

UNOFFICIAL COPY



Doc#: 0631326208 Fee: \$58.00
Eugene "Gene" Moore RHSP Fee: \$10.00
Cook County Recorder of Deeds
Date: 11/09/2006 03:53 PM Pg: 1 of 18

351 MORTGAGE LOAN BORROWER LLC, as assignor
(Assignor)

to

HYPO REAL ESTATE CAPITAL CORPORATION,
as Agent for the ratable benefit of the Lenders, as assignee
(Assignee)

ASSIGNMENT OF LEASES AND RENTS

Dated: As of November 8, 2006

Location: 351 North Clark Street
Chicago, Illinois

PIN: 17-09-408-009 and 17-09-408-010
County: Cook

PREPARED BY AND UPON
RECORDATION RETURN TO:

Kaye Scholer LLP
425 Park Avenue
New York, New York 10022
Attention: Warren J. Bernstein, Esq.

Near North National Title
222 N. LaSalle
Chicago, IL 60601

UNOFFICIAL COPY

THIS ASSIGNMENT OF LEASES AND RENTS (this "**Assignment**") is made as of the 8th of November, 2006, by **351 MORTGAGE LOAN BORROWER LLC**, a Delaware limited liability company, having its principal place of business at 350 North Clark Street, Chicago, Illinois 60610, as assignor ("**Assignor**") to **HYPO REAL ESTATE CAPITAL CORPORATION** ("**HRECC**"), a Delaware corporation, having an address at 622 Third Avenue, New York, New York 10017, as agent for the ratable benefit of the Lenders party to the Loan Agreement from time to time (together with HRECC, collectively, the "**Lenders**"), as assignee ("**Assignee**").

WITNESSETH:

WHEREAS, this Assignment is given in connection with a loan in the principal sum of THREE HUNDRED FIFTY-THREE MILLION EIGHT HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS (\$353,850,000) (the "**Loan**") or so much thereof as may have been advanced pursuant to that certain Loan and Security Agreement, dated as of the date hereof, by and among Assignor, Assignee and the Lenders party thereto from time to time (as the same may be amended, restated, extended, replaced, supplemented or otherwise modified from time to time, the "**Loan Agreement**") and evidenced by those certain Promissory Notes, dated the date hereof, made by Assignor to the Lender named therein according to its respective Ratable Share (such Note or Notes, as the same may be amended, restated, extended, consolidated, replaced, supplemented or otherwise modified from time to time, the "**Note**");

WHEREAS, the Note is secured by that certain Mortgage and Security Agreement, dated as of the date hereof (as the same may be amended, restated, extended, consolidated, replaced, supplemented or otherwise modified from time to time, the "**Security Instrument**") made by Assignor for the benefit of Assignee; and

WHEREAS, Assignor desires to further secure the payment of the Debt and the performance of all of its obligations under the Note, the Loan Agreement and the other Loan Documents.

NOW THEREFORE, in consideration of the making of the Loan by the Lenders, the covenants, agreements, representations and warranties set forth in this Assignment, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by Assignor, Assignor hereby represents, warrants, covenants and agrees as follows:

ARTICLE I ASSIGNMENT

Section 1.1 Property Assigned. Assignor hereby absolutely and unconditionally assigns and grants to Assignee the following property, rights, interests and estates, now owned, or hereafter acquired by Assignor:

(a) **Leases.** All existing and future "leases" and "lease provisions" (as described in **Exhibit B** annexed hereto and made a part hereof) affecting the use, enjoyment, or occupancy of all or any part of that certain lot or piece of land, more particularly described in **Exhibit A** annexed hereto and made a part hereof, or all or any part of the buildings, structures,

UNOFFICIAL COPY

fixtures, additions, enlargements, extensions, modifications, repairs, replacements and improvements now or hereafter located thereon (collectively, the "**Property**") and the right, title and interest of Assignor, its successors and assigns, therein and thereunder.

(b) **Other Leases and Agreements.** All other leases and other agreements, whether or not in writing, affecting the use, enjoyment or occupancy of the Property or any portion thereof now or hereafter made, whether made before or after the filing by or against Assignor of any petition for relief under 11 U.S.C. §101 et seq., as the same may be amended from time to time (the "**Bankruptcy Code**") together with any extension, renewal or replacement of the same, this Assignment of other present and future leases and present and future agreements being effective without further or supplemental assignment. The "leases" and the "lease provisions" described in **Section 1.1(a)** and the leases and other agreements described in this **Section 1.1(b)** are collectively referred to as the "**Leases**".

(c) **Rents.** All "rents" (as described in **Exhibit B** annexed hereto and made a part hereof) whether paid or accruing before or after the filing by or against Assignor of any petition for relief under the Bankruptcy Code (collectively, the "**Rents**").

(d) **Bankruptcy Claims.** All of Assignor's claims and rights (the "**Bankruptcy Claims**") to the payment of damages arising from any rejection by a Tenant of any Lease under the Bankruptcy Code.

(e) **Lease Guaranties.** All of Assignor's right, title and interest in and claims under any and all lease guaranties, letters of credit and any other credit support (individually, a "**Lease Guaranty**", collectively, the "**Lease Guaranties**") given by any guarantor in connection with any of the Leases or leasing commissions (individually, a "**Lease Guarantor**", collectively, the "**Lease Guarantors**") to Assignor.

(f) **Proceeds.** All proceeds from the sale or other disposition of the Leases, the Rents, the Lease Guaranties and the Bankruptcy Claims.

(g) **Other.** All rights, powers, privileges, options and other benefits of Assignor as landlord under the Leases and beneficiary under the Lease Guaranties, including, without limitation the immediate and continuing right to make claim for, receive, collect and receipt for all Rents payable or receivable under the Leases and all sums payable under the Lease Guaranties or pursuant thereto (and to apply the same to the payment of the Debt or the Other Obligations), and to do all other things which Assignor or any landlord is or may become entitled to do under the Leases or the Lease Guaranties.

(h) **Entry.** The right, at Assignee's option, upon revocation of the license granted herein, to enter upon the Property in person, by agent or by court-appointed receiver, to collect the Rents.

(i) **Power of Attorney.** Assignor's irrevocable power of attorney, coupled with an interest, to take, during the existence of an Event of Default, any and all of the actions set forth in **Section 3.1** of this Assignment and any or all other actions designated by Assignee for the proper management and preservation of the Property.

UNOFFICIAL COPY

(j) **Other Rights and Agreements.** Any and all other rights of Assignor in and to the items set forth in subsections (a) through (i) above, and all amendments, modifications, replacements, restatements, renewals and substitutions thereof.

ARTICLE II TERMS OF ASSIGNMENT

Section 2.1 Present Assignment And License Back. It is intended by Assignor that this Assignment constitute a present, absolute assignment of the Leases, Rents, Lease Guaranties and Bankruptcy Claims, and not an assignment for additional security only. Nevertheless, subject to the terms of this **Section 2.1**, Assignee grants to Assignor a revocable license to collect, receive, use and enjoy the Rents, as well as other sums due under the Lease Guaranties. Assignor shall hold the Rents, as well as all sums received pursuant to any Lease Guaranty, or a portion thereof sufficient to discharge all current sums due on the Debt, in trust for the benefit of Assignee for use in the payment of such sums.

Section 2.2 Notice To Tenants. Assignor hereby authorizes and directs the Tenants named in the Leases or any other future Tenants of the Property and all Lease Guarantors to pay over to Assignee or to such other party as Assignee directs all Rents and all sums due under any Lease Guaranties upon receipt from Assignee of written notice to the effect that Assignee is then the holder of this Assignment and that an Event of Default exists, and to continue so to do until otherwise notified by Assignee.

Section 2.3 Incorporation By Reference. All representations, warranties, covenants, conditions and agreements contained in the Loan Agreement and the other Loan Documents, as the same may be amended, modified, replaced, restated, renewed, substituted, supplemented, consolidated or extended are hereby made a part of this Assignment to the same extent and with the same force as if fully set forth herein.

ARTICLE III REMEDIES

Section 3.1 Remedies of Assignee. Upon the occurrence and during the continuance of an Event of Default, the license granted to Assignor in **Section 2.1** shall automatically be revoked, and Assignee shall immediately be entitled to possession of all Rents, all sums due under any Lease Guaranties and all Bankruptcy Claims, whether or not Assignee enters upon or takes control of the Property. In addition, Assignee may, at its option, without waiving such Event of Default, without regard to the adequacy of the security for the Debt, either in person or by agent, nominee or attorney, with or without bringing any action or proceeding, or by a receiver appointed by a court, dispossess Assignor and its agents and servants from the Property, without liability for trespass, damages or otherwise and exclude Assignor and its agents or servants wholly therefrom, and take possession of the Property and all books, records and accounts relating thereto and have, hold, manage, lease and operate the Property on such terms and for such period of time as Assignee may deem proper and either with or without taking possession of the Property in its own name, demand, sue for or otherwise collect and receive all Rents, all sums due under all Lease Guaranties and all Bankruptcy Claims, including those past due and unpaid with full power to make from time to time all alterations, renovations, repairs or

UNOFFICIAL COPY

replacements thereto or thereof as Assignee may deem proper and may apply the Rents, all sums received pursuant to any Lease Guaranties and all Bankruptcy Claims to the payment of the following in such order and proportion as Assignee in its sole discretion may determine, any law, custom or use to the contrary notwithstanding: (a) all expenses of managing and securing the Property, including, without being limited thereto, the salaries, fees and wages of a managing agent and such other employees or agents as Assignee may deem necessary or desirable and all expenses of operating and maintaining the Property, including, without being limited thereto, all taxes, charges, claims, assessments, water charges, sewer rents and any and all other Liens, and premiums for all insurance which Assignee may deem necessary or desirable, and the cost of all alterations, renovations, repairs or replacements, and all expenses, including, without limitation, reasonable attorneys' fees and disbursements, incident to taking and retaining possession of the Property; and (b) the Debt, together with all costs and reasonable attorneys' fees and disbursements. In addition, upon the occurrence of an Event of Default, Assignee, at its option, may (i) complete any construction on the Property in such manner and form as Assignee deems advisable, (ii) exercise all rights and powers of Assignor, including, without limitation, the right to negotiate, execute, cancel, enforce or modify Leases, obtain and evict tenants, and demand, sue for, collect and receive all Rents from the Property and all sums due under any Lease Guaranties, (iii) either require Assignor to pay monthly in advance to Assignee, or any receiver appointed to collect the Rents, the fair and reasonable rental value for the use and occupancy of such part of the Property as may be in possession of Assignor or (iv) require Assignor to vacate and surrender possession of the Property to Assignee or to such receiver and, in default thereof, Assignor may be evicted by summary proceedings or otherwise.

Section 3.2 Other Remedies. Nothing contained in this Assignment and no act done or omitted by Assignee pursuant to the power and rights granted to Assignee hereunder shall be deemed to be a waiver by Assignee or any Lender of its rights and remedies under the Loan Agreement, the Note, or the other Loan Documents and this Assignment is made and accepted without prejudice to any of the rights and remedies possessed by Assignee or any Lender under the terms thereof. The right of Assignee to collect the Debt and to enforce any other security therefor held by it may be exercised by Assignee either prior to, simultaneously with, or subsequent to any action taken by it hereunder.

Section 3.3 Other Security. Assignee may take or release other security for the payment of the Debt, may release any party primarily or secondarily liable therefor and may apply any other security held by it to the reduction or satisfaction of the Debt without prejudice to any of its rights under this Assignment.

Section 3.4 Non-Waiver. The exercise by Assignee of the option granted it in **Section 3.1** of this Assignment and the collection of the Rents and sums due under the Lease Guaranties and any Bankruptcy Claims and the application thereof as herein provided shall not be considered a waiver of any default by Assignor under the Note, the Loan Agreement, the Leases, this Assignment or the other Loan Documents. The failure of Assignee to insist upon strict performance of any term hereof shall not be deemed to be a waiver of any term of this Assignment. Assignor shall not be relieved of Assignor's obligations hereunder by reason of (a) the failure of Assignee or any Lender to comply with any request of Assignor or any other party to take any action to enforce any of the provisions hereof or of the Loan Agreement, the Note or the other Loan Documents, (b) the release regardless of consideration, of the whole or any part of

UNOFFICIAL COPY

the Property, or (c) any agreement or stipulation by Assignee or any Lender extending the time of payment or otherwise modifying or supplementing the terms of this Assignment, the Loan Agreement, the Note, or the other Loan Documents. Assignee may resort for the payment of the Debt to any other security held by Assignee in such order and manner as Assignee, in its sole discretion, may elect. Assignee may take any action to recover the Debt, or any portion thereof, or to enforce any covenant hereof without prejudice to the right of Assignee thereafter to enforce its rights under this Assignment. The rights of Assignee under this Assignment shall be separate, distinct and cumulative and none shall be given effect to the exclusion of the others. No act of Assignee shall be construed as an election to proceed under any one provision herein to the exclusion of any other provision.

Section 3.5 Bankruptcy. (a) Upon or at any time after the occurrence of an Event of Default, Assignee shall have the right to proceed in its own name or in the name of Assignor in respect of any claim, suit, action or proceeding relating to the rejection of any Lease, including, without limitation, the right to file and prosecute, to the exclusion of Assignor, any proofs of claim, complaints, motions, applications, notices and other documents, in any case in respect of the Tenant under such Lease under the Bankruptcy Code.

(b) If there shall be filed by or against Assignor a petition under the Bankruptcy Code, and Assignor, as landlord under any Lease, shall determine to reject such Lease pursuant to Section 365(a) of the Bankruptcy Code, then Assignor shall give Assignee not less than ten (10) days' prior notice of the date on which Assignor shall apply to the bankruptcy court for authority to reject the Lease. Assignee shall have the right, but not the obligation, to serve upon Assignor within such ten-day period a notice stating that (i) Assignee demands that Assignor assume and assign the Lease to Assignee pursuant to Section 365 of the Bankruptcy Code and (ii) Assignee covenants to cure or provide adequate assurance of future performance under the Lease. If Assignee serves upon Assignor the notice described in the preceding sentence, Assignor shall not seek to reject the Lease and shall comply with the demand provided for in clause (i) of the preceding sentence within thirty (30) days after the notice shall have been given, subject to the performance by Assignee of the covenant provided for in clause (ii) of the preceding sentence.

Section 3.6 Remedies Cumulative. No right or remedy herein conferred upon or reserved to Assignee is intended to be exclusive of any other right or remedy contained herein or in any other Loan Document, and every right and remedy contained herein shall, to the extent permitted by law, be cumulative and in addition to every other right and remedy given hereunder, under each other Loan Document or now or hereafter existing at law or in equity or otherwise. The assertion or employment of any right or remedy hereunder, or under any other Loan Document, shall not prevent the concurrent or subsequent assertion or employment of any other right or remedy available hereunder, under any other Loan Document or otherwise.

ARTICLE IV NO LIABILITY, FURTHER ASSURANCES

Section 4.1 No Liability of Assignee. This Assignment shall not be construed to bind Assignee or any Lender to the performance of any of the covenants, conditions or provisions contained in any Lease or Lease Guaranty or otherwise impose any obligation upon

UNOFFICIAL COPY

Assignee or any Lender. None of Assignee or any Lender shall be liable for any loss sustained by Assignor resulting from Assignee's failure to let the Property after an Event of Default or from any other act or omission of Assignee in managing the Property after an Event of Default unless such loss is caused by the willful misconduct or gross negligence of Assignee after Assignee shall take legal possession of the Property. None of Assignee or any Lender shall be obligated to perform or discharge any obligation, duty or liability under the Leases or any Lease Guaranties or under or by reason of this Assignment and Assignor shall indemnify Assignee and each Lender for, and hold Assignee and each Lender harmless from and against, any and all Losses which may or might be incurred under the Leases, any Lease Guaranties or under or by reason of this Assignment and from any and all Claims whatsoever, including the defense of any such Claims which may be asserted against Assignee or any Lender by reason of any alleged obligations and undertakings on its part to perform or discharge any of the terms, covenants or agreements contained in the Leases or any Lease Guaranties. Should Assignee or any Lender incur any such Losses, the amount thereof, including, without limitation, all costs, expenses and reasonable attorneys' fees and disbursements, shall be secured by this Assignment and by the Security Instrument and the other Loan Documents and Assignor shall reimburse Assignee and any Lender therefor immediately upon demand and upon the failure of Assignor to reimburse as aforesaid, Assignee may, at its option, declare all sums secured by this Assignment and by the Security Instrument and the other Loan Documents immediately due and payable. This Assignment shall not operate to place any obligation or liability for the control, care, management or repair of the Property upon Assignee or any Lender, nor for the carrying out of any of the terms and conditions of the Leases or any Lease Guaranties; nor shall it operate to make Assignee or any Lender responsible or liable for any waste committed on the Property by the Tenants or any other parties, or for any dangerous or defective condition of the Property including, without limitation, the presence of any Hazardous Substances (as defined in the Environmental Indemnity), 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 or stranger.

Section 4.2 No Mortgagee in Possession. Nothing herein contained shall be construed as constituting Assignee or any Lender a "mortgagee in possession" in the absence of the taking of actual possession of the Property by Assignee or any Lender. In the exercise of the powers herein granted Assignee, no liability shall be asserted or enforced against Assignee or any Lender, all such liability being expressly waived and released by Assignor.

Section 4.3 Further Assurances. Assignor shall, at its sole cost and expense, and without expense to Assignee or any Lender, do, execute, acknowledge and deliver all and every such further acts, conveyances, assignments, notices of assignments, transfers and assurances as Assignee shall, from time to time, require for the better assuring, conveying, assigning, transferring and confirming unto Assignee or any Lender the property and rights hereby assigned or intended now or hereafter so to be, or which Assignor may be or may hereafter become bound to convey or assign to Assignee or any Lender, or for carrying out the intention or facilitating the performance of the terms of this Assignment or for filing, registering or recording this Assignment and, on demand, will execute and deliver and hereby authorizes Assignee to execute in the name of Assignor to the extent Assignee may lawfully do so, one or more financing statements, chattel mortgages or comparable security instruments, to evidence more effectively the lien and security interest hereof in and upon the Leases.

UNOFFICIAL COPY

ARTICLE V EXCULPATION

Section 5.1 Exculpation. The provisions of **Section 11.20** of the Loan Agreement are hereby incorporated by reference into this Assignment to the same extent and with the same force as if fully set forth herein.

ARTICLE VI NOTICES

Section 6.1 Notices. All notices or other written communications hereunder shall be delivered in accordance with **Section 11.5** of the Loan Agreement.

ARTICLE VII APPLICABLE LAW; WAIVER OF JURY TRIAL

Section 7.1 GOVERNING LAW. (A) THIS ASSIGNMENT WAS NEGOTIATED IN THE STATE OF NEW YORK, AND MADE BY ASSIGNOR AND ACCEPTED BY ASSIGNEE IN THE STATE OF NEW YORK, AND THE PROCEEDS OF THE NOTE SECURED HEREBY WERE DISBURSED FROM THE STATE OF NEW YORK, WHICH STATE THE PARTIES AGREE HAS A SUBSTANTIAL RELATIONSHIP TO THE PARTIES AND TO THE UNDERLYING TRANSACTION EMBODIED HEREBY, AND IN ALL RESPECTS, INCLUDING, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE, THIS ASSIGNMENT AND THE OBLIGATIONS ARISING HEREUNDER SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO CONTRACTS MADE AND PERFORMED IN SUCH STATE (WITHOUT REGARD TO PRINCIPLES OF CONFLICT OF LAWS) AND ANY APPLICABLE LAW OF THE UNITED STATES OF AMERICA, EXCEPT THAT AT ALL TIMES THE PROVISIONS FOR THE CREATION, PERFECTION, AND ENFORCEMENT OF THE LIENS AND SECURITY INTERESTS CREATED PURSUANT HERETO AND PURSUANT TO THE OTHER LOAN DOCUMENTS WITH RESPECT TO THE PROPERTY SHALL BE GOVERNED BY AND CONSTRUED ACCORDING TO THE LAW OF THE STATE IN WHICH THE PROPERTY IS LOCATED, IT BEING UNDERSTOOD THAT, TO THE FULLEST EXTENT PERMITTED BY THE LAW OF SUCH STATE, THE LAW OF THE STATE OF NEW YORK SHALL GOVERN THE CONSTRUCTION, VALIDITY AND ENFORCEABILITY OF ALL LOAN DOCUMENTS AND ALL OF THE OBLIGATIONS ARISING HEREUNDER OR THEREUNDER. TO THE FULLEST EXTENT PERMITTED BY LAW, ASSIGNOR HEREBY UNCONDITIONALLY AND IRREVOCABLY WAIVES ANY CLAIM TO ASSERT THAT THE LAW OF ANY OTHER JURISDICTION GOVERNS THIS ASSIGNMENT OR THE OTHER LOAN DOCUMENTS, AND THIS ASSIGNMENT AND THE OTHER LOAN DOCUMENTS SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK PURSUANT TO SECTION 5-1401 OF THE NEW YORK GENERAL OBLIGATIONS LAW.

UNOFFICIAL COPY

(B) ANY LEGAL SUIT, ACTION OR PROCEEDING AGAINST ASSIGNEE, ANY LENDER OR ASSIGNOR ARISING OUT OF OR RELATING TO THIS ASSIGNMENT MAY AT ASSIGNEE'S OPTION BE INSTITUTED IN ANY FEDERAL OR STATE COURT IN THE CITY OF NEW YORK, COUNTY OF NEW YORK, PURSUANT TO SECTION 5-1402 OF THE NEW YORK GENERAL OBLIGATIONS LAW, AND ASSIGNOR WAIVES ANY OBJECTIONS WHICH IT MAY NOW OR HEREAFTER HAVE BASED ON VENUE AND/OR FORUM NON CONVENIENS OF ANY SUCH SUIT, ACTION OR PROCEEDING, AND ASSIGNOR HEREBY IRREVOCABLY SUBMITS TO THE JURISDICTION OF ANY SUCH COURT IN ANY SUIT, ACTION OR PROCEEDING. ASSIGNOR DOES HEREBY DESIGNATE AND APPOINT:

Corporation Service Company
80 State Street
Albany, New York 12207

AS ITS AUTHORIZED AGENT TO ACCEPT AND ACKNOWLEDGE ON ITS BEHALF SERVICE OF ANY AND ALL PROCESS WHICH MAY BE SERVED IN ANY SUCH SUIT, ACTION OR PROCEEDING IN ANY FEDERAL OR STATE COURT IN NEW YORK, NEW YORK, AND AGREES THAT SERVICE OF PROCESS UPON SAID AGENT AT SAID ADDRESS AND WRITTEN NOTICE OF SAID SERVICE MAILED OR DELIVERED TO ASSIGNOR IN THE MANNER PROVIDED HEREIN SHALL BE DEEMED IN EVERY RESPECT EFFECTIVE SERVICE OF PROCESS UPON ASSIGNOR IN ANY SUCH SUIT, ACTION OR PROCEEDING IN THE STATE OF NEW YORK. ASSIGNOR (I) SHALL GIVE PROMPT NOTICE TO ASSIGNEE OF ANY CHANGED ADDRESS OF ITS AUTHORIZED AGENT HEREUNDER, (II) MAY AT ANY TIME AND FROM TIME TO TIME DESIGNATE A SUBSTITUTE AUTHORIZED AGENT WITH AN OFFICE IN NEW YORK, NEW YORK (WHICH SUBSTITUTE AGENT AND OFFICE SHALL BE DESIGNATED AS THE PERSON AND ADDRESS FOR SERVICE OF PROCESS), AND (III) SHALL PROMPTLY DESIGNATE SUCH A SUBSTITUTE IF ITS AUTHORIZED AGENT CEASES TO HAVE AN OFFICE IN NEW YORK, NEW YORK OR IS DISSOLVED WITHOUT LEAVING A SUCCESSOR OR REFUSES TO CONSENT TO SUCH DESIGNATION AS AUTHORIZED AGENT FOR ASSIGNOR PURSUANT TO A WRITTEN CONSENT IN FORM AND SUBSTANCE SATISFACTORY TO ASSIGNEE.

Section 7.2 Provisions Subject to Applicable Law. All rights, powers and remedies provided in this Assignment may be exercised only to the extent that the exercise thereof does not violate any applicable provisions of law and are intended to be limited to the extent necessary so that they will not render this Assignment invalid, unenforceable or not entitled to be recorded, registered or filed under the provisions of any applicable law. If any term of this Assignment or any application thereof shall be invalid, illegal or unenforceable in any respect, the remainder of this Assignment shall be construed without such provision and this Assignment and any other application of the term shall not be affected thereby.

UNOFFICIAL COPY

Section 7.3 Waiver of Trial by Jury. ASSIGNOR, ASSIGNEE AND EACH LENDER HEREBY WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, THE RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING, SUIT, COUNTERCLAIM, CROSSCLAIM OR OTHERWISE, WHETHER IN CONTRACT, TORT OR OTHERWISE, RELATING DIRECTLY OR INDIRECTLY TO THE LOAN EVIDENCED BY THE NOTE, THE APPLICATION FOR THE LOAN EVIDENCED BY THE NOTE, THIS ASSIGNMENT, THE NOTE, OR THE OTHER LOAN DOCUMENTS, THE PROPERTY OR ANY ACTS OR OMISSIONS OF ASSIGNEE OR ANY LENDER, AND EACH OF THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, OR AGENTS IN CONNECTION THEREWITH. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS GIVEN KNOWINGLY AND VOLUNTARILY BY ASSIGNOR, ASSIGNEE AND EACH LENDER, AND ITS INTENDED TO ENCOMPASS INDIVIDUALLY EACH INSTANCE AND EACH ISSUE AS TO WHICH THE RIGHT TO A TRIAL BY JURY WOULD OTHERWISE ACCRUE. ASSIGNOR, ASSIGNEE AND EACH LENDER ARE EACH HEREBY AUTHORIZED TO FILE A COPY OF THIS SECTION IN ANY PROCEEDING AS CONCLUSIVE EVIDENCE OF THIS WAIVER.

ARTICLE VIII DEFINITIONS; CONSTRUCTION

Section 8.1 General Definitions. All capitalized terms not defined herein shall have the respective meanings set forth in the Loan Agreement. Unless the context clearly indicates a contrary intent or unless otherwise specifically provided herein, words used in this Assignment may be used interchangeably in singular or plural form and the word "Assignor" shall mean "each Assignor and any subsequent owner or owners of the Property or any part thereof or interest therein," the word "Assignee" shall mean "Assignee and any successor Agent pursuant to the Loan Agreement," the word "Lender" shall mean "Lender and each and any subsequent holder(s) of the Note or any part thereof", the word "Note" shall mean "the Note and any other evidence of indebtedness secured by the Security Instrument and this Assignment," the word "Property" shall include any portion of the Property and any interest therein, the phrases "attorneys' fees", "legal fees" and "counsel fees" shall include any and all reasonable attorney's, paralegal, legal assistant and law clerk fees and disbursements, whether retained firms, the reimbursement for the expenses of in-house staff or otherwise, and including, but not limited to, fees and disbursements at the pre-trial, trial and appellate levels incurred or paid by Assignee or any Lender in protecting its interest in the Property, the Leases and the Rents and enforcing its rights hereunder. Wherever pursuant to this Assignment it is provided that Assignor shall pay any costs and expenses, such costs and expenses shall include, but not be limited to, legal fees as defined above. Whenever the context may require, any pronouns used herein shall include the corresponding masculine, feminine or neuter forms, and the singular form of nouns and pronouns shall include the plural and vice versa. All references to sections, subsections, paragraphs, schedules and exhibits are to sections, subsections, paragraphs, schedules and exhibits in or to this Assignment unless otherwise specified. The Schedules and Exhibits annexed hereto are hereby incorporated herein as a part of this Assignment with the same force and effect as if set forth in the body hereof. The headings and captions of various Articles and Sections of this Assignment are for convenience of reference only and are not to be construed as defining or limiting, in any way, the scope or intent of the provisions hereof. Unless otherwise specified, the

UNOFFICIAL COPY

words “hereof”, “herein” and “hereunder” and words of similar import when used in this Assignment shall refer to this Assignment as a whole and not to any particular provision of this Assignment. The words “includes”, “including” and similar terms shall be construed as if followed by the words “without limitation”. Whenever in this Assignment any consent, approval, determination or decision of Assignee is to be made by Assignee, or any matter is to be satisfactory to Assignee, then unless expressly provided to the contrary, such provision shall be deemed to mean that such consent, approval, determination or decision of Assignee or determination whether a matter is satisfactory shall be made by Assignee in its sole and absolute discretion for any or no reason and shall be final and conclusive. In the event that a claim or adjudication is made that Assignee or any Lender or its agents have acted unreasonably or unreasonably delayed (or refrained from) acting in any case where, by law or under this Assignment or the other Loan Documents, Assignee or such Lender or such agent, as the case may be, has an obligation to act reasonably or promptly, neither Assignee nor such Lender nor its agents shall be liable for any monetary damages, and Assignor’s sole remedy shall be limited to commencing an action seeking injunctive relief or declaratory judgment. Any action or proceeding to determine whether Assignee or a Lender has acted reasonably shall be determined by an action seeking declaratory judgment. Any reference in this Assignment or in any other Loan Document to any Loan Document shall be deemed to include references to such documents as the same may hereafter be amended, modified, supplemented, extended, replaced and/or restated from time to time (and, in the case of any note or other instrument, to any instrument issued in substitution therefor). The parties hereto acknowledge that they were represented by counsel in connection with negotiation and drafting of this Assignment and that this Assignment shall not be subject to the principle of construing its meaning against the party which drafted same.

ARTICLE IX MISCELLANEOUS PROVISIONS

Section 9.1 Conflict of Terms. In case of any conflict between the terms of this Assignment and the terms of the Loan Agreement, the terms of the Loan Agreement shall govern and control.

Section 9.2 No Oral Change. This Assignment, and any provisions hereof, may not be modified, amended, waived, extended, restated, changed, discharged or terminated orally, or by any act or failure to act on the part of Assignor, Assignee or any Lender, but only by an agreement in writing signed by the party against whom the enforcement of any modification, amendment, waiver, extension, restatement change, discharge or termination is sought. Assignee, as Agent for the Lenders may execute any such modification, amendment, waiver, extension, restatement, change, discharge or termination and Lenders’ execution thereof shall not be required.

Section 9.3 Successors and Assigns. This Assignment shall be binding upon Assignor and Assignee and inure to the benefit of Assignor, Assignee and each Lender and their respective successors and permitted assigns forever. Nothing contained in this Section shall be construed to alter or change any requirement contained herein or in the Loan Agreement which requires Assignor to obtain Assignee’s prior consent to any Transfer.

UNOFFICIAL COPY

Section 9.4 Entire Agreement. THIS ASSIGNMENT EMBODIES THE FINAL, ENTIRE AGREEMENT OF ASSIGNOR, ASSIGNEE AND THE LENDERS WITH RESPECT TO THE SUBJECT MATTER HEREOF AND SUPERSEDES ANY AND ALL PRIOR COMMITMENTS, AGREEMENTS, REPRESENTATIONS, AND UNDERSTANDINGS, WHETHER WRITTEN OR ORAL, RELATING TO THE SUBJECT MATTER HEREOF. THIS ASSIGNMENT IS INTENDED BY ASSIGNOR, ASSIGNEE AND THE LENDERS AS A FINAL AND COMPLETE EXPRESSION OF THE TERMS OF THEIR AGREEMENT WITH RESPECT TO THE SUBJECT MATTER HEREOF, AND NO COURSE OF DEALING BETWEEN ASSIGNOR OR ASSIGNEE, NO COURSE OF PERFORMANCE, NO TRADE PRACTICES, AND NO EVIDENCE OF PRIOR, CONTEMPORANEOUS OR SUBSEQUENT ORAL AGREEMENTS OR DISCUSSIONS OR OTHER EXTRINSIC EVIDENCE OF ANY NATURE SHALL BE USED TO CONTRADICT, VARY, SUPPLEMENT OR MODIFY ANY TERM OF THIS ASSIGNMENT. THERE ARE NO ORAL AGREEMENTS BETWEEN ASSIGNOR AND ASSIGNEE.

Section 9.5 Delay Not a Waiver. Neither any failure nor any delay on the part of any party hereto in insisting upon strict performance of any term, condition, covenant or agreement, or exercising any right, power, remedy or privilege hereunder, or any other document or instrument entered into or delivered in connection herewith or pursuant hereto, shall operate as or constitute a waiver thereof, nor shall a single or partial exercise thereof preclude any other future exercise, or the exercise of any other right, power, remedy or privilege. A waiver of one default with respect to any Person shall not be construed to be a waiver of any subsequent default with respect to such Person or any other Person or to impair any remedy, right or power consequent thereon.

Section 9.6 No Joint Venture or Partnership; No Third Party Beneficiaries. (a) Assignor, Assignee and Lenders intend that the relationships created hereunder and under the other Loan Documents be solely that of borrower and lender. Nothing herein or therein is intended to create a joint venture, partnership, tenancy in common, or joint tenancy relationship between Assignor and Assignee or Lenders nor to grant Assignee or Lenders any interest in the Property other than that of mortgagee, assignee, secured party, beneficiary or lender.

(b) This Assignment and the other Loan Documents are solely for the benefit of Assignee and Lenders and nothing contained in this Assignment or the other Loan Documents shall be deemed to confer upon anyone other than Assignee and Lenders any right to insist upon or to enforce the performance or observance of any of the obligations contained herein or therein. All conditions to the obligations of Lenders to make Advances under the Loan Documents are imposed solely and exclusively for the benefit of Assignee and Lenders and no other Person shall have standing to require satisfaction of such conditions in accordance with their terms or be entitled to assume that Assignee or Lenders will refuse to make Advances in the absence of strict compliance with any or all thereof and no other Person shall under any circumstances be deemed to be a beneficiary of such conditions, any or all of which may be freely waived in whole or in part by Assignee on behalf of Lenders if, in Assignee's sole discretion, Assignee deems it advisable or desirable to do so. In addition, none of Assignee or any Lender is the agent or representative of Assignor and this Assignment shall not make Assignee or any Lender liable to

UNOFFICIAL COPY

any Person for goods delivered to or services performed by them upon the Property, or for debts or claims accruing to such parties against Assignor and there is no contractual relationship, either express or implied, between Assignee and/or any Lender and any Person supplying any work, labor or materials for the Improvements.

Section 9.7 Subrogation. If any or all of the proceeds of the Note have been used to extinguish, extend or renew any indebtedness heretofore existing against the Property, then, to the extent of the funds so used, Assignee shall be subrogated to all of the rights, claims, Liens, titles, and interests existing against the Property heretofore held by, or in favor of, the holder of such indebtedness and such former rights, claims, liens, titles, and interests, if any, are not waived but rather are continued in full force and effect in favor of Assignee and are merged with the Lien and security interest created herein as cumulative security for the repayment of the Debt, the performance and discharge of Assignor's obligations hereunder, under the Loan Agreement, the Note and the other Loan Documents.

Section 9.8 Joint and Several Liability. If Assignor is comprised of more than one Person, all representations, warranties, covenants (both affirmative and negative) and all other obligations hereunder shall be the joint and several obligation of each entity making up Assignor and a Default or Event of Default by any such Person shall be deemed a Default or Event of Default by all such entities and Assignor.

Section 9.9 Termination of Assignment. Upon payment in full of the Debt, this Assignment shall be and become null and void and of no further force or effect.

Section 9.10 Time of the Essence. Time is of the essence with respect to the performance by Mortgagor of its obligations pursuant to this Assignment.

[NO FURTHER TEXT ON THIS PAGE]

UNOFFICIAL COPY

IN WITNESS WHEREOF, Assignor has executed this Assignment the day and year first written above.

ASSIGNOR:

351 MORTGAGE LOAN BORROWER LLC, a Delaware limited liability company

By: 351 Mezzanine LLC, a Delaware limited liability company, Manager

By: South Parcel Development, LLC, an Illinois limited liability company, Manager

By: SMIH South Parcel, LLC, an Illinois limited liability company, Authorized Member

By: ~~Mesirow Financial Real Estate, Inc., Manager~~

By: _____
Name: *Richard A Stein*
Title: *Chairman*

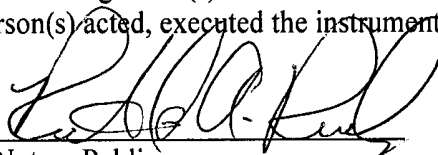
Property of Cook County Clerk's Office

UNOFFICIAL COPY

STATE OF ILLINOIS)
) ss.:
COUNTY OF COOK)

On the 2nd day of November, 2006 before me, the undersigned, a Notary Public for said state, personally appeared Richard A Stein, personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity(ies) upon behalf of which the person(s) acted, executed the instrument.




Notary Public

My commission expires: 1/27/08

Cook County Clerk's Office

UNOFFICIAL COPY

EXHIBIT A

LEGAL DESCRIPTION

Parcel 1:

That part of Block 2 in Original Town of Chicago in Section 9, Township 39 North, Range 14 East of the Third Principal Meridian, bounded and described as follows:

Beginning at the intersection of the East line of North Clark Street (Also being the West line of Lot 5 in said Block 2) and the South line of West Kinzie Street (also being the North line of Lots 5 thru 8, both inclusive, in said Block 2); thence East along the South line of said West Kinzie Street a distance of 321.47 feet to the West line of North Dearborn Street; thence South along the West line of said North Dearborn Street (also being the East line of Lot 8 in said Block 2) a distance of 178.60 feet to a point 311.60 North (as measured along said West line of North Dearborn Street) of the Chicago River, as occupied; thence West at right angles to the last described line a distance of 321.47 feet to a point on the East line of said North Clark Street 300.43 feet North (as measured along said East line of North Clark Street) of said Chicago River, as occupied; thence North along the East line of said North Clark Street a distance of 177.86 feet to the point of beginning, in Cook County, Illinois.

Parcel 2:

Non-Exclusive Easement for the benefit of Parcel 1, as created by First Amendment to Easement and Operating Agreement dated August 23, 1988 and recorded August 24, 1988 as document number 88384561 for pedestrian and vehicular ingress and egress on, over, through and across the "Hotel Road Easement Area" and the "Project Road Easement Area" described as follows:

Hotel Road Easement Area:

Part of Block 2 in Original Town of Chicago in Section 9, Township 39 North, Range 14 East of the Third Principal Meridian, bounded and described as follows: Commencing at the point of intersection of the South line of West Kinzie Street (also being the North line of Lots 5, 6, 7 and 8 in said Block 2) and the East line of North Clark Street (also being the East line of Lots 4 and 5 in said Block 2); thence South 0 degrees West along said East line of North Clark Street a distance of 177.86 feet to an intersection with the North line of Tracts I and II in said Block 2; thence South 90 degrees East along said North line of Tracts I and II as distance of 134.10 feet to an intersection with the line between Parcels 1 (below +50.00 feet Chicago City Datum) of said Tracts I and II and the point of beginning, thence continuing South 90 degrees East along said North line of Tracts I and II a distance of 187.57 feet to a point in the West line of North Dearborn Street (also being the East line of Lots 1 and 8 in said Block 2) said point being 178.60 feet South of said South line of West Kinzie Street as measured long the West line of North Dearborn Street; thence South 0 degrees West along said West line of North Dearborn Street a distance of 26.32 feet to the back of a curb of an elevated driveway; thence South 89 degrees 59 minutes 22 seconds West along said back of curb a distance of 68.78 feet; thence North 89 degrees 34 minutes 27 seconds West a distance of 47.20 feet; thence South 89 degrees 59 minutes 22 seconds West a distance of 29.31 feet; thence North 75 degrees 07 minutes 03

UNOFFICIAL COPY

seconds West a distance of 43.45 feet to a point where the said line between Parcels 1 intersects the back of curb of said elevated driveway; thence North 0 degrees East along said line between Parcels 1 a distance of 14.83 feet to the point of beginning.

Project Road Easement Area:

Part of Block 2 in Original Town of Chicago in Section 9, Township 39 North, Range 14 East of the Third Principal Meridian, bounded and described as follows: Commencing at the point of intersection of the South line of West Kinzie Street (also being the North line of Lots 5, 6, 7 and 8 in said Block 2) and the East line of North Clark Street (also being the West line of Lots 4 and 5 in said Block 2); thence South 0 degrees West along the East line of North Clark Street a distance of 177.86 feet to an intersection with the North line of Tracts I and II in said Block 2 and the point of beginning; thence South 90 degrees East along said North line of Tracts I and II a distance of 134.10 feet to an intersection with the line between Parcels 1 (below 50.00 feet Chicago City Datum) of said Tract I and II; thence South 0 degrees West along said line between Parcels 1 a distance of 14.33 feet to a point of intersection, not tangent with a curved line, said curved line being the back of a curb of an elevated driveway; thence Westerly along the back of curb of said driveway being the arc of a circle convex Northerly and having a radius of 15.00 feet a distance of 5.08 feet to a point of tangency; thence South 89 degrees 59 minutes 39 seconds West along the back of curb of said driveway and tangent to the last described curved line a distance of 129.11 feet to said East line of North Clark Street; thence North 0 degrees East along said East line of North Clark Street a distance of 13.99 feet to the point of beginning.

UNOFFICIAL COPY

EXHIBIT B

DESCRIPTION OF LEASES AND RENTS

As used in Section 1.1(a) of this Assignment, the term “leases” shall mean all leases, subleases, licenses, franchises, concessions or grants of other possessory interests, tenancies, and any other agreements affecting the use, possession or occupancy of the Property or any part thereof (including, without limitation, guest rooms, restaurants, bars, conference and meeting rooms, and banquet halls and other public facilities), whether now or hereafter existing or entered into (including, without limitation, any use or occupancy arrangements created pursuant to Section 365(d) of the Bankruptcy Code or otherwise in connection with the commencement or continuance of any bankruptcy, reorganization, arrangement, insolvency, dissolution, receivership or similar proceedings, or any assignment for the benefit of creditors, in respect of any tenant or occupant of any portion of the Property) and all amendments, modifications, supplements, expansions, extensions or renewals thereof, whether now or hereafter existing and all amendments, modifications, supplements, extensions or renewals thereof. As used in Section 1.1(a) of this Assignment the term “lease provisions” shall mean the right to enforce, whether at law or in equity or by any other means, all terms, covenants and provisions of the Leases.

As used in Section 1.1(c) of this Assignment, the term “rents” shall mean all rents, issues, profits, royalties (including all oil and gas or other hydrocarbon substances), earnings, receipts, revenues, accounts, account receivable, security deposits and other deposits (subject to the prior right of the tenants making such deposits) and income, including, without limitation, fixed, additional and percentage rents, and all operating expense reimbursements, reimbursements for increases in taxes, sums paid by tenants to Assignor to reimburse Assignor for amounts originally paid or to be paid by Assignor or Assignor’s agents or affiliates for which such tenants were liable, as, or example, tenant improvements costs in excess of any work letter, lease takeover costs, moving expenses and tax and operating expense pass-throughs for which a tenant is solely liable, parking, maintenance, common area, tax, insurance, utility and service charges and contributions, proceeds of sale of electricity, gas, heating, air-conditioning and other utilities and services, deficiency rents and liquidated damages, and other benefits now or hereafter derived from any portion of the Property or otherwise due and payable or to become due and payable as a result of any ownership, use, possession, occupancy or operation thereof and/or services rendered, goods provided and business conducted in connection therewith (including any payments received pursuant to Section 502(b) of the Bankruptcy Code or otherwise in arrangement, insolvency, dissolution, receivership or similar proceedings, or any assignment for the benefit of creditors, in respect of any tenant or other occupants of any portion of the Property and all claims as a creditor in connection with any of the foregoing) and all cash or security deposits, advance rentals, and all deposits or payments of a similar nature relating thereto, now or hereafter, including during any period of redemption, derived from the Property or any portion thereof and all proceeds from the cancellation, surrender, sale or other disposition of the Leases.