

# UNOFFICIAL COPY

## Illinois Anti-Predatory Lending Database Program

### Certificate of Exemption



Doc#: 0920445059 Fee: \$90.00  
Eugene "Gene" Moore RHSP Fee: \$10.00  
Cook County Recorder of Deeds  
Date: 07/23/2009 11:32 AM Pg: 1 of 28

**Report Mortgage Fraud**  
800-532-8765

The property identified as: **PIN: 08-35-404-004-0000**

**Address:**

**Street:** 2395 Arthur Avenue

**Street line 2:**

**City:** Elk Grove Village

**State:** IL

**ZIP Code:** 60007

**Lender:** Wilmington Trust FSB, as Agent

**Borrower:** YRC Inc.

**Loan / Mortgage Amount:** \$300,000,000.00

This property is located within Cook County and is exempt from the requirements of 765 ILCS 77/70 et seq. because it is commercial property.

**Box 400-CTCC**

**Certificate number:** B4FF782B-6A15-4CC5-8F7D-CBA0E61B5D85

**Execution date:** 07/14/2009

8457937-A - Da-Tms (info)

Property of Cook County Clerk's Office

# UNOFFICIAL COPY

8457937-A - DA-Tms (info)

Property of Cook County Clerk's Office

This document was prepared by and after recording should be returned to:

Matthew D. Vandermyde, Esq.  
Skadden, Arps, Slate, Meagher & Flom LLP  
300 South Grand Avenue, Suite 3400  
Los Angeles, California 90071

Site No. 612  
Cook County, State of Illinois

## MORTGAGE, SECURITY AGREEMENT, FINANCING STATEMENT, FIXTURE FILING AND ASSIGNMENT OF RENTS AND LEASES

THIS MORTGAGE, SECURITY AGREEMENT, FINANCING STATEMENT, FIXTURE FILING AND ASSIGNMENT OF RENTS AND LEASES (as the same may be amended, restated, supplemented or otherwise modified from time to time, this "Mortgage") is executed as of the date acknowledged below, but is granted and made effective as of the 14th day of July, 2009, by YRC INC., a Delaware corporation, f/k/a Yellow Roadway

# UNOFFICIAL COPY

Corp., a Delaware corporation, f/k/a Roadway Express, Inc., a Delaware corporation, successor by merger to Yellow Transportation, Inc., an Indiana corporation, f/k/a Yellow Freight System, Inc., an Indiana corporation ("Mortgagor"), having its principal place of business at c/o YRC Worldwide Inc., 10990 Roe Avenue, Overland Park, Kansas 66211, Attention: Treasurer, to WILMINGTON TRUST FSB, a federal savings bank, having an office at c/o WT SP Services, 3993 Howard Hughes Parkway, Suite 250, Las Vegas, Nevada 89169-6754, Attention: Rebecca Howell, as sub-agent (together with its successors and assigns, in such capacity, "Mortgagee") for Wilmington Trust Company, a Delaware banking corporation, as "Agent" under the Deferral Agreement (as hereinafter defined) (together with its successors and assigns, in such capacity, "Agent"), for Mortgagee's own benefit, for the benefit of Agent and for the benefit of the "Funds" as defined in the Deferral Agreement. Except as otherwise provided herein, all capitalized terms used but not defined herein shall have the respective meanings given to them in the Deferral Agreement.

## WITNESSETH:

WHEREAS, YRC Inc., a Delaware corporation ("YRC"), USF Holland Inc., a Michigan corporation ("Holland"), New Penn Motor Express, Inc., a Pennsylvania corporation ("New Penn") and USF Reddaway Inc., an Oregon corporation ("Reddaway", and together with YRC, Holland and New Penn, each an "Obligor", and collectively, "Obligors"), the Funds and Agent have entered into that certain Contribution Deferral Agreement dated June 17, 2009 (as the same may be amended, restated, supplemented or otherwise modified from time to time, the "Deferral Agreement");

WHEREAS, pursuant to and following satisfaction of the conditions set forth in the Deferral Agreement, the Funds have deferred the time of payment required of Obligors of certain contributions due to the Funds from Obligors under the CBA and have agreed to extend certain other financial accommodations from time to time to Obligors;

WHEREAS, Mortgagor is an Obligor, is an Affiliate of one or more of Obligors and has derived and will continue to derive direct and indirect economic benefit from the financial accommodations made by the Funds to Obligors; and

WHEREAS, Agent and the Funds have required, pursuant to the terms of the Deferral Agreement, that Mortgagor enter into this Mortgage and grant to Mortgagee, as sub-agent of Agent pursuant to Article 9 of the Deferral Agreement, the liens and security interests referred to herein to secure the Obligations, including, without limitation: (i) payment of all Deferred Pension Payments, and interest (including interest accruing during the pendency of any bankruptcy, insolvency, receivership or other similar proceeding, regardless of whether allowed or allowable in such proceeding) on the Deferred Pension Payments when and as due, whether at maturity, by acceleration, upon one or more dates set for prepayment or otherwise, and (ii) payment of all other indemnities, fees, costs, and expenses (including, without limitation, the fees and expenses of Mortgagee, Mortgagee's sub-agents, Agent, Agent's sub-agents, and legal counsel reimbursable under the Deferral Agreement), whether primary, secondary, direct, contingent, fixed or otherwise (including monetary obligations incurred during the pendency of any bankruptcy, insolvency, receivership or other similar proceeding, regardless of whether allowed or allowable in such proceeding), of Obligors under the Deferral Agreement, this

# UNOFFICIAL COPY

Mortgage and the other Fund Documents (the aforesaid obligations shall be hereinafter referred to collectively as the "Liabilities");

NOW, THEREFORE, in consideration of the premises contained herein and to secure payment and performance of the Liabilities and in consideration of One Dollar (\$1.00) in hand paid, and other good and valuable consideration, the receipt and sufficiency whereof are hereby acknowledged, Mortgagor does hereby assign, bargain, sell, pledge, grant, remise, release, alien, convey, hypothecate, mortgage and warrant to Mortgagee, its successors and assigns, the following described real estate (the "Land") in Cook County, Illinois and all of the other real property portions of the Mortgaged Property (as defined below), and does further grant a security interest to Mortgagee, its successors and permitted assigns, in all such portions of the Mortgaged Property that may be secured under the Uniform Commercial Code in effect in the State of Illinois (the "State") (said Uniform Commercial Code is hereinafter referred to as the "UCC"; terms defined in the UCC which are not otherwise defined in this Mortgage are used herein as defined in the UCC):

See Exhibit A attached hereto and by this reference made a part hereof for the legal description of the Land,

subject, however, to the Permitted Liens, which Land, together with all right, title and interest, if any, which Mortgagor may now have or hereafter acquire in and to all improvements, buildings and structures now or hereafter located thereon of every nature whatsoever, is herein called the "Premises".

TOGETHER WITH all right, title and interest, if any, including any after-acquired right, title and interest, and including any right of use or occupancy, which Mortgagor may now have or hereafter acquire in and to (a) all easements, rights of way, gores of land or any lands occupied by streets, ways, alleys, passages, sewer rights, water courses, water rights and powers, and public places adjoining said Land, and any other interests in property constituting appurtenances to the Premises, or which hereafter shall in any way belong, relate or be appurtenant thereto, (b) all hereditaments, gas, oil, minerals (together (in each case, whether or not extracted from the Premises) with the right to extract, sever and remove such gas, oil and minerals), and easements, of every nature whatsoever, located in or on the Premises and all other rights and privileges thereunto belonging or appertaining, (c) all water, ditch, well and reservoir rights which are appurtenant to or which have been used in connection with the Land, (d) all development rights associated with the Land, whether previously or subsequently transferred to the Land from other real property or now or hereafter susceptible of transfer from such Land to other real property, (e) any land lying between the boundaries of the Land and the center line of any adjacent street, road, avenue or alley, whether opened or proposed, (f) all other or greater rights and interests of every nature in the Premises and in the possession or use thereof and income therefrom, whether now owned or hereafter acquired by Mortgagor, and (g) all extensions, additions, improvements, betterments, renewals, substitutions and replacements to or of any of the rights and interests described in subparagraphs (a) through (f) above (collectively, hereinafter the "Property Rights").

TOGETHER WITH all right, title and interest, if any, including any after-acquired right, title and interest, and including any right of use or occupancy, which

# UNOFFICIAL COPY

Mortgagor may now have or hereafter acquire in and to all fixtures and appurtenances of every nature whatsoever owned or leased by Mortgagor now or hereafter located in, on or attached to, and used in connection with, or with the operation of, the Premises, including, but not limited to: (a) all apparatus, machinery and equipment; and (b) all extensions, additions, improvements, betterments, renewals, substitutions and replacements to or of any of the foregoing (the items described in the foregoing clauses (a) and (b) being hereinafter collectively referred to as the "Fixtures"). It is mutually agreed, intended and declared that the Premises and all of the Property Rights and Fixtures owned by Mortgagor (referred to collectively herein as the "Real Property") shall, so far as permitted by law, be deemed to form a part and parcel of the Land and for the purpose of this Mortgage to be real estate that is covered by the lien of this Mortgage. It is also agreed that if any of the property herein mortgaged is of a nature so that a security interest therein can be perfected under the UCC in effect in the State, this instrument shall constitute a security agreement, fixture filing and financing statement, and Mortgagor agrees to execute, deliver and file or refile, and hereby authorizes Mortgagee and the Funds to prepare and file or refile, without Mortgagor's consent but with prior notice to Mortgagor, any financing statement, continuation statement, or other instruments Mortgagee or the Funds may reasonably require from time to time to perfect or renew such security interest under the UCC. To the extent permitted by law, (i) all of the fixtures are or are to become fixtures on the Land and (ii) this instrument, upon recording or registration in the real estate records of the proper office, shall constitute a "fixture-filing" within the meaning of Sections 9-102, 9-501 and 9-502 of the UCC. Subject to the terms and conditions of the Deferral Agreement, the remedies for any violation of the covenants, terms and conditions of the agreements herein contained shall be as prescribed herein or by general law, or, as to that part of the security in which a security interest may be perfected under the UCC, by the specific statutory consequences now or hereafter enacted and specified in the UCC, all at Mortgagee's sole election.

TOGETHER WITH all the estate, right, title and interest of Mortgagor in and to: (i) all judgments, insurance proceeds, awards of damages and settlements resulting from condemnation proceedings or the taking of the Real Property, or any part thereof, under the power of eminent domain or for any damage (whether caused by such taking or otherwise) to the Real Property, or any part thereof, or to any rights appurtenant thereto, and all proceeds of any sales or other dispositions of the Real Property or any part thereof; and (except as otherwise provided herein) Mortgagee is hereby authorized to collect and receive said awards and proceeds and to give proper receipts and acquittances therefor, and to apply the same as provided in the Deferral Agreement; (ii) all contract rights, accounts, general intangibles, actions and rights in action relating to the Real Property, including, without limitation, all rights to insurance proceeds and unearned premiums arising from or relating to damage to the Real Property; (iii) all accounts and payment intangibles arising out of the sales at the wellhead or mine head of oil, gas or other minerals in which Mortgagee had an interest before extraction thereof; and (iv) all proceeds, products, replacements, additions, substitutions, renewals and accessions of and to the Real Property. The rights and interests described in this paragraph are hereinafter collectively referred to as the "Intangibles". Notwithstanding any of the foregoing or anything to the contrary set forth elsewhere in this Mortgage, the security interests in and to the Intangibles created hereby and pursuant to the other Fund Documents in favor of Mortgagee (for its own benefit, for the benefit of Agent and for the benefit of the Funds), shall be governed by the terms and conditions of the UCC then in effect in the State.

# UNOFFICIAL COPY

As additional security for the Liabilities secured hereby, Mortgagor (i) does hereby absolutely pledge and assign to Mortgagee, for its benefit, for the benefit of Agent and for the benefit of the Funds, from and after the date hereof (including any period of redemption), primarily and on a parity with the Real Property, and not secondarily, all the rents, issues and profits of the Real Property and all rents, issues, profits, revenues, royalties, bonuses, rights and benefits due, payable or accruing (including any letters of credit, letter-of-credit rights supporting obligations, or other credit support for any rents or leases and all deposits of money as advance rent, for security or as earnest money or as down payment for the purchase of all or any part of the Real Property) (collectively, the "Rents") under any and all present and future leases, subleases, contracts or other agreements to which it is a party as a lessor and relative to its ownership or occupancy of all or any portion of the Real Property (collectively, the "Leases"), and (ii) except to the extent such a transfer or assignment is not permitted by the terms thereof, does hereby transfer and assign to Mortgagee, for its benefit, for the benefit of Agent and for the benefit of the Funds, all such Leases (including all of Mortgagor's rights under any contracts for the sale of any portion of the Mortgaged Property and all of Mortgagor's revenues and royalties under any oil, gas and mineral leases relating to the Real Property or accruing to it). Mortgagee hereby licenses to Mortgagor until an Event of Default (as defined in the Deferral Agreement) shall have occurred and be continuing, the right to collect and use the Rents as they become due and payable under the Leases, but not more than one month in advance thereof (unless otherwise required by the terms of any such related agreement), provided that the existence of such right shall not operate to subordinate this assignment to any subsequent assignment, in whole or in part, by Mortgagor, and any such subsequent assignment shall be subject to the rights of Mortgagee under this Mortgage. Mortgagor further agrees to execute and deliver such assignments of Leases (including land sale contracts or other agreements) as Mortgagee or the Funds may from time to time reasonably request (which contracts or other agreements shall be in form and substance reasonably acceptable to Mortgagee and the Funds). Upon the occurrence and during the continuance of an Event of Default (1) Mortgagor agrees, upon receipt of written demand from Mortgagee, to deliver to Mortgagee all of the Leases with such additional assignments thereof as Mortgagee may request, and agrees that Mortgagee may assume (or cause a receiver to be appointed to assume) the management of the Real Property and collect the Rents, applying the same upon the Liabilities in the manner provided in the Deferral Agreement, and (2) Mortgagor hereby authorizes and directs all tenants, purchasers or other Persons occupying or otherwise acquiring any interest in any part of the Real Property to pay the Rents due under the Leases to Mortgagee upon request of Mortgagee. Upon the occurrence and during the continuance of an Event of Default, Mortgagor hereby appoints Mortgagee as its true and lawful attorney in fact to manage (or cause a receiver to be appointed to manage) said property and collect the Rents, with full power to bring suit for collection of the Rents and possession of the Real Property, giving and granting unto said Mortgagee and unto its agents and attorneys full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in the protection of the security hereby conveyed; provided, however, that (a) this power of attorney and assignment of rents shall not be construed as an obligation upon said Mortgagee to make or cause to be made any repairs that may be needful or necessary, and (b) Mortgagee agrees that unless such Event of Default has occurred and is continuing as aforesaid, Mortgagee shall permit Mortgagor to perform the aforementioned management responsibilities. Upon Mortgagee's receipt of the Rents, at Mortgagee's option, it may use the proceeds of the Rents to pay: (x) charges for collection thereof or hereunder, costs of necessary

# UNOFFICIAL COPY

repairs and other costs requisite and necessary during the continuance of this power of attorney and assignment of rents; (y) general and special taxes and insurance premiums and deductibles; and (z) any or all of the Liabilities pursuant to the provisions of the Deferral Agreement. This power of attorney and assignment of rents shall be irrevocable until this Mortgage shall have been satisfied and released, and the releasing of this Mortgage shall act as a revocation of this power of attorney and assignment of rents. During the continuance of an Event of Default, Mortgagee shall have and hereby expressly reserves the right and privilege (but assumes no obligation) to demand, collect, sue for, receive and recover the Rents, or any part thereof, now existing or hereafter made, and apply the same in accordance with the provisions of the Deferral Agreement.

All of the property described above, and each item of property therein described, not limited to but including the Land, the Premises, the Property Rights, the Fixtures, the Real Property, the Intangibles, the Rents and the Leases, and all profits and proceeds therefrom and all replacements thereof, are herein collectively referred to as the "Mortgaged Property".

Nothing herein contained shall be construed as constituting Mortgagee a mortgagee-in-possession in the absence of the taking of actual possession of the Mortgaged Property by Mortgagee. Nothing contained in this Mortgage shall be construed as imposing on Mortgagee any of the obligations of the lessor under any Lease of the Mortgaged Property in the absence of an explicit written assumption thereof (on a case-by-case basis) by Mortgagee. In the exercise of the powers herein granted Mortgagee, no liability shall be asserted or enforced against Mortgagee, all such liability being hereby expressly waived and released by Mortgagor (on behalf of itself and all Persons now or hereafter claiming by or through Mortgagor).

TO HAVE AND TO HOLD the Mortgaged Property, properties, rights and privileges hereby conveyed or assigned, or intended so to be, unto Mortgagee, its beneficiaries (including the Funds), successors and permitted assigns, forever for the uses and purposes herein set forth. Mortgagor (on behalf of itself and all Persons now or hereafter claiming by, through or under Mortgagor) hereby releases and waives all rights under and by virtue of the homestead exemption laws, if any, of the State, and Mortgagor hereby covenants, represents and warrants that, at the time of the enrolling and delivery of these presents, Mortgagor is well seised of the Mortgaged Property in fee simple and with full legal and equitable title to the Mortgaged Property, with full power and lawful authority to assign, bargain, sell, pledge, grant, remise, release, alien, convey, hypothecate, mortgage and warrant to Mortgagee and its successors and assigns the Mortgaged Property as set forth herein, and that the title to the Mortgaged Property is free and clear of all Liens and other encumbrances, except for the Permitted Liens. Mortgagor shall forever warrant, defend and preserve such title and the validity and priority of the lien of this Mortgage and shall forever warrant and defend the same, subject to the Permitted Liens, to Mortgagee and its successors and permitted assigns against the claims of all Persons claiming by, through or under Mortgagor.

The following provisions shall also constitute an integral part of this Mortgage:

1. Payment of Taxes on the Mortgage. Without limiting any of the provisions of the Deferral Agreement, Mortgagor agrees that, if the United States or any department, agency or bureau thereof or if the State or any of its subdivisions having jurisdiction

# UNOFFICIAL COPY

shall at any time require documentary stamps to be affixed to this Mortgage or shall levy, assess, or charge any tax, assessment or imposition upon this Mortgage or the credit or indebtedness secured hereby or the interest of Mortgagee in the Mortgaged Property or upon Mortgagee by reason of or as holder of any of the foregoing, including, without limitation, any tax, interest or penalty arising in connection with the recordation of this Mortgage or the imposition of documentary stamps or taxes, intangibles taxes or the like, including those required to be paid because of future advances or financial accommodations or an increase in the amount of the Liabilities secured hereby, then, Mortgagor shall pay for such documentary stamps in the required amount and deliver them to Mortgagee or pay (or reimburse Mortgagee for) such taxes, assessments or impositions. Mortgagor agrees to provide to Mortgagee, within ten (10) business days after any such taxes, assessments or impositions become due and payable, and at any other times upon request from Mortgagee, copies of official receipts showing payment of all such taxes, assessments and charges which Mortgagor pays hereunder. Mortgagor agrees to indemnify Mortgagee against liability on account of such documentary stamps, taxes, assessments or impositions, whether such liability arises before or after payment of the Liabilities and regardless of whether this Mortgage shall have been released.

2. Leases Affecting the Real Property. Mortgagor agrees faithfully to perform all of its obligations under all present and future Leases at any time assigned to Mortgagee as additional security, and to refrain from any action or inaction which would result in termination of any such Leases or in the material diminution of the value thereof or of the Rents due thereunder. All future Leases made after the effective date of this Mortgage shall include provisions requiring the lessees thereunder, at Mortgagee's option and without any further documentation, to attorn to Mortgagee as lessor if for any reason Mortgagee becomes lessor thereunder, and to pay rent to Mortgagee during the continuance of an Event of Default, upon demand, and Mortgagee shall not be responsible under such Lease for matters arising prior to Mortgagee becoming lessor thereunder.

3. Use of the Real Property. Mortgagor agrees that it shall not permit the public to use the Real Property in any manner that might tend, in Mortgagee's reasonable judgment, adversely to impair Mortgagor's title to such property or any portion thereof or to make possible any claim or claims of easement by prescription or of implied dedication to public use other than the Permitted Liens. Mortgagor shall not use or knowingly permit the use of any part of the Real Property for an illegal purpose, including, without limitation, the violation of any Environmental Laws (as hereinafter defined). Moreover, Mortgagor shall duly and punctually observe and perform each and every material term, provision, condition, and covenant to be observed or performed by Mortgagor pursuant to the terms of any agreement or recorded instrument (including all instruments comprising the Permitted Liens) affecting or pertaining to the Mortgaged Property, except where failure to do so, individually or in the aggregate, could not reasonably be expected to result in a Material Adverse Effect. The term "Environmental Laws" as used in this Mortgage means any and all federal, state and local statutes, laws, regulations, ordinances, rules, judgments, orders, decrees, permits, concessions, grants, franchises, licenses, agreements or governmental restrictions relating to pollution and the protection of the environment or the release of any materials into the environment, including those related to hazardous substances or wastes, air emissions and discharges to waste or public systems.



# UNOFFICIAL COPY

4. Indemnification. Mortgagor acknowledges and agrees that any obligations and liabilities of Mortgagor arising under this Mortgage shall be deemed to constitute both (1) Obligations under the Deferral Agreement, and (2) Liabilities under this Mortgage. Without limiting any indemnification that Mortgagor, Obligors or Guarantors have granted in the Deferral Agreement, the Guarantee, or any of the other Fund Documents, Mortgagor hereby agrees, without duplication, to indemnify and hold harmless Mortgagee, Agent, all Funds, and any of their respective Affiliates (for purposes of this Section 4, collectively, the "Indemnitees" and each individually, an "Indemnitee") from and against any and all losses, claims, damages, penalties, liabilities and related expenses (including attorneys' fees, paralegals' fees, other professionals' fees, court costs and disbursements) which may be imposed on, incurred or paid by or asserted against either the Mortgaged Property or any of the Indemnitees by reason or on account of or in connection with (i) the construction, reconstruction or alteration of the Mortgaged Property, (ii) any gross negligence or willful misconduct of any Obligor, Mortgagor, any Guarantor, any lessee of the Mortgaged Property, or any of their respective agents, contractors, subcontractors, servants, employees, licensees or invitees, or (iii) to the fullest extent permissible in accordance with applicable laws, any accident, injury, death or damage to any Person or property occurring in, on or about the Mortgaged Property to the extent the same was not caused by the gross negligence or willful misconduct of the Indemnitees; provided that such indemnity shall not, as to any particular Indemnitee, be available to the extent that such losses, claims, damages, penalties, liabilities or related expenses are determined by a court of competent jurisdiction by final and nonappealable judgment to have resulted from the gross negligence, willful misconduct, violation of law or breach by such Indemnitee, or claims brought by any Indemnitee against any one or more other indemnitees; provided further that no such gross negligence, willful misconduct, violation of law or breach by any one or more of the Indemnitees shall be deemed to void, reduce, limit, impair or otherwise affect the indemnification provided for hereunder respecting any and/or all of the other Indemnitees which are not deemed by said court to be responsible for such gross negligence, willful misconduct, violation of law or breach, and all Indemnitees not held by said court to be responsible for same shall be entitled to the full scope of the indemnification contemplated hereunder as if such gross negligence, willful misconduct, violation of law or breach by one or more of the Indemnitees which are deemed to be responsible by said court for same did not exist.

5. Insurance and Impositions.

(a) Mortgagor shall, at its sole expense, obtain for, deliver to and maintain for the benefit of Mortgagee, Agent and all Funds, until the Liabilities are paid in full: (1) all insurance policies as required pursuant to Section 6.05 of the Deferral Agreement; and (2) flood insurance, if (i) the surveyor preparing the survey of the Mortgaged Property (or a standard flood hazard determination certificate issued by a flood hazard certification firm acceptable to Mortgagee and the Funds) determines that all or any portion of the improved Real Property is situated within a special hazard flood area, as designated by the applicable Governmental Authority (as defined below), and (ii) such flood insurance is then required by the National Flood Insurance Reform Act of 1994 et. seq. (as amended, the "Flood Act"), or by other applicable laws, rules or regulations, or by Mortgagee in accordance with Mortgagee's standard policies and practices. If any flood insurance is required to be obtained in accordance with the preceding sentence, then Mortgagor shall, at its sole expense: (I) purchase flood insurance covering the Mortgaged Property in such amounts as may be required or otherwise specified by the Flood Act

# UNOFFICIAL COPY

or by Mortgagee and the Funds (whichever stipulated amount may be greater); and (II) take any and all other actions as Mortgagee and the Funds may deem necessary or desirable to comply with the Flood Act, other applicable laws and/or Mortgagee's standard policies and practices. In the event of any casualty loss affecting all or any part of the Mortgaged Property, the net insurance proceeds from any insurance policies covering the Mortgaged Property shall be collected, paid and applied as specified in the Deferral Agreement, or if not so specified, such proceeds shall be paid over and remitted to Mortgagor. The term "Governmental Authority" as used in this Mortgage means the government of the United States or any other nation, or of any political subdivision thereof, whether provincial, state or local, and any agency, authority, instrumentality, regulatory body, court, central bank or other entity exercising executive, legislative, judicial, taxing, regulatory or administrative powers or functions of or pertaining to government.

(3) Mortgagor shall promptly cause to be paid all impositions of real estate taxes, assessments and insurance premiums and deductibles that if not paid, could result in a Material Adverse Effect (collectively, the "Impositions") now or hereafter levied or assessed or imposed against the Mortgaged Property or any part thereof before the same shall become delinquent or in default, except where: (a) the validity or amount thereof is being contested in good faith by appropriate proceedings, (b) Mortgagor has set aside on its books adequate reserves with respect thereto in accordance with GAAP and (c) the failure to make payment pending such contest could not reasonably be expected to result in a Material Adverse Effect. If requested by Mortgagee, Mortgagor shall furnish to Mortgagee or its designee receipts for the payment of the Impositions.

6. Condemnation Awards. Mortgagor hereby assigns to Mortgagee, as additional security, all awards of damage resulting from condemnation proceedings or the taking of or injury to the Mortgaged Property for public use, and Mortgagor agrees that the proceeds of all such awards shall be collected, paid and applied as specified in the Deferral Agreement.

7. Event of Default and Remedies. The term "Event of Default" as used herein shall have the meaning ascribed to such term pursuant to the Deferral Agreement. Subject to the provisions of the Deferral Agreement, upon the occurrence and during the continuance of an Event of Default, in addition to any rights and remedies provided for in the Deferral Agreement, the Guarantee and/or any of the other Fund Documents, and to the extent permitted by applicable law, the following provisions of this Section 7 shall apply, in each case at the direction of the Majority Funds:

(a) Mortgagee's Power of Enforcement. It shall be lawful for Mortgagee to (i) immediately sell the Mortgaged Property either in whole or in separate parcels, as prescribed by the State law, under power of sale, which power is hereby granted to Mortgagee to the full extent permitted by the State law, and thereupon, to make and execute to any purchaser(s) thereof deeds of conveyance pursuant to applicable law or (ii) immediately foreclose this Mortgage by judicial action. The court in which any proceeding is pending for the purpose of foreclosure or enforcement of this Mortgage, or any other court of competent jurisdiction, may, at once or at any time thereafter, either before or after sale, and to the extent permitted by law without notice, and without requiring bond, and without regard to the solvency or insolvency of any Person liable for payment of the Liabilities secured hereby, and without regard to the then

# UNOFFICIAL COPY

value of the Mortgaged Property or the occupancy thereof as a homestead, appoint a receiver (the provisions for the appointment of a receiver and assignment of rents being an express condition upon which the Payment Deferral is made) for the benefit of Mortgagee, Agent and the Funds, with power to collect the Rents, due and to become due, during such foreclosure or enforcement suit and the full statutory period of redemption notwithstanding any redemption. The receiver, out of the Rents when collected, may pay costs incurred in the management and operation of the Mortgaged Property, prior and subordinate liens, if any, and taxes, assessments, water and other utilities and insurance, then due or thereafter accruing, and may make and pay for any necessary repairs to any and all portion(s) of the Mortgaged Property, and may pay all or any part of the Liabilities or other sums secured hereby or any deficiency decree entered in such foreclosure or enforcement proceedings. Upon or at any time after the filing of a suit to foreclose or enforce this Mortgage, the court in which such suit is filed shall have full power to enter an order placing Mortgagee in possession of the Mortgaged Property with the same power granted to a receiver pursuant to this subparagraph and with all other rights and privileges of a mortgagee-in-possession under applicable law.

(b) Mortgagee's Right to Enter and Take Possession, Operate and Apply Income. Mortgagee and the Funds shall, at their option, have the right, acting through their agents or attorneys, either with or without process of law, forcibly or otherwise, to enter upon and take possession of the Mortgaged Property, expel and remove any Persons, goods, or chattels occupying or upon the same, to the extent permitted under applicable laws, to collect or receive all the Rents, and to manage and control the same, and to lease the same or any part thereof, from time to time, and, after deducting all attorneys' fees and expenses, and all expenses incurred in the protection, care, maintenance, management and operation of the Mortgaged Property, distribute and apply the remaining net income in accordance with the terms of the Deferral Agreement or upon any deficiency decree entered in any foreclosure proceedings.

(c) Rights Under the UCC. Mortgagee may exercise its rights of enforcement and remedies available to it pursuant to the UCC.

(d) Rights in Connection with Bankruptcy. If the Mortgaged Property or any portion thereof or any interest therein becomes property of any bankruptcy estate or subject to any state or federal insolvency proceeding, or in the event of the filing of any voluntary or involuntary petition under Title 11 of the United States Code, as amended from time to time, and all rules and regulations promulgated thereunder (the "Bankruptcy Code") by or against Mortgagor, any Obligor, or any Guarantor, then Mortgagee shall immediately become entitled, in addition to all other relief to which Mortgagee may be entitled under this Mortgage, the other Fund Documents, at law or in equity, to obtain (i) an order from any bankruptcy court or other appropriate court granting immediate relief from the automatic stay pursuant to § 362 of the Bankruptcy Code (or similar successor provisions under the Bankruptcy Code) so as to permit Mortgagee to pursue its rights and remedies against Mortgagor as provided under this Mortgage, the other Fund Documents and all other rights and remedies of Mortgagee at law and in equity under applicable State laws, and (ii) an order from the bankruptcy court prohibiting Mortgagor's use of all "cash collateral" as defined under § 363 of the Bankruptcy Code (or similar successor provisions under the Bankruptcy Code). Mortgagor shall not assert, or request any other Person to assert, that the automatic stay under § 362 of the Bankruptcy Code (or similar successor provisions under the Bankruptcy Code) operate or be interpreted to stay, interdict, condition,

# UNOFFICIAL COPY

reduce or inhibit the ability of Mortgagee to enforce any rights it has by virtue of this Mortgage, or any other rights that Mortgagee has, whether now or hereafter acquired, against any obligor or guarantor of the Liabilities (including, without limitation, any Guarantor). Mortgagor shall not seek a supplemental stay or any other relief, whether injunctive or otherwise, pursuant to § 105 of the Bankruptcy Code (or similar successor provisions under the Bankruptcy Code) or any other provision therein to stay, interdict, condition, reduce or inhibit the ability of Mortgagee to enforce any rights it has by virtue of this Mortgage against any obligor or guarantor of the Liabilities (including, without limitation, any Guarantor). Any bankruptcy petition or other action taken by Mortgagor to stay, condition, or inhibit Mortgagee from exercising its remedies are hereby admitted by Mortgagor to be in bad faith and Mortgagor further admits that Mortgagee would have just cause for relief from the automatic stay in order to take such actions authorized under State law. Mortgagor covenants to give prompt written notice to Mortgagee of the insolvency or bankruptcy filing (whether voluntary or involuntary) of Mortgagor, or the death, insolvency or bankruptcy filing (whether voluntary or involuntary) of any Obligor, or any Guarantor.

8. Application of the Rents or Proceeds from Foreclosure or Sale. In any foreclosure of this Mortgage by judicial action, or any sale of all or any portion(s) of the Mortgaged Property by advertisement, in addition to any of the terms and provisions of the Deferral Agreement and this Mortgage, there shall be allowed (and included in the decree for sale in the event of a foreclosure by judicial action) to be paid out of the Rents or the proceeds of such foreclosure proceeding and/or sale:

(a) Liabilities. All of the Liabilities which then remain unpaid;

(b) Other Advances. All other items advanced or paid by Mortgagee pursuant to this Mortgage; and

(c) Costs, Fees and Other Expenses. All court costs, attorneys' fees, paralegals' fees, and other professionals' fees and expenses, appraiser's fees, advertising costs, filing fees and transfer taxes, notice expenses, expenditures for documentary and expert evidence, stenographer's charges, publication costs, other court costs, and costs (which may be estimated as to items to be expended after entry of the decree) of procuring all abstracts of title, title searches and examinations, title guarantees, title insurance policies, Torrens certificates and similar data with respect to title which Mortgagee in the exercise of its judgment may deem necessary. All such expenses shall become additional Liabilities secured hereby when paid or incurred by Mortgagee in connection with any proceedings, including, but not limited to, probate and bankruptcy proceedings or a deed in lieu of foreclosure, to which Mortgagee shall be a party, either as plaintiff, claimant or defendant, by reason of this Mortgage or any indebtedness hereby secured or in connection with the preparations for the commencement of any suit for the foreclosure, whether or not actually commenced, or sale by advertisement. The proceeds of any sale (whether through a foreclosure proceeding or Mortgagee's exercise of the power of sale) shall be distributed and applied in accordance with the terms of Section 2.04 of the Deferral Agreement.

9. Right to Perform Mortgagor's Covenants; Cumulative Remedies; Delay or Omission Not a Waiver.

# UNOFFICIAL COPY

(a) If Mortgagor has failed to keep or perform any covenant whatsoever contained in this Mortgage, Mortgagee may (but shall not be obligated to) perform or attempt to perform said covenant; and any payment made or expense incurred by or on behalf of Mortgagee in the performance or attempted performance of any such covenant, together with any sum expended by or on behalf of Mortgagee that is chargeable to Mortgagor or subject to reimbursement by Mortgagor under the Fund Documents, shall be and become a part of the Liabilities, and Mortgagor promises to pay to Mortgagee, within ten (10) business days after Mortgagee's written demand therefor (whether such demand occurs prior to, simultaneously with, or subsequent to such time that Obligors may be obligated to repay the Obligations secured hereby pursuant to the other Fund Documents) and Mortgagor's receipt of reasonably detailed evidence of such payments, all sums so incurred, paid or expended by or on behalf of Mortgagee, with interest from the date paid, incurred or expended by or on behalf of Mortgagee, at the applicable interest rate then specified by the Fund Documents.

(b) Each remedy or right of Mortgagee shall not be exclusive of but shall be in addition to every other remedy or right now or hereafter existing pursuant to this Mortgage, the Deferral Agreement, the other Fund Documents, at law or in equity. No delay in the exercise or omission to exercise any remedy or right accruing on the occurrence or existence of any Event of Default shall impair any such remedy or right or be construed to be a waiver of any such Event of Default or acquiescence therein, or rights with respect to any other Event of Default, nor shall it affect any subsequent Event of Default of the same or different nature. Every such remedy or right may be exercised concurrently or independently and when and as often as may be deemed expedient by Mortgagee. If Mortgagee shall have proceeded to invoke any right, remedy, or recourse permitted under the Fund Documents, at law or in equity, and shall thereafter elect to discontinue or abandon the same for any reason, Mortgagee shall have the unqualified right so to do and, in such event, Mortgagor and Mortgagee shall be restored to their former positions with respect to the Liabilities, the Fund Documents, the Mortgaged Property or otherwise, and the rights, remedies, recourses and powers of Mortgagee shall continue as if same had never been invoked.

10. Mortgagee's Remedies Against Multiple Parcels. Without limitation of the terms and conditions set forth in Section 26 below, if more than one property, lot, parcel or Lease is covered by this Mortgage, and if this Mortgage is foreclosed upon, or judgment is entered upon any Liabilities secured hereby, or if Mortgagee exercises its power of sale, execution may be made upon, or Mortgagee may exercise its power of sale against, any one or more of the properties, lots, parcels or Leases and not upon the others, or upon all of such properties or parcels, either together or separately, and at different times or at the same time, and execution sales or sales by advertisement may likewise be conducted separately or concurrently, in each case at Mortgagee's election.

11. No Merger. In the event of a foreclosure of this Mortgage or any other mortgage, deed of trust or deed to secure debt securing the Liabilities, the Liabilities then due Mortgagee shall not be merged into any decree of foreclosure entered by the court, and Mortgagee may concurrently or subsequently seek to foreclose one or more mortgages, deeds of trust, or deeds to secure debt which also secure said Liabilities.

# UNOFFICIAL COPY

12. Notices. All notices required or permitted to be given under this Mortgage shall be sent (and deemed received) in the manner and to the addresses set forth in Section 11.15 of the Deferral Agreement, and to Mortgagor and Mortgagee at their respective addresses set forth above. Any such notice delivered to Mortgagor shall be deemed, for all intents and purposes of the Fund Documents, to have also been delivered to Obligors and any Guarantor, and any such notice delivered to any Obligor pursuant to the Deferral Agreement shall be deemed, for all intents and purposes of the Fund Documents, to have also been delivered to Mortgagor and any Guarantor.

13. Extension of Payments. Mortgagor agrees that, without affecting the liability of any Person for payment of the Liabilities secured hereby or affecting the lien of this Mortgage upon the Mortgaged Property or any part thereof (other than Persons or property explicitly released as a result of the exercise by Mortgagee of its rights and privileges hereunder), Mortgagee may at any time and from time to time, on request of Mortgagor, any Obligor or any Guarantor, without notice to any Person liable for payment of any Liabilities secured hereby, but otherwise subject to the provisions of the Deferral Agreement, extend the time, or agree to alter or amend the terms of payment of such Liabilities. Mortgagor further agrees that any part of the security herein described may be released by Mortgagee at its election (subject to the terms of the Deferral Agreement) with or without consideration without affecting the remainder of the Liabilities or the remainder of the security.

14. Governing Law. Except where the law of the State is expressly referenced in this Mortgage (including in Sections 19 and 27 hereof), this Mortgage and all obligations secured hereby are governed by and to be construed in accordance with the internal laws, but otherwise without regard to the conflict of laws provisions, of the State of New York. The parties stipulate and agree that the State of New York has a substantial relationship to the underlying transactions related to this Mortgage and the parties involved. Notwithstanding the foregoing, the parties stipulate and agree that State law governs issues of lien creation and priority and the procedures for enforcing, in the State, provisional remedies directly related to the real property encumbered hereby, including, without limitation, appointment of a receiver. Wherever possible, each provision of this Mortgage shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Mortgage shall be prohibited by or invalid under applicable law, such provision shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Mortgage.

15. Satisfaction of Mortgage. Upon the full, indefeasible payment of all the Liabilities (other than contingent indemnity obligations), at the time and in the manner provided in the Deferral Agreement or other Fund Documents, or upon satisfaction of the conditions set forth in the Deferral Agreement for release of the Mortgaged Property from this Mortgage under Article 9 thereof, the conveyance or lien created by this Mortgage shall terminate and, upon demand therefor following such payment or satisfaction of the conditions set forth in the Deferral Agreement for release of the Mortgaged Property, as the case may be, a satisfaction of mortgage or reconveyance of the Mortgaged Property shall promptly be provided by Mortgagee to Mortgagor.

# UNOFFICIAL COPY

16. Successors and Assigns Included in Parties. This Mortgage shall be binding upon Mortgagor and upon the successors, assigns and vendees of Mortgagor and the assigns, vendees and other transferees of the Mortgaged Property and shall inure to the benefit of Mortgagee's successors and permitted assigns (for their own benefit, for the benefit of Agent and for the benefit of the Funds and their respective successors and permitted assigns); all references herein to Mortgagor and to Mortgagee shall be deemed to include their respective successors and assigns or permitted assigns, as the case may be. Mortgagor's successors and assigns shall include, without limitation, a receiver, trustee or debtor in possession of or for Mortgagor. Wherever used, the singular number shall include the plural, the plural shall include the singular, and the use of any gender shall be applicable to all genders.

17. Waiver of Appraisal, Valuation, Stay, Extension and Redemption Laws; Waiver of Right to Trial by Jury.

(a) MORTGAGOR HEREBY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL PROCEEDING DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS MORTGAGE, ANY OTHER FUND DOCUMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY (WHETHER BASED ON CONTRACT, TORT OR ANY OTHER THEORY). MORTGAGOR (A) CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER, AND (B) ACKNOWLEDGES THAT IT HAS BEEN INDUCED TO ENTER INTO THIS MORTGAGE BY, AMONG OTHER THINGS, THE CORRESPONDING RECIPROCAL WAIVER BY MORTGAGEE OF ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY PURSUANT TO THE CERTIFICATIONS SET FORTH IN SECTION 11.14 OF THE DEFERRAL AGREEMENT.

(b) MORTGAGOR AGREES, TO THE FULL EXTENT PERMITTED BY LAW, THAT AT ALL TIMES FOLLOWING AN EVENT OF DEFAULT AND DURING THE CONTINUANCE THEREOF, NEITHER MORTGAGOR NOR ANYONE CLAIMING THROUGH OR UNDER IT SHALL OR WILL SET UP, CLAIM OR SEEK TO TAKE ADVANTAGE OF ANY APPRAISEMENT, VALUATION, STAY, EXTENSION, EXEMPTION OR REDEMPTION LAWS NOW OR HEREAFTER IN FORCE, IN ORDER TO PREVENT OR HINDER THE ENFORCEMENT OR FORECLOSURE OF THIS MORTGAGE OR THE ABSOLUTE SALE OF THE MORTGAGED PROPERTY OR THE FINAL AND ABSOLUTE PUTTING INTO POSSESSION THEREOF, IMMEDIATELY AFTER SUCH SALE, OF THE PURCHASER THEREAT; AND MORTGAGOR, FOR ITSELF AND ALL WHO MAY AT ANY TIME CLAIM THROUGH OR UNDER IT, HEREBY WAIVES, TO THE FULLEST EXTENT THAT IT MAY LAWFULLY SO DO, THE BENEFIT OF ALL SUCH LAWS AND ANY AND ALL RIGHT TO HAVE THE ASSETS COMPRISING THE MORTGAGED PROPERTY MARSHALED UPON ANY FORECLOSURE OF THE LIEN HEREOF AND AGREES THAT MORTGAGEE OR ANY COURT HAVING JURISDICTION TO FORECLOSE SUCH LIEN MAY SELL THE MORTGAGED PROPERTY IN PART OR AS AN ENTIRETY. TO THE FULL EXTENT PERMITTED BY LAW, MORTGAGOR HEREBY WAIVES ANY AND ALL STATUTORY

# UNOFFICIAL COPY

OR OTHER RIGHTS OF REDEMPTION FROM SALE UNDER ANY ORDER OR DECREE OF FORECLOSURE OF THIS MORTGAGE, ON ITS OWN BEHALF AND ON BEHALF OF EACH AND EVERY PERSON ACQUIRING ANY INTEREST IN OR TITLE TO THE MORTGAGED PROPERTY SUBSEQUENT TO THE DATE HEREOF.

18. Interpretation with Other Documents; Mortgagee's Sole Discretion. The terms and provisions of this Mortgage shall be construed to the extent possible consistently with those of the Deferral Agreement as being in addition to and supplementing the provisions of the Deferral Agreement and the other Fund Documents; however, notwithstanding anything in this Mortgage to the contrary, in the event of a conflict or inconsistency between this Mortgage and the Deferral Agreement, the provisions of the Deferral Agreement shall govern and control, except to the extent that the terms and conditions in question are provided for more stringently within this Mortgage than as are set forth in the Deferral Agreement (such as, by means of example and without limitation, the flood insurance and related requirements and obligations that are set forth in Section 5 hereof), it being the intention of Mortgagor and Mortgagee, for all intents and purposes of the Fund Documents, that the most stringent terms and conditions prospectively at issue shall govern and control. Whenever pursuant to this Mortgage or the other Fund Documents Mortgagee or the Funds exercise any right given to them to elect, consent, approve or disapprove, or any arrangement or term is to be satisfactory to Mortgagee and the Funds or determined in the judgment of Mortgagee and the Funds, the decision of Mortgagee or the Funds to elect, consent, approve or disapprove, or to decide that arrangements or terms are satisfactory or not satisfactory, shall be in the sole good faith discretion of Mortgagee or the Funds and shall be final and conclusive, except as may be otherwise expressly and specifically provided elsewhere herein or in the Deferral Agreement.

19. Security. This Mortgage shall secure not only presently existing obligations under the Deferral Agreement and the other Fund Documents (including, without limitation, the Guarantee), but also future financial accommodations that constitute Obligations under the Deferral Agreement (whether such accommodations are obligatory or are to be made at the option of Mortgagee, or otherwise), as authorized under applicable Illinois statutes, to the same extent and with the same priority as if such future accommodations were made on the date of the execution of this Mortgage, and without regard as to whether or not there is any indebtedness outstanding at the effective date of this Mortgage or at the date any such accommodation is made. This Mortgage secures all present and future Obligations under the Deferral Agreement, and all other sums from time to time owing to the Funds by Obligors and/or Mortgagor under the Fund Documents. The maximum principal amount which may be secured hereby at any one time is Three Hundred Million Dollars (\$300,000,000), plus interest thereon, and any disbursements made by Mortgagee for the payment of taxes, special assessments, or insurance on the Mortgaged Property, with interest on such disbursements; provided, however, that the foregoing limitation shall apply only to the maximum amount of the lien created by this Mortgage, and it shall not in any manner limit, affect or impair any grant of a security interest or other right in favor of Mortgagee or the Funds under the provisions of the Deferral Agreement or under any of the other Fund Documents at any time executed by Obligors or Mortgagor or any Guarantor. To the fullest extent permitted by applicable law, the lien of this Mortgage, as to all such sums so owed, shall have priority over all subsequent liens and encumbrances, including statutory liens (excepting solely taxes and assessments levied on the Mortgaged Property secured by this Mortgage).



# UNOFFICIAL COPY

20. Invalid Provisions to Affect No Others. In the event that any of the covenants, agreements, terms or provisions contained in this Mortgage shall be invalid, illegal or unenforceable in any respect, the validity of the remaining covenants, agreements, terms or provisions contained herein or in the Deferral Agreement shall not be in any way affected, prejudiced or disturbed thereby. In the event that the application of any of the covenants, agreements, terms or provisions of this Mortgage is held to be invalid, illegal or unenforceable, those covenants, agreements, terms and provisions shall not be in any way affected, prejudiced or disturbed when otherwise applied.

21. Changes. Neither this Mortgage nor any term hereof may be changed, waived, discharged or terminated orally, or by any action or inaction, but only by an instrument in writing signed by the party against which enforcement of the change, waiver, discharge or termination is sought. To the extent permitted by law, any agreement hereafter made by Obligors and/or Mortgagor and Mortgagee relating to this Mortgage shall be superior to the rights of the holder of any intervening lien or encumbrance.

22. Time of the Essence. Mortgagor shall pay the Liabilities at the time and in the manner provided in the Deferral Agreement, this Mortgage and the other Fund Documents. Mortgagor will duly and punctually perform all of the covenants, conditions and agreements contained in the Deferral Agreement, this Mortgage and the other Fund Documents, all of which covenants, conditions and agreements are hereby made a part of this Mortgage to the same extent and with the same force as if fully set forth herein. Time is of the essence with respect to the provisions of this Mortgage.

23. Headings For Convenience Only; No Strict Construction. The headings and captions of various sections of this Mortgage are for convenience of reference only and are not to be construed as defining or limiting, in any way, the scope or intent of the provisions hereof. Mortgagor and Mortgagee, with the assistance of their respective legal counsel, have participated jointly in the negotiation and drafting of this Mortgage. In the event an ambiguity or question of intent or interpretation arises, this Mortgage shall be construed as if drafted jointly by Mortgagor and Mortgagee and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any provisions of this Mortgage.

24. Transfer or Encumbrance of the Mortgaged Property.

(a) Mortgagor acknowledges that Mortgagee has examined and relied on the creditworthiness and experience of Mortgagor in owning and operating properties such as the Mortgaged Property in agreeing to make the Payment Deferral, and that Mortgagee will continue to rely on Mortgagor's ownership of the Mortgaged Property as a means of maintaining the value of the Mortgaged Property as security for repayment of the Liabilities. Except as expressly permitted pursuant to Subsection 24(c) below (if and as applicable), Mortgagor shall not cause or suffer to occur or exist, directly or indirectly, voluntarily or involuntarily, by operation of law or otherwise, any sale, transfer, mortgage, pledge, lien or encumbrance (other than Permitted Liens) (collectively, "Transfers") of all or any part of the Mortgaged Property or any interest therein.

(b) Mortgagee's written consent to any Transfer of the Mortgaged Property or any interest in Mortgagor shall not be deemed to be a waiver of Mortgagee's right to require

# UNOFFICIAL COPY

such consent to any future occurrence of same. Any attempted or purported Transfer of the Mortgaged Property or of any direct or indirect interest in Mortgagor, if made in contravention of this Section 24, shall be null and void ab initio and of no force and effect.

(c) Notwithstanding the foregoing or anything set forth in this Section 24 to the contrary, Mortgagor may (i) consummate any Asset Sale, which may include the Transfer of the Mortgaged Property (or any portion thereof) or any interest in Mortgagor, to the extent permitted under, and subject to the applicable terms, conditions and limitations of, Section 7.01 of the Deferral Agreement, and (ii) merge into or amalgamate or consolidate with any other Person, or permit any other Person to merge into or amalgamate or consolidate with it, so long as the surviving entity assumes or remains liable for the Liabilities to the same extent Mortgagor was liable for the Liabilities immediately prior to such merger, amalgamation or consolidation.

## 25. Mortgagor's Covenants, Representations and Warranties; Survival of Obligations, Covenants, Representations and Warranties; Covenants Running with the Land.

(a) Mortgagor hereby covenants, represents and warrants that:

(i) Mortgagor is duly authorized to make and enter into this Mortgage and to carry out the transactions contemplated herein;

(ii) The execution, delivery and performance of this Mortgage by Mortgagor (A) are within its corporate or equivalent power and authority and (B) have been duly authorized by all necessary corporate or equivalent action; this Mortgage has been duly executed and delivered by Mortgagor and constitutes a legal, valid and binding obligation of Mortgagor, enforceable against Mortgagor in accordance with its terms, subject, however, to bankruptcy and other law, decisional or statutory, of general application affecting the enforcement of creditors' rights, and to the fact that the availability of the remedy of specific performance or of injunctive relief in equity is subject to the discretion of the court before which any proceeding therefor may be brought;

(iii) To the knowledge of Mortgagor, Mortgagor is not now in default (beyond any applicable cure period) under any material instruments or obligations relating to the Mortgaged Property and Mortgagor has not received any written notice from any Person asserting any claim of default against Mortgagor relating to the Mortgaged Property;

(iv) To the knowledge of Mortgagor, the execution and performance of this Mortgage and the consummation of the transactions hereby contemplated will not result in any breach of, or constitute a default under, the Senior Credit Facility (as defined in the Deferral Agreement);

(v) There are no actions, investigations, suits or proceedings (including, without limitation, any condemnation or bankruptcy proceedings) pending or, to the knowledge of Mortgagor, overtly threatened in writing against or affecting Mortgagor or the Mortgaged Property, or which, if adversely

# UNOFFICIAL COPY

determined against Mortgagor or the Mortgaged Property, may be reasonably expected to adversely affect the validity or enforceability of this Mortgage, at law or in equity, or before or by any Governmental Authority; Mortgagor is not in violation (beyond any applicable cure period) with respect to any writ, injunction, decree or demand of any court or any Governmental Authority affecting the Mortgaged Property;

(vi) To the knowledge of Mortgagor and except where the necessity of compliance therewith is contested in good faith by appropriate proceedings and, to the extent applicable, Mortgagor or such Obligor shall have set aside on its books adequate reserves with respect thereto in accordance with GAAP, the Mortgaged Property presently complies with, and will continue to comply with, all applicable restrictive covenants and applicable zoning and subdivision ordinances, building codes and other applicable laws, except where the failure to do so, individually or in the aggregate, could not reasonably be expected to result in a Material Adverse Effect; and

(vii) To the knowledge of Mortgagor, Mortgagor owns, is licensed, or otherwise has the right to use or is in possession of all licenses, permits and required approvals or authorizations from all necessary Governmental Authorities, patents, trademarks, service marks, trade names, copyrights, franchises, authorizations and other rights that are necessary for its operations on the Mortgaged Property, without conflict with the rights of any other Person with respect thereto, except for any such infringements that, individually or in the aggregate, could not reasonably be expected to result in a Material Adverse Effect.

(b) Each and all of the covenants, obligations, representations and warranties of Mortgagor shall survive the execution and delivery of the Fund Documents and the transfer or assignment of this Mortgage (including, without limitation, any Transfer and/or any transfer or assignment by Mortgagee of any of its rights, title and interest in and to the Mortgaged Property or any part thereof to any Person, whether or not affiliated with Mortgagee).

(c) All covenants, conditions, warranties, representations and other obligations contained in this Mortgage and the other Fund Documents are intended by Mortgagor and Mortgagee to be, and shall be construed as, covenants running with the Mortgaged Property until the lien of this Mortgage has been fully released by Mortgagee, pursuant to the terms hereof.

26. Contemporaneous Security Instruments. THIS MORTGAGE IS MADE IN ADDITION TO OTHER SECURITY INSTRUMENTS GIVEN BY MORTGAGOR, OBLIGORS AND THEIR AFFILIATES TO SECURE THE OBLIGATIONS (collectively, the "Other Security Instruments"), WHICH OTHER SECURITY INSTRUMENTS COVER PROPERTIES LOCATED IN VARIOUS STATES AND COMMONWEALTHS OF THE UNITED STATES OF AMERICA AND OTHER COUNTRIES. The Other Security Instruments further secure the obligations of Obligors, Mortgagor and any Guarantor under the

# UNOFFICIAL COPY

Fund Documents. Upon the occurrence and during the continuance of an Event of Default, and subject to the terms of each applicable agreement or instrument, Mortgagee may proceed under this Mortgage and/or any one or more of the Other Security Instruments against any of the other property secured thereby and/or the Mortgaged Property, in one or more parcels and in such manner and order as Mortgagee shall elect. MORTGAGOR HEREBY IRREVOCABLY WAIVES AND RELEASES, TO THE EXTENT PERMITTED BY LAW, AND WHETHER NOW OR HEREAFTER IN FORCE, ANY RIGHT TO HAVE THE MORTGAGED PROPERTY AND/OR ANY SUCH OTHER PROPERTY SECURED BY THE OTHER SECURITY INSTRUMENTS, MARSHALLED UPON ANY FORECLOSURE OF THIS MORTGAGE OR ANY OF THE OTHER SECURITY INSTRUMENTS. For the avoidance of doubt, neither Agent nor Mortgagee shall be responsible for the perfection of this Mortgage and the lien and security interest intended to be created hereby nor the filing, form, content or renewal of this Mortgage, any Other Security Instruments, or any other instruments in addition or supplemental thereto.

27. State Specific Provisions. The terms and provisions set forth below in this Section 27 shall be construed, to the greatest extent possible, consistently with those set forth elsewhere in this Mortgage as being in addition to and supplementing such other terms and provisions set forth elsewhere in this Mortgage; however, notwithstanding anything to the contrary set forth elsewhere in this Mortgage, in the event of any conflict or inconsistency between the terms and provisions of this Section 27 and the terms and provisions set forth elsewhere in this Mortgage, the following terms and provisions of this Section 27 shall govern and control:

(a) Mortgagor represents and warrants to Mortgagee that the proceeds of the Deferred Pension Payments secured hereby shall be used solely for business purposes and in furtherance of the regular business affairs of Mortgagor, and the entire obligation secured by this Mortgage constitutes (i) a "business loan" as that term is defined in, and for all purposes of, 815 ILCS 205/4(1)(c) and (ii) a "loan secured by a mortgage on real estate" within the purview and operation of 815 ILCS 205/4(1)(l).

(b) Pursuant to the terms of the Collateral Protection Act, 815 ILCS 180/1 et seq., Mortgagor is hereby notified that unless Mortgagor provides Mortgagee with evidence of the insurance coverage required by this Mortgage, Mortgagee may purchase insurance at Mortgagor's expense to protect Mortgagee's interests in the Mortgaged Property, which insurance may, but need not, protect the interests of Mortgagor. The coverage purchased by Mortgagee may not pay any claim made by Mortgagor or any claim made against Mortgagor in connection with the Mortgaged Property. Mortgagor may later cancel any insurance purchased by Mortgagee, but only after providing Mortgagee with evidence that Mortgagor has obtained the insurance as required hereunder. If Mortgagee purchases insurance for the Mortgaged Property, the Mortgagor will be responsible for the costs of such insurance, including interest and any other charges imposed in connection with the placement of the insurance, until the effective date of the cancellation or expiration of the insurance. The costs of the insurance may be added to the Liabilities secured hereby. The costs of such insurance may be greater than the cost of insurance Mortgagor may be able to obtain for itself.

# UNOFFICIAL COPY

(c) It is the intention of Mortgagor and Mortgagee that the enforcement of the terms and provisions of this Mortgage shall be accomplished in accordance with the Illinois Mortgage Foreclosure Law (the "Act"), 735 ILCS 5/15-1101 et seq., and with respect to such Act, Mortgagor agrees and covenants that:

(i) Mortgagee shall have the benefit of all of the provisions of the Act, including all amendments thereto which may become effective from time to time after the date hereof. In the event any provision of the Act which is specifically referred to herein may be repealed, to the maximum extent permitted by law, Mortgagee shall have the benefit of such provision as most recently existing prior to such repeal, as though the same were incorporated herein by express reference. If any provision in this Mortgage shall be inconsistent with any provision of the Act, provisions of the Act shall take precedence over the provisions of this Mortgage but shall not invalidate or render unenforceable any other provision of this Mortgage that can be construed in a manner consistent with the Act. If any provision of this Mortgage shall grant to Mortgagee (including Mortgagee acting as a mortgagee-in-possession) or a receiver, any powers, rights or remedies prior to or upon the occurrence and during the continuance of an Event of Default, which are more limited than the powers, rights or remedies that would otherwise be vested in Mortgagee or in such receiver under the Act in the absence of said provision, Mortgagee and such receiver shall be vested with the powers, rights and remedies granted in the Act to the full extent permitted by law. Without limiting the generality of the foregoing, all expenses incurred by Mortgagee, whether incurred before or after any decree or judgment of foreclosure, and whether or not enumerated in this Mortgage, shall be added to the Liabilities and shall have the benefit of all applicable provisions of the Act.

(ii) Wherever provision is made in this Mortgage for insurance policies to bear mortgagee clauses or other loss payable clauses or endorsements in favor of Mortgagee, or to confer authority upon to settle or participate in the settlement of losses under policies of insurance or to hold and disburse or otherwise control the use of insurance proceeds, from and after the entry of judgment of foreclosure, all such rights and powers of the Mortgagee shall continue in the Mortgagee as judgment creditor or mortgagee until confirmation of sale.

(iii) In addition to any provision of this Mortgage authorizing the Mortgagee to take or be placed in possession of the Premises, or for the appointment of a receiver, Mortgagee shall have the right, in accordance with Sections 15-1701 and 15-1702 of the Act, to be placed in the possession of the Premises or at its request to have a receiver appointed, and such receiver, or Mortgagee, if and when placed in possession, shall have, in addition to any other powers provided in this Mortgage, all rights, powers, immunities, and duties and provisions for in Sections 15-1701 and 15-1703 of the Act.

(iv) Mortgagor acknowledges that the Premises do not constitute agricultural real estate, as said term is defined in Section 15-1201 of the Act or residential real estate as defined in Section 15-1219 of the Act.

(v) Mortgagor hereby expressly waives any and all rights of reinstatement and redemption, if any, under any order or decree of foreclosure of this Mortgage, on its own behalf and on behalf of each and every person, it being the intent hereof that any and all such rights of reinstatement and redemption of Mortgagor and of all other persons are and shall be deemed to

# UNOFFICIAL COPY

be hereby waived to the full extent permitted by the provisions of Section 5/15-1601 of the Act or other applicable law or replacement statutes.

(vi) All advances, disbursements and expenditures made or incurred by Mortgagee before and during a foreclosure, and before and after judgment of foreclosure, and at any time prior to sale, and, where applicable, after sale, and during the pendency of any related proceedings, for the following purposes, in addition to those otherwise authorized by the Mortgage, or the Deferral Agreement or by the Act (collectively "Protective Advances"), shall have the benefit of all applicable provisions of the Act, including those provisions of the Act hereinbelow referred to:

(A) all advances by Mortgagee in accordance with the terms of this Mortgage or the Deferral Agreement to: (i) preserve, maintain, repair, restore or rebuild the improvements upon the Mortgaged Property; (ii) preserve the lien of this Mortgage or the priority thereof; or (iii) enforce this Mortgage, as referred to in Subsection (b)(5) of Section 15-1302 of the Act;

(B) payments by Mortgagee of (i) principal, interest or other obligations in accordance with the terms of any senior mortgage or other prior lien or encumbrance; (ii) real estate taxes and assessments, general and special and all other taxes and assessments of any kind or nature whatsoever which are assessed or imposed upon the Mortgaged Property or any part thereof; (iii) other obligations authorized by the Mortgage; or (iv) with court approval, any other amounts in connection with other liens, encumbrances or interests reasonably necessary to preserve the status of title, as referred to in Section 15-1505 of the Act;

(C) advances by Mortgagee in settlement or compromise of any claims asserted by claimants under senior mortgages or any other prior liens;

(D) attorneys' fees and other costs incurred: (i) in connection with the foreclosure of this Mortgage as referred to in Sections 15-1504(d)(2) and 15-1510 of the Act; (ii) in connection with any action, suit or proceeding brought by or against Mortgagee for the enforcement of this Mortgage or arising from the interest of the Mortgagee hereunder; or (iii) in preparation for or in connection with the commencement, prosecution or defense of any other action related to this Mortgage or the Mortgaged Property;

(E) Mortgagee's fees and costs, including attorneys' fees, arising between the entry of judgment of foreclosure and the confirmation hearing as referred to in Section 15-1508(b)(1) of the Act;

(F) expenses deductible from proceeds of sale as referred to in Section 15-1512(a) and (b) of the Act; and

(G) expenses incurred and expenditures made by Mortgagee for any one or more of the following: (i) if the Mortgaged Property or any portion thereof constitutes one or more units under a condominium declaration, assessments

# UNOFFICIAL COPY

imposed upon the unit owner thereof; (ii) if Mortgagor's interest in the Mortgaged Property is a leasehold estate under a lease or sublease, rentals or other payments required to be made by the lessee under the terms of the lease or sublease; (iii) premiums for casualty and liability insurance paid by Mortgagee whether or not Mortgagee or a receiver is in possession, if reasonably required, in reasonable amounts, and all renewals thereof, without regard to the limitation to maintaining of existing insurance in effect at the time any receiver or mortgagee takes possession of the Mortgaged Property imposed by Section 15-1704(c)(1) of the Act; (iv) repair or restoration of damage or destruction in excess of available insurance proceeds or condemnation awards; (v) payments deemed by Mortgagee to be required for the benefit of the Mortgaged Property or required to be made by the owner of the Mortgaged Property under any grant or declaration of easement, easement agreement, agreement with any adjoining land owners or instruments creating covenants or restrictions for the benefit of or affecting the Mortgaged Property; (vi) shared or common expense assessments payable to any association or corporation in which the owner of the Mortgaged Property is a member in any way affecting the Mortgaged Property; (vii) if the loan secured hereby is a construction loan, costs incurred by Mortgagee for demolition, preparation for and completion of construction, as may be authorized by the applicable commitment, loan agreement or other agreement; (viii) payments required to be paid by Mortgagor or Mortgagee pursuant to any lease or other agreement for occupancy of the Mortgaged Property and (ix) if this Mortgage is insured, payment of FHA or private mortgage insurance required to keep such insurance in force.

(vii) This Mortgage shall be a lien for all Protective Advances as to subsequent purchasers and judgment creditors from the time this Mortgage is recorded pursuant to Subsection (b)(5) of Section 15-1302 of the Act. All Protective Advances shall, except to the extent, if any, that any of the same is clearly contrary to or inconsistent with the provisions of the Act, apply to and be included in:

- (A) any determination of the amount of indebtedness secured by this Mortgage at any time;
- (B) the indebtedness found due and owing to Mortgagee in the judgment of foreclosure and any subsequent supplemental judgments, orders, adjudications or findings by the court of any additional indebtedness becoming due after such entry of judgment, it being agreed that in any foreclosure judgment, the court may reserve jurisdiction for such purpose;
- (C) if right of redemption has not been waived by this Mortgage, computation of amounts required to redeem, pursuant to Sections 15-1603(d)(2) and 1603(e) of the Act;
- (D) determination of amounts deductible from sale proceeds pursuant to Section 15-1512 of the Act;

# UNOFFICIAL COPY

(E) application of income in the hands of any receiver or mortgagee in possession; and

(F) computation of any deficiency judgment pursuant to Sections 15-1508(b)(2), 15-1508(e) and 15-1511 of the Act.

28. Future Advances. Mortgagee is obligated under the terms of the Deferral Agreement to make advances as provided therein, and Mortgagor acknowledges and intends that all such advances, including future advances whenever hereafter made, shall be a lien from the time this Mortgage is recorded, as provided in Section 15-1302(b)(1) of the Act. Mortgagor covenants and agrees that this Mortgage shall secure the payment of all advances made pursuant to the terms and provisions of the Deferral Agreement, whether such advances are made as of the date hereof or at any time in the future, and whether such future advances are obligatory or are to be made at the option of Mortgagee or otherwise (but not advances or loans made more than 20 years after the date hereof), to the same extent as if such future advances were made on the date of the execution of this Mortgage and although there may be no advances made at the time of the execution of this Mortgage and although there may be no other indebtedness outstanding at the time any advance is made. The lien of this Mortgage shall be valid as to all Obligations, including future advances, from the time of its filing of record in the office of the Recorder of Deeds of the County in which the Mortgaged Property is located. The total amount of the Obligations may increase or decrease from time to time, but the total unpaid principal balance of the Obligations (including disbursements which Mortgagee may make under this Mortgage or any other document or instrument evidencing or securing the Obligations) at any time outstanding shall not exceed the amount referred to in this Mortgage. This Mortgage shall be valid and shall have priority over all subsequent liens and encumbrances, including statutory liens, except taxes and assessments levied on the Mortgaged Property, to the extent of the maximum amount secured hereby.

29. Maturity Date. The Liabilities secured hereby shall have a final maturity date of January 15, 2013, subject to acceleration and extension as provided herein and in the Deferral Agreement.

(REMAINDER OF PAGE INTENTIONALLY LEFT BLANK)



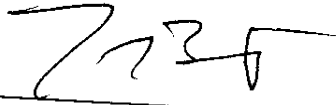
# UNOFFICIAL COPY

IN WITNESS WHEREOF, this Mortgage is executed as of the day and year first above written by the Person (or Persons) identified below on behalf of Mortgagor.

MORTGAGOR HEREBY DECLARES AND ACKNOWLEDGES THAT MORTGAGOR HAS RECEIVED, WITHOUT CHARGE, A TRUE COPY OF THIS MORTGAGE.

**MORTGAGOR:**

YRC INC.,  
a Delaware corporation, f/k/a Yellow Roadway Corp., a Delaware corporation, f/k/a Roadway Express, Inc., a Delaware corporation, successor by merger to Yellow Transportation, Inc., an Indiana corporation, f/k/a Yellow Freight System, Inc., an Indiana corporation

By   
Name: Jeff P. Bennett  
Title: Vice President - Legal and Secretary

Property of Cook County Clerk's Office

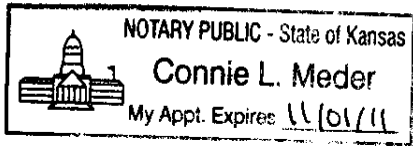
# UNOFFICIAL COPY

STATE OF KANSAS            )  
  ) SS.  
COUNTY OF JOHNSON    )

I, the undersigned, a Notary Public in and for said County, in said State, hereby certify that Jeff P. Bennett whose name as Vice President - Legal and Secretary of YRC INC., a Delaware corporation, f/k/a Yellow Roadway Corp., a Delaware corporation, f/k/a Roadway Express, Inc., a Delaware corporation, successor by merger to Yellow Transportation, Inc., an Indiana corporation, f/k/a Yellow Freight System, Inc., an Indiana corporation, is signed to the foregoing instrument, and who is known to me, acknowledged before me on this day that, being informed of the contents of the instrument, he, as such officer and with full authority, executed the same voluntarily for and as the act of said corporation.

Given under my hand and Official seal this 14th day of July, 2009.

Connie L. Meder  
Notary Public



(Seal)

My Commission Expires: 11/01/2011

Connie L. Meder  
Notary Public in and for the  
State of Kansas

# UNOFFICIAL COPY

## EXHIBIT A

Legal Description of the Land

(See attached)

The attached legal description relates to the following:

**ADDRESS OF PREMISES:**

2395 Arthur Ave.

Elk Grove Village, Cook County, Illinois

**PIN's:**

08-35-404-004-0000

08-35-404-005-0000

08-35-404-006-0000

08-35-404-007-0000

08-35-404-008-0000

08-35-404-009-0000

08-35-404-010-0000

08-35-404-053-0000

08-35-404-076-0000

Based on information and records provided by Mortgagor, the street address and PIN(s) above relate to the attached legal description; however, in the event of a conflict between the street address and/or PIN(s), and the legal description, the legal description shall control.

# UNOFFICIAL COPY

Site No. 612  
2395 Arthur Ave., Elk Grove Village, IL  
Cook County

LOT 104 (EXCEPT THE EAST 50 FEET THEREOF) AND ALL OF LOTS 105, 106, 107, 108, 109, 110, 111 AND 112 (EXCEPT THE WEST 37.5 FEET THEREOF) IN CENTEX INDUSTRIAL PARK UNIT 11, A SUBDIVISION IN SECTION 35, TOWNSHIP 41 NORTH, RANGE 11, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS

PIN's:

- 08-35-404-004-0000
- 08-35-404-005-0000
- 08-35-404-006-0000
- 08-35-404-007-0000
- 08-35-404-008-0000
- 08-35-404-009-0000
- 08-35-404-010-0000
- 08-35-404-053-0000
- 08-35-404-076-0000

Property of Cook County Clerk's Office