO HOLD the Property with all rights, privileges and appurtenances thereunto belonging, and all rents, issues and profits therefrom, unto Mortgagee, its successors and assigns, forever, for the uses and purposes herein expressed.

ARTICLE 2 OBLIGATIONS SECURED

2.1 Obligations Secured. Mortgagor makes the foregoing grant and assignment for the purpose of securing the following obligations ("**Secured Obligations**").

(a) Full and punctual payment to Mortgagee of all sums at any time owing under the Note and of such additional sums with interest thereon which may hereafter be loaned to Mortgagor by Mortgagee or advanced under the Loan Documents, even though the aggregate amount outstanding at any time may exceed the original principal balance stated herein and in the Note (provided, however, that the indebtedness secured hereby shall in no event exceed an amount equal to three hundred percent (300%) of the face amount of the Note);

(b) Payment and performance of all covenants and obligations of Mortgagor under this Mortgage including, without limitation, indemnification obligations and advances made to protect the Property;

(c) Payment and performance of all additional covenants and obligations of Mortgagor under the Loan Documents including, without limitation, the Environmental Indemnity Agreement of even date herewith given by Mortgagor in favor of Mortgagee;

(d) Payment and performance of all covenants and obligations, if any, which any rider attached as an exhibit to this Mortgage recites are secured hereby;

(e) Payment and performance of all future advances and other obligations that the then record owner of all or part of the Property may agree to pay and/or perform (whether as principal, surety or guarantor) for the benefit of Mortgagee, when the obligation is evidenced by a writing which recites that it is secured by this Mortgage;

UNOFFICIAL COPY

(f) All interest and charges on all obligations secured hereby including, without limitation, prepayment charges, late charges and loan fees; and

(g) All modifications, extensions and renewals of any of the obligations secured hereby, however evidenced, including, without limitation: (i) modifications of the required principal payment dates or interest payment dates or both, as the case may be, deferring or accelerating payment dates wholly or partly; and (ii) modifications, extensions or renewals at a different rate of interest whether or not any such modification, extension or renewal is evidenced by a new or additional promissory note or notes.

2.2 Obligations. The term "**obligations**" is used herein in its broadest and most comprehensive sense and shall be deemed to include, without limitation, all interest and charges, prepayment charges, late charges and loan fees at any time accruing or assessed on any of the Secured Obligations.

2.3 Incorporation. All terms and conditions of the documents which evidence any of the Secured Obligations are incorporated herein by this reference. All persons who may have or acquire an interest in the Property shall be deemed to have notice of the terms of the Secured Obligations and to have notice that the rate of interest on one or more Secured Obligation may vary from time to time.

ARTICLE 3 ABSOLUTE ASSIGNMENT OF RENTS AND LEASES

3.1 Assignment. Mortgagor irrevocably assigns to Mortgagee all of Mortgagor's right, title and interest in, to and under:

(a) all present and future leases of the Property or any portion thereof, all licenses and agreements relating to the management, leasing or operation of the Property or any portion thereof, and all other agreements of any kind relating to the use or occupancy of the Property or any portion thereof, whether such leases, licenses and agreements are now existing or entered into after the date hereof ("**Leases**"); and

(b) the rents, issues, deposits and profits of the Property, including, without limitation, all amounts payable and all rights and benefits accruing to Mortgagor under the Leases ("**Payments**"). The term "**Leases**" shall also include all Guarantees of and security for the tenants' performance thereunder, and all amendments, extensions, renewals or modifications thereto which are permitted hereunder.

This is a present and absolute assignment, not an assignment for security purposes only, and Mortgagee's right to the Leases and Payments is not contingent upon, and may be exercised without possession of, the Property.

3.2 Grant of License. Mortgagee confers upon Mortgagor a revocable license ("**License**") to collect and retain the Payments as they become due and payable, until the occurrence of a "**Default**" (as hereinafter defined). Upon a Default, the License shall be automatically revoked and Mortgagee may collect and apply the Payments pursuant to the terms hereof without notice and without taking possession of the Property. All Payments thereafter collected by Mortgagor shall be held by Mortgagor as trustee under a constructive trust for the benefit of Mortgagee. Mortgagor hereby irrevocably authorizes and directs the tenants under the Leases to rely upon and comply with any notice or demand by Mortgagee for the payment to Mortgagee of any rental or other sums which may at any time become due under the Leases, or for the performance of any of the tenants' undertakings under the Leases, and the tenants shall have no right or duty to inquire as to whether any Default has actually occurred or is then existing. Mortgagor hereby relieves the tenants from any liability to Mortgagor by reason of relying upon and complying with any such notice or demand by Mortgagee. Mortgagee may apply, in its sole discretion, any Payments so collected by Mortgagee against any Secured Obligation or any other obligation of Mortgagor or any other person or entity, under any document or instrument related to or executed in connection with

UNOFFICIAL COPY

the Loan Documents, whether existing on the date hereof or hereafter arising. Collection of any Payments by Mortgagee shall not cure or waive any Default or notice of Default or invalidate any acts done pursuant to such notice.

3.3 Effect of Assignment. The foregoing irrevocable assignment shall not cause Mortgagee to be:

- (a) a mortgagee in possession;
- (b) responsible or liable for the control, care, management or repair of the Property or for performing any of the terms, agreements, undertakings, obligations, representations, warranties, covenants and conditions of the Leases;
- (c) responsible or liable for any waste committed on the Property by the tenants under any of the Leases or by any other parties for any dangerous or defective condition of the Property, or for any negligence in the management, upkeep, repair or control of the Property resulting in loss or injury or death to any tenant, licensee, employee, invitee or other person; or
- (d) responsible for or impose upon Mortgagee any duty to produce rents or profits. Mortgagee shall not directly or indirectly be liable to Mortgagor or any other person as a consequence of:

- (i) the exercise or failure to exercise any of the rights, remedies or powers granted to Mortgagee hereunder; or

- (ii) the failure or refusal of Mortgagee to perform or discharge any obligation, duty or liability of Mortgagor arising under the Leases.

3.4 Covenants.

(a) **All Leases.** Mortgagor shall, at Mortgagor's sole cost and expense:

- (i) perform all obligations of the landlord under the Leases and use reasonable efforts to enforce performance by the tenants of all obligations of the tenants under the Leases;

- (ii) use reasonable efforts to keep the Property leased at all times to tenants which Mortgagor in good faith believes are creditworthy, at rents not less than the fair market rental value (including, but not limited to, free or discounted rents to the extent the market so requires);

- (iii) promptly upon Mortgagee's request, deliver to Mortgagee a copy of each requested Lease and all amendments thereto and waivers thereof;

- (iv) promptly upon Mortgagee's request, execute and record any additional assignments of landlord's interest under any Lease to Mortgagee and specific subordinations of any Lease to this Mortgagee, in form and substance satisfactory to Mortgagee; and

- (v) promptly upon Mortgagee's request to do so, but in any event by January 1 of each year, provide Mortgagee a current rent roll, certified by Mortgagor as being true and correct, containing the names of all tenants with respect to the Property, the terms of their respective Leases, the spaces occupied and the rentals or fees payable thereunder and the amount of each tenant's security deposit.

Unless consented to in writing by Mortgagee or otherwise permitted under any other provision of the Loan Documents, Mortgagor shall not:

UNOFFICIAL COPY

- (vi) grant any tenant under any Lease any option, right of first refusal or other right to purchase all or any portion of the Property under any circumstances;
- (vii) grant any tenant under any Lease any right to prepay rent more than one (1) month in advance;
- (viii) except upon Mortgagee's request, execute any assignment of landlord's interest in any Lease;
- (ix) collect rent or other sums due under any Lease in advance, other than to collect rent one (1) month in advance of the time when it becomes due; or
- (x) execute any lease which deviates materially from the standard form Lease approved by Mortgagee in writing.

Any such attempted action in violation of the provisions of this section shall be null and void.

Mortgagee's failure to deny any written request by Mortgagor for consent under this section within five (5) "Business Days" (as defined in the Note) after Mortgagee's receipt of such request (and all documents and information reasonably related thereto) shall be deemed to constitute Mortgagee's consent to such request.

(b) **Major Leases.** Mortgagor shall, at Mortgagor's sole cost and expense, give Mortgagee prompt written notice of any material default by landlord or tenant under any "Major Lease" (as defined below). Unless consented to in writing by Mortgagee or otherwise permitted under any other provision of the Loan Documents, Mortgagor shall not:

- (i) enter into any Major Lease which:
 - (A) is not on fair market terms (which terms may include free or discounted rent to the extent the market so requires);
 - (B) does not contain a provision requiring the tenant to execute and deliver to the landlord an estoppel certificate in form and substance satisfactory to the landlord promptly upon the landlord's request; or
 - (C) allows the tenant to assign or sublet the premises without the landlord's consent;
- (ii) reduce any rent or other sums due from the tenant under any Major Lease;
- (iii) terminate or materially modify or amend any Major Lease; or
- (iv) release or discharge the tenant or any guarantor under any Major Lease from any material obligation thereunder.

Any such attempted action in violation of the provisions of this section shall be null and void.

Without in any way limiting the requirement of Mortgagee's consent hereunder, any sums received by Mortgagor in consideration of any termination or material modification or amendment of any Major Lease or any release or discharge of any tenant under any Major Lease from any material obligation thereunder shall be applied to reduce the outstanding Secured Obligations (without payment of a prepayment charge) and any such sums received by Mortgagor shall be held in trust by Mortgagor for such purpose; provided, however, so long as no Default shall exist at the time, any sums received by Mortgagor in consideration of any termination (or the release or discharge of any tenant), modification or amendment of any Major

UNOFFICIAL COPY

Lease which: (1) total less than \$50,000 shall be payable to Mortgagor; and (2) total \$50,000 or more shall be placed into an impound account and shall be released to Mortgagor from time to time upon delivery of an executed replacement tenant lease and satisfactory evidence as to the completion of re-tenanting work. Following the completion of such re-tenanting work, and provided no Default shall exist at such time, Mortgagee shall release any excess funds received by Mortgagor with respect to the termination of any Major Lease to Mortgagor. "**Major Lease**", as used herein, shall mean a Lease of any portion of the Property which accounts for fifteen percent (15%) or more of the total rental income of all buildings forming a part of the Property, as reasonably determined by Mortgagee. Mortgagor's obligations with respect to Major Leases shall be governed by the provisions of Section 3.4(a) applicable to all Leases as well as by the provisions of this section. Mortgagee's failure to deny any written request by Mortgagor for consent under this section within five (5) "**Business Days**" (as defined in the Note) after Mortgagee's receipt of such request (and all documents and information reasonably related thereto) shall be deemed to constitute Mortgagee's consent to such request.

3.5 Estoppel Certificates. Within thirty (30) days after request by Mortgagee, Mortgagor shall deliver to Mortgagee and to any party designated by Mortgagee, estoppel certificates relating to the Leases executed by Mortgagor and by each of the tenants, in form and substance acceptable to Mortgagee; provided, however, if any tenant shall fail or refuse to so execute and deliver any such estoppel certificate upon request, Mortgagor shall use reasonable efforts to cause such tenant to execute and deliver such estoppel certificate but such tenant's continued failure or refusal to do so, despite Mortgagor's reasonable efforts, shall not constitute a default by Mortgagor under this section.

3.6 Right of Subordination. Mortgagee may at any time and from time to time by specific written instrument intended for the purpose unilaterally subordinate the lien of this Mortgage to any Lease, without joinder or consent of, or notice to, Mortgagor, any tenant or any other person. Notice is hereby given to each tenant under a Lease of such right to subordinate. No subordination referred to in this section shall constitute a subordination to any lien or other encumbrance, whenever arising, or improve the right of any junior lienholder. Nothing herein shall be construed as subordinating this Mortgage to any Lease.

ARTICLE 4 SECURITY AGREEMENT AND FIXTURE FILING

4.1 Security Interest. Mortgagor grants and assigns to Mortgagee a security interest to secure payment and performance of all of the Secured Obligations in all of the following described personal property in which Mortgagor now or at any time hereafter has any interest ("**Collateral**"):

- (a) All goods, building and other materials, supplies, work in process, equipment, machinery, fixtures, furniture, furnishings, signs and other personal property, wherever situated, which are or are to be incorporated into, used in connection with or appropriated for use on the Property;
- (b) all rents, issues, deposits and profits of the Property (to the extent, if any, they are not subject to the Absolute Assignment of Rents and Leases);
- (c) all inventory, accounts, cash receipts, deposit accounts, impounds, accounts receivable, contract rights, general intangibles, chattel paper, instruments, documents, notes, drafts, letters of credit, insurance policies, insurance and condemnation awards and proceeds, any other rights to the payment of money, trade names, trademarks and service marks arising from or related to the Property or any business now or hereafter conducted thereon by Mortgagor;
- (d) all permits, consents, approvals, licenses, authorizations and other rights granted by, given by or obtained from, any governmental entity with respect to the Property;
- (e) all deposits or other security now or hereafter made with or given to utility companies by Mortgagor with respect to the Property;

UNOFFICIAL COPY

- the Property;
- (f) all advance payments of insurance premiums made by Mortgagor with respect to the Property;
 - (g) all plans, drawings and specifications relating to the Property;
 - (h) all loan funds held by Mortgagee, whether or not disbursed;
 - (i) all funds deposited with Mortgagee pursuant to any Loan Document, including, without limitation, all "**Restoration Funds**" as defined herein;
 - (j) all reserves, deferred payments, deposits, accounts, refunds, cost savings and payments of any kind related to the Property or any portion thereof, including, without limitation, all "**Impounds**" (as defined herein);
 - (k) all replacements and proceeds of, and additions and accessions to, any of the foregoing items in clauses (a) through (j) above, and all books, records and files relating to any of the foregoing items in clauses (a) through (j) above.

As to all of the above-described personal property which is or which hereafter becomes a "fixture" under applicable law, this mortgage constitutes a financing statement for purposes of 810 ILCS 5/9-502, as amended or recodified from time to time ("**UCC**"), and shall constitute a "Fixture Filing" under such statutes and shall be filed in the real estate records of Cook, Illinois.

- (l) Name of Debtor: BROADWAY FESTIVAL, L.L.C.
Debtor's Mailing Address: 3730 West Devon, Lincolnwood, Illinois 60712
Address of Property: 5300-5322 North Broadway Street, Chicago, Illinois 60640
Name of Secured Party: CAPSTONE REALTY ADVISORS, LLC
Address of Secured Party: 1120 Chester Avenue, Suite 300
Cleveland, Ohio 44114
- (m) This financing statement covers the Collateral described in this instrument.
- (n) Some of the goods are or are to become fixtures on the real property described herein.

Mortgagor is the record owner of the real property described herein upon which the foregoing fixtures and other items and types of property are located.

4.2 Rights of Mortgagee. In addition to Mortgagee's rights as a "secured party" under the UCC, Mortgagee may, but shall not be obligated to, at any time without notice and at the expense of Mortgagor:

- (a) give notice to any person of Mortgagee's rights hereunder and enforce such rights at law or in equity;
- (b) insure, protect, defend and preserve the Collateral or any rights or interests of Mortgagee therein;
- (c) inspect the Collateral; and
- (d) endorse, collect and receive any right to payment of money owing to Mortgagor under or from the Collateral.

Notwithstanding the above, in no event shall Mortgagee be deemed to have accepted any property other than cash in satisfaction of any obligation of Mortgagor to Mortgagee unless Mortgagee shall make an express written election of said remedy under the UCC or other applicable law.

UNOFFICIAL COPY

4.3 Additional Rights of Mortgagee Upon Default. Upon the occurrence of a Default hereunder, then in addition to all of Mortgagee's rights as a "secured party" under the UCC or otherwise at law:

(a) **Sale of Collateral.** Mortgagee may:

(i) upon written notice, require Mortgagor to assemble any or all of the Collateral and make it available to Mortgagee at a place designated by Mortgagee;

(ii) without prior notice, to the extent permitted under the UCC or other applicable law, enter upon the Property or other place where any of the Collateral may be located and take possession of, collect, sell and dispose of any or all of the Collateral, and store the same at locations acceptable to Mortgagee at Mortgagor's expense; or

(iii) sell, assign and deliver at any place or in any lawful manner all or any part of the Collateral and bid and become purchaser at any such sales; and

(b) **Other Rights.** Mortgagee may, for the account of Mortgagor and at Mortgagor's expense:

(i) operate, use, consume, sell or dispose of the Collateral as Mortgagee deems appropriate for the purpose of performing any or all of the Secured Obligations;

(ii) enter into any agreement, compromise or settlement including insurance claims, which Mortgagee may deem desirable or proper with respect to any of the Collateral; and

(iii) endorse and deliver evidences of title for, and receive, enforce and collect by legal action or otherwise, all indebtedness and obligations now or hereafter owing to Mortgagor in connection with or on account of any or all of the Collateral.

Mortgagor acknowledges and agrees that a disposition of the Collateral in accordance with Mortgagee's rights and remedies as heretofore provided is a disposition thereof in a commercially reasonable manner and that ten (10) days' prior notice of such disposition is commercially reasonable notice. Mortgagor further agrees that any sale or other disposition of all or any portion of the Collateral may be applied by Mortgagee first to the reasonable expenses in connection therewith, including reasonable attorneys' fees and disbursements, and then to the payment of the Secured Obligations.

4.4 Power of Attorney. Mortgagor hereby irrevocably appoints Mortgagee as Mortgagor's attorney-in-fact (such power of attorney being coupled with an interest), and as such attorney-in-fact, Mortgagee may, without the obligation to do so, in Mortgagee's name or in the name of Mortgagor, prepare, execute, file and record financing statements, continuation statements, applications for registration and like papers necessary to create, perfect or preserve any of Mortgagee's security interests and rights in or to any of the Collateral, and upon a Default hereunder, take any other action required of Mortgagor; provided, however, that Mortgagee as such attorney-in-fact shall be accountable only for such funds as are actually received by Mortgagee.

ARTICLE 5 REPRESENTATIONS AND WARRANTIES

5.1 Representations and Warranties. Mortgagor represents and warrants to Mortgagee that, to Mortgagor's current actual knowledge after reasonable investigation and inquiry, the following statements are true and correct as of the "**Closing Date**" (as defined in the Note):

UNOFFICIAL COPY

(a) **Legal Status.** Mortgagor is duly organized and existing and in good standing under the laws of the state of Illinois. Mortgagor is qualified or licensed to do business in all jurisdictions in which such qualification or licensing is required.

(b) **Permits.** Mortgagor possesses all permits, franchises and licenses and all rights to all trademarks, trade names, patents and fictitious names necessary to enable Mortgagor to conduct the business in which Mortgagor is now engaged in compliance with applicable law.

(c) **Authorization and Validity.** The execution and delivery of the Loan Documents have been duly authorized and the Loan Documents constitute valid and binding obligations of Mortgagor, or the party which executed the same, enforceable in accordance with their respective terms, except as such enforcement may be limited by bankruptcy, insolvency, moratorium or other laws affecting the enforcement of creditors' rights, or by the application of rules of equity.

(d) **Violations.** The execution, delivery and performance by Mortgagor of each of the Loan Documents do not violate any provision of any law or regulation, or result in any breach or default under any contract, obligation, indenture or other instrument to which Mortgagor is a party or by which Mortgagor is bound.

(e) **Litigation.** There are no pending or threatened actions, claims, investigations, suits or proceedings before any governmental authority, court or administrative agency which may adversely affect the financial condition or operations of Mortgagor other than those previously disclosed in writing by Mortgagor to Mortgagee.

(f) **Financial Statements.** The financial statements of Mortgagor, of each member of Mortgagor, and of each guarantor previously delivered by Mortgagor to Mortgagee:

- (i) are materially complete and correct;
- (ii) present fairly the financial condition of such party; and
- (iii) have been prepared in accordance with the same accounting standard used by Mortgagor to prepare the financial statements delivered to and approved by Mortgagee in connection with the making of the Loan, or other accounting standards approved by Mortgagee.

Since the date of such financial statements, there has been no material adverse change in such financial condition, nor have any assets or properties reflected on such financial statements been sold, transferred, assigned, mortgaged, pledged or encumbered except as previously disclosed in writing by Mortgagor to Mortgagee and approved in writing by Mortgagee.

(g) **Reports.** All reports, documents, instruments and information delivered to Mortgagee in connection with the Loan:

- (i) are correct and sufficiently complete to give Mortgagee accurate knowledge of their subject matter; and
- (ii) do not contain any misrepresentation of a material fact or omission of a material fact which omission makes the provided information misleading.

(h) **Income Taxes.** There are no pending assessments or adjustments of Mortgagor's income tax payable with respect to any year.

(i) **Subordination.** There is no agreement or instrument to which Mortgagor is a party or by which Mortgagor is bound that would require the subordination in right of payment of any of Mortgagor's obligations under the Note to an obligation owed to another party.

UNOFFICIAL COPY

(j) **Title.** Mortgagor lawfully holds and possesses fee simple title to the Property, without limitation on the right to encumber the Property. This Mortgage is a first lien on the Property prior and superior to all other liens and encumbrances on the Property except:

- (i) liens for real estate taxes and assessments not yet due and payable;
- (ii) senior exceptions previously approved by Mortgagee and shown in the title insurance policy insuring the lien of this Mortgage; and
- (iii) other matters, if any, previously disclosed to Mortgagee by Mortgagor in a writing specifically referring to this representation and warranty.

(k) **Mechanics' Liens.** There are no mechanics' or similar liens or claims which have been filed for work, labor or material (and no rights are outstanding that under law could give rise to any such liens) affecting the Property which are or may be prior to or equal to the lien of this Mortgage.

(l) **Encroachments.** Except as shown in the survey, if any, previously delivered to Mortgagee, none of the buildings or other improvements which were included for the purpose of determining the appraised value of the Property lies outside of the boundaries or building restriction lines of the Property and no buildings or other improvements located on adjoining properties encroach upon the Property.

(m) **Leases.** All existing Leases are in full force and effect and are enforceable in accordance with their respective terms. No material breach or default by any party, or event which would constitute a material breach or default by any party after notice or the passage of time, or both, exists under any existing Lease. None of the landlord's interests under any of the Leases, including, but not limited to, rents, additional rents, charges, issues or profits, has been transferred or assigned. No rent or other payment under any existing Lease has been paid by any tenant for more than one (1) month in advance.

(n) **Collateral.** Mortgagor has good title to the existing Collateral. Mortgagor has not previously assigned or encumbered Mortgagor's interest in any of the Collateral. No financing statement covering any of the Collateral has been delivered to any other person or entity. Mortgagor's principal place of business is located at the address shown in this Mortgage.

(o) **Condition of Property.** Except as shown in the property condition survey or other engineering reports, if any, previously delivered to or obtained by Mortgagee, the Property is in good condition and repair and is free from any damage, waste or defect that would materially and adversely affect the value of the Property as security for the Loan or the intended use of the Property.

(p) **Wetlands.** No part of the Property consists of or is classified as wetlands, tidelands or swamp and overflow lands.

(q) **Compliance With Laws: ERISA.**

(i) All federal, state and local laws, rules and regulations applicable to the Property, including, without limitation, all zoning and building requirements and all requirements of the Americans With Disabilities Act of 1990, as amended from time to time (42 U.S.C. Section 12101 et seq.) have been satisfied or complied with. Mortgagor is in possession of all certificates of occupancy and all other licenses, permits and other authorizations required by applicable law for the existing use of the Property. All such certificates of occupancy and other licenses, permits and authorizations are valid and in full force and effect;

(ii) Mortgagor shall not engage in any transaction which would cause any obligation, or action taken or to be taken, hereunder (or the exercise by Mortgagee of any of its rights under the Note, this Mortgage and the other Loan Documents) to be a non-exempt (under a

UNOFFICIAL COPY

statutory or administrative class exemption) prohibited transaction under the Employee Retirement Income Security Act of 1974, as amended ("**ERISA**"); and

(iii) Mortgagor shall deliver to Mortgagee such certifications or other evidence from time to time throughout the term of this Mortgage, as requested by Mortgagee in its sole discretion, that Mortgagor

(A) is not an "employee benefit plan" as defined in Section 3(32) of ERISA, which is subject to Title I of ERISA, or a "governmental plan" within the meaning of Section 3(32) of ERISA, and

(B) is not subject to state statutes regulating investments and fiduciary obligations with respect to governmental plans.

(r) **Property Taxes and Other Liabilities.** All taxes, governmental assessments, insurance premiums, water, sewer and municipal charges, and ground rents, if any, which previously became due and owing in respect of the Property have been paid.

(s) **Condemnation.** There is no proceeding pending or threatened for the total or partial condemnation of the Property.

(t) **Homestead.** Because the Property is not a homestead property, there is no homestead or other exemption available to Mortgagor that would materially interfere with the right of Mortgagee to foreclose this Mortgage.

(u) **Single-Purpose Entity.** Mortgagor satisfies all of the single-purpose entity requirements set forth in **Exhibit "B"** attached hereto and incorporated herein by this reference.

ARTICLE 6 RIGHTS AND DUTIES OF THE PARTIES

6.1 **Maintenance and Preservation of the Property.** Mortgagor shall:

(a) keep the Property in good condition and repair;

(b) complete or restore promptly and in workmanlike manner the Property or any part thereof which may be damaged or destroyed (unless, if and to the extent permitted under Section 6.10, Mortgagee elects to require that insurance proceeds be used to reduce the Secured Obligations and after such repayment the ratio of Secured Obligations to the value of the Property, as reasonably determined by Mortgagee is the same as or lower than it was immediately before the loss or taking occurred);

(c) comply and cause the Property to comply with (i) all laws, ordinances, regulations and standards, (ii) all covenants, conditions, restrictions and equitable servitudes, whether public or private, of every kind and character; and (iii) all requirements of insurance companies and any bureau or agency which establishes standards of insurability, which laws, covenants or requirements affect the Property and pertain to acts committed or conditions existing thereon, including, without limitation, any work of alteration, improvement or demolition as such laws, covenants or requirements mandate;

(d) operate and manage the Property at all times in a professional manner and do all other acts which from the character or use of the Property may be reasonably necessary to maintain and preserve its value;

(e) promptly after execution, deliver to Mortgagee a copy of any management agreement concerning the Property and all amendments thereto and waivers thereof; and

UNOFFICIAL COPY

(f) execute and acknowledge all further documents, instruments and other papers as Mortgagee deems necessary or appropriate to preserve, continue, perfect and enjoy the benefits of this Mortgage and perform Mortgagor's obligations, including, without limitation, statements of the amount secured hereby then owing and statements of no offset.

Mortgagor shall not:

- (g) remove or demolish all or any material part of the Property;
- (h) alter either (i) the exterior of the Property in a manner which materially and adversely affects the value of the Property or (ii) the roof or other structural elements of the Property in a manner which requires a building permit;
- (i) initiate or acquiesce in any change in any zoning or other land classification which affects the Property;
- (j) materially alter the type of occupancy or use of all or any part of the Property; or
- (k) commit or permit waste of the Property.

Mortgagor shall at its own expense deliver any reappraisal or updated appraisal for the Property; provided, however, that notwithstanding the foregoing, Mortgagee shall not order appraisals of the Property more than one (1) time per year unless (i) Mortgagee believes that a material adverse change has occurred with respect to the Property or any portion thereof, or (ii) Mortgagor requests in writing that Mortgagee order an appraisal of the Property, or (iii) Mortgagee is required to reappraise the Property in connection with any rating agency or similar requirements.

6.2 Compliance With Laws; ERISA

(a) Mortgagor shall comply with all federal, state and local laws, rules and regulations applicable to the Property, including, without limitation, all zoning and building requirements and all requirements of the Americans With Disabilities Act of 1990 (42 U.S.C. Section 12101 et seq.), as amended from time to time;

(b) Mortgagor shall possess and maintain or cause Mortgagor to possess and maintain in full force and effect at all times:

(i) all certificates of occupancy and other licenses, permits and authorizations required by applicable law for the existing use of the Property; and

(ii) all permits, franchises and licenses and all rights to all trademarks, trade names, patents and fictitious names, if any, required by applicable law for Mortgagor to conduct the business(es) in which Mortgagor is now engaged;

(c) Mortgagor is not and will not be an "employee benefit plan" as defined in Section 3(32) of ERISA, which is subject to Title I of ERISA, and the assets of Mortgagor do not and will not constitute "plan assets" of one or more such plans for purposes of Title I of ERISA; and

(d) Mortgagor is not and will not be a "governmental plan" within the meaning of Section 3(32) of ERISA, and transactions by or with Mortgagor are not and will not be subject to state statutes applicable to Mortgagor regulating investments of and fiduciary obligations with respect to governmental plans.

6.3 Litigation. Mortgagor shall promptly notify Mortgagee in writing of any litigation pending or threatened against Mortgagor claiming damages in excess of \$50,000 and of all pending or threatened

UNOFFICIAL COPY

litigation against Mortgagor or Mortgagee if the aggregate damage claims against Mortgagor exceed \$100,000.

6.4 Merger, Consolidation, Transfer of Assets. Mortgagor shall not:

- (a) merge or consolidate with any other entity;
- (b) make any substantial change in the nature of Mortgagor's business or structure;
- (c) acquire all or substantially all of the assets of any other entity; or
- (d) sell, lease, assign, transfer or otherwise dispose of a material part of Mortgagor's assets except in the ordinary course of Mortgagor's business.

6.5 Accounting Records. Mortgagor shall maintain adequate books and records in accordance with the same accounting standard used by Mortgagor to prepare the financial statements delivered to and approved by Mortgagee in connection with the making of the Loan or other accounting standards approved by Mortgagee. Mortgagor shall permit any representative of Mortgagee, at any reasonable time and from time to time, to inspect, audit and examine such books and records and make copies of thereof.

6.6 Costs, Expenses and Attorneys' Fees. Mortgagor shall pay to Mortgagee the full amount of all costs and expenses, including, without limitation, reasonable attorneys' fees and expenses of Mortgagee's in-house or outside counsel, incurred by Mortgagee in connection with:

- (a) appraisals and inspections of the Property or Collateral required by Mortgagee as a result of (i) a "Transfer" or proposed "Transfer" (as defined below), (ii) in connection with any sale or securitization of the Loan, or (iii) a Default,
- (b) any acts performed by Mortgagee at Mortgagor's request or wholly or partially for the benefit of Mortgagor (including, without limitation, the preparation or review of amendments, assumptions, waivers, releases, reconveyances, estoppel certificates or statements of amounts owing under any Secured Obligation).

Mortgagor shall pay all costs and expenses arising under this section immediately upon demand by Mortgagee together with interest thereon following notice of such indebtedness at the rate of interest then applicable to the principal balance of the Note as specified therein.

6.7 No Other Debt; Liens, Encumbrances and Charges.

(a) Without obtaining Mortgagee's prior written consent (which consent shall be granted or withheld in Mortgagee's sole and absolute discretion and at Mortgagor's sole cost and expense), Mortgagor shall not incur any debt, secured or unsecured, direct or indirect, absolute or contingent (including guaranteeing any obligation), other than the Loan and trade debt incurred in the ordinary course of Mortgagor's business (with any such trade debt to be paid within sixty (60) days of the date such debt was incurred and, in any event, prior to delinquency). In addition, without obtaining Mortgagee's prior written consent (which consent shall be granted or withheld in Mortgagee's sole and absolute discretion and at Mortgagor's sole cost and expense), Mortgagor shall not permit the encumbrance, hypothecation or pledge of any of the membership interests of Mortgagor; and

(b) Mortgagor shall immediately discharge by bonding or otherwise any lien, charge or other encumbrance which attaches to the Property in violation of Section 6.14.

Subject to Mortgagor's right to contest such matters under this Mortgage or as expressly permitted in the Loan Documents, Mortgagor shall pay when due all obligations secured by or reducible to liens and encumbrances which shall now or hereafter encumber or appear to encumber all or any part of the

UNOFFICIAL COPY

Property or any interest therein, whether senior or subordinate hereto, including, without limitation, all claims for work or labor performed, or materials or supplies furnished, in connection with any work of demolition, alteration, repair, improvement or construction of or upon the Property, except such as Mortgagor may in good faith contest or as to which a bona fide dispute may arise (provided provision is made to the satisfaction of Mortgagee for eventual payment thereof in the event that Mortgagor is obligated to make such payment and that any recorded claim of lien, charge or other encumbrance against the Property is immediately discharged by bonding or otherwise).

Notwithstanding anything in this Section 6.7 to the contrary, Mortgagor and Mortgagee have agreed that, at any time after the 36th month following Securitization (as defined below) of the Loan, additional debt in an amount approved by Mortgagee ("**Approved Subordinate Debt**") may be incurred subject to the provisions hereof. Any Approved Subordinate Debt incurred may be secured only by either (i) a subordinate mortgage on the Property ("**Subordinate Mortgage**"), or (ii) a pledge of the non-controlling ownership interests in the Mortgagor ("**Pledged Equity Interests**"); provided, that in each case, any Approved Subordinate Debt must in all respects be subject and subordinate to the Debt secured hereby and the form of any and all documents evidencing, securing or supporting the Approved Subordinate Debt ("**Subordinate Loan Documents**") must be acceptable to Lender in its sole discretion. Without limiting Mortgagee's discretion to approve or disapprove any request for Approved Subordinate Debt, Mortgagee specifically reserves the right to condition such consent upon the satisfaction of the following minimum conditions:

- (1) Mortgagee shall have received Mortgagor's written request for the Approved Subordinate Debt, which shall have been expressly approved by Mortgagee in writing and Mortgagor shall have delivered to Mortgagee the Subordinate Loan Documents;
- (2) No Default, or no event which with the giving of notice or the lapse of time, or both, shall become a Default, under this Mortgage and/or any of the other Loan Documents shall have occurred and be continuing;
- (3) The aggregate amount of the obligations evidenced by the Note, this Mortgage and the other Loan Documents (the "**Debt**") and Approved Subordinate Debt shall not exceed an amount that would cause the loan to value ratio (the "**LTV**") (taking into account the Debt and the proposed Approved Subordinate Debt) to exceed eighty-five percent (85%) of the appraised value of the Property (the "**Subordinate Mortgage LTV Cap**"), as determined by an appraisal obtained by Mortgagee which is consistent with Mortgagee's underwriting standards;
- (4) The net operating income from the Property (as determined in a manner consistent with Mortgagee's underwriting standards and measured on a trailing three month basis) shall be sufficient to produce a debt service coverage ratio ("**DSCR**") of not less than 1.15 to 1.00 (the "**Minimum DSCR**"), taking into account the combined annual debt service required for the Debt and the Approved Subordinate Debt (as determined in a manner consistent with Mortgagee's underwriting standards);
- (5) The net operating income from the Property shall be sufficient to produce a DSCR of not less than .82 to 1.00 based on a loan constant of 9.25% and the outstanding principal balance of the Loan and the Approved Subordinate Debt;
- (6) The Property shall be not less than ninety-five percent (95%) occupied with tenants occupying leased space in the Property pursuant to written leases reasonably acceptable to Lender or month-to-month tenancies initiated pursuant to written leases reasonably acceptable to Lender;
- (7) The holder of the Approved Subordinate Debt ("**Holder**") shall be an institutional lender satisfactory to Mortgagee and shall have executed an Intercreditor and Subordination Agreement in recordable form satisfactory to Mortgagee (the "**Subordination Agreement**"). Without limitation of the terms and conditions that otherwise may be set forth in the Subordination Agreement, the Subordination Agreement shall provide that:

UNOFFICIAL COPY

- (A) The Approved Subordinate Debt and the Subordinate Loan Documents shall at all times be and remain subordinate in all respects to the debt secured hereby and the Loan Documents, including with respect to payment priority, lien priority or otherwise;
- (B) If Mortgagee shall have given written notice to Holder that a Default has occurred under the Loan Documents and is continuing, Holder shall not demand, collect, or enforce against Mortgagor or the Property or accept from Mortgagor or any person for Mortgagor's account, the payment of any principal or interest on account of the Approved Subordinate Debt, nor take any action to realize upon any collateral securing the Approved Subordinate Debt;
- (C) Holder shall not sell any interests or participations in the Approved Subordinate Debt without Mortgagee's prior written consent, and shall not transfer or assign its interests in the Approved Subordinate Debt without Mortgagee's prior written consent;
- (D) Holder shall not declare a default or exercise any rights or remedies Holder may have under the Subordinate Loan Documents or applicable law with respect to a foreclosure or receivership or other realization upon the collateral for the Approved Subordinate Debt (including, without limitation, obtaining title to the Property or the Pledged Equity Interests or selling or otherwise transferring the Equity Interests) in each case without Mortgagee's consent unless (A) the transferee of title is Holder or another institutional investor satisfactory to Mortgagee (a "**Qualified Transferee**"), (B) the Property will be managed by a manager acceptable to Mortgagee, and (C) if not in place prior to the transfer of title, hard cash management and adequate reserves for taxes, insurance, debt service, ground rents, capital repair and improvement expenses, tenant improvement expenses and leasing commissions and operating expenses will be implemented;
- (E) If the Debt secured hereby has been accelerated, any enforcement action commenced under the Loan Documents or the Loan shall have been deemed a "specially serviced mortgage loan" under the applicable pooling and servicing agreement (each a "**Purchase Trigger Event**"), Holder shall have no right to cure any default that caused or resulted in the occurrence of the Purchase Trigger Event or to cause any foreclosure sale or other action of Mortgagee to realize on the Property to be prevented or delayed, provided however Holder shall have the right to purchase (in whole but not in part), the Loan for a price equal to the outstanding principal balance thereof, together with all accrued interest and other amounts due thereon (including, without limitation, any late charges, default interest, exit fees, advances and post-petition interest), any protective advances made by Mortgagee, and any interest charged by Mortgagee on any advances for monthly payments of principal and/or interest on the Loan and/or any protective advances), including all costs and expenses (including legal fees and expenses) actually incurred by Mortgagee in enforcing the terms of the Loan Documents;
- (F) Holder shall irrevocably grant to Mortgagee the right to exercise all rights of Holder in any bankruptcy proceeding to make elections with respect to the Approved Subordinate Debt, including the exclusive right to exercise any voting rights in respect of the debt secured hereby and the Approved Subordinate Debt; and
- (G) Such other terms and conditions as Mortgagee may require.
- (8) Mortgagor shall certify, represent, warrant and covenant to Mortgagee that, during the term of the Loan, Mortgagor shall not materially modify or enter into any agreement with Holder to materially modify any one or more of the Subordinate Loan Documents without the prior written consent of Mortgagee.
- (9) the Approved Subordinate Debt shall have a maturity date that coincides with the Maturity Date (as defined in the Note), and shall comply with all rating agency criteria relating to subordinate debt;

UNOFFICIAL COPY

(10) Mortgagor and Holder have delivered or caused to be delivered such other documents and instruments as Mortgagee may require, including without limitation any items required to satisfy any rating agency requirements imposed as a condition to any junior lien and subordinate debt, an updated appraisal or other evidence in form and substance satisfactory to Mortgagee relating to the Property, a title endorsement insuring Mortgagee's first lien priority in form and content reasonably acceptable to Mortgagee and/or any opinion of counsel for Mortgagor, if requested in Mortgagee's reasonable discretion and if reasonably necessary, in form and substance and delivered by counsel satisfactory to Mortgagee stating, among other things, (i) the effect, if any of said junior lien and subordinate debt on the status of any "real estate mortgage investment conduit" (a "REMIC") within the meaning of Section 860D of the Internal Revenue Code of 1986, as amended, which holds the Loan if Mortgagee in its reasonable good faith discretion determines that such Approved Subordinate Debt will have a negative effect on the status of any REMIC which holds the Loan, and (ii) the Subordination Agreement shall be enforceable against Mortgagor and Holder in accordance with its terms;

(11) Mortgagee's consent to the Approved Subordinate Debt shall not constitute a waiver of any right Mortgagee may have to prohibit any further additional financing; and

(12) Mortgagor shall pay for all of Mortgagee's costs incurred in connection with its review and approval of the Approved Subordinate Debt, including processing fees, title insurance fees, appraisal fees, attorney's fees and rating agency fees, whether or not Mortgagee consents to any requested Approved Subordinate Debt.

6.8 Taxes and Other Liabilities. Mortgagor shall pay and discharge when due any and all indebtedness, obligations, assessments and taxes, both real and personal and including federal and state income taxes and state and local property taxes and assessments. Mortgagor shall promptly provide to Mortgagee copies of all tax and assessment notices pertaining to the Property. Mortgagor hereby authorizes Mortgagee to obtain, at Mortgagor's expense, a tax service contract which shall provide tax information on the Property to Mortgagee for the term of the Loan and any extensions or renewals of the Loan.

6.9 Insurance Coverage. Mortgagor shall insure the Property against loss or damage by fire and such other hazards as Mortgagee shall from time to time require, however, not to exceed full replacement cost; provided, however,

(a) Mortgagee, at Mortgagee's election, may only require flood insurance if all or any portion of the improvements located on the Property is or becomes located in a special flood hazard area, and

(b) Mortgagee, at Mortgagee's election, may only require earthquake insurance if all or any portion of the Property is or becomes located in an earthquake fault zone.

Mortgagor shall also carry public liability insurance and such other insurance as Mortgagee may require, including, without limitation, business interruption insurance or loss of rents insurance. In addition, but not by way of limitation, Mortgagor shall also, at its expense, obtain and keep in effect (or cause any contractor and, if required under applicable law, any subcontractor engaged in work on, or with respect to, the Property, to procure and keep in effect), worker's compensation insurance (including employer's liability in an amount satisfactory to Lender and if applicable, insurance covering claims of workers against employers arising under federal law) covering all employees of Mortgagor (and/or any employees of any contractor and, if required under applicable law, any subcontractor engaged in work on, or with respect to, the Property) in such amount as is reasonably satisfactory to Mortgagee. Such policies shall contain a standard mortgage clause naming Mortgagee and its successors and assigns as a loss payee or additional insured, as appropriate, and requiring at least thirty (30) days' prior notice to the holder at termination or cancellation. Mortgagor shall maintain all required insurance at Mortgagor's expense, in companies, and in substance and form satisfactory to Mortgagee, including, without limitation, an agreed amount endorsement.

UNOFFICIAL COPY

(c) Neither Mortgagee nor Mortgagor, by reason of accepting, rejecting, approving or obtaining insurance shall incur any liability for:

- (i) the existence, nonexistence, form or legal sufficiency of any insurance;
- (ii) the solvency of any insurer; or
- (iii) the payment of claims.

If Mortgagor fails to maintain and deliver to Mortgagee the original policies or certificates of insurance required by this Mortgage, upon ten (10) days' prior notice to Mortgagor, Mortgagee may procure such insurance at Mortgagor's sole cost and expense. Mortgagor agrees to deliver to Mortgagee promptly upon receipt, but in any event no later than thirty (30) days prior to the termination of any of such insurance policies, a renewal policy (or certificate of insurance evidencing the same) satisfying the requirements of the Mortgage.

6.10 Insurance and Condemnation Proceeds.

(a) **Assignment of Claims.** Mortgagor absolutely and irrevocably assigns to Mortgagee all of the following rights, claims and amounts (collectively, "**Claims**"), all of which shall be paid to Mortgagee:

- (i) all awards of damages and all other compensation payable directly or indirectly by reason of a condemnation or proposed condemnation for public or private use affecting all or any part of, or any interest in, the Property;
- (ii) all other claims and awards for damages to or decrease in value of all or any part of, or any interest in, the Property;
- (iii) all proceeds of any insurance policies payable by reason of loss sustained to all or any part of the Property; and
- (iv) all interest which may accrue on any of the foregoing.

Mortgagor shall give Mortgagee prompt written notice of the occurrence of any casualty affecting, or the institution of any proceedings for eminent domain or for the condemnation of, the Property or any portion thereof. So long as no Default has occurred and is continuing at the time, Mortgagor shall have the right to adjust, compromise and settle any Claim of \$100,000 or less without the consent of Mortgagee, provided, however, all awards, proceeds and other sums described herein shall continue to be payable to Mortgagee. Mortgagee may commence, appear in, defend or prosecute any Claim exceeding \$100,000, and may adjust, compromise and settle all Claims (except for Claims which Mortgagor may settle as provided herein), but shall not be responsible for any failure to commence, appear in, defend, prosecute or collect any such Claim regardless of the cause of the failure. All awards, proceeds and other sums described herein shall be payable to Mortgagee.

(b) **Application of Proceeds; No Default.** So long as no Default has occurred and is continuing at the time of Mortgagee's receipt of the proceeds of the Claims ("**Proceeds**") and no Default occurs thereafter, Mortgagee shall apply the Proceeds in the following order of priority: **First**, to Mortgagee's expenses in settling, prosecuting or defending the Claims; **Second**, to the repair or restoration of the Property; and **Third**, to Mortgagor if the repair or restoration of the Property has been completed, but to the Secured Obligations in any order without suspending, extending or reducing any obligation of Mortgagor to make installment payments if the repair or restoration of the Property has not been completed; provided, however, that nothing herein shall prevent Mortgagee from applying any such proceeds or awards if, as required by Illinois law, Mortgagee is able to demonstrate that its security for the Loan has been substantially impaired. Notwithstanding the foregoing, Mortgagee shall have no obligation

UNOFFICIAL COPY

to make any Proceeds available for the repair or restoration of the Property unless and until all the following conditions have been satisfied in Mortgagee's sole and absolute discretion:

- (i) delivery to Mortgagee of the Proceeds plus any additional amount which is needed to pay all costs of the repair or restoration (including, without limitation, taxes, financing charges, insurance and rent during the repair period);
- (ii) establishment of an arrangement for lien releases and disbursement of funds acceptable to Mortgagee;
- (iii) delivery to Mortgagee in form and content acceptable to Mortgagee of all of the following:
 - (A) plans and specifications for the work;
 - (B) a contract for the work, signed by a contractor acceptable to Mortgagee;
 - (C) a cost breakdown for the work;
 - (D) if required by Mortgagee, a payment and performance bond for the work;
 - (E) evidence of the continuation of all Leases unless consented to in writing by Mortgagee;
 - (F) evidence that, upon completion of the work, the size, capacity, value, and income coverage ratios for the Property will be at least as great as those which existed immediately before the damage or condemnation occurred; and
 - (G) evidence of the satisfaction of any additional conditions that Mortgagee may reasonably establish to protect Mortgagee's security.

Mortgagor acknowledges that the specific conditions described above are reasonable.

(c) **Application of Proceeds; Default.** If a Default has occurred and is continuing at the time of Mortgagee's receipt of the Proceeds or if a Default occurs at any time thereafter, Mortgagee may, at Mortgagee's absolute discretion and regardless of any impairment of security or lack of impairment of security, but subject to applicable law governing use of the Proceeds, if any, apply all or any of the Proceeds to Mortgagee's expenses in settling, prosecuting or defending the Claims and then apply the balance to the Secured Obligations in any order without suspending, extending or reducing any obligation of Mortgagor to make installment payments, and may release all or any part of the Proceeds to Mortgagor upon any conditions Mortgagee chooses.

6.11 Impounds.

(a) **Post-Default Impounds.** If required by Mortgagee at any time after a Default occurs (and regardless of whether such Default is thereafter cured), Mortgagor shall deposit with Mortgagee such amounts ("**Post-Default Impounds**") on such dates (determined by Mortgagee as provided below) as will be sufficient to pay any or all "**Costs**" (as defined below) specified by Mortgagee. Mortgagee in its sole discretion shall estimate the amount of such Costs that will be payable or required during any period selected by Mortgagee not exceeding one year and shall determine the fractional portion thereof that Mortgagor shall deposit with Mortgagee on each date specified by Mortgagee during such period. If the Post-Default Impounds paid by Mortgagor are not sufficient to pay the related Costs, Mortgagor shall deposit with Mortgagee upon demand an amount equal to the deficiency. All Post-Default

UNOFFICIAL COPY

Impounds shall be payable by Mortgagor in addition to (but without duplication of) any other "Impounds" (as defined below).

(b) **All Impounds.** Post-Default Impounds and any other impounds, holdbacks or other reserves that may be payable by Mortgagor under the Note are collectively called "Impounds". All Impounds shall be deposited into an account maintained by Mortgagee or its servicing agent, which may be a commingled account, and Mortgagee shall not be entitled to interest thereon. Mortgagee shall not be a trustee, special depository or other fiduciary for Mortgagor with respect to such account, and the existence of such account shall not limit Mortgagee's rights under this Mortgage, any other agreement or any provision of law. If no Default exists, Mortgagee shall apply all Impounds to the payment of the related Costs, or in Mortgagee's sole discretion may release any or all Impounds to Mortgagor for application to and payment of such Costs. If a Default exists, Mortgagee may apply any or all Impounds to any Secured Obligation and/or to cure such Default, whereupon Mortgagor shall restore all Impounds so applied and cure all Defaults not cured by such application. The obligations of Mortgagor hereunder shall not be diminished by deposits of Impounds made by Mortgagor, except to the extent that such obligations have actually been met by application of such Impounds. Upon any assignment of this Mortgage, Mortgagee may assign all Impounds in its possession to Mortgagee's assignee, whereupon Mortgagee and Mortgagor shall be released from all liability with respect to such Impounds. Within sixty (60) days following full repayment of the Secured Obligations (other than as a consequence of foreclosure or conveyance in lieu of foreclosure) or at such earlier time as Mortgagee may elect, Mortgagee shall pay to Mortgagor all Impounds in its possession, and no other party shall have any right or claim thereto. "Costs" means (i) all taxes and other liabilities payable by Mortgagor under Section 6.8, (ii) all insurance premiums payable by Mortgagor under Section 6.9, (iii) all other costs and expenses for which Impounds are required under the Note, and/or (iv) all other amounts that will be required to preserve the value of the Property. Mortgagor shall deliver to mortgagee, promptly upon receipt, all bills for Costs for which Mortgagee has required Post-Default Impounds.

6.12 Defense and Notice of Losses, Claims and Actions. Mortgagor shall protect, preserve and defend the Property and title to and right of possession of the Property, the security of this Mortgage and the rights and powers of Mortgagee and Mortgagor hereunder at Mortgagor's sole expense against all adverse claims, whether the claim: (a) is against a possessory or non-possessory interest; (b) arose prior or subsequent to the Closing Date; or (c) is senior or junior to Mortgagor's or Mortgagee's rights. Mortgagor shall give Mortgagee prompt notice in writing of the assertion of any claim, of the filing of any action or proceeding, of the occurrence of any damage to the Property and of any condemnation offer or action.

6.13 Right of Inspection. Mortgagee and its independent contractors, agents and employees may enter the Property from time to time at any reasonable time for the purpose of inspecting the Property and ascertaining Mortgagor's compliance with the terms of this Mortgage. Mortgagee shall use reasonable efforts to assure that Mortgagee's entry upon and inspection of the Property shall not materially and unreasonably interfere with the business or operations of Mortgagor or Mortgagor's tenants on the Property.

6.14 Prohibition of Transfer of Property or Interests in Mortgagor. Mortgagor acknowledges that Mortgagee has relied upon the principals of Mortgagor and their experience in owning and operating properties similar to the Property in connection with the closing of the Loan. Accordingly, except with the prior written consent of Mortgagee or as otherwise expressly permitted in the Note, Mortgagor shall not cause or permit any sale, exchange, mortgage, pledge, hypothecation, assignment, encumbrance or other transfer, conveyance or disposition, whether voluntarily, involuntarily or by operation of law ("Transfer") of all or any part of, or all or any direct or indirect interest in, the Property or the Collateral (except for equipment and inventory in the ordinary course of its business), or cause or permit a Transfer of any direct or indirect interest (whether general or limited partnership interest, stock, limited liability company interest, trust, or otherwise) in Mortgagor. In the event of any Transfer that is not expressly permitted in the Note and is without the prior written consent of Mortgagee, Mortgagee shall have the absolute right at its option, without prior demand or notice, to declare all of the Secured Obligations immediately due and payable, except to the extent prohibited by law, and pursue its rights and

UNOFFICIAL COPY

remedies under Section 7.3 herein. Mortgagor agrees to pay any prepayment fee as set forth in the Note in the event the Secured Obligations are accelerated pursuant to the terms of this Section. Consent to one such Transfer shall not be deemed to be a waiver of the right to require the consent to future or successive Transfers.

6.15 [Intentionally Deleted]

6.16 [Intentionally Deleted]

6.17 **Exculpation.** Mortgagee shall not directly or indirectly, be liable to Mortgagor or any other person as a consequence of:

(a) the exercise of the rights, remedies or powers granted to Mortgagee in this Mortgage;

(b) the failure or refusal of Mortgagee to perform or discharge any obligation or liability of Mortgagor under any agreement related to the Property or under this Mortgage; or

(c) any loss sustained by Mortgagor or any third party resulting from Mortgagee's failure to lease the Property after a "**Default**" (hereafter defined) or from any other act or omission of Mortgagee in managing the Property after a Default unless the loss is caused by the willful misconduct and bad faith of Mortgagee and no such liability shall be asserted or enforced against Mortgagee, all such liability being expressly waived and released by Mortgagor.

6.18 **Indemnity.** Without in any way limiting any other indemnity contained in this Mortgage, Mortgagor agrees to defend, indemnify and hold harmless the "**Mortgagee Group**" (hereinafter defined) from and against any claim, loss, damage, cost, expense or liability directly or indirectly arising out of:

(a) the making of the Loan, except for violations of banking laws or regulations by the Mortgagee Group;

(b) this Mortgage;

(c) the execution of this Mortgage or the performance of any act required or permitted hereunder or by law;

(d) any failure of Mortgagor to perform Mortgagor's obligations under this Mortgage or the other Loan Documents;

(e) any alleged obligation or undertaking on the Mortgagee Group's part to perform or discharge any of the representations, warranties, conditions, covenants or other obligations contained in any other document related to the Property;

(f) any act or omission by Mortgagor or any contractor, agent, employee or representative of Mortgagor with respect to the Property; or

(g) any prohibited transaction or in the sale of a prohibited loan, and in obtaining any individual prohibited transaction exemption under ERISA that may be required, in Lender's sole discretion that Lender may incur, directly or indirectly, as a result of a Default under Sections 5.1(q) or 6.2.

The foregoing to the contrary notwithstanding, this indemnity shall not include any claim, loss, damage, cost, expense or liability directly or indirectly arising out of the gross negligence or willful misconduct of any member of the Mortgagee Group, or any claim, loss, damage, cost, expense or liability incurred by the Mortgagee Group arising from any act or incident on the Property occurring after the full reconveyance and release of the lien of this Mortgage on the Property. This indemnity shall include, without limitation:

UNOFFICIAL COPY

(h) all consequential damages (including, without limitation, any third-party tort claims or governmental claims, fines or penalties against the Mortgagee Group); and

(i) all court costs and reasonable attorneys' fees (including, without limitation, expert witness fees) paid or incurred by the Mortgagee Group. "**Mortgagee Group**", as used herein, shall mean

- (i) Mortgagee (including, without limitation, any participant in the Loan),
- (ii) any entity controlling, controlled by or under common control with Mortgagee,
- (iii) the directors, officers, employees and agents of Mortgagee and such other entities, and
- (iv) the successors, heirs and assigns of the entities and persons described in foregoing clauses (i) through (iii).

Mortgagor shall pay immediately upon Mortgagee's demand any amounts owing under this indemnity together with interest from the date the indebtedness arises until paid at the rate of interest applicable to the principal balance of the Note as specified therein. Mortgagor agrees to use legal counsel reasonably acceptable to the Mortgagee Group in any action or proceeding arising under this indemnity. THE PROVISIONS OF THIS SECTION SHALL SURVIVE THE TERMINATION AND RECONVEYANCE OF THIS MORTGAGE, BUT MORTGAGOR'S LIABILITY UNDER THIS INDEMNITY SHALL BE SUBJECT TO THE PROVISIONS OF THE SECTION, IF ANY, IN THE NOTE ENTITLED "**BORROWER'S LIABILITY.**"

6.19 [Intentionally Deleted]

6.20 Releases, Extensions, Modifications and Additional Security. Without notice to or the consent, approval or agreement of any persons or entities having any interest at any time in the Property or in any manner obligated under the Secured Obligations ("**Interested Parties**"), Mortgagee may, from time to time:

- (a) fully or partially release any person or entity from liability for the payment or performance of any Secured Obligation;
- (b) extend the maturity of any Secured Obligation;
- (c) make any agreement with Mortgagor increasing the amount or otherwise altering the terms of any Secured Obligation;
- (d) accept additional security for any Secured Obligation; or
- (e) release all or any portion of the Property, Collateral and other security for any Secured Obligation.

None of the foregoing actions shall release or reduce the personal liability of any of said Interested Parties, or release or impair the priority of the lien of this Mortgage upon the Property.

6.21 Sale or Participation of Loan. Mortgagor agrees that Mortgagee may at any time sell, transfer or assign all or any portion of Mortgagee's rights and obligations under the Loan Documents, including any or all servicing rights with respect thereto, or grant participations therein, or issue mortgage pass-through certificates or other securities evidencing a beneficial interest in a rated or unrated public offering or private placement (a "**Securitization**") and that any such Securitization may be to one or more financial institutions or other entities, to private investors, and/or into the public securities market, in Mortgagee's sole discretion. Mortgagor further agrees that Mortgagee may disseminate to any such

UNOFFICIAL COPY

actual or potential purchasers, assignees or participants all documents and financial and other information heretofore or hereafter provided to or known to Mortgagee with respect to: (a) the Property and its operation; and/or (b) any party connected with the Loan (including, without limitation, Mortgagor, any partner or member of Mortgagor, any constituent partner or member of Mortgagor, any guarantor and any non-borrower mortgagor).

In the event of any Securitization, Mortgagee and the other parties to the same shall share in the rights and obligations of Mortgagee set forth in the Loan Documents as and to the extent they shall agree among themselves. In connection with any such Securitization, Mortgagor further agrees that the Loan Documents shall be sufficient evidence of the obligations of Mortgagor to each purchaser, assignee or participant, and Mortgagor shall, within fifteen (15) days after request by Mortgagee, deliver an estoppel certificate verifying for the benefit of Mortgagee and any other party designated by Mortgagee the status and the terms and provisions of the Loan in form and substance acceptable to Mortgagee, and enter into such amendments or modifications to the Loan Documents as may be reasonably required in order to facilitate any Securitization without impairing Mortgagor's rights or increasing Mortgagor's obligations. The indemnity obligations of Mortgagor under the Loan Documents shall also apply with respect to any purchaser, assignee or participant.

6.22 Subrogation. Mortgagee shall be subrogated to the lien of all encumbrances, whether released of record or not, paid in whole or in part by Mortgagee pursuant to this Mortgage or by the proceeds of any loan secured by this Mortgage.

6.23 Single-Purpose Entity. Mortgagor shall maintain itself at all times as a single-purpose entity in compliance with the requirements set forth in **Exhibit "B"** attached hereto.

6.24 Management Agreement. Any management agreement for or relating to all or any part of the Property whether now in effect or entered into hereafter by Mortgagor or any agent of Mortgagor with a property manager shall contain a "no lien" provision whereby the property manager forever and unconditionally waives and releases any and all mechanics' lien rights and claims that it or anyone claiming through or under it may have at any time pursuant to any statute or law. Such management agreement or a short form thereof including such waiver shall, at Mortgagee's request, be recorded with the Office of the Recorder of Deeds for the county in which the Property is located. In addition, subordination of such management agreement, as provided herein, shall include, without limitation, the subordination of such property manager's present and future lien rights and those of any party claiming by, through or under it, to the lien of this Mortgage.

6.25 Use of Loan Proceeds. Mortgagor covenants and agrees that all of the proceeds of the Note secured by this Mortgage will be used solely for business purposes and in furtherance of the regular business affairs of Mortgagor, and the entire principal obligation secured hereby constitutes: (a) a "business loan" as that term is defined in, and for all purposes of, the Illinois Interest Act, Section 815 ILCS 205/4(1)(a), (c), or (l); and (b) "a loan secured by a mortgage on real estate" within the purview and operation of Section 815 ILCS 205/4(1)(l).

6.26 Single-Purpose Entity. Mortgagor shall maintain itself at all times as a single-purpose entity in compliance with the requirements set forth in **Exhibit "B"** attached hereto.

ARTICLE 7 DEFAULT

7.1 Default. For all purposes hereof, "Default" shall mean either an "Optional Default" (as defined below) or an "Automatic Default" (as defined below).

(a) **Optional Default.** An "Optional Default" shall occur, at Mortgagee's option, upon the occurrence of any of the following events:

UNOFFICIAL COPY

(i) **Monetary.** Mortgagor shall fail to:

(A) pay when due any sums which by their express terms require immediate payment without any grace period or sums which are payable on the Maturity Date, or

(B) pay within five (5) days when due any other sums payable under the Note, this Mortgage or any of the other Loan Documents, including, without limitation, any monthly payment due under the Note.

(ii) **Failure To Perform.** Mortgagor shall fail to observe, perform or discharge any of Mortgagor's obligations, covenants, conditions or agreements, other than Mortgagor's payment obligations, under the Note, this Mortgage or any of the other Loan Documents, and

(A) such failure shall remain uncured for thirty (30) days after written notice thereof shall have been given to Mortgagee by Mortgagee or

(B) if such failure is of such a nature that it cannot be cured within such 30-day period, Mortgagor shall fail to commence to cure such failure within such thirty 30-day period or shall fail to diligently prosecute such curative action thereafter or shall fail to cure such default within ninety (90) days after written notice thereof was first given to Mortgagee.

(iii) **Representations and Warranties.** Any representation, warranty, certificate or other statement (financial or otherwise) made or furnished by or on behalf of Mortgagor or a guarantor to Mortgagee or in connection with any of the Loan Documents, or as an inducement to Mortgagee to make the Loan, shall be false, incorrect, incomplete or misleading in any material respect when made or furnished.

(iv) **Condemnation, Attachment.** The condemnation, seizure or appropriation of any material portion (as reasonably determined by Mortgagee) of the Property, or the sequestration or attachment of, or levy or execution upon any of the Property, the Collateral or any other collateral provided by Mortgagor under any of the Loan Documents, or any material portion of the other assets of Mortgagor, which sequestration, attachment, levy or execution is not released or dismissed within forty-five (45) days after its occurrence; or the sale of any assets affected by any of the foregoing.

(v) **Uninsured Casualty.** The occurrence of an uninsured casualty with respect to any material portion (as reasonably determined by Mortgagee) of the Property unless:

(A) no other Default has occurred and is continuing at the time of such casualty or occurs thereafter;

(B) Mortgagor promptly notifies Mortgagee of the occurrence of such casualty; and

(C) not more than forty-five (45) days after the occurrence of such casualty, Mortgagor delivers to Mortgagee immediately available funds ("**Restoration Funds**") in an amount sufficient, in Mortgagee's reasonable opinion, to pay all costs of the repair or restoration (including, without limitation, taxes, financing charges, insurance and rent during the repair period).

So long as no Default has occurred and is continuing at the time of Mortgagee's receipt of the Restoration Funds and no Default occurs thereafter, Mortgagee shall make the Restoration Funds available for the repair or restoration of the Property. Notwithstanding the foregoing, Mortgagee shall have no obligation to make any Restoration Funds available for repair or restoration of the Property unless and until all the conditions set forth in clauses (ii) and (iii) of the second sentence

UNOFFICIAL COPY

of Section 6.10(b) of this Mortgage have been satisfied. Mortgagor acknowledges that the specific conditions described above are reasonable.

(vi) **Adverse Financial Change.** Any adverse change in the financial condition of Mortgagor, any guarantor, or any other person or entity from the condition shown on the financial statements submitted to Mortgagee and relied upon by Mortgagee in making the Loan, and which change Mortgagee reasonably determines will have a material adverse effect on

(A) the business, operations or condition of the Property; or

(B) the ability of Mortgagor to pay or perform Mortgagor's obligations in accordance with the terms of the Note, this Mortgage, and the other Loan Documents.

(vii) **Key Person or Entity.** The retirement, death, incapacity or withdrawal of Jesal Patel and/or Adesh Patel as members of Mortgagor and Mortgagor's failure to provide a substitute or replacement acceptable to Mortgagee within thirty (30) days after the occurrence of any such event.

(viii) **Single-Purpose Entity.** Mortgagor's failure to satisfy, maintain or comply with all of the single-purpose entity requirements set forth in **Exhibit "B"** attached hereto and incorporated herein by this reference.

(b) **Automatic Default.** An "Automatic Default" shall occur automatically upon the occurrence of any of the following events:

(i) **Voluntary Bankruptcy, Insolvency, Dissolution.**

(A) Mortgagor's filing a petition for relief under the Bankruptcy Reform Act of 1978, as amended or recodified ("**Bankruptcy Code**"), or under any other present or future state or federal law regarding bankruptcy, reorganization or other relief to debtors (collectively, "**Debtor Relief Law**"); or

(B) Mortgagor's filing any pleading in any involuntary proceeding under the Bankruptcy Code or other Debtor Relief Law which admits the jurisdiction of a court to regulate Mortgagor or the Property or the petition's material allegations regarding Mortgagor's insolvency; or

(C) Mortgagor's making a general assignment for the benefit of creditors; or

(D) Mortgagor's applying for, or the appointment of, a receiver, trustee, custodian or liquidator of Mortgagor or any of their respective property; or

(E) the filing by or against Mortgagor of a petition seeking the liquidation or dissolution of Mortgagor or the commencement of any other procedure to liquidate or dissolve Mortgagor.

(ii) **Involuntary Bankruptcy.** Mortgagor's failure to effect a full dismissal of any involuntary petition under the Bankruptcy Code or other Debtor Relief Law that is filed against Mortgagor or in any way restrains or limits Mortgagor or Mortgagee regarding the Loan or the Property, prior to the earlier of the entry of any order granting relief sought in the involuntary petition or forty-five (45) days after the date of filing of the petition.

(iii) **Partners, Guarantors.** The occurrence of an event specified in Sections (i) or (ii) as to Mortgagor, any general partner of Mortgagor, or any guarantor or other person or entity in any manner obligated to Mortgagee under the Loan Documents.

UNOFFICIAL COPY

7.2 Acceleration. Upon the occurrence of an Optional Default, Mortgagee may, at its option, declare all sums owing to Mortgagee under the Note and the other Loan Documents immediately due and payable. Upon the occurrence of an Automatic Default, all sums owing to Mortgagee under the Note and the other Loan Documents shall automatically become immediately due and payable.

7.3 Rights and Remedies. In addition to the rights and remedies in Section 7.2 above, at any time after a Default, Mortgagee shall have all of the following rights and remedies:

(a) **Entry on Property.** With or without notice, and without releasing Mortgagor from any Secured Obligation, and without becoming a mortgagee in possession, to enter upon the Property from time to time and to do such acts and things as Mortgagee deems necessary or desirable in order to inspect, investigate, assess and protect the security hereof or to cure any Default, including, without limitation:

(i) to take and possess all documents, books, records, papers and accounts of Mortgagor, or the then owner of the Property which relate to the Property;

(ii) to make, terminate, enforce or modify leases of the Property upon such terms and conditions as Mortgagee deems proper;

(iii) to make repairs, alterations and improvements to the Property necessary, in Mortgagee's sole judgment, to protect or enhance the security hereof;

(iv) to appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Mortgagee hereunder;

(v) to pay, purchase, contest or compromise any encumbrance, charge, lien or claim of lien which, in the sole judgment of Mortgagee, is or may be senior in priority hereto, the judgment of Mortgagee being conclusive, as between the parties hereto;

(vi) to obtain insurance;

(vii) to pay any premiums or charges with respect to insurance required to be carried hereunder; and/or

(viii) to employ legal counsel, accountants, engineers, consultants, contractors and other appropriate persons to assist them;

(b) **Appointment of Receiver.** To apply to a court of competent jurisdiction for and obtain appointment of a receiver of the Property as a matter of strict right and without regard to:

(i) the adequacy of the security for the repayment of the Secured Obligations;

(ii) the existence of a declaration that the Secured Obligations are immediately due and payable; or

(iii) the filing of a notice of default; and Mortgagor consents to such appointment;

(c) **Judicial Foreclosure, Injunction.** To commence and maintain an action or actions in any court of competent jurisdiction to foreclose this instrument as a mortgage or to obtain specific enforcement of the covenants of Mortgagor hereunder, and Mortgagor agrees that such covenants shall be specifically enforceable by injunction or any other appropriate equitable remedy and

UNOFFICIAL COPY

that for the purposes of any suit brought under this subparagraph, Mortgagor waives the defense of laches and any applicable statute of limitations;

(d) Nonjudicial Foreclosure. To the extent permitted by applicable law, to execute a written notice of such Default and of the election to cause the Property to be sold to satisfy the Secured Obligations. Mortgagee shall give and record such notice as the law then requires as a condition precedent to a sale. When the minimum period of time required by law after such notice has elapsed, Mortgagee, without notice to or demand upon Mortgagor except as required by law, shall sell the Property at the time and place of sale fixed by it in the notice of sale, at one or several sales, either as a whole or in separate parcels and in such manner and order, all as Mortgagee in its sole discretion may determine, at public auction to the highest bidder for cash, in lawful money of the United States, payable at time of sale. Neither Mortgagor nor any other person or entity other than Mortgagee shall have the right to direct the order in which the Property is sold. Subject to requirements and limits imposed by law, Mortgagee may, from time to time postpone sale of all or any portion of the Property by public announcement at such time and place of sale, and from time to time may postpone the sale by public announcement at the time and place fixed by the preceding postponement. A sale of less than the whole of the Property or any defective or irregular sale made hereunder shall not exhaust the power of sale provided for herein. Mortgagee shall deliver to the purchaser at such sale a deed conveying the Property or portion thereof so sold, but without any covenant or warranty, express or implied. The recitals in the deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Mortgagor or Mortgagee may purchase at the sale;

Upon sale of the Property at any judicial or nonjudicial foreclosure, Mortgagee may credit bid (as determined by Mortgagee in its sole and absolute discretion) all or any portion of the secured obligations. In determining such credit bid, Mortgagor may, but is not obligated to, take into account all or any of the following:

- (i) appraisals of the Property as such appraisals may be discounted or adjusted by Mortgagee in its sole and absolute underwriting discretion;
- (ii) expenses and costs incurred by Mortgagee with respect to the Property prior to foreclosure;
- (iii) expenses and costs which Mortgagee anticipates will be incurred with respect to the Property after foreclosure, but prior to resale, including, without limitation, costs of property inspections, structural reports and other due diligence, costs to carry the Property prior to resale, costs of resale (e.g., commissions, attorneys' fees, and taxes), costs of deferred maintenance, repair, refurbishment and retrofit, costs of defending or settling litigation affecting the Property, and lost opportunity costs (if any), including the time value of money during any anticipated holding period by Mortgagee;
- (iv) declining trends in real property values generally and with respect to properties similar to the Property;
- (v) anticipated discounts upon resale of the Property as a distressed or foreclosed property;
- (vi) the fact of additional collateral (if any), for the secured obligations; and
- (vii) such other factors or matters that Mortgagee (in its sole and absolute discretion) deems appropriate.

In regard to the above, Mortgagor acknowledges and agrees that:

- (viii) Mortgagee is not required to use any or all of the foregoing factors to determine the amount of its credit bid;

UNOFFICIAL COPY

(ix) this paragraph does not impose upon Mortgagee any additional obligations that are not imposed by law at the time the credit bid is made;

(x) the amount of Mortgagee's credit bid need not have any relation to any loan-to-value ratios specified in the Loan Documents or previously discussed between Mortgagor and Mortgagee; and

(xi) Mortgagee's credit bid may be (at Mortgagee's sole and absolute discretion) higher or lower than any appraised value of the Property;

(e) **Multiple Foreclosures.** To resort to and realize upon the security hereunder and any other security now or later held by Mortgagee concurrently or successively and in one or several consolidated or independent judicial actions or lawfully taken nonjudicial proceedings, or both, as permitted by applicable law, and to apply the proceeds received upon the Secured Obligations all in such order and manner as Mortgagee determines in its sole discretion;

(f) **Rights to Collateral.** To exercise all rights Mortgagee may have with respect to the Collateral under this Mortgage, the UCC or otherwise at law; and

(g) **Other Rights.** To exercise such other rights as Mortgagee may have at law or in equity or pursuant to the terms and conditions of this Mortgage or any of the other Loan Documents.

In connection with any sale or sales hereunder, Mortgagee may elect to treat any of the property which consists of a right in action or which is property that can be severed from the Property (including, without limitation, any improvements forming a part thereof) without causing structural damage thereto as if the same were personal property or a fixture, as the case may be, and dispose of the same in accordance with applicable law, separate and apart from the sale of the Property. Any sale of Collateral hereunder shall be conducted in any manner permitted by the UCC.

7.4 Application of Foreclosure Sale Proceeds. If any foreclosure sale is effected, Mortgagee shall, to the extent permitted by applicable law, apply the proceeds of such sale in the following order of priority: **First**, to the costs, fees and expenses of exercising the power of sale and of the sale, including, without limitation, the payment of the Mortgagee's fees and attorneys' fees permitted pursuant to applicable law; **Second**, to the payment of the Secured Obligations which are secured by this Mortgage, in such order as Mortgagee shall determine in its sole discretion; **Third**, to satisfy the outstanding balance of obligations secured by any junior liens or encumbrances in the order of their priority; and **Fourth**, to the Mortgagor or the Mortgagor's successor in interest, or in the event the Property has been sold or transferred to another, to the vested owner of record at the time of the sale.

7.5 Waiver of Marshaling Rights. Mortgagor, for itself and for all parties claiming through or under Mortgagor, and for all parties who may acquire a lien on or interest in the Property, hereby waives all rights to have the Property and/or any other property, including, without limitation, the Collateral, which is now or later may be security for any Secured Obligation, marshaled upon any foreclosure of this Mortgage or on a foreclosure of any other security for any of the Secured Obligations.

7.6 No Cure or Waiver. Neither Mortgagee's nor any receiver's entry upon and taking possession of all or any part of the Property, nor any collection of rents, issues, profits, insurance proceeds, condemnation proceeds or damages, other security or proceeds of other security, or other sums, nor the application of any collected sum to any Secured Obligation, nor the exercise of any other right or remedy by Mortgagee or any receiver shall cure or waive any Default or notice of default under this Mortgage, or nullify the effect of any notice of default or sale (unless all Secured Obligations then due have been paid or performed and Mortgagor has cured all other Defaults hereunder), or impair the status of the security, or prejudice Mortgagee in the exercise of any right or remedy, or be construed as an affirmation by Mortgagee of any tenancy, lease or option or a subordination of the lien of this Mortgage.

UNOFFICIAL COPY

7.7 Payment of Costs, Expenses and Attorneys' Fees. Mortgagor agrees to pay to Mortgagee immediately and upon demand all costs and expenses incurred by Mortgagee in the enforcement of the terms and conditions of this Mortgage (including, without limitation, statutory trustee's fees, court costs and attorneys' fees, whether incurred in litigation or not) with interest from the date of expenditure until said sums have been paid at the rate of interest applicable to the principal balance of the Note as specified therein.

7.8 Power To File Notices and Cure Defaults. Mortgagor hereby irrevocably appoints Mortgagee and its successors and assigns, as its attorney-in-fact, which power of attorney is coupled with an interest, to perform any obligation of Mortgagor hereunder upon the occurrence of an event, act or omission which, with notice or passage of time or both, would constitute a Default, provided, however, that: (i) Mortgagee as such attorney-in-fact shall only be accountable for such funds as are actually received by Mortgagee; and (ii) Mortgagee shall not be liable to Mortgagor or any other person or entity for any failure to act under this Section.

7.9 Remedies Cumulative. All rights and remedies of Mortgagee provided hereunder are cumulative and are in addition to all rights and remedies provided by applicable law or in any other agreements between Mortgagor and Mortgagee. Mortgagee may enforce any one or more remedies or rights hereunder successively or concurrently.

7.10 Additional Illinois Law Provisions. With respect to the Property that is located in the State of Illinois, notwithstanding anything contained herein to the contrary.

(a) If any provision of this Mortgage is inconsistent with any applicable provision of the Act (as defined below), the provisions of the Act shall take precedence over the provisions of this Mortgage, but shall not invalidate or render unenforceable any other provision of this Mortgage that can fairly be construed in a manner consistent with the Act.

(b) Without in any way limiting or restricting any of Mortgagee's rights, remedies, powers and authorities under this Mortgage, and in addition to all of such rights, remedies, powers, and authorities, Mortgagee shall also have and may exercise any and all rights, remedies, powers and authorities which the holder of a mortgage is permitted to have or exercise under the provisions of the Act, as the same may be amended from time to time. If any provision of this Mortgage shall grant to Mortgagee any rights, remedies, powers or authorities upon default of Mortgagor which are more limited than the rights that would otherwise be vested in Mortgagee under the Act in the absence of said provision, Mortgagee shall be vested with all of the rights, remedies, powers, and authorities granted in the Act to the fullest extent permitted by law.

(c) Mortgagor waives, to the extent permitted by law, (i) the benefit of all laws now existing or that may hereafter be enacted providing for any appraisal before sale of any portion of the Property, (ii) all rights of reinstatement, redemption, valuation, appraisal, homestead, moratorium, exemption, extension, stay of execution, notice of election to mature or declare due in whole of the Secured Obligations in the event of foreclosure of the liens hereby created, (iii) all rights and remedies which Mortgagor may have or be able to assert by reason of the laws of the State of Illinois pertaining to the rights and remedies of sureties, (iv) the right to assert any statute of limitations as a bar to the enforcement of the lien of this Mortgage or to any action brought to enforce the Secured Obligations, and (v) any rights, legal or equitable, to require marshaling of assets or to require foreclosure sales in a particular order. Without limiting the generality of the preceding sentence, Mortgagor, on its own behalf and on behalf of each and every person acquiring any interest in or title to the Property subsequent to the date of this Mortgage, hereby irrevocably waives any and all rights of reinstatement or redemption from sale or from or under any order, judgment or decree of foreclosure of this Mortgage or under any power contained herein or under any sale pursuant to any statute, order, decree or judgment of any court. Mortgagor, for itself and for all persons hereafter claiming through or under it or who may at any time hereafter become holders of liens junior to the lien of this Mortgage, hereby expressly waives and releases all rights to direct the order in which any of the Property shall be sold in the event of any sale or sales pursuant hereto and to have any of the Property and/or any other property now or hereafter

UNOFFICIAL COPY

constituting security for any of the indebtedness hereby secured marshaled upon any foreclosure of this Mortgage or of any other security for any of said indebtedness. Mortgagee shall have the right to determine the order in which any or all of the Property shall be subjected to the remedies provided herein. Mortgagee shall have the right to determine the order in which any or all portions of the Secured Obligations are satisfied from the proceeds realized upon the exercise of the remedies provided herein. Mortgagor, on behalf of itself and all persons now or hereafter interested in the Property, voluntarily and knowingly hereby: acknowledges that the transaction of which this Mortgage is a part is a transaction which does not include either agricultural real estate (as defined in the Illinois Mortgage Foreclosure Law, Illinois Compiled Statutes Chapter 735, Section 5/15-1101 et seq., herein the "Act"), or residential real estate (as defined in the Act).

ARTICLE 8 MISCELLANEOUS PROVISIONS

8.1 Additional Provisions. The Loan Documents contain or incorporate by reference the entire agreement of the parties with respect to matters contemplated herein and supersede all prior negotiations. The Loan Documents grant further rights to Mortgagee and contain further agreements and affirmative and negative covenants by Mortgagor that apply to this Mortgage and to the Property and such further rights and agreements are incorporated herein by this reference. THE OBLIGATIONS AND LIABILITIES OF MORTGAGOR UNDER THIS MORTGAGE AND THE OTHER LOAN DOCUMENTS ARE SUBJECT TO THE PROVISIONS OF THE SECTION, IF ANY, IN THE NOTE ENTITLED "BORROWER'S LIABILITY."

8.2 Non-Waiver. By accepting payment of any amount secured hereby after its due date or late performance of any other Secured Obligation, Mortgagee shall not waive its right against any person obligated directly or indirectly hereunder or on any Secured Obligation, either to require prompt payment or performance when due of all other sums and obligations so secured or to declare default for failure to make such prompt payment or performance. No exercise of any right or remedy by Mortgagee hereunder shall constitute a waiver of any other right or remedy herein contained or provided by law. No failure by Mortgagee to exercise any right or remedy hereunder arising upon any Default shall be construed to prejudice Mortgagee's rights or remedies upon the occurrence of any other or subsequent Default. No delay by Mortgagee in exercising any such right or remedy shall be construed to preclude Mortgagee from the exercise thereof at any time while that Default is continuing. Neither notice to nor demand on Mortgagor shall of itself entitle Mortgagor to any other or further notice or demand in similar or other circumstances.

8.3 Consents and Approvals. Wherever Mortgagee's consent, approval, acceptance or satisfaction is required under any provision of this Mortgage or any of the other Loan Documents, such consent, approval, acceptance or satisfaction shall not be unreasonably withheld, conditioned or delayed by Mortgagee unless such provision expressly so provides.

8.4 Permitted Contests. After prior written notice to Mortgagee, Mortgagor may contest, by appropriate legal or other proceedings conducted in good faith and with due diligence, the amount, validity or application, in whole or in part, of any lien, levy, tax or assessment, or any lien of any laborer, mechanic, materialman, supplier or vendor, or the application to Mortgagor or the Property of any law or the validity thereof, the assertion or imposition of which, or the failure to pay when due, would constitute a Default; provided that:

(a) Mortgagor pursues the contest diligently, in a manner which Mortgagee determines is not prejudicial to Mortgagee, and does not impair the lien of this Mortgage;

(b) the Property, or any part hereof or estate or interest therein, shall not be in any danger of being sold, forfeited or lost by reason of such proceedings;

UNOFFICIAL COPY

(c) in the case of the contest of any law or other legal requirement, Mortgagee shall not be in any danger of any civil or criminal liability; and

(d) if required by Mortgagee, Mortgagor deposits with Mortgagee any funds or other forms of assurance (including a bond or letter of credit) satisfactory to Mortgagee to protect Mortgagee from the consequences of the contest being unsuccessful.

Mortgagor's right to contest pursuant to the terms of this provision shall in no way relieve Mortgagor of its obligations under the Loan or to make payments to Mortgagee as and when due.

8.5 Further Assurances. Mortgagor shall, upon demand by Mortgagee, execute, acknowledge (if appropriate) and deliver any and all documents and instruments and do or cause to be done all further acts reasonably necessary or appropriate to effectuate the provisions hereof.

8.6 Attorneys' Fees. In the event it is necessary for Mortgagee to retain the services of an attorney or any other party to enforce or to commence any legal action to enforce the terms of this Mortgage, or any of the other Loan Documents, or any portion hereof or thereof, Mortgagor agrees to pay to Mortgagee, in addition to damages or other relief, any and all costs and expenses, including, without limitation, expert witness fees and reasonable attorneys' fees incurred by Mortgagee as a result thereof.

8.7 Mortgagor and Mortgagee Defined. The term "**Mortgagor**" includes both the original Mortgagor and any subsequent owner or owners of any of the Property, and the term "**Mortgagee**" includes the original Mortgagee and any future owner or holder, including assignees, pledges and participants, of the Note or any interest therein.

8.8 Disclaimers.

(a) **Relationship.** The relationship of Mortgagor and Mortgagee under this Mortgage and the other Loan Documents is, and shall at all times remain, solely that of Mortgagor and lender; and Mortgagee neither undertakes nor assumes any responsibility or duty to Mortgagor or to any third party with respect to the Property. Notwithstanding any other provisions of this Mortgage and the other Loan Documents:

(i) Mortgagee is not, and shall not be construed to be, a partner, joint venturer, member, alter ego, manager, controlling person or other business associate or participant of any kind of Mortgagor, and Mortgagee does not intend to ever assume such status;

(ii) Mortgagee does not intend to ever assume any responsibility to any person for the quality, suitability, safety or condition of the Property; and

(iii) Mortgagee shall not be deemed responsible for or a participant in any acts, omissions or decisions of Mortgagor.

(b) **No Liability.** Mortgagee shall not be directly or indirectly liable or responsible for any loss, claim, cause of action, liability, indebtedness, damage or injury of any kind or character to any person or property arising from any construction on, or occupancy or use of, the Property, whether caused by or arising from:

(i) any defect in any building, structure, grading, fill, landscaping or other improvements thereon or in any on-site or off-site improvement or other facility therein or thereon;

(ii) any act or omission of Mortgagor or any of Mortgagor's agents, employees, independent contractors, licensees or invitees;

(iii) any accident in or on the Property or any fire, flood or other casualty or hazard thereon;

UNOFFICIAL COPY

(iv) the failure of Mortgagor or any of Mortgagor's licensees, employees, invitees, agents, independent contractors or other representatives to maintain the Property in a safe condition; or

(v) any nuisance made or suffered on any part of the Property.

8.9 Severability. If any term of this Mortgage, or the application thereof to any person or circumstances, shall, to any extent, be invalid or unenforceable, the remainder of this Mortgage, or the application of such term to persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each term of this Mortgage shall be valid and enforceable to the fullest extent permitted by law.

8.10 Relationship of Articles. The rights, remedies and interests of Mortgagee under the mortgage established by Article 1 and the security agreement established by Article 4 are independent and cumulative and there shall be no merger of any lien created by the mortgage with any security interest created by the security agreement. Mortgagee may elect to exercise or enforce any of its rights, remedies or interests under either or both the mortgage or the security agreement as Mortgagee may from time to time deem appropriate. The absolute assignment of rents and leases established by Article 3 is similarly independent of and separate from the mortgage and the security agreement.

8.11 Merger. No merger shall occur as a result of Mortgagee's acquiring any other estate in, or any other lien on, the Property unless Mortgagee consents to a merger in writing.

8.12 Obligations of Mortgagor, Joint and Several. If more than one person has executed this Mortgage as "Mortgagor", the obligations of all such persons hereunder shall be joint and several.

8.13 Separate and Community Property. Any married person who executes this Mortgage as a Mortgagor agrees that any money judgment which Mortgagee obtains pursuant to the terms of this Mortgage or any other obligation of that married person secured by this Mortgage may be collected by execution upon any separate property or community property of that person.

8.14 Integration; Interpretation. The Loan Documents contain or expressly incorporate by reference the entire agreement of the parties with respect to the matters contemplated therein and supersede all prior negotiations or agreements, written or oral. The Loan Documents shall not be modified except by written instrument executed by all parties. Any reference in any of the Loan Documents to the Property or Collateral shall include all or any part of the Property or Collateral. Any reference to the Loan Documents includes any amendments, renewals or extensions now or hereafter approved by Mortgagee in writing. When the identity of the parties or other circumstances make it appropriate, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

8.15 Capitalized Terms. Capitalized terms not otherwise defined herein shall have the meanings set forth in the Note.

8.16 Successors in Interest. The terms, covenants, and conditions herein contained shall be binding upon and inure to the benefit of the heirs, successors and assigns of the parties hereto. The foregoing sentence shall not be construed to permit Mortgagor to assign the Loan except as otherwise permitted under the Note or the other Loan Documents.

8.17 Governing Law. This Mortgage, the Note and the other Loan Documents and the obligations arising hereunder and thereunder shall be governed by, and construed in accordance with, the laws of the State of Illinois applicable to contracts made and performed in such State and any applicable law of the United States of America. Except as provided in the immediately preceding sentence, Mortgagor hereby unconditionally and irrevocably waives, to the fullest extent permitted by law, any claim to assert that the law of any jurisdiction other than Illinois governs this Mortgage, the Note and other Loan Documents.

UNOFFICIAL COPY

8.18 Consent to Jurisdiction. Mortgagor irrevocably submits to the Jurisdiction of: (a) any state or federal court sitting in the state of Illinois over any suit, action, or proceeding, brought by Mortgagor against Mortgagee, arising out of or relating to this Mortgage, the Note or the Loan; (b) any state or federal court sitting in the state where the Property is located or the state in which Mortgagor's principal place of business is located over any suit, action or proceeding, brought by Mortgagee against Mortgagor, arising out of or relating to this Mortgage, the Note or the Loan; and (c) any state court sitting in the county of the state where the Property is located over any suit, action, or proceeding, brought by Mortgagee to exercise its statutory power of sale (to the extent permitted by applicable law) under this Mortgage or any action brought by Mortgagee to enforce its rights with respect to the Collateral. Mortgagor irrevocably waives, to the fullest extent permitted by law, any objection that Mortgagor may now or hereafter have to the laying of venue of any such suit, action, or proceeding brought in any such court and any claim that any such suit, action, or proceeding brought in any such court has been brought in an inconvenient forum.

8.19 Exhibits. Exhibit "A" and Exhibit "B" are incorporated into this Mortgage by this reference.

8.20 Addresses; Request for Notice. All notices and other communications that are required or permitted to be given to a party under this Mortgage shall be in writing, refer to the Loan number, and shall be sent to such party, either by personal delivery, by overnight delivery service, by certified first-class mail, return receipt requested, or by facsimile transmission to the addressee or facsimile number below. All such notices and communications shall be effective upon receipt of such delivery or facsimile transmission. The addresses of the parties are set forth on Page 1 of this Mortgage and the facsimile numbers for the parties are as follows:

Mortgagor:	BROADWAY FESTIVAL, L.L.C. Attn: Jesal Patel Fax No.: 847-763-1480
Mortgagee:	CAPSTONE REALTY ADVISORS, LLC Attn: Marty Clancy Fax No.: 216-902-3659 Loan No.: 14237

Mortgagor's principal place of business is at the address set forth on page 1 of this Mortgage.

Any Mortgagor whose address is set forth on Page 1 of this Mortgage hereby requests that a copy of notice of default and notice of sale be delivered to it at that address. Failure to insert an address shall constitute a designation of Mortgagor's last known address as the address for such notice. Any party shall have the right to change its address for notice hereunder to any other location within the continental United States by giving thirty (30) days' notice to the other parties in the manner set forth above.

8.21 Counterparts. This Mortgage may be executed in any number of counterparts, each of which, when executed and delivered, will be deemed an original and all of which taken together, will be deemed to be one and the same instrument.

8.22 Waiver of Jury Trial. MORTGAGEE AND MORTGAGOR HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY RIGHTS THEY MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED HEREON, OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH, THIS MORTGAGE OR ANY OTHER LOAN DOCUMENT, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER ORAL OR WRITTEN) OR ACTIONS OF MORTGAGEE OR MORTGAGOR. THIS PROVISION IS A MATERIAL INDUCEMENT FOR MORTGAGEE TO ENTER INTO THIS MORTGAGE.

UNOFFICIAL COPY

8.23 Maximum Rate Permitted By Law. None of the Note, this Mortgage, or any of the other Loan Documents shall require the payment or permit the collection of any interest or any late payment charge in excess of the maximum rate permitted by law to be charged to Mortgagor. If any such excess interest or late payment charge is provided for under the Note, this Mortgage or any of the other Loan Documents or if the Note, this Mortgage or any of the other Loan Documents shall be adjudicated to provide for such excess, neither Mortgagor nor Mortgagor's successors or assigns shall be obligated to pay such excess, and the right to demand the payment of any such excess shall be and hereby is waived, and this provision shall control any other provision of the Note, this Mortgage or any of the other Loan Documents. If Mortgagee shall collect amounts which are deemed to constitute interest and which would increase the effective interest rate to a rate in excess of the maximum rate permitted by law to be charged to Mortgagor, all such amounts deemed to constitute interest in excess of the maximum legal rate shall, upon such determination, at the option of Mortgagee, be returned to Mortgagor or credited against the outstanding principal balance of the Note.

UNOFFICIAL COPY

IN WITNESS WHEREOF, Mortgagor has executed this Mortgage as of the day and year set forth above.

MORTGAGOR:

BROADWAY FESTIVAL, L.L.C.,
an Illinois limited liability company

By: 

JESAL PATEL, Member

By: 

ADESH PATEL, Member

Property of Cook County Clerk's Office

UNOFFICIAL COPY

STATE OF ILLINOIS)
COUNTY OF COOK) ss.

I the undersigned do hereby certify that on the 22nd day of February, 2006, JESAL PATEL, personally appeared before me and being first duly sworn by me acknowledged that he signed the foregoing document in his capacity as a member and manager and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year before written.

Michelle E. Crockett
Notary Public

My commission expires: _____



STATE OF ILLINOIS)
COUNTY OF COOK) ss.

I the undersigned do hereby certify that on the 22nd day of February, 2006, ADESH PATEL, personally appeared before me and being first duly sworn by me acknowledged that he signed the foregoing document in his capacity as a member and manager and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year before written.

Michelle E. Crockett
Notary Public

My commission expires: _____



UNOFFICIAL COPY

EXHIBIT "A" DESCRIPTION OF LAND

Exhibit "A" to MORTGAGE AND ABSOLUTE ASSIGNMENT OF RENTS AND LEASES AND SECURITY AGREEMENT (AND FIXTURE FILING) ("**Mortgage**") between BROADWAY FESTIVAL, L.L.C., an Illinois limited liability company as "**Mortgagor**", and CAPSTONE REALTY ADVISORS, LLC, an Ohio limited liability company as "**Mortgagee**".

1. **Description of Land.** The Land referred to in this Mortgage is situated in Cook County, Illinois, and is described as follows:

LOTS 10 THROUGH 24 IN BLOCK 9 IN COCHRAN'S THIRD ADDITION TO EDGEWATER IN THE EAST ONE-HALF ($\frac{1}{2}$) OF THE NORTHWEST ONE-QUARTER ($\frac{1}{4}$) OF SECTION 8, TOWNSHIP 40 NORTH, RANGE 14 EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS.

Tax Parcel Numbers:

Lots 11 and 12: 14-08-121-022-0000

Lot 13: 14-08-121-023-0000

Lot 14: 14-08-121-024-0000

Lots 15 and 16: 14-08-121-025-0000

Lot 17, 18 & 19: 14-08-121-026-0000

Lots 20, 21, 22, 23 & 24: 14-08-121-027-0000

Lot 10: 14-08-121-032-0000.

UNOFFICIAL COPY

EXHIBIT "B"

This **Exhibit "B"** is attached to and forms a part of the Mortgage and Absolute Assignment of Rents and Leases and Security Agreement (and Fixture Filing) ("**Mortgage**") executed by BROADWAY FESTIVAL, L.L.C., an Illinois limited liability company ("**Mortgagor**") in favor of CAPSTONE REALTY ADVISORS, LLC, an Ohio limited liability company ("**Mortgagee**").

Mortgagor hereby covenants that for so long as the loan secured by the Mortgage (such loan, as modified, amended, or extended, the "**Loan**") shall remain in existence and unpaid:

1. Mortgagor shall not own and will not own any asset or property other than (i) the Property and (ii) incidental personal property necessary for the ownership or operation of the Property.
2. Mortgagor shall not incur any debt, secured or unsecured, direct or indirect, absolute or contingent (including guaranteeing any obligation), other than (i) the Loan; (ii) Approved Subordinate Debt; and (iii) trade debt incurred in the ordinary course of Mortgagor's business;
3. Mortgagor shall not engage directly or indirectly in any business other than those necessary for the ownership, management, or operation of the Property and any business transactions with any member, partner, owner of 50% or more of the membership interests in of Mortgagor ("**Beneficial Owner**") or affiliate of Mortgagor or any affiliate of any member, partner or Beneficial Owner of Mortgagor shall be entered into upon the terms and conditions that are intrinsically fair and substantially similar to those that would be available on an arm's-length basis with third parties other than an affiliate of Mortgagor or any member, partner, Beneficial Owner of an affiliate of any member, partner or Beneficial Owner of Mortgagor.
4. Mortgagor shall not make any loans or advances to any third party (including any affiliate of Mortgagor or any member, partner or Beneficial Owner or principal or an affiliate of any member, partner, Beneficial Owner or principal of Mortgagor) and shall not acquire obligations or securities of its affiliates.
5. Mortgagor shall be solvent and pay its own liabilities from its own assets (including salaries of any employees) as the same shall become due, and each Beneficial Owner of Mortgagor shall be solvent and pay its own liabilities (including the salaries of its employees) from its own assets as the same shall become due.
6. Mortgagor shall do all things necessary to observe organizational formalities and preserve its existence, and it shall not, without the prior written consent of Mortgagee, amend, modify or otherwise change the articles of incorporation or the articles of organization, as the case may be, and Mortgagor will not change its name, identity, the state under which Mortgagor is registered and/or organized or Mortgagor's principal place of business (if different than the state of organization) without the prior written consent of Mortgagee.
7. Mortgagor shall conduct and operate its business as presently conducted and operated.
8. Mortgagor shall maintain books and records, financial statements and bank accounts separate from those of its affiliates, including its members and/or manager.
9. Mortgagor shall be, and at all times shall hold itself out to the public as, a legal entity separate and distinct from any other entity (including any affiliate thereof, including any Beneficial Owner or manager or any affiliate of any Beneficial Owner or member/manager of Mortgagor) and shall correct any known misunderstanding regarding its status as a separate entity, shall conduct and operate its business in its own name, shall not identify itself or any of its affiliates as a division or part of the other and shall maintain and utilize separate stationery, invoices and checks.

UNOFFICIAL COPY

10. Mortgagor shall establish and maintain an office through which its business shall be conducted separate and apart from those of any of its affiliates or, if it shares office space with its parent or any affiliate, it shall allocate fairly and reasonably any overhead and expense for shared office space.
11. Mortgagor shall file its own tax returns.
12. Mortgagor shall maintain adequate capital for the normal obligations reasonably foreseeable in a business of its size and character and in light of its contemplated business operations.
13. Mortgagor shall not seek or consent to the dissolution or winding up in whole or in part, of Mortgagor nor shall Mortgagor permit the managing members of Mortgagor to consent to the dissolution or liquidation in whole or in part of Mortgagor. In the event of a dissolution of Mortgagor affected by the withdrawal or addition of a member, Mortgagor shall continue its existence, unless the members or partners unanimously vote to dissolve Mortgagor. In the event of any dissolution of Mortgagor, Mortgagor shall not liquidate its interest in the Property without the prior written consent of Mortgagee.
14. Mortgagor shall not commingle the funds and other assets of Mortgagor with those of any member, manager or Beneficial Owner of Mortgagor, any affiliate of a member, manager or Beneficial Owner of Mortgagor or any other person.
15. Mortgagor shall maintain its assets in such a manner that it will not be costly or difficult to segregate, ascertain or identify its individual asset or assets, as the case may be, from those of any affiliate or constituent party, or any affiliate, member, partner or Beneficial Owner, or any other person.
16. Mortgagor shall not pledge its assets and does not and will not hold itself out to be responsible for the debts or obligations of any other person.
17. Mortgagor hereby authorizes Mortgagee to file a financing statement, with or without Mortgagor's signature, to perfect Mortgagee's lien and security interest in the Collateral and Fixtures as described in the Loan Documents (including any required continuation statements, amendment statements or other such documents necessary to perfect and continue the lien) and Mortgagor hereby expressly ratifies any financing statements Mortgagee may have filed prior to the date of this Mortgage.