

UNOFFICIAL COPY

Prepared By:
Crowley & Lamb, P.C.
350 North LaSalle Street Suite 900
Chicago, Illinois 60610



Doc#: 0633349495 Fee: \$72.00
Eugene "Gene" Moore RHSP Fee: \$10.00
Cook County Recorder of Deeds
Date: 11/29/2006 03:31 PM Pg: 1 of 25

Mail to:
Diamond Bank, FSB
100 West North Avenue
Chicago, IL 60610

FREEDOM TITLE CORP.

270906 1053

MORTGAGE AND SECURITY AGREEMENT and UCC FIXTURE FILING

Maximum Principal Indebtedness
Not To Exceed \$3,540,100.00

THIS MORTGAGE AND SECURITY AGREEMENT ("Mortgage") made as of November 15, 2006, by 1351 N ASHLAND INC., an Illinois corporation, (the "Mortgagor"), having an address at 2134 W. Chicago Avenue, Chicago, Illinois 60622 in favor of DIAMOND BANK, FSB, (the "Mortgagee"), having an address at 100 West North Avenue, Chicago, Illinois 60610:

WITNESSETH:

WHEREAS, Mortgagor is the owner in fee simple of certain real property (the "Premises") located in the City of Chicago, Cook County, Illinois, as more particularly described on Exhibit A attached, as improved on the date hereof;

WHEREAS, Mortgagor has applied to Mortgagee for a loan in the amount of ONE MILLION SEVEN HUNDRED SEVENTY THOUSAND FIFTY AND 00/100THS DOLLARS U.S. (\$1,770,050.00) (the "Loan Amount") and, in accordance with a Loan Commitment (hereinafter defined) Mortgagor has executed and delivered a certain Promissory Note of even date herewith, in the principal sum of ONE MILLION SEVEN HUNDRED SEVENTY THOUSAND FIFTY AND 00/100THS DOLLARS U.S. (\$1,770,050.00) made payable to the order of Mortgagee (the "Note"); and

WHEREAS, Mortgagor is required to execute and deliver this Mortgage as a covenant and condition to obtaining the loan.

NOW, THEREFORE, Mortgagor does hereby give, grant, bargain, sell, assign, convey, warrant, mortgage and pledge to Mortgagee, its successors and assigns, the Premises, and all of Mortgagor's estate, right, title and interest therein;

TOGETHER with all right, title and interest of Mortgagor, including any after-acquired title or reversion, in and to the ways, easements, streets, alleys, passages, water, water courses, riparian rights, oil, gas and other mineral rights, gaps, gores, rights, hereditaments, liberties and privileges thereof, if any, and in any way appertaining to the Premises;

TOGETHER with all rents, royalties, issues, proceeds and profits accruing and to accrue from the Premises as more particularly described in that certain Assignment of Leases and Rents of even date herewith (the "Assignment") from Mortgagor as Assignor to Mortgagee as Assignee;

UNOFFICIAL COPY

TOGETHER with all buildings and improvements of every kind and description now or hereafter erected or placed on the Premises including, without limitation, all materials intended for construction, reconstruction, alteration and repair of such improvements now or hereafter erected thereon, all of which materials shall be deemed to be included within the Mortgaged Property (as hereinafter defined) immediately upon the delivery thereof to the Premises, and all fixtures and articles of personal property now or hereafter owned by Mortgagor and attached to or contained in and used in connection with the Premises, including, without limitation, all furniture, apparatus, machinery, equipment, motors, elevators, fittings, radiators, furnaces, stoves, microwave ovens, awnings, shades, screens, blinds, office equipment, trash and garbage removal equipment, carpeting and other furnishings, and all plumbing, heating, lighting, cooking, laundry, ventilating, refrigerating, incinerating, air-conditioning, conveyor, security, sprinkler and other equipment, and all fixtures and appurtenances thereof; and all renewals or replacements thereof or articles in substitution therefor, whether or not the same are or shall be attached to such improvements in any manner; it being intended that all the above-described property owned by Mortgagor and placed by Mortgagor on the Premises shall, so far as permitted by law, be deemed to be fixtures and a part of the realty, and security for the indebtedness of Mortgagor to Mortgagee hereinafter described and secured by this Mortgage, and as to the balance of the above-described property, this Mortgage is hereby deemed to be as well a Security Agreement for the purpose of creating hereby a security interest in such property, securing such indebtedness, for the benefit of Mortgagee; all of the property described in this paragraph is hereinafter sometimes collectively called the "Improvements";

TOGETHER with any and all warranty claims, maintenance contracts and other contract rights, instruments, documents, chattel papers and general intangibles with respect to or arising from the Premises, the Improvements and the balance of the Mortgaged Property, and all cash and non-cash proceeds and products thereof; and

TOGETHER with all awards and other compensation heretofore or hereafter to be made to the present and all subsequent owners of the Mortgaged Property for any taking by eminent domain, either permanent or temporary (a "Taking"), of all or any part of the Mortgaged Property or any easement or other appurtenance thereof, including severance and consequential damage and change in grade of streets (collectively, "Taking Proceeds"), and any and all refunds of impositions or other charges relating to the Mortgaged Property or the indebtedness secured by this Mortgage.

The property described above is hereafter called the "Premises" to the extent that such property is realty, and the "Collateral" to the extent that such property is personalty. The Premises and the Collateral are hereafter collectively called the "Mortgaged Property."

TO HAVE AND TO HOLD, all and singular, the Mortgaged Property, whether now owned or held or hereafter acquired by Mortgagor, with the appurtenances thereunto belonging, unto Mortgagee, its successors and assigns, forever. Mortgagor does hereby covenant with Mortgagee, its successors and assigns, that at and until the ensembling of these presents, Mortgagor is well seized of the Premises as a good and indefeasible estate in fee simple and is the sole owner of the Collateral, and has good right to bargain, sell and convey the Mortgaged Property in manner and form as above written; that title to the Mortgaged Property is free and clear of all defects, liens and encumbrances except for real estate taxes and assessments not yet due or payable and the matters described on Exhibit B (the "Permitted Exceptions") and that Mortgagor will warrant and defend the Premises, with the appurtenances thereunto belonging, and the Collateral to Mortgagee, its successors and assigns, forever, against all liens, security interests, encumbrances, defects, claims and demands whatsoever.

UNOFFICIAL COPY

Mortgagor has executed and delivered this Mortgage to secure the following:

(a) Payment of principal, interest and all other charges under the Note, as the same may be amended, extended, supplemented, modified and/or renewed, and all replacements and substitutions therefor (alternatively and collectively, the "Note"), together with interest thereon at a rate or rates which may vary from time to time as specified in the Note, with principal and interest payable in accordance with the terms of the Note, and all accrued but unpaid interest and the entire unpaid principal amount being due and payable on December 1, 2007 all in accordance with the terms of the Note; the Note also contains an option in Mortgagee to declare the unpaid balance under the Note due and payable forthwith upon the occurrence of an Event of Default (as hereinafter defined);

(b) Payment of any and all amounts or charges required to be paid by Mortgagor pursuant to this Mortgage or any of the other Loan Documents (as hereinafter defined);

(c) Payment by Mortgagor to Mortgagee of all sums expended or advanced by Mortgagee pursuant to this Mortgage or any of the other Loan Documents;

(d) Payment of any and all amounts advanced by Mortgagee with respect to the Mortgaged Property for the payment of taxes, assessments, insurance premiums or costs incurred in the protection of the Mortgaged Property;

(e) Performance and observance of each covenant and agreement of Mortgagor contained herein or in any of the other Loan Documents; and

(f) Payment by Mortgagor to Mortgagee of any and all other liabilities and indebtedness of Mortgagor to Mortgagee, direct or contingent, now or hereafter owing by Mortgagor to Mortgagee, other than as provided in subparagraphs (a) through (e) above.

PROVIDED, HOWEVER, that if Mortgagor shall pay or cause to be paid to Mortgagee the principal, interest and all other charges under the Note on or before the date on which the outstanding principal balance of the Note is due and payable in full in accordance with the terms of the Note, and in the manner stipulated therein and herein, all without deduction or credit for taxes or other charges paid by Mortgagor, and if Mortgagor shall have kept, performed and observed all of the covenants and conditions contained in this Mortgage and all of the other Loan Documents, then this Mortgage shall cease, terminate and be void, but otherwise shall remain in full force and effect.

Mortgagor further covenants and agrees as follows:

1. Payment of Indebtedness. Mortgagor shall pay promptly the indebtedness evidenced by the Note at the time and in the manner provided herein and in the Note, and all other sums and charges payable when due by Mortgagor and pursuant to the Note, this Mortgage and any of the other Loan Documents.

2. Tax and Insurance Escrows.

(a) Subject to the terms and conditions of subsection 2(d) below, Mortgagor shall pay to Mortgagee, in addition to the monthly payments under the Note and concurrently therewith in a single payment monthly until the Note is fully paid, a sum equal to annual real estate taxes, general and special

UNOFFICIAL COPY

assessments and premiums for insurance required hereunder (all as estimated by Mortgagee) less all sums previously paid therefor, divided by the number of full calendar months to elapse before the date which is one (1) month prior to the date when such taxes and assessments and insurance premiums will become due. Such sums shall be held by Mortgagee for payment of such taxes and assessments and insurance premiums as and when due. Mortgagee shall have the right to commingle and hold such sums with its general funds, and no interest shall accrue thereon in favor of Mortgagor.

(b) Mortgagee shall have the right to make any and all payments notwithstanding that at that time any such tax, assessment or premium is then being protested or contested by Mortgagor, unless Mortgagor shall have notified Mortgagee in writing not less than thirty (30) days prior to the due date of such protest or contest of such tax, assessment or premium, in which event, Mortgagee shall make such payment under protest in the manner prescribed by Mortgagor. In the event such protest or contest shall or might result in a penalty or other charges, Mortgagor shall deposit with Mortgagee monthly pro-rata the amount of any such penalty or additional charge. If, upon receipt by Mortgagee of any refunds of impositions or other charges relating to the Mortgaged Property or the indebtedness secured hereby, Mortgagor is not in default hereunder, then Mortgagee shall promptly pay such refund to Mortgagor; if Mortgagor is in default hereunder beyond any applicable grace period, Mortgagee shall have the right to apply such refund to reduce the indebtedness secured hereby.

(c) Without limiting the rights of Mortgagee hereunder, including, without limitation, those provided in Paragraph 18 hereof, in the event of a sale of the Premises or any other part of the Mortgaged Property, any funds then on deposit with the Mortgagee shall, at Mortgagee's option, and thereupon automatically and without the necessity of further notice or written assignment, be transferred to and held thereafter for the account of the new owner, to be applied in accordance with the foregoing. If the Premises or any other part of the Mortgaged Property is purchased by Mortgagee at foreclosure sale or is otherwise acquired by Mortgagee after an Event of Default, the remaining balance, if any, of the funds deposited with Mortgagee pursuant to subsection 2(a) above shall continue to be applied, subject to the security interest hereunder, first to Mortgagee's unreimbursed costs and expenses in such purchase or acquisition, then to reduce the indebtedness secured by this Mortgage, and the balance, if any, shall be paid to Mortgagor, subject to the order of the court having jurisdiction, in any such proceeding.

(d) Mortgagee hereby waives the requirement for deposit by Mortgagor of the sums described in subsection 2(a) above, for so long as (i) there is no default in the obligations of Mortgagor or any other person under this Mortgage or any of the Loan Documents, and no event which, with the giving of notice, passage of time or both, would constitute such a default, and (ii) Mortgagor delivers to Mortgagee, no later than five (5) days prior to the last day for payment of such sums without penalty or interest, evidence satisfactory to Mortgagee in Mortgagee's sole and absolute discretion, that all sums described in subsection 2(a) above have been paid in full. Upon failure of either of the foregoing conditions, the waiver set forth in this subsection 2(d) shall immediately and automatically become null and void, without notice from Mortgagee to Mortgagor.

3. Protection Against Charges. Except for the Permitted Exceptions, Mortgagor shall keep the Mortgaged Property free from liens of every kind, except only for real estate taxes and general and special assessments which are not yet due and payable, and mortgage taxes, if any, as provided in Paragraph 7 hereof, and shall pay, before delinquency and before any penalty for non-payment attaches thereto, all taxes, assessments, and other governmental or municipal or public dues, charges, fines or impositions which are or hereafter may be levied against the Mortgaged Property or any part thereof. Mortgagor shall promptly deliver to Mortgagee receipted bills evidencing each such payment, together with any other

UNOFFICIAL COPY

evidence of payment required by Mortgagee in its sole and absolute discretion, no later than five (5) days prior to the last day upon which such payment can be made without penalty or interest. Mortgagor shall also pay, in full, under protest or otherwise in the manner provided by law, any tax, assessment, charge, fine or imposition described above which Mortgagor contests in accordance with the provisions of law and this Mortgage.

4. Insurance and Casualty Damage.

(a) Mortgagor shall keep, or cause to be kept, all of the following insurance policies with respect to the Mortgaged Property in companies, forms, amounts and coverage satisfactory to Mortgagee, containing waiver of subrogation and first mortgagee clauses in favor of Mortgagee and providing for thirty (30) days' written notice to Mortgagee in advance of cancellation of said policies for non-payment of premiums or any other reason or for material modification of said policies, and ten (10) days' written notice to Mortgagee in advance of payment of any insurance claims under said policies to any person:

(i) Insurance against loss or damage by fire and such other hazards, casualties and contingencies (including, without limitation, so-called all risk coverages) as Mortgagee reasonably may require, in an amount equal to the greater of (1) the Loan Amount, or (2) the replacement cost of the Mortgaged Property, with a replacement cost endorsement and in such amounts so as to avoid the operation of any coinsurance clause, for such periods and otherwise as Mortgagee reasonably may require from time to time.

(ii) Comprehensive general public liability, property damage and indemnity insurance, including, without limitation, so-called assumed and contractual liability coverage and claims for bodily injury, death or property damage, naming Mortgagee as an additional insured, in such amounts as Mortgagee reasonably may from time to time require.

(iii) Insurance against rent loss or abatement of rent, covering payment of rent and like charges from the Mortgaged Property over a term of not less than twelve (12) months, in an amount at least equal to the aggregate annual amount payable from time to time under the Note.

(iv) Flood insurance in an amount as Mortgagee may reasonably require if the Mortgaged Property is located in a Special Flood Hazard Area (as defined in the National Flood Insurance Act of 1968, as amended).

Mortgagor shall deliver renewal certificates of all insurance required above, together with written evidence of full payment of the annual premiums therefor at least thirty (30) days prior to the expiration of the existing insurance. Any such insurance may be provided under so-called "blanket" policies, so long as the amounts and coverages thereunder will, in Mortgagee's sole judgment, provide protection equivalent to that provided under a single policy meeting the requirements hereinabove.

(b) Notice. In case of any material damage or destruction of the Mortgaged Property, or any part thereof, or any interest therein or right accruing thereto, Mortgagor shall promptly give to Mortgagee written notice generally describing the nature and extent of such damage or destruction which has resulted or which may result therefrom. Mortgagee may appear in any such proceedings and negotiations and Mortgagor shall promptly deliver to Mortgagee copies of all notices and pleadings in any such proceedings. Mortgagor will in good faith, file and prosecute all claims necessary for any award or

UNOFFICIAL COPY

payment resulting from such damage or destruction. All costs and expenses incurred by Mortgagee in exercising its rights under this section shall constitute indebtedness secured by this Mortgage.

(c) Application of Insurance Proceeds. Upon occurrence of any loss or damage to all or any portion of the Mortgaged Property resulting from fire, vandalism, malicious mischief or any other casualty or physical harm (a "Casualty"), Mortgagee may elect subject to the provisions set forth below to collect, retain and apply as a Loan prepayment all proceeds (the "Proceeds") of any insurance policies collected or claimed as a result of such Casualty after deduction of all expenses of collection and settlement, including attorney's and adjusters' fees and charges. Mortgagor hereby authorizes Mortgagee, at Mortgagee's option, to collect, adjust and compromise any losses under any insurance with respect to the Mortgaged Property which is kept, or caused to be kept, by Mortgagor, and hereby irrevocably appoints Mortgagee as its attorney-in-fact, coupled with an interest, for such purposes. Any Proceeds remaining after payment in full of the Loan and all other sums due Mortgagee hereunder shall be paid by Mortgagee to Mortgagor without any allowance for interest thereon.

In the event Mortgagee elects to allow Mortgagor to restore or rebuild the Mortgaged Property and such Proceeds would not be sufficient to restore or rebuild the Mortgaged Property, then Mortgagor shall deposit with Mortgagee cash, letters of credit, surety bonds or equivalent assurances of the availability of funds with which to pay for the restoration or rebuilding of the Mortgaged Property. Such letters of credit, surety bonds or equivalent assurances shall in all respects be in form, substance, execution and sufficiency acceptable to Mortgagee. Mortgagor shall promptly proceed with restoration of the Mortgaged Property resulting from any such Casualty.

5. Maintenance of Improvements.

(a) None of the Improvements shall be structurally or otherwise materially altered, removed or demolished, nor shall any fixtures or any portion of the Collateral on, in or about the Premises be severed, removed, sold, mortgaged or otherwise encumbered, without the prior written consent of Mortgagee in each case; except, however, that Mortgagor shall have the right, without such consent, to remove and dispose of, free from the lien of this Mortgage such Collateral as from time to time may become worn out or obsolete, provided that simultaneously with or prior to such removal, such Collateral shall be replaced with other new Collateral of like kind and quality, and by such removal, the Mortgagor shall be deemed to have subjected the replacement Collateral to the lien of this Mortgage. Any Improvements or any of the Collateral which are demolished or destroyed in whole or in part shall be replaced promptly by similar Improvements and articles of personal property of comparable quality, condition and value as those demolished or destroyed, thereupon becoming part of the Mortgaged Property free from any other lien or security interest or encumbrance on or reservation of title to such property. Mortgagor shall not permit, commit or suffer any waste, impairment or deterioration of the Mortgaged Property or any part thereof and shall keep and maintain (or cause to be kept and maintained) the same in good repair and condition. Mortgagor shall make (or cause to be made) all necessary and proper repairs and replacements so that all components of the Mortgaged Property will, at all times, be in good condition, fit and proper for the respective purposes for which they were erected or installed, other than for matters of health and safety prior to the demolition thereof.

(b) Mortgagor hereby grants to Mortgagee and its agents the right in their reasonable discretion, but Mortgagee shall have no obligation, to enter upon the Premises at any time for the purpose of inspecting and appraising the Mortgaged Property and conducting tests and surveys thereof. In the event that Mortgagor shall fail fully to comply with any of the requirements of this Paragraph 5, without

UNOFFICIAL COPY

prejudice to any other right or remedy that may be available to Mortgagee in such event, Mortgagee shall have the right to recover, as damages for such failure, an amount equivalent to the cost required to restore the Mortgaged Property to the condition hereby required.

(c) Mortgagor hereby covenants and agrees to comply with, and to cause all occupants of all or any portion of the Mortgaged Property to comply with, all applicable zoning, building, use and environmental restrictions and all laws, rules, statutes, ordinances, regulations, orders and requirements, including, without limitation, environmental matters and notices of violation of all governmental authorities having jurisdiction over the Mortgaged Property or the maintenance, use and operation thereof, and all applicable restrictions, agreements and requirements, whether or not of record (collectively, "Laws"). Mortgagor will deliver to Mortgagee within ten (10) days after receipt thereof any additional permits or renewals, issued and approved or disapproved with respect to the Mortgaged Property. Mortgagor hereby indemnifies Mortgagee and its officers, directors, shareholders, employees, agents and partners and their respective heirs, successors and assigns (collectively, "Indemnified Parties") and agrees to defend and hold the Indemnified Parties harmless from and against any and all claims, demands, loss, cost, damage, liability or expense incurred or suffered by the Indemnified Parties arising from any failure of the Mortgaged Property to comply with Laws, or from any failure of Mortgagor to obtain, maintain or renew, or to have obtained, maintained or renewed, any permit or approval required with respect to the Mortgaged Property. The foregoing indemnification and agreement shall survive the release of this Mortgage and the payment or other satisfaction of the indebtedness secured hereby.

6. Hazardous Materials and Wetlands.

(a) Without limiting the generality of any provision herein or in any of the Loan Documents, Mortgagor hereby represents and warrants to Lender that neither Mortgagor nor, to the best knowledge and belief of Mortgagor, any previous owner or user of the Mortgaged Property or any adjacent properties, has used, generated, stored or disposed of, in violation of Environmental Law (as defined below) in, on, under, around or above the Mortgaged Property, any Regulated Material (defined herein as flammable explosives, radioactive materials, solid waste, hazardous substances, hazardous waste, hazardous materials, asbestos containing materials, petroleum or any fraction thereof, pollutants, irritants, contaminants, toxic substances, or any other materials respectively defined as such in, or regulated by, any applicable Environmental Law), that, to the best knowledge and belief of Mortgagor, or any of them, the Mortgaged Property is not currently in violation of any Environmental Law (defined herein as any federal, state or local law, regulation or ordinance, as each may be validly interpreted and applied by the appropriate governmental entity, governing any Regulated Material for the protection of human health, safety or the environment, including but not limited to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 and the Emergency Planning and Community Right-to-Know Act of 1986, the Resource Conservation and Recovery Act, the Toxic Substances Control Act, the Clean Air Act, the Federal Water Pollution Control Act, the Safe Drinking Water Act and the Oil Pollution Act of 1990, in each case as amended and as effective at the date of this Agreement), and that the Mortgaged Property is not "real property" as that term is defined in the Illinois Responsible Property Transfer Act, 765 ILCS 90/1 *et seq.*, in that it does not contain one or more facilities which are subject to reporting under Section 312 of the federal Emergency Planning and Community Right-to-Know Act of 1986 and the federal regulations promulgated thereunder, or contain an underground storage tank which requires notification under Section 9002 of the Solid Waste Disposal Act. Mortgagor shall cause all tenants and any other persons present on or occupying the Mortgaged Property ("Tenants"), employees, agents, contractors and subcontractors of Mortgagor and Tenants, to keep and maintain the Mortgaged Property, including,

UNOFFICIAL COPY

without limitation, the soil and ground water thereof, in compliance with, and not cause or knowingly permit the Mortgaged Property, including the soil and ground water thereof, to be in violation of any federal, state or local laws, ordinances or regulations relating to industrial hygiene or to the environmental conditions thereon (including but not limited to any Environmental Law). Neither Mortgagor nor Tenants nor any employees, agents, contractors and subcontractors of Mortgagor or Tenants or any other persons occupying or present on the Mortgaged Property shall (i) use, generate, manufacture, store or dispose of in violation of Environmental Law on, under or about the Mortgaged Property or transport to or from the Mortgaged Property any Regulated Material, except as such may be required to be used, stored, or transported in connection with the permitted uses of the Mortgaged Property and then only to the extent permitted by law after obtaining all necessary permits and licenses therefor; or (ii) perform, cause to be performed or permit any fill activities or other acts which would in any way destroy, eliminate, alter, obstruct, interfere with, or otherwise affect any Wetlands, as defined in 33 C.F.R. Section 328.3 and in any comparable state and local law, statute, ordinances, rule or regulation ("Wetlands"), in violation of any federal, state or local laws, statutes, ordinances, rules or regulations pertaining to such Wetlands ("Wetlands Law").

(b) Mortgagor shall immediately advise Lender in writing of: (i) any notices (whether such notices are received from the Environmental Protection Agency, or any other federal, state or local governmental agency or regional office thereof) of violation or potential violation which are received by Mortgagor of any applicable federal, state or local laws, ordinances, or regulations relating to any Environmental Law or any Wetlands Law; (ii) any and all enforcement, cleanup, removal or other governmental or regulatory actions instituted, completed or threatened pursuant to any Environmental Law or Wetlands Law; (iii) all claims made or threatened by any third party against Mortgagor or the Mortgaged Property relating to damage, contribution, cost recovery compensation, loss or injury resulting from any Environmental Law or Wetlands Law (the matters set forth in clauses (i), (ii) and (iii) above are hereinafter referred to as "Environmental or Wetlands Claims"); and (iv) discovery by Mortgagor of any occurrence or condition on any real property adjoining, or in the vicinity of the Mortgaged Property that could cause the Mortgaged Property or any part thereof to be classified as in violation of any Environmental Law or Wetlands Law or any regulation adopted in accordance therewith, or to be otherwise subject to any restrictions on the ownership, occupancy, transferability or use of the Mortgaged Property under any Environmental Law or Wetlands Law.

(c) Lender shall have the right but not the obligation to join and participate in, as a party if it so elects, any legal proceedings or actions initiated in connection with any Environmental or Wetlands Claims, and to have its reasonable attorneys' and consultants' fees in connection therewith paid by Mortgagor upon demand.

(d) Mortgagor shall be solely responsible for, and each hereby jointly and severally indemnifies and agrees to defend and hold harmless Lender, its directors, officers, employees, agents, successors and assigns and any other person or entity claiming by, through, or under Lender, from and against, any loss, damage, cost, expense or liability directly or indirectly arising out of or attributable to the use, generation, storage, release, threatened release, discharge, disposal, or presence (whether prior to or during the term of the loan secured by this Mortgage) of Regulated Materials on, under or about the Mortgaged Property (whether by Mortgagor or a predecessor in title or any Tenants, employees, agents, contractors or subcontractors of Mortgagor or any predecessor in title or any third persons at any time occupying or present on the Mortgaged Property), including, without limitation: (i) all foreseeable consequential damages; (ii) the cost of any required or necessary repair, cleanup or detoxification of the Mortgaged Property, including the soil and ground water thereof, and the preparation and implementation of any

UNOFFICIAL COPY

closure, remedial or other required plans; (iii) damage to any Wetlands or natural resources; and (iv) all reasonable costs and expenses incurred by Lender in connection with clauses (i), (ii), and (iii), including but not limited to reasonable attorneys' and consultants' fees; provided, however, that nothing contained in this paragraph shall be deemed to create or give any rights to any person other than Lender and its successors and assigns, it being intended that there shall be no third party beneficiary of such provisions, or preclude Mortgagor from seeking indemnification from, or otherwise proceeding against, any third party including, without limitation, any tenant or predecessor entitled to the Mortgaged Property.

(e) Any costs or expenses reasonably incurred by Lender for which Mortgagor is responsible or for which Mortgagor has indemnified Lender shall be paid to Lender on demand, and failing prompt reimbursement, shall earn interest at the default rate of interest set forth in the Loan Documents (the "Default Rate").

(f) Mortgagor shall take any and all remedial action in response to the presence of any Regulated Materials or Wetlands on, under, or about the Mortgaged Property, required pursuant to any settlement agreement, consent decree or other governmental proceeding; furthermore, Mortgagor shall take such additional steps as may be necessary to preserve the value of Lender's security under the Loan Documents.

(g) Upon Lender's request, Mortgagor shall retain, at Mortgagor's sole cost and expense, a licensed geologist, industrial hygienist or an environmental consultant (referred to hereinafter as the "Consultant") acceptable to Lender to conduct a baseline investigation of the Mortgaged Property for the presence of Regulated Materials or Wetlands ("Environmental Audit"). The Environmental Audit shall be performed in a manner reasonably calculated to discover the presence of Regulated Materials contamination or Wetlands; provided, however, such investigation shall be of a scope and intensity no greater than a baseline investigation conducted in accordance with the general standards of persons providing such services taking into consideration the known uses of the Mortgaged Property and property in the vicinity of the Mortgaged Property and any factors unique to the Mortgaged Property. The Consultant shall concurrently deliver the results of its investigation in writing directly to Mortgagor and Lender. Such results shall be kept confidential by both Mortgagor and Lender unless legally compelled or required to disclose such results or disclosure is reasonably required in order to pursue rights or remedies provided herein or at law.

(h) If Mortgagor fails to pay for or obtain an Environmental Audit as provided for herein, Lender may, but shall not be obligated to, obtain the Environmental Audit, whereupon Mortgagor shall immediately reimburse Lender all its costs and expenses in so doing, together with interest on such sums at the Default Rate.

(i) Mortgagor covenants to reasonably cooperate with the Consultant and to allow entry and reasonable access to all portions of the Mortgaged Property for the purpose of Consultant's investigation. Mortgagor covenants to comply, at its sole cost and expense, with all recommendations contained in the Environmental Audit reasonably required to bring the Mortgaged Property into compliance with all Environmental Laws and Wetlands Laws, including any recommendation for additional testing and studies to detect the quantity and types of Regulated Materials or Wetlands present, if Lender requires the implementation of the same.

7. Mortgage Tax. If at any time any governmental authority, whether federal, state or municipal, or any agency or subdivision of any of them, shall require Internal Revenue or other documentary stamps

UNOFFICIAL COPY

on the Note, this Mortgage or any of the other Loan Documents, or upon the passage of any law of the State of Illinois deducting from the value of land for the purposes of real estate taxation the amount of any lien thereon, or changing in any way the laws for the taxation of mortgages or debts secured by mortgages for federal, state or local purposes, or the manner of the collection of any such taxes so as to impose, in any such event, a tax (other than an income tax) upon or otherwise to substantially and adversely affect the value of this Mortgage, then all indebtedness secured hereby shall become due and payable at the election of Mortgagee thirty (30) days after the mailing of notice of such election to Mortgagor; provided, however, this Mortgage, the Note and the other Loan Documents shall be and remain in effect if Mortgagor lawfully may pay, and does in fact pay, when payable, for such stamps and taxes, including interest and penalties thereon, to or for Mortgagee. Mortgagor further agrees to deliver to Mortgagee, at any time, upon demand, such evidence as may be required by any government agency having jurisdiction in order to determine whether the obligation secured hereby is subject to or exempt from any such tax.

8. Indemnification for Costs. Mortgagor hereby indemnifies Mortgagee and agrees to defend and hold Mortgagee harmless from and against all costs, liabilities and expenses, including but not limited to attorneys' fees and expenses to the fullest extent not then prohibited by applicable law, and costs of any Environmental Audit, title search, continuation of abstract and preparation of survey, incurred by reason of any action, suit, proceeding, hearing, motion or application before any court or administrative body, including an action to foreclose or to collect any indebtedness or obligation secured hereby, or incurred in connection with any extra-judicial collection procedure, in and to which Mortgagee may be or become a party by reason hereof, including, without limitation, any Taking, bankruptcy, probate and administration proceedings, as well as any other proceeding wherein proof of claims required to be filed by law or in which it becomes necessary to defend or uphold the terms of and the lien created by this Mortgage.

9. Taking.

(a) In the event all or any part of the Mortgaged Property shall be damaged or taken as a result of a Taking, either temporarily or permanently, Mortgagor shall assign, transfer and set over unto Mortgagee the Taking Proceeds or any claim for damages for any of the Premises taken or damaged under the power of eminent domain, and agrees that in the event the whole or any part of the Premises is taken by eminent domain proceedings, then all sums awarded as damages for the Taking shall be applied in reduction of the indebtedness secured by this Mortgage, but without imposition of the prepayment premium to such application. Any and all costs and expenses, including, without limitation, reasonable attorneys' fees and expenses to the fullest extent not then prohibited by applicable law, incurred by Mortgagee by reason of any condemnation, threatened condemnation or proceedings thereunder shall be secured hereby and Mortgagor shall reimburse Mortgagee therefor immediately, or Mortgagee shall have the right, at its option, to deduct such costs and expenses from any Taking Proceeds paid to Mortgagee hereunder. In the event that the Premises is wholly condemned, Mortgagee shall receive from Mortgagor and/or from the Taking Proceeds payment of the entire amount of the indebtedness secured by this Mortgage.

(b) Subject to paragraph (a) of this Section, Mortgagor will immediately notify Mortgagee of the actual or threatened commencement of any Taking proceedings affecting all or any part of the Premises, including any easement therein or appurtenance thereof, including severance and consequential damage and change in grade of streets, and will deliver to Mortgagee copies of any and all papers served in connection with any such proceedings. Mortgagor further covenants and agrees to make, execute and deliver to Mortgagee, from time to time upon request, free, clear and discharged of any encumbrances of any kind whatsoever, any and all further assignments or other instruments deemed necessary by Mortgagee for the purpose of validly and sufficiently assigning the Taking Proceeds and all other awards

UNOFFICIAL COPY

and compensation heretofore and hereafter to be made to Mortgagor, including the assignment of any award from the United States Government at any time after the allowance of the claim therefor, the ascertainment of the amount thereof and the issuance of the warrant for payment thereof, for any Taking, either permanent or temporary, under any such proceedings. In the event of a Taking, Mortgagee shall not be limited to the rate of interest paid on the award by the condemning authority but shall be entitled to receive out of the Taking Proceeds interest on the entire unpaid principal sum under the Note and the other Loan Documents at the applicable rate(s) provided therein. Mortgagor hereby assigns to Mortgagee so much of the balance of the Taking Proceeds payable by the condemning authority as is required to pay such interest.

(c) Subject to paragraph (a) of this Section, Mortgagor hereby irrevocably authorizes and appoints Mortgagee its attorney-in-fact, coupled with an interest, to collect and receive any such Taking Proceeds from the authorities making the same, to appear in any proceeding therefor, to give receipts and acquittances therefor, and to apply the same to payment on account of the indebtedness secured hereby whether then matured or not. Mortgagor shall execute and deliver to Mortgagee on demand such assignments and other instruments as Mortgagee may require for such purposes.

10. Estoppel Certificate. Within ten (10) days after request by Mortgagee, Mortgagor shall furnish to Mortgagee a written statement, duly acknowledged, of the aggregate amount of indebtedness secured by this Mortgage, confirming (to the extent true) that no right of offset exists under the Loan Documents or otherwise, and stating either that no defenses exist against the indebtedness secured hereby, or, if such defenses are alleged to exist, the nature thereof, and any other information which Mortgagee may reasonably request.

11. Title Warranty; Title Evidence: Mortgagor hereby confirms the warranties and representations as to title to the Mortgaged Property made in the granting clause of this Mortgage, and agrees to pay the costs of title insurance or other title evidence satisfactory to Mortgagee showing title to the Mortgaged Property to be as herein warranted. In the event of any subsequent change in title to the Mortgaged Property, other than a change expressly permitted by the Loan Documents, Mortgagor agrees to pay the cost of (i) an extension or endorsement to such title evidence showing such change in title, and (ii) changing any and all insurance and other records in connection with the servicing of the loan secured hereby made necessary by such change in title.

12. Mortgagee's Reliance. Mortgagee, in advancing any payment relating to taxes, assessments and other governmental or municipal charges, fines, impositions or liens assessed against the Mortgaged Property, shall have the right to do so according to any bill, statement or estimate procured from the appropriate public office without inquiry into the accuracy or validity thereof. Mortgagee shall have the right to make any such payment whenever Mortgagee, in its sole discretion, shall deem such payment to be necessary or desirable to protect the security intended to be created by this Mortgage. In connection with any such advance, Mortgagee, at its option, shall have the right to and is hereby authorized to obtain, at Mortgagor's sole cost and expense, a date down or continuation endorsement to the loan policy of title insurance insuring this Mortgage prepared by a title insurance company of Mortgagee's choice.

13. Default. Each of the following events shall be deemed to be an "Event of Default" hereunder:

(a) Mortgagor shall fail to make payment of any sum of money due and payable under this Mortgage after the date such payment is due as herein provided, or of the indebtedness

UNOFFICIAL COPY

evidenced by the Note, or any sum of money due and payable under any of the other Loan Documents on the date when the same is due and payable or within any applicable grace period; or

(b) Mortgagor shall file a voluntary petition in bankruptcy or under any bankruptcy act or similar law, state or federal, whether now or hereafter existing, or make an assignment for the benefit of creditors or file an answer admitting insolvency or inability to pay its or their debts generally as they become due, or shall fail to obtain a vacation or stay of any such proceedings which are involuntary within sixty (60) days after the institution of such proceedings, as hereinafter provided; or

(c) Any plan of liquidation or reorganization is filed by or on behalf of Mortgagor or either in any bankruptcy, insolvency or other judicial proceeding, or a trustee or a receiver shall be appointed for the Mortgaged Property in any involuntary proceeding and such trustee or receiver shall not be discharged or such jurisdiction relinquished, vacated or stayed on appeal or otherwise within sixty (60) days after the appointment thereof; or

(d) Failure of Mortgagor to commence, diligently pursue and/or complete actions as and when provided in Paragraphs 2, 5 or 6 above; or

(e) Any sale or transfer of the Mortgaged Property in violation of Paragraph 18 of this Mortgage; or

(f) The occurrence of an involuntary transfer under subsection 26(d) of this Mortgage; or

(g) Any violation of the representations and warranties, or the filing of formal charges or commencement of proceedings as contemplated by Paragraph 33 of this Mortgage; or

(h) Default shall be made in the due observance or performance of any of the other covenants, agreements or conditions required to be kept, performed or observed by Mortgagor under this Mortgage and such default is not cured within thirty (30) days after written notice thereof has been delivered to Mortgagor by Mortgagee; provided, however if such default cannot reasonably be cured within the thirty (30)-day period, and Mortgagor promptly commences such cure within the thirty (30)-day period, then within such additional period during which Mortgagor diligently pursues and prosecutes such cure to completion and so long as the value of the Mortgaged Property is not impaired; or

(i) Default shall be made in the due observance or performance of any of the covenants, agreements or conditions required to be kept, performed or observed by Mortgagor or any other party under the Note or any of the other Loan Documents, and such default is not cured within the applicable grace period, if any, expressly provided for therein;

then and upon any such Event of Default, the entire amount of the indebtedness hereby secured, shall, at the option of Mortgagee, become immediately due and payable, without execution or other process and without further notice or demand, all of which are hereby expressly waived. Upon and after any such Event of Default, the indebtedness hereby secured shall, at the option of Mortgagee, bear interest at the Default Interest Rate (as defined in the Note), payable on demand. Acceleration of maturity, once claimed hereunder by Mortgagee, may, at the option of Mortgagee, be rescinded by written

UNOFFICIAL COPY

acknowledgment to that effect by Mortgagee, but the tender and acceptance of partial payments alone shall not in any way affect or rescind such acceleration of maturity, nor extend or affect the grace period, if any.

14. Additional Rights upon Default. Without limiting the generality of the foregoing, Mortgagee shall have the following additional rights during the continuance of any Event of Default:

(a) Mortgagee shall have the immediate right to collect, as the same becomes due, any and all unearned insurance premiums or refunds of insurance premiums, due or to become due, and all proceeds and other benefits to be received under insurance policies of every nature affecting or covering the Mortgaged Property, any and all refunds of taxes, assessments and other charges heretofore or hereafter paid on or with respect to the Mortgaged Property, together with all rents and profits of the Mortgaged Property, all of which having been hereby assigned to Mortgagee. In addition, Mortgagee shall have the right, but shall not be obligated, without notice or demand, to enter immediately upon and take possession of the Mortgaged Property, together with all documents, books, records, papers and accounts of Mortgagor relating to the Mortgaged Property or any portion thereof without further consent or assignment by Mortgagor and shall have the right to cause to be conducted environmental investigations and analyses, to operate, manage, lease and control the Mortgaged Property and conduct the business thereof, if any, either personally or by its agents, and terminate any management agreements, contracts, agents or managers responsible for the management of the Mortgaged Property, and with full power to use such measures, legal or equitable, as Mortgagee may deem proper or necessary to enforce the payment or security of the rents, issues and profits of the Mortgaged Property.

(b) Mortgagor hereby grants full power and authority to Mortgagee as follows: to exercise each and every one of the rights, privileges and powers herein granted at any and all times hereafter, without notice to Mortgagor; to make all alterations, additions, improvements, renovations, replacements and repairs as Mortgagee may deem proper; to demolish any part or all of the Improvements which, in the judgment of Mortgagee, may be in unsafe condition and dangerous to life or property; to remodel any or all of the Improvements so as to make the same available in whole or in part for business, commercial, retail, multiple dwelling or other purposes; to lease the Mortgaged Property, or any part thereof to Mortgagor or any other person or persons, on such terms and for such periods of time as Mortgagee may deem proper, and the provisions of any lease made by Mortgagee pursuant hereto shall be valid and binding upon Mortgagor, notwithstanding the fact that Mortgagee's right of possession may terminate or this Mortgage may be satisfied of record prior to the expiration of the term of such lease; and to collect and receive all of the rents, issues, profits and all other amounts past due or to become due to Mortgagor and to apply the same in such order of priority as Mortgagee may determine to all necessary charges and expenses in connection with the Mortgaged Property, or for interest, principal, whether matured or not, taxes, water charges and assessments, insurance premiums and any advances made by Mortgagee for improvements, alterations or repairs for the account of Mortgagor or on account of the indebtedness hereby secured. Neither the taking of possession, nor the collection of rents by Mortgagee as described above shall be construed to be an affirmation of any lease of the Mortgaged Property or any part thereof, and Mortgagee or any other purchaser at any foreclosure sale shall have the right to exercise the right to terminate any such lease as though such taking of possession and collection of rents had not occurred, subject, however, to the terms of any subordination, nondisturbance and attornment agreement which may be in effect from time to time with respect to any part of the Mortgaged Property.

(c) Without limiting the foregoing, Mortgagor hereby irrevocably appoints Mortgagee its attorney-in-fact, coupled with an interest, upon an Event of Default, to institute summary proceedings

UNOFFICIAL COPY

against any lessee of the Mortgaged Property who fails to comply with the provisions of his or its lease. If Mortgagor is occupying all or any part of the Mortgaged Property upon an Event of Default, it is hereby agreed that Mortgagor will either (i) immediately surrender possession of the Mortgaged Property to Mortgagee and vacate the Mortgaged Property so occupied by Mortgagor, or (ii) pay a reasonable rental, determined by Mortgagee, for the use thereof, monthly in advance, to Mortgagee, and, in default of so doing, may be dispossessed by summary proceedings or otherwise.

(d) To the extent permitted by law, Mortgagee is hereby authorized and empowered to sell or cause the Mortgaged Property to be sold at public or private auction, and to convey same by execution and delivery to the purchaser at such sale a good and sufficient deed of conveyance, to retain out of the proceeds of such sale the amounts due under the terms of this Mortgage and the other Loan Documents, the costs and charges of such sale and attorneys' fees and expenses, all to the fullest extent not prohibited by applicable law, amounts due to any other person asserting a lien or otherwise claiming an interest in the Mortgaged Property and to deliver the surplus moneys, if any, to Mortgagor.

(e) To the extent permitted by law, Mortgagee shall be entitled to the appointment of a receiver of the Mortgaged Property as a matter of right and without notice, which is hereby expressly waived, with power to collect the rents, issues and profits of the Mortgaged Property, due and to become due without regard to the value of the Mortgaged Property and regardless of whether Mortgagee has an adequate remedy at law. Mortgagor, for itself and its successors and assigns, hereby waives any and all defenses to the application for a receiver as set forth above and hereby specifically consents to such appointment without notice, but nothing herein contained is to be construed to deprive Mortgagee of any other right, remedy or privilege it may now have, or may hereafter obtain, to have a receiver appointed. From such rents, issues and profits collected by the receiver or by Mortgagee prior to a foreclosure sale, there shall be deducted the cost of collection thereof, including, without limitation, real estate commissions, if any, for new leases, if any, receiver's fees, attorney's fees and expenses to the fullest extent not prohibited by applicable law, and any court costs; the remainder shall be applied against the indebtedness hereby secured.

(f) Mortgagee shall have the right to bring foreclosure proceedings hereunder and whether or not any order or decree shall have been entered therein and to the fullest extent not prohibited by applicable law, a reasonable sum shall be allowed for Mortgagees' attorneys' fees and expenses in such proceeding. There shall be included in any judgment or decree foreclosing this Mortgage and be paid out of any rents, issues and profits or out of the proceeds of any sale made in pursuance of any such judgment or decree: (i) all costs and expenses of such suit or suits, advertising, sale and conveyance, including attorneys' fees and expenses to the fullest extent not prohibited by applicable law, costs of documentary evidence and costs of any abstract, examination of title and title insurance; (ii) all moneys advanced by Mortgagee, if any, for any purpose authorized in this Mortgage with interest as herein provided; (iii) all accrued interest remaining unpaid on the indebtedness hereby secured; and (iv) the principal balance of the indebtedness hereby secured. The surplus proceeds, if any, shall be paid to Mortgagor or as the court may direct.

15. Waiver. Mortgagor shall not, and anyone claiming through or under Mortgagor shall not, set up, claim or seek to take advantage of any appraisal, valuation, stay, extension or redemption laws now or hereafter in force, in order to prevent or hinder the enforcement or foreclosure of this Mortgage, or the final and absolute sale of the Mortgaged Property, or the final and absolute placing into possession thereof, immediately after such sale, of the purchaser or purchasers thereof, and Mortgagor, for itself and all who may claim through or under it, waive, if and to the fullest extent not prohibited by applicable law, all benefits and protections under such appraisal, valuation, stay, extension and redemption laws.

UNOFFICIAL COPY

16. Marshalling of Assets. Mortgagor hereby waives for itself and, to the fullest extent not prohibited by applicable law, for any subsequent lienor, any right to apply for an order, decree, judgment, or ruling requiring or providing for a marshalling of assets which would require Mortgagee to proceed against certain of the Mortgaged Property before proceeding against any of the other Mortgaged Property. Mortgagee shall have the right to proceed, in its sole discretion, against the Mortgaged Property in such order and in such portions as Mortgagee may determine, without regard to the adequacy of value or other liens on any such Mortgaged Property. No such action shall in any way be considered as a waiver of any of the rights, benefits, liens or security interests created hereby or by any of the Loan Documents.

17. Subrogation. If the indebtedness hereby secured or any part thereof, including any amounts advanced by Mortgagee, are used directly or indirectly to pay off, discharge or satisfy, in whole or in part, any prior lien or encumbrance upon the Mortgaged Property or any part thereof, then Mortgagee shall be subrogated to such other liens or encumbrances and to any additional security held by the holder thereof and shall have the benefit of the priority of all of the same, whether or not any such lien, encumbrance or additional security is canceled of record upon such payment or advancement or otherwise, and in addition to the security afforded by this Mortgage and the other Loan Documents.

18. Sale or Transfer. Mortgagor, without the prior written consent of Mortgagee, shall not create, effect, consent to, attempt, contract for, agree to make, suffer or permit any conveyance, sale, assignments, transfer, lien, pledge, encumbrance, mortgage, security interest or alienation of all or any portion of, or any interest in, the Mortgaged Property or the Mortgagor, whether effected directly, indirectly, voluntarily, involuntarily, by operation of law or otherwise. If any of the foregoing shall occur without Mortgagee's prior written consent, then the same shall conclusively be deemed to increase the risk to Mortgagee and immediately constitute an Event of Default hereunder.

19. Mortgagee's Cost of Collection or Performance. If any action or proceeding is commenced by or against Mortgagee, including, without limitation, condemnation proceedings, proceedings involving the foreclosure of this Mortgage or of any other liens or encumbrances, the enforcement or interpretation of contracts, leases or other documents relating to the Mortgaged Property, or any other proceeding of any nature, legal or otherwise, affecting the Mortgage Property or any part thereof, or the title thereto, or the validity or priority of the lien of this Mortgage, Mortgagee shall have the right to appear, defend, prosecute, retain counsel, and take such action as Mortgagee shall determine. In addition, upon an Event of Default hereunder, Mortgagee is authorized, but not obligated, to discharge Mortgagor's obligations hereunder. Mortgagor shall pay to Mortgagee, promptly upon demand, all costs, including, without limitation, "late charges" payable under the Note, out-of-pocket expenses and attorneys' fees and expenses, to the fullest extent not prohibited by applicable law, and the costs of any environmental examination and analysis, title examination, supplemental examination of title or title insurance, that may be incurred by Mortgagee in connection with any proceedings affecting the Mortgaged Property, or any part thereof, to cause the enforcement of the covenants or agreements of Mortgagor contained herein or in the any of other Loan Documents, or with or without the institution of an action or proceeding, or that may otherwise be incurred by Mortgagee in the performance of any other action by Mortgagee authorized by this Mortgage. All such costs, expenses and attorneys' fees and expenses, and any other moneys advanced by Mortgagee to protect the Mortgaged Property shall, to the fullest extent not prohibited by applicable law, bear interest from the date of payment thereof at the Default Rate until repaid by Mortgagor, and shall be repaid by Mortgagor to Mortgagee immediately upon demand. Mortgagor hereby agrees that if a default is made in the payment of the indebtedness secured hereby when due, pursuant to the terms hereof, even if the indebtedness secured hereby shall not have been declared due and payable upon any Event of Default, Mortgagee shall be entitled to receive interest thereon at the

UNOFFICIAL COPY

Default Rate, to be computed from the due date through actual receipt and collection of the amount then in default. The preceding sentence shall not be construed as an agreement or privilege to extend the time for performance of any obligation under the Mortgage or any of the other Loan Documents, nor as a waiver of any other right or remedy accruing to Mortgagee by reason of any such default.

20. Partial Release. Mortgagee, without notice, and without regard to any consideration paid therefor, and notwithstanding the existence at the time of any inferior liens thereon, shall have the right to release (a) any part of the security for the indebtedness secured hereby, including, without limitation, the interest under this Mortgage in and to any of the Mortgaged Property, or (b) any person liable for any indebtedness secured hereby, without affecting the priority of any part of the security and the obligations of any person not expressly released, and shall have the right to agree with any party remaining liable for such indebtedness or having any interest therein to extend the time for payment of any part or all of the indebtedness secured hereby. Such agreement shall not in any way release or impair the lien hereof, but shall extend the lien hereof as against all parties having any interest in such security.

21. Non-Waiver. In the event Mortgagee (a) releases, as aforesaid, any part of such security or any person liable for any indebtedness secured hereby; (b) grants an extension of time for any payments of the indebtedness secured hereby; (c) takes other or additional security for the payment thereof; (d) accepts partial payments; or (e) otherwise exercises or waives or fails to exercise any right granted herein or in any of the other Loan Documents, no such act or omission shall constitute a waiver of any default, or extend or affect the grace period, if any, release Mortgagor, subsequent owners of the Mortgaged Property or any part thereof, or makers or guarantors of the Note, this Mortgage, or any of the other Loan Documents, or preclude Mortgagee from exercising any right, power or privilege herein granted or intended to be granted for any Event of Default.

22. No Merger of Estates. There shall be no merger of the lien, security interest or other estate or interest created by this Mortgage with the fee estate in the Mortgaged Property by reason that any such interest created by this Mortgage may be held, directly or indirectly, by or for the account of any person who shall own the fee estate or any other interest in the Mortgaged Property. No such merger shall occur unless and until all persons at the time having such concurrent interests shall join in a written instrument effecting such merger, and such instrument shall be duly recorded.

23. Further Assurances. Upon request of Mortgagee, Mortgagor shall execute, acknowledge and deliver to Mortgagee, in form satisfactory to Mortgagee, financing statements covering as Collateral any personal property owned by the Mortgagor, which, in the sole opinion of Mortgagee, is essential to the operation of any of the Mortgaged Property, and any supplemental mortgage, security agreement, financing statement, assignment of leases, rents, income and profits from the Mortgaged Property, affidavit, continuation statement or certification as Mortgagee may request in order to protect, preserve, maintain, continue and extend the lien and security interest hereunder or the priority hereof. Mortgagor hereby irrevocably appoints Mortgagee its attorney-in-fact, coupled with an interest, and authorizes, directs and empowers such attorney, at its option, to execute, acknowledge and deliver on behalf of Mortgagor, its successors and assigns, any such documents if Mortgagor shall fail so to do within five (5) days after request by Mortgagee. Mortgagor shall pay to Mortgagee on demand all costs and expenses incurred by Mortgagee in connection with the preparation, execution, recording and filing of any such documents.

24. Application of Proceeds. All payments made by Mortgagor under the Note, this Mortgage or any of the other Loan Documents and received by Mortgagee shall be applied by Mortgagee to the

UNOFFICIAL COPY

following items and in such order as Mortgagee may determine in its sole discretion: (a) advances by Mortgagee for payment of taxes, assessments, insurance premiums and other costs and expenses, as set forth in this Mortgage, the Note or any of the other Loan Documents; (b) any amounts which may be overdue under the Note, this Mortgage or any of the other Loan Documents; (c) interest on the indebtedness secured hereby; and (d) outstanding principal under the Note.

25. Mortgagee's Subordination Right. At the option of Mortgagee, this Mortgage shall become subject and subordinate, but not with respect to the priority of entitlement to Proceeds of a Casualty or any Taking Proceeds, to any and all leases of all or any part of the Mortgaged Property, upon the execution by Mortgagee and recording of a unilateral declaration to that effect at any time hereafter, in the Office of the Recorder of the County in which Mortgaged Property is located.

26. UCC Security Agreement. This Mortgage is hereby deemed to be as well a Security Agreement and creates a security interest in and to the Collateral securing the indebtedness secured by this Mortgage. Without derogating any of the provisions of this instrument, Mortgagee to the extent permitted by law hereby:

(a) grants to Mortgagee a security interest in and to all Collateral, including without limitation the items referred to above and the tax and insurance escrow payments and deposits made by Mortgagor pursuant to Section 2 hereof, together with all additions, accessions and substitutions and all similar property hereafter acquired and used or obtained for use on or in connection with the Mortgaged Property. The proceeds of the Collateral are intended to be secured hereby; however, such intent shall never constitute an expressed or implied consent on the part of Mortgagee to the sale of any or all Collateral;

(b) agrees that the security interest hereby granted shall secure the payment of the indebtedness specifically described herein together with payment of any future debt or advancement owing by Mortgagor to Mortgagee with respect to the Mortgaged Property;

(c) except as otherwise provided herein, agrees not to remove from the Mortgaged Property, sell, convey, mortgage or grant a security interest in, or otherwise dispose of or encumber, any of the Collateral or any of the Mortgagor's right, title or interest therein, without first obtaining Mortgagee's written consent; Mortgagee shall have the right, at its sole option, to require Mortgagor to apply the proceeds from the disposition of Collateral in reduction of the indebtedness secured hereby;

(d) agrees that if Mortgagor's rights in the Collateral are voluntarily or involuntarily transferred, whether by sale, creation of a security interest, attachment, levy, garnishment or other judicial process, without the prior written consent of Mortgagee, such transfer shall constitute an Event of Default hereunder;

(e) agrees that upon or after the occurrence of any Event of Default, Mortgagee shall have all rights and remedies contemplated hereunder, including, without limitation, the right to take possession of the Collateral, and for this purpose Mortgagee shall have the right to enter upon any premises on which any or all of the Collateral is situated without being deemed guilty of trespass and without liability for damages thereby occasioned, and take possession of and operate the Collateral or remove it therefrom. Mortgagee shall have the further right, as Mortgagee may determine, to repair, refurbish or otherwise prepare the Collateral for sale, lease or other use or disposition, and to sell at public or private sale or otherwise dispose of, lease or utilize the Collateral and any part thereof in any manner authorized or

UNOFFICIAL COPY

permitted by law and to apply the proceeds thereof toward payment of any costs and expenses incurred by Mortgagee including, to the fullest extent not prohibited by applicable law, attorneys' fees and expenses, and toward payment of the indebtedness secured hereby, in such order and manner as Mortgagee may determine. To the fullest extent not prohibited by applicable law, Mortgagor expressly waives any notice of sale or other disposition of the Collateral and any other rights or remedies of a debtor or formalities prescribed by law relative to a sale or disposition of the Collateral or to exercise any other right or remedy existing after an Event of Default. To the extent any notice is required and cannot be waived, Mortgagor agrees that if such notice is deposited for mailing, postage prepaid, certified or registered mail, to the owner of record of the Mortgaged Property, directed to the such owner at the last address actually furnished to Mortgagee at least five (5) days before the time of sale or disposition, such notice shall be deemed reasonable and shall fully satisfy any requirements for giving of such notice;

(f) agrees, to the extent not prohibited by law and without limiting any rights and privileges herein granted to Mortgagee, that Mortgagee shall have the right to dispose of any or all of the Collateral at the same time and place upon giving the same notice, if any, provided for in this Mortgage, and in the same manner as the nonjudicial foreclosure sale provided under the terms and conditions of this Mortgage; and

(g) authorizes Mortgagee to file, in the jurisdiction where this agreement will be given effect, financing statements covering the Collateral and the proceeds of the Collateral. At the request of Mortgagee, Mortgagor will join Mortgagee in executing one or more such financing statements pursuant to this Mortgage. To the extent permitted by law, a carbon, photographic or other reproduction of this instrument or any financing statement executed in accordance herewith shall be sufficient as a financing statement.

27. Management. Mortgagee shall have the right to give or withhold its prior consent to any contract or other arrangement for the management of all or any part of the Mortgaged Property. Mortgagee shall have the right, exercisable at its option upon an Event of Default or an event which, with the passage of time, the giving of notice, or both, would constitute an Event of Default, to terminate the rights of any party engaged to manage the Mortgaged Property and any and all other agreements or contracts relating to the operation or management of the Mortgaged Property, if, in Mortgagee's sole discretion, the management and/or operation of the Mortgaged Property is unsatisfactory.

28. Notices. Any notice, demand, request or other communication which any party hereto may be required or may desire to give hereunder shall be in writing and shall be deemed to have been properly given (i) if hand delivered, or if sent by telecopy, effective upon receipt, or (ii) if delivered by overnight courier service, effective on the day following delivery to such courier service or (iii) if mailed by United States registered or certified mail, postage prepaid, return receipt requested, effective two (2) business days after deposit in the United States mails addressed as follows:

If to Mortgagor:

Aleksei Nakonetchny
1351 N Ashland Inc.
2134 West Chicago Avenue
Chicago, Illinois 60622

UNOFFICIAL COPY

If to Mortgagee:

Diamond Bank, FSB
100 West North Avenue
Chicago, Illinois 60610
Attn: Vice President

or at such other address or to such other addressee as the party to be served with notice may have furnished in writing to the party seeking or desiring to serve notice as a place for the service of notice.

29. Loan Documents. The term "Loan Documents" as used herein collectively refers to (a) the Note, (b) this Mortgage, (c) the Assignment, (d) all Uniform Commercial Code Financing Statements executed by Mortgagor, as debtor, in favor of Mortgagee, as secured party, in connection with the Mortgaged Property, (e) an Indemnity Agreement, (f) a Guaranty Agreement and (g) any and all other documents and/or agreements evidencing, securing or relating to the Loan

30. Financial Reporting. As soon as available, (a) and in any event not later than ninety (90) days after Mortgagor's fiscal year end, Mortgagor shall deliver to Mortgagee its annual Federal Income Tax Returns (or the application for the extension thereof and the return itself promptly after filing), financial statements, certified rent roll for the Mortgage Property, and annual operating statement for the Mortgaged Property for such fiscal year, and (b) and in any event not later than ninety (90) days after each guarantor's fiscal year end, Mortgagor shall deliver to Mortgagee each guarantor's financial statement and Federal Income Tax Returns (or the application for the extension thereof and the return itself promptly after filing) for such fiscal year.

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

32. Advances. (a) This Mortgage shall secure the indebtedness of Mortgagor to Mortgagee that is evidenced, permitted or secured by the Loan Documents, including future advances made by Mortgagee to the Mortgagor. All of such indebtedness, including future advances, shall be a lien from the time that this Mortgage is recorded with the Recorder of the County in which the Mortgaged Property is located as provided in 735 ILCS 5/15-1302(b).

(b) The maximum amount of indebtedness secured by this Mortgage shall not exceed two (2) times the Loan Amount.

(c) In addition to the loan advances referred to in subsection (a) above, Mortgagee shall have the right, but not the obligation, to make protective advances with respect to the Mortgaged Property for the payment of taxes, assessments, insurance premiums, repairs, maintenance and other costs incurred in the protection of the Mortgaged Property, and such protective advances, together with interest thereon at the Default Rate from the date of each such advance until it is repaid in full, shall be secured by this

UNOFFICIAL COPY

Mortgage with priority running from the time of the recording of this Mortgage with the Recorder of the County in which the Mortgaged Property is located pursuant to 735 ILCS 5/15-1302(b)(5).

33. Survival and Conflicts. The execution and delivery of this Mortgage and the other Loan Documents shall in no way merge or extinguish the Loan Commitment or the terms and conditions set forth therein, which shall survive the closing of the loan and delivery of this Mortgage. In the event of any inconsistency or conflict between any provisions of the Loan Commitment and the other Loan Documents, the provisions of the other Loan Documents shall prevail and apply.

34. Anti-Forfeiture. Mortgagor hereby further expressly represents and warrants to Mortgagee that to the best of Mortgagor's knowledge there has not been committed by Mortgagor or any other person involved with the Mortgaged Property or the Mortgagor any act or omission affording the federal government or any state or local government the right and/or remedy of forfeiture as against the Mortgaged Property or any part thereof or any monies paid in performance of its obligations under the Note or under any of the other Loan Documents, and Mortgagor hereby covenants and agrees not to commit, permit or suffer to exist any act or omission affording such right and/or remedy of forfeiture. In furtherance thereof, Mortgagor hereby indemnifies Mortgagee and agrees to defend and hold Mortgagee harmless from and against any loss, damage or other injury, including without limitation, attorneys' fees and expenses, to the fullest extent not prohibited by applicable law, and all other costs and expenses incurred by Mortgagee in preserving its lien, security interest and other rights and interests in the Mortgaged Property and any additional collateral under any of the Loan Documents in any proceeding or other governmental action asserting forfeiture thereof, by reason of, or in any manner resulting from, the breach of the covenants and agreements or the warranties and representations set forth in the preceding sentence. Without limiting the generality of the foregoing, the filing of formal charges or the commencement of proceedings against Mortgagor, Mortgagee, any guarantor, any additional collateral under any of the Loan Documents or all or any part of the Mortgaged Property under any federal or state law in respect of which forfeiture of the Mortgaged Property or any part thereof or of any monies paid in performance of Mortgagor's obligations under the Loan Documents is a potential result shall, at the election of the Mortgagee in its absolute discretion, constitute an Event of Default hereunder without notice or opportunity to cure.

35. Miscellaneous. The Mortgaged Property is located in the State of Illinois, and this Mortgage and the rights and indebtedness secured hereby shall, without regard to the place of contract or payment, be construed and enforced according to the laws of Illinois. Nothing herein contained nor any transaction related hereto shall be construed or so operate as to require Mortgagor to do any act contrary to law, and if any clauses or provisions herein contained operate or would prospectively operate to invalidate this Mortgage, in whole or in part, or any of the Mortgagor's obligations hereunder, such clauses and provisions only shall be held void and of no force or effect as though not herein contained, and the remainder of this Mortgage shall remain operative and in full force and effect. All of the obligations, rights and covenants herein contained shall run with the land, and shall bind and inure to the benefit of Mortgagor, its successors and permitted assigns, and Mortgagee and any subsequent holder of the Note. Whenever used, the singular number shall include the plural and the plural numbers shall include the singular, and the use of any gender shall include all genders, all as the context may reasonably require.

If any provision of this Mortgage is inconsistent with any applicable provision of the Illinois Mortgage Foreclosure Law, 735 ILCS 5/15-101, *et seq.* (the "Act"), the provisions of the Act shall take precedence over the provisions of this Mortgage, but the Act shall not invalidate or render unenforceable any other provision of this Mortgage that can be fairly construed in a manner consistent with the Act.

UNOFFICIAL COPY

Without in any way limiting any of the Mortgagee's rights, remedies, powers and authorities provided in this Mortgage or otherwise, and in addition to all of such rights, remedies, powers and authorities, Mortgagee shall also have all rights, remedies, powers and authorities permitted to the holder of a mortgage under the Act, as the same may be amended from time to time. If any provision of this Mortgage shall grant to Mortgagee any rights, remedies, powers or authorities upon default of the Mortgagor which are more limited than what would be vested in Mortgagee under the Act in the absence of said provision, Mortgagee shall have such rights, remedies, powers and authorities that would be otherwise vested in it under the Act. Without limitation, all expenses (including reasonable attorneys fees and costs) incurred by Mortgagee to the extent reimbursable under 735 ILCS 5/15-1510 and 5/15-1512, or any other provision of the Act, whether incurred before or after any judgment of foreclosure, shall be added to the indebtedness secured by this Mortgage and included in the judgment of foreclosure.

36. UCC Financing Statement/Fixture Filing. This Mortgage is intended to be a UCC Financing Statement/Fixture filing within the purview of section 9-502 of the Uniform Commercial Code with respect to the collateral and the goods described herein, which goods are and may become fixtures relating to the Premises. The addresses of the Mortgagor as Debtor and the Mortgagee as Secured Party are set forth herein. This Mortgage is to be filed for record with the Recorder of Deeds of the county or counties where the Premises are located.

MORTGAGOR HEREBY, AND MORTGAGEE BY ITS ACCEPTANCE HEREOF, EACH WAIVES THE RIGHT OF A JURY TRIAL IN EACH AND EVERY ACTION ON THIS MORTGAGE OR ANY OF THE OTHER LOAN DOCUMENTS, IT BEING ACKNOWLEDGED AND AGREED THAT ANY ISSUES OF FACT IN ANY SUCH ACTION ARE MORE APPROPRIATELY DETERMINED BY THE COURTS; FURTHER, MORTGAGOR HEREBY CONSENTS AND SUBJECTS ITSELF TO THE JURISDICTION OF COURTS OF THE STATE OF ILLINOIS AND, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, TO THE VENUE OF SUCH COURTS IN THE COUNTY IN WHICH THE MORTGAGED PROPERTY IS LOCATED.

PROVIDED, THAT THE CONDITION OF THIS MORTGAGE IS SUCH that if Mortgagor shall pay all of the indebtedness secured hereby, then thereupon this Mortgage shall be released of record by Mortgagee, at the cost and expense of Mortgagor, and thereafter the Mortgage shall be void. The foregoing shall not affect the covenants, agreements, indemnifications and warranties in this Mortgage which expressly survive the release hereof, which shall remain in full force and effect.

IN WITNESS WHEREOF, Mortgagor has caused this Mortgage to be duly executed and delivered as of the date first above written.

MORTGAGOR:

1351 N ASHLAND INC., an Illinois corporation

By: _____
 Aleksei Nakonetchny, its President

UNOFFICIAL COPY

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

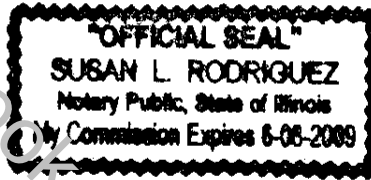
I, SUSAN L. RODRIGUEZ, a Notary Public in and for said County in the State aforesaid, DO HEREBY CERTIFY that Aleksei Nakonetchny, as President of 1351 N ASHLAND INC., an Illinois corporation, personally know to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed and delivered the said instrument as his own free and voluntary act, and as the free and voluntary act of 1351 N ASHLAND INC., an Illinois corporation, for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal this 15TH day of November, 2006.

Susan Rodriguez
Notary Public

My Commission Expires:

6-8-09



Property of Cook County Clerk's Office

UNOFFICIAL COPY

EXHIBIT A

LEGAL DESCRIPTION

LOT 47 OF BLOCK 11 IN SOUTHWORTH'S SUBDIVISION OF THE NORTH 1/2 OF BLOCK 11 IN CANAL TRUSTEE'S SUBDIVISION OF THE WEST 1/2 OF SECTION 5, TOWNSHIP 39 NORTH, RANGE 14 EAST OF THE THIRD PRINCIPAL MERIDIAN (EXCEPT THE SOUTH EAST 1/4 OF THE NORTH WEST 1/4 AND THE NORTH EAST 1/4 OF THE SOUTH WEST 1/4) IN COOK COUNTY, ILLINOIS.

PIN NO.: 17-05-115-003-0000

COMMONLY KNOWN AS: 1351 NORTH ASHLAND, CHICAGO, ILLINOIS 60622

Property of Cook County Clerk's Office

UNOFFICIAL COPY

EXHIBIT B

PERMITTED EXCEPTIONS

1. General real estate taxes for the first installment tax year 2006 and each year thereafter not yet due and payable.
2. Exception letter _____, contained on Schedule B of Chicago Title Insurance Company Commitment No. _____ dated _____.

Property of Cook County Clerk's Office

UNOFFICIAL COPY

EXHIBIT B

PERMITTED EXCEPTIONS

1. General real estate taxes for the first installment tax year 2006 and each year thereafter not yet due and payable.
2. Exception no. 11, contained on Schedule B of Freedom Title Corporation Commitment No. 6709016 dated October 30, 2006.

Property of Cook County Clerk's Office