



Doc#: 0922455081 Fee: \$70.00
Eugene "Gene" Moore RHSP Fee:\$10.00
Cook County Recorder of Deeds
Date: 08/12/2009 11:47 AM Pg: 1 of 18

Illinois Anti-Predatory
Lending Database
Program

Certificate of Exemption

Report Mortgage Fraud
800-532-8785

The property identified as: PIN: 08-35-202-046-0000

Address:

Street: 1680 Elmhurst Road

Street line 2:

City: Elk Grove Village

State: IL

ZIP Code: 60007

Lender: CITICORP NORTH AMERICA, INC

Borrower: PLDSPE LLC

Loan / Mortgage Amount: \$411,392,782.54

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.

Certificate number: B69C76CE-180B-497D-897C-4E1B21E45DC7

Execution date: 07/16/2009

UNOFFICIAL COPY

JFagon D-1

MORTGAGE, SECURITY AGREEMENT, ASSIGNMENT OF RENTS AND LEASES AND FIXTURE FILING

by and from

PLDSPE LLC, "Mortgagor"

to

CITICORP NORTH AMERICA, INC. , in its capacity as Administrative Agent,
"Mortgagee"

Dated as of July 16, 2009

Location:	1685 Elmhurst Road
Municipalities:	Elk Grove Village
County:	Cook
State:	Illinois

Mortgagor's Organizational Identification No: 4702299

**THE SECURED PARTY (MORTGAGEE) DESIRES THIS FIXTURE FILING
TO BE INDEXED AGAINST THE RECORD OWNER OF THE REAL ESTATE
DESCRIBED HEREIN.**

**PREPARED BY, RECORDING REQUESTED BY,
AND WHEN RECORDED MAIL TO:**

Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, New York 10153
Attention: Samuel Zylberberg (LW)

UNOFFICIAL COPY

MORTGAGE, SECURITY AGREEMENT, ASSIGNMENT OF RENTS AND LEASES AND FIXTURE FILING

THIS MORTGAGE, SECURITY AGREEMENT, ASSIGNMENT OF RENTS AND LEASES AND FIXTURE FILING (this "Mortgage") is dated as of July 16, 2009 by PLDSPE LLC, a Delaware limited liability company ("Mortgagor"), whose address is 4545 Airport Way, Denver, CO 80239 to CITICORP NORTH AMERICA, INC. ("CNA"), a Delaware corporation, as mortgagee, assignee and secured party, in its capacity as agent for the Secured Parties under the Collateral Documents (as defined in the Credit Agreement referred to below) (in such capacity, "Administrative Agent") (Administrative Agent, together with its successors and assigns, "Mortgagee") having an address at 388 Greenwich Street, 19th Floor, New York, New York 10013.

RECITALS:

WHEREAS, ProLogis NA2 Sub Holdings LLC (the "Borrower") has entered into an Amended and Restated Credit Agreement, dated as of July 1, 2009 (as the same may be amended, restated, supplemented or otherwise modified from time to time, the "Credit Agreement"), with various affiliates thereof (including, for the limited purposes set forth therein, Mortgagor), the Lenders that are parties thereto and the Administrative Agent;

WHEREAS, as a material inducement for the Lenders to enter into the Credit Agreement, Mortgagor has agreed, pursuant to the PLDSPE Guaranty, to unconditionally guaranty the Guaranteed Obligations (as defined therein);

WHEREAS, Mortgagor acknowledges that it will derive substantial direct and indirect benefit from the Lenders entering into the Credit Agreement;

WHEREAS, Mortgagor is the owner and holder of fee simple title in and to all of the real estate located in the County of Cook and State of Illinois (the "State"), and more fully described in Exhibit A attached hereto (the "Land"), which Land forms a portion of the Mortgaged Property described below; and

WHEREAS, as a condition precedent to the Lenders agreeing to enter into the Credit Agreement, the Lenders have required that Mortgagor execute and deliver this Mortgage as security for the payment and performance of the Guaranteed Obligations; and

NOW, THEREFORE, in consideration of the premises and the agreements, provisions and covenants herein contained, Mortgagee and Mortgagor agree as follows:

ARTICLE 1

DEFINITIONS

Section 1.1 Definitions. Unless otherwise defined herein, terms defined in the Credit Agreement and used herein have the meanings given to them in the Credit Agreement. As used herein, the following terms shall have the following meanings:

(a) "Default Rate": The rate of interest specified in Section 2.6(c) of the Credit Agreement.

UNOFFICIAL COPY

(b) “Mortgaged Property”: All of Mortgagor’s right, title and interest in and to (1) the Land, together with any greater estate therein as hereafter may be acquired by Mortgagor, (2) all improvements now owned or hereafter acquired by Mortgagor, now or at any time situated, placed or constructed upon the Land (the “Improvements”); the Land and Improvements are collectively referred to as the “Premises”), (3) all materials, supplies, equipment, apparatus and other items of personal property now owned or hereafter acquired by Mortgagor and now or hereafter attached to, installed in or used in connection with any of the Improvements or the Land, and water, gas, electrical, telephone, storm and sanitary sewer facilities and all other utilities related to the Premises whether or not situated in easements (the “Fixtures”), (4) all goods, accounts, general intangibles, instruments, documents, chattel paper and all other personal property of any kind or character, including such items of personal property as defined in the UCC (defined below), now owned or hereafter acquired by Mortgagor and now or hereafter affixed to, placed upon, used in connection with, arising from or otherwise related to the Premises (the “Personalty”), (5) all reserves, escrows or impounds required under the Credit Agreement and all deposit accounts maintained by Mortgagor with respect to any of the property described in this sentence (the “Deposit Accounts”), (6) all leases, licenses, concessions, occupancy agreements or other agreements (written or oral, now or at any time in effect) which grant to any Person a possessory interest in, or the right to use, all or any part of the foregoing, together with all related security and other deposits (the “Leases”), (7) all of the rents, revenues, royalties, income, proceeds, profits, security and other types of deposits, and other benefits paid or payable by parties to the Leases for using, leasing, licensing, possessing, operating from, residing in, selling or otherwise enjoying all or any part of the foregoing (the “Rents”), (8) all other agreements, such as construction contracts, architects’ agreements, engineers’ contracts, utility contracts, maintenance agreements, management agreements, service contracts, listing agreements, guaranties, warranties, permits, licenses, certificates and entitlements in any way relating to the construction, use, occupancy, operation, maintenance, enjoyment or ownership of any of the foregoing (the “Property Agreements”), (9) all rights, privileges, tenements, hereditaments, rights-of-way, easements, appendages and appurtenances appertaining to the foregoing, (10) all property tax refunds payable with respect to any of the foregoing (the “Tax Refunds”), (11) all accessions, replacements and substitutions for any of the foregoing and all proceeds thereof (the “Proceeds”), (12) all claims under insurance policies thereof, with respect to any of the foregoing (the “Insurance”), and (13) all awards, damages, remunerations, reimbursements, settlements or compensation heretofore made or hereafter to be made by any governmental authority pertaining to any Condemnation of all or any portion of the Land, Improvements, Fixtures or Personalty (the “Condemnation Awards”). Any cash transferred by Mortgagor in the ordinary course of business to ProLogis or its Affiliates (whether by way of loan, advance, dividend, investment or otherwise) shall not constitute proceeds of the Mortgaged Property following such transfer notwithstanding that such proceeds may be identifiable by a method of tracing for purposes of Section 9-315(b)(2) of the UCC.

(c) “UCC”: The Uniform Commercial Code of New York, subject however, to the requirements of Section 7.10 below; *provided, however*, that, in the event that, by reason of mandatory provisions of law, any of the attachment, perfection or priority of the Administrative Agent’s security interest in any Mortgaged Property is governed by the Uniform Commercial Code as in effect in a jurisdiction other than the State of New York, the term “UCC” shall mean the Uniform Commercial Code as in effect in such other jurisdiction for purposes of the provisions hereof relating to such attachment, perfection or priority and for purposes of definitions related to such provisions.

ARTICLE 2

GRANT

Section 2.1 Grant. To secure the full, prompt and complete payment and performance when due (whether at stated maturity, by acceleration or otherwise) of Mortgagor’s

UNOFFICIAL COPY

obligations under the PLDSPE Guaranty, Mortgagor GRANTS, MORTGAGES, BARGAINS, ASSIGNS, SELLS, CONVEYS and CONFIRMS, to Mortgagee and its successors and assigns (for the benefit of the Lenders) forever and grants to Mortgagee and its successors and assigns (for the benefit of the Lenders) forever a continuing security interest in and to all of the Mortgaged Property, subject, however, only to Liens permitted by Section 8.2 of the Credit Agreement (“Permitted Liens”).

ARTICLE 3

WARRANTIES, REPRESENTATIONS AND COVENANTS

Mortgagor warrants, represents and covenants to Mortgagee as follows:

Section 3.1 **First Lien Status.** Mortgagor shall preserve and protect the first lien and security interest status of this Mortgage and the other Loan Documents. If any lien or security interest other than a Permitted Lien is asserted against the Mortgaged Property, Mortgagor shall promptly, and at its expense, (a) give Mortgagee a detailed written notice of such lien or security interest (including origin, amount and other terms), and (b) pay the underlying claim in full or take such other action so as to cause it to be released or contest the same in compliance with the requirements of the Credit Agreement.

Section 3.2 **Leases.** Mortgagor shall (a) observe and perform all the material obligations imposed upon the lessor under the Leases; (b) not collect any of the fixed rent due under the Leases more than thirty (30) days in advance of its due date; (c) not execute any assignment of lessor’s interest in the Leases or Rents other than the assignment of Rents and Leases contained in Article 5 of this Mortgage; (d) not terminate or cancel any guarantee, if any, of any of the Major Leases without the prior written consent of Mortgagee; and (e) enforce all of the material terms, covenants and conditions contained in the Leases, on the part of the lessee thereunder to be observed or performed, short of termination thereof, except that Mortgagor may terminate any Lease (i) following a material default thereunder by the respective lessee or (ii) in the absence of a material default, provided that such termination, together with all such terminations that have occurred from and after the date of this Mortgage will not (A) in the aggregate, result in the termination of more than two and one-half percent (2.5%) of the aggregate rentable square footage of the PLD Additional Collateral and Fund Collateral Properties (collectively, the “PLD-Fund Properties”), or (B) result in the PLD-Fund Properties being less than 90% leased based on the aggregate rentable square footage of all such properties (the “90% Lease Standard”) provided that such termination may result in the PLD-Fund Properties being below the 90% Lease Standard, but in no event lower than 85% leased based on the aggregate rentable square footage of all such properties, if none of the tenants from the leases that result in the PLD-Fund Properties being below the 90% Lease Standard were relocated to any other space owned or leased by Mortgagor or its Affiliates.

Section 3.3 **Replacement of Fixtures and Personalty.** Mortgagor shall not, without the prior written consent of Mortgagee, permit any material portion of the Fixtures or Personalty owned or leased by Mortgagor to be removed at any time from the Land or Improvements, unless the removed item is (a) replaced with an item of equal or greater value, (b) removed temporarily for maintenance and repair or (c) permitted to be removed pursuant to the terms of the Credit Agreement.

Section 3.4 **Condemnation Awards and Insurance Proceeds.**

(a) **Condemnation Awards.** Mortgagor assigns all Condemnation Awards to Mortgagee and authorizes Mortgagee to collect and receive such Condemnation Awards and to give proper receipts and acquittances therefor, subject to the terms of the Credit Agreement.

UNOFFICIAL COPY

(b) Insurance Proceeds. Mortgagor assigns to Mortgagee all proceeds of any insurance policies insuring against loss or damage to the Mortgaged Property. Mortgagor authorizes Mortgagee to collect and receive such proceeds and authorizes and directs the issuer of each of such insurance policies to make payment for all such losses directly to Mortgagee, instead of to Mortgagor and Mortgagee jointly, subject to the terms of the Credit Agreement.

Section 3.5 Management of Property.

(a) The Premises shall be managed at all times by the Property Manager pursuant to the Management Agreement. Pursuant to the Subordination of Management Agreement, the Property Manager shall agree that the Management Agreement and all fees thereunder (including any incentive fees) are subject and subordinate to the Guaranteed Obligations.

(b) Upon the occurrence of and during the continuance of an Event of Default or a material default by the Property Manager under the Management Agreement after the expiration of any applicable cure periods or upon the filing of a bankruptcy petition or occurrence of similar event with respect to the Property Manager, Mortgagee may, in its sole discretion, require Mortgagor to terminate the Management Agreement and engage a Property Manager selected by Mortgagee to serve as a replacement Property Manager pursuant to an approved Management Agreement.

Section 3.6 Payment of Rents. Within five (5) Business Days following Mortgagee's receipt of the Deposit Account Control Agreements with respect to Mortgagor's Approved Deposit Account in accordance with the terms of the Credit Agreement, Mortgagor shall deliver a written notice to each tenant in the Premises (and any other Person from whom Rents are received) instructing that (a) all payments under the Leases shall thereafter be transmitted by them directly to, and deposited directly into, Mortgagor's Approved Deposit Account and (b) such instruction may not be rescinded unless and until such tenant or other Person receives from Mortgagor or Mortgagee, a copy of Mortgagee's written consent to such rescission; and Mortgagor covenants that it shall not rescind such instruction without the prior written consent of Mortgagee. Mortgagor shall cause all other Rent received by Mortgagor with respect to the Premises to be deposited in Mortgagor's Approved Deposit Account within five (5) Business Days after Mortgagor's receipt thereof.

Section 3.7 Zoning and Uses. Mortgagor shall not, to the extent that same could reasonably be expected to have a Material Adverse Effect, do any of the following:

(a) initiate or support any limiting change in the permitted uses of the Premises (or to the extent applicable, zoning reclassification of the Premises) or any portion thereof, seek any variance under existing land use restrictions, laws, rules or regulations (or, to the extent applicable, zoning ordinances) applicable to the Premises, or use or permit the use of the Premises in a manner that would result in the use of the Premises becoming a nonconforming use under applicable land-use restrictions or zoning ordinances or that would violate the terms of any Lease, Requirement of Law or Permitted Lien;

(b) consent to any modification, amendment or supplement to any of the terms of, or default in its obligations under, any Lien;

(c) impose or consent to the imposition of any restrictive covenants, easements or encumbrances upon the Premises in any manner that adversely affects its value, utility or transferability; or

(d) execute or file any subdivision plat affecting the Premises, or institute, or permit the institution of, proceedings to alter any tax lot comprising the Premises.

UNOFFICIAL COPY

Section 3.8 Waste. Mortgagor shall not commit or permit any material abuse or destructive use (whether by action or inaction) of the Premises, or take any action that might invalidate any insurance with respect to the Mortgaged Property and Mortgagor shall promptly correct any such actions of which Mortgagor becomes aware.

Section 3.9 Further Assurances. Mortgagor shall, at Mortgagor's sole cost and expense, from time to time as reasonably requested by Mortgagee, execute, acknowledge, record, register, file and/or deliver to Mortgagee such other instruments, agreements, certificates and documents (including amended or replacement mortgages) as Mortgagee may reasonably request to evidence, confirm, perfect and maintain the Lien of this Mortgage securing the Guaranteed Obligations.

Section 3.10 Other Covenants. All of the representations, warranties and covenants in the Credit Agreement applicable to the Mortgaged Property are incorporated herein by reference and are true and correct with respect to the Mortgaged Property and the covenants contained in the Credit Agreement, together with covenants in this Article 3, shall be covenants running with the Land.

ARTICLE 4

DEFAULT AND FORECLOSURE

Section 4.1 Remedies. Upon the occurrence and during the continuance of an Event of Default, Mortgagee may, at Mortgagee's election exercise any or all of the following rights, remedies and recourses:

(a) Acceleration. Subject to any provisions of the Loan Documents providing for the automatic acceleration of the Loan upon the occurrence of certain Events of Default, declare the Guaranteed Obligations to be immediately due and payable, without further notice, presentment, protest, notice of intent to accelerate, notice of acceleration, demand or action of any nature whatsoever (each of which hereby is expressly waived by Mortgagor), whereupon the same shall become immediately due and payable.

(b) Entry on Mortgaged Property. Enter the Mortgaged Property and take exclusive possession thereof and of all books, records and accounts relating thereto or located thereon. If Mortgagor remains in possession of the Mortgaged Property following the occurrence and during the continuance of an Event of Default and without Mortgagee's prior written consent, Mortgagee may invoke any legal remedies to dispossess Mortgagor.

(c) Operation of Mortgaged Property. Hold, lease, develop, manage, operate or otherwise use the Mortgaged Property upon such terms and conditions as Mortgagee may deem reasonable under the circumstances (making such repairs, alterations, additions and improvements and taking other actions, from time to time, as Mortgagee deems necessary or desirable), and apply all Rents and other amounts collected in connection therewith in accordance with the provisions of Section 4.7.

(d) Foreclosure and Sale. Institute proceedings for the complete foreclosure of this Mortgage, either by judicial action or by power of sale, in which case the Mortgaged Property may be sold for cash or credit in one or more parcels as Mortgagee may determine. With respect to any notices required or permitted under the UCC, Mortgagor agrees that ten (10) days' prior written notice shall be deemed commercially reasonable. At any such sale by virtue of any judicial proceedings, power of sale, or any other legal right, remedy or recourse, the title to and right of possession of any such property shall pass to the purchaser thereof, and to the fullest extent permitted by law, Mortgagor shall be completely and irrevocably divested of all of its right, title, interest, claim, equity, equity of redemption, and demand

UNOFFICIAL COPY

whatsoever, either at law or in equity, in and to the property sold and such sale shall be a perpetual bar both at law and in equity against Mortgagor, and against all other Persons claiming or to claim the property sold or any part thereof, by, through or under Mortgagor. Mortgagee or any of the Secured Parties may be a purchaser at such sale. If Mortgagee is the highest bidder, Mortgagee may credit the portion of the purchase price that would be distributed to Mortgagee against the Guaranteed Obligations in lieu of paying cash. In the event this Mortgage is foreclosed by judicial action, appraisal of the Mortgaged Property is waived.

(e) Receiver. Make application to a court of competent jurisdiction for, and obtain from such court as a matter of strict right and without notice to Mortgagor or regard to the adequacy of the Mortgaged Property for the repayment of the Guaranteed Obligations, the appointment of a receiver of the Mortgaged Property, and Mortgagor irrevocably consents to such appointment. Any such receiver shall have all the usual powers and duties of receivers in similar cases, including the full power to rent, maintain and otherwise operate the Mortgaged Property upon such terms as may be approved by the court, and shall apply such Rents in accordance with the provisions of Section 4.7.

(f) Other. Exercise all other rights, remedies and recourses granted under the Loan Documents or otherwise available at law or in equity.

Section 4.2 Separate Sales. The Mortgaged Property may be sold in one or more parcels and in such manner and order as Mortgagee in its sole discretion may elect; the right of sale arising out of any Event of Default shall not be exhausted by any one or more sales.

Section 4.3 Remedies Cumulative, Concurrent and Nonexclusive. Mortgagee and the Secured Parties shall have all rights, remedies and recourses granted in the Loan Documents and available at law or equity (including the UCC and the remedy of specific performance), which rights (a) shall be cumulative and concurrent, (b) may be pursued separately, successively or concurrently against Mortgagor or others obligated under the Loan Documents, or against the Mortgaged Property, or against any one or more of them, at the sole discretion of Mortgagee or the Secured Parties, as the case may be, (c) may be exercised as often as occasion therefor shall arise, and the exercise or failure to exercise any of them shall not be construed as a waiver or release thereof or of any other right, remedy or recourse, and (d) are intended to be, and shall be, nonexclusive. No action by Mortgagee or the Secured Parties in the enforcement of any rights, remedies or recourses under the Loan Documents or otherwise at law or equity shall be deemed to cure any Event of Default.

Section 4.4 Release of and Resort to Collateral. Mortgagee may release, regardless of consideration and without the necessity for any notice to or consent by the holder of any subordinate lien on the Mortgaged Property, any part of the Mortgaged Property without, as to the remainder, in any way impairing, affecting, subordinating or releasing the lien or security interest created in or evidenced by the Loan Documents or their status as a first and prior lien and security interest in and to the Mortgaged Property. For payment of the Guaranteed Obligations, Mortgagee may resort to any other security in such order and manner as Mortgagee may elect.

Section 4.5 Waiver of Redemption, Notice and Marshalling of Assets. To the fullest extent permitted by law, Mortgagor hereby irrevocably and unconditionally waives and releases (a) all benefit that might accrue to Mortgagor by virtue of any present or future statute of limitations or law or judicial decision exempting the Mortgaged Property from attachment, levy or sale on execution or providing for any stay of execution, exemption from civil process, redemption or extension of time for payment, (b) all notices of any Event of Default or of any election by Mortgagee to exercise or the actual exercise of any right, remedy or recourse provided for under the Loan Documents, and (c) any right to a marshalling of assets or a sale in inverse order of alienation.

UNOFFICIAL COPY

Section 4.6 Discontinuance of Proceedings. If Mortgagee or the Secured Parties shall have proceeded to invoke any right, remedy or recourse permitted under the Loan Documents and shall thereafter elect to discontinue or abandon it for any reason, Mortgagee or the Secured Parties, as the case may be, shall have the unqualified right to do so and, in such an event, Mortgagor, Mortgagee and the Secured Parties shall be restored to their former positions with respect to the Guaranteed Obligations, the Loan Documents, the Mortgaged Property and otherwise, and the rights, remedies, recourses and powers of Mortgagee and the Secured Parties shall continue as if the right, remedy or recourse had never been invoked, but no such discontinuance or abandonment shall waive any Event of Default which may then exist or the right of Mortgagee or the Secured Parties thereafter to exercise any right, remedy or recourse under the Loan Documents for such Event of Default.

Section 4.7 Application of Proceeds. Upon the occurrence and during the continuance of an Event of Default, the proceeds of any sale of, and the Rents and other amounts generated by the holding, leasing, management, operation or other use of the Mortgaged Property, shall be applied by Mortgagee (or the receiver, if one is appointed) as set forth in the Credit Agreement.

Section 4.8 Occupancy After Foreclosure. Any sale of the Mortgaged Property or any part thereof in accordance with Section 4.1(d) will divest all right, title and interest of Mortgagor in and to the property sold. Subject to applicable law, any purchaser at a foreclosure sale will receive immediate possession of the property purchased. If Mortgagor retains possession of such property or any part thereof subsequent to such sale, Mortgagor will be considered a tenant at sufferance of the purchaser, and will, if Mortgagor remains in possession after demand to remove, be subject to eviction and removal, forcible or otherwise, with or without process of law.

Section 4.9 Additional Advances and Disbursements; Costs of Enforcement.

(a) Upon the occurrence and during the continuance of any Event of Default, Mortgagee and each of the Secured Parties shall have the right but not the obligation, to cure such Event of Default in the name and on behalf of Mortgagor. All sums advanced and expenses incurred at any time by Mortgagee or any Secured Party under this Section 4.9, or otherwise under this Mortgage or any of the other Loan Documents or applicable law, shall bear interest from the date that such sum is advanced or expense incurred, to and including the date of reimbursement, computed at the Default Rate, and all such sums, together with interest thereon, shall be secured by this Mortgage.

(b) Mortgagor shall pay all expenses (including reasonable attorneys' fees and expenses) of or incidental to the perfection and enforcement of this Mortgage and the other Loan Documents to which Mortgagor is a party, or the enforcement, compromise or settlement of the Guaranteed Obligations or any claim under this Mortgage and the other Loan Documents to which Mortgagor is a party, and for the curing thereof, or for defending or asserting the rights and claims of Mortgagee in respect thereof, by litigation or otherwise.

Section 4.10 No Mortgagee in Possession. Neither the enforcement of any of the remedies under this Article 4, the assignment of the Rents and Leases under Article 5, the security interests under Article 6, nor any other remedies afforded to Mortgagee under the Loan Documents, at law or in equity shall cause Mortgagee or any Secured Party to be deemed or construed to be a mortgagee in possession of the Mortgaged Property, to obligate Mortgagee or any Secured Party to lease the Mortgaged Property or attempt to do so, or to take any action, incur any expense, or perform or discharge any obligation, duty or liability whatsoever under any of the Leases or otherwise.

UNOFFICIAL COPY

ARTICLE 5

ASSIGNMENT OF RENTS AND LEASES

Section 5.1 Assignment. In furtherance of and in addition to the assignment made by Mortgagor in Section 2.1 of this Mortgage, Mortgagor hereby absolutely and unconditionally assigns, sells, transfers and conveys to Mortgagee all of its right, title and interest in and to all Leases, whether now existing or hereafter entered into, and all of its right, title and interest in and to all Rents. This assignment is an absolute assignment and not an assignment for additional security only. So long as no Event of Default shall have occurred and be continuing, Mortgagor shall have a revocable license from Mortgagee to exercise all rights extended to the landlord under the Leases, including the right to receive and collect all Rents and to hold the Rents in trust for use in the payment and performance of the Guaranteed Obligations and to otherwise use the same. The foregoing license is granted subject to the conditional limitation that no Event of Default shall have occurred and be continuing. Upon the occurrence and during the continuance of an Event of Default, whether or not legal proceedings have commenced, and without regard to waste, adequacy of security for the Guaranteed Obligations or solvency of Mortgagor, the license herein granted shall automatically expire and terminate, without notice to Mortgagor by Mortgagee (any such notice being hereby expressly waived by Mortgagor to the extent permitted by applicable law).

Section 5.2 Perfection Upon Recordation. Mortgagor acknowledges that Mortgagee has taken all actions necessary to obtain, and that upon recordation of this Mortgage Mortgagee shall have, to the extent permitted under applicable law, a valid and fully perfected, first priority, present assignment of the Rents arising out of the Leases and all security for such Leases. Mortgagor acknowledges and agrees that upon recordation of this Mortgage, Mortgagee's interest in the Rents shall be deemed to be fully perfected, "choate" and enforceable as to Mortgagor and to the extent permitted under applicable law, all third parties, including, without limitation, any subsequently appointed trustee in any case under Title 11 of the United States Code (the "Bankruptcy Code"), without the necessity of commencing a foreclosure action with respect to this Mortgage, making formal demand for the Rents, obtaining the appointment of a receiver or taking any other affirmative action.

Section 5.3 Bankruptcy Provisions. Without limitation of the absolute nature of the assignment of the Rents hereunder, Mortgagor and Mortgagee agree that (a) this Mortgage shall constitute a "security agreement" for purposes of Section 552(b) of the Bankruptcy Code, (b) the security interest created by this Mortgage extends to property of Mortgagor acquired before the commencement of a case in bankruptcy and to all amounts paid as Rents and (c) such security interest shall extend to all Rents acquired by the estate after the commencement of any case in bankruptcy.

Section 5.4 No Merger of Estates. So long as any of the Guaranteed Obligations remain unpaid and undischarged, the fee and leasehold estates to the Mortgaged Property shall not merge, but shall remain separate and distinct, notwithstanding the union of such estates either in Mortgagor, Mortgagee, any tenant or any third party by purchase or otherwise.

ARTICLE 6

SECURITY AGREEMENT

Section 6.1 Security Interest. This Mortgage constitutes a "security agreement" on personal property within the meaning of the UCC and other applicable law and with respect to the Personalty, Fixtures, Leases, Rents, Deposit Accounts, Property Agreements, Tax Refunds, Proceeds, Insurance and Condemnation Awards. To this end, Mortgagor grants to Mortgagee a first and prior

UNOFFICIAL COPY

security interest in the Personalty, Fixtures, Leases, Rents, Deposit Accounts, Property Agreements, Tax Refunds, Proceeds, Insurance, Condemnation Awards and all other Mortgaged Property which is personal property to secure the payment and performance of the Guaranteed Obligations, and agrees that Mortgagee shall have all the rights and remedies of a secured party under the UCC with respect to such property. Any notice of sale, disposition or other intended action by Mortgagee with respect to the Personalty, Fixtures, Leases, Rents, Deposit Accounts, Property Agreements, Tax Refunds, Proceeds, Insurance and Condemnation Awards sent to Mortgagor at least ten (10) days prior to any action under the UCC shall constitute reasonable notice to Mortgagor.

Section 6.2 Financing Statements. Mortgagor shall prepare and deliver to Mortgagee such financing statements, and shall execute and deliver to Mortgagee such documents, instruments and further assurances, in each case in form and substance satisfactory to Mortgagee, as Mortgagee may, from time to time, reasonably consider necessary to create, perfect and preserve Mortgagee's security interest hereunder. Mortgagor hereby irrevocably authorizes Mortgagee to cause financing statements and any such documents, instruments and assurances to be recorded and filed, at such times and places as may be required or permitted by law to so create, perfect and preserve such security interest. Mortgagor's jurisdiction of organization is set forth in the introductory paragraph of this Mortgage. After the date of this Mortgage, Mortgagor shall not change its name, type of organization, organizational identification number (if any), jurisdiction of organization or location (within the meaning of the UCC) without giving at least thirty (30) days' prior written notice to Mortgagee.

Section 6.3 Fixture Filing. This Mortgage shall also constitute a "fixture filing" for the purposes of the UCC against all of the Mortgaged Property which is or is to become fixtures. The information provided in this Section 6.3 is provided so that this Mortgage shall comply with the requirements of the UCC for a mortgage instrument to be filed as a financing statement. Mortgagor is the "Debtor" and its name and mailing address are set forth in the preamble of this Mortgage immediately preceding Article 1. Mortgagee is the "Secured Party" and its name and mailing address from which information concerning the security interest granted herein may be obtained are also set forth in the preamble of this Mortgage immediately preceding Article 1. A statement describing the portion of the Mortgaged Property comprising the fixtures hereby secured is set forth in Section 1.1(c) of this Mortgage. The record owner of the Mortgaged Property is Mortgagor. The organizational identification number of Debtor (Mortgagor) is set forth on the cover page hereof.

ARTICLE 7

MISCELLANEOUS

Section 7.1 Notices. Any notice required or permitted to be given under this Mortgage shall be given in accordance with Section 11.8 of the Credit Agreement.

Section 7.2 Covenants Running with the Land. All obligations of Mortgagor contained in this Mortgage are intended by Mortgagor and Mortgagee to be, and shall be construed as, covenants running with the Mortgaged Property. As used herein, "Mortgagor" shall refer to the party named in the first paragraph of this Mortgage and to any subsequent owner of all or any portion of the Mortgaged Property. All Persons who may have or acquire an interest in the Mortgaged Property shall be deemed to have notice of, and be bound by, the terms of this Mortgage and the other Loan Documents to which, and to the extent that, Mortgagor is a party; however, no such party shall be entitled to any rights thereunder without the prior written consent of Mortgagee.

Section 7.3 Attorney-in-Fact. Mortgagor hereby irrevocably appoints Mortgagee and its successors and assigns, as its attorney-in-fact, which agency is coupled with an interest and with full

UNOFFICIAL COPY

power of substitution, (a) upon the issuance of a deed pursuant to the foreclosure of this Mortgage or the delivery of a deed in lieu of foreclosure, to execute all instruments of assignment, conveyance or further assurance with respect to the Leases, Rents, Deposit Accounts, Property Agreements, Tax Refunds, Proceeds, Insurance and Condemnation Awards in favor of the grantee of any such deed and as may be necessary or desirable for such purpose, (b) to prepare and file or record financing statements and continuation statements, and to prepare, execute and file or record applications for registration and like papers necessary to create, perfect or preserve Mortgagee's security interests and rights in or to any of the Mortgaged Property, and (c) after the occurrence and during the continuance of any Event of Default, to perform any obligation of Mortgagor hereunder, however: (1) Mortgagee shall not under any circumstances be obligated to perform any obligation of Mortgagor; (2) any sums advanced by Mortgagee in such performance shall be added to and included in the Guaranteed Obligations and shall bear interest at the highest rate at which interest is then computed on any portion of the Loan; (3) Mortgagee as such attorney-in-fact shall only be accountable for such funds as are actually received by Mortgagee; and (4) Mortgagee shall not be liable to Mortgagor or any other person or entity for any failure to take any action which it is empowered to take under this Section 7.3.

Section 7.4 Time of Essence. Time is of the essence of this Mortgage.

Section 7.5 Successors and Assigns. This Mortgage shall be binding upon and inure to the benefit of Mortgagee, the Secured Parties and Mortgagor and their respective successors and assigns. Mortgagor shall not, without the prior written consent of Mortgagee, assign any rights, duties or obligations hereunder.

Section 7.6 No Waiver. Any failure by Mortgagee or the Secured Parties to insist upon strict performance of any of the terms, provisions or conditions of the Loan Documents shall not be deemed to be a waiver of same, and Mortgagee and the Secured Parties shall each have the right at any time to insist upon strict performance of all of such terms, provisions and conditions.

Section 7.7 Credit Agreement. If any conflict or inconsistency exists between this Mortgage and the Credit Agreement, the Credit Agreement shall govern.

Section 7.8 Release or Reconveyance. Upon payment and performance in full of the Guaranteed Obligations or upon a sale or other disposition of the Mortgaged Property permitted by the Credit Agreement, Mortgagee, at Mortgagor's request and expense, shall release the liens and security interests created by this Mortgage.

Section 7.9 Waiver of Stay, Moratorium and Similar Rights. Mortgagor agrees, to the full extent that it may lawfully do so, that it will not at any time insist upon or plead or in any way take advantage of any stay, marshalling of assets, extension, redemption or moratorium law now or hereafter in force and effect so as to prevent or hinder the enforcement of the provisions of this Mortgage or the Guaranteed Obligations, or any agreement between Mortgagor and Mortgagee or any rights or remedies of Mortgagee, or the Secured Parties.

Section 7.10 Applicable Law. The provisions of this Mortgage regarding the creation, perfection and enforcement of the liens and security interests herein granted shall be governed by and construed under the laws of the State. All other provisions of this Mortgage shall be governed by the laws of the State of New York (including, without limitation, Section 5-1401 of the General Obligations Law of the State of New York).

UNOFFICIAL COPY

Section 7.11 Headings. The Article, Section and Subsection titles hereof are inserted for convenience of reference only and shall in no way alter, modify or define, or be used in construing, the text of such Articles, Sections or Subsections.

Section 7.12 Severability. If any provision of this Mortgage shall be held by any court of competent jurisdiction to be unlawful, void or unenforceable for any reason, such provision shall be deemed severable from and shall in no way effect the enforceability and validity of the remaining provisions of this Mortgage.

Section 7.13 Entire Agreement. This Mortgage and the other Loan Documents embody the entire agreement and understanding between Mortgagor and Mortgagee and supersede all prior agreements and understandings between such parties relating to the subject matter hereof and thereof. Accordingly, the Loan Documents may not be contradicted by evidence of prior, contemporaneous or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties.

Section 7.14 Mortgagee as Agent; Successor Agents.

(a) Administrative Agent has been appointed to act as Administrative Agent hereunder by the Secured Parties. Administrative Agent shall have the right hereunder to make demands, to give notices, to exercise or refrain from exercising any rights, and to take or refrain from taking any action (including, without limitation, the release or substitution of the Mortgaged Property) in accordance with the terms of the Credit Agreement, any related agency agreement among Administrative Agent and the Secured Parties (collectively, as amended, supplemented or otherwise modified or replaced from time to time, the "Agency Documents") and this Mortgage. Mortgagor and all other persons shall be entitled to rely on releases, waivers, consents, approvals, notifications and other acts of Administrative Agent, without inquiry into the existence of required consents or approvals of the Secured Parties therefor.

(b) Mortgagee shall at all times be the same Person that is Administrative Agent under the Agency Documents. Written notice of resignation by Administrative Agent pursuant to the Agency Documents shall also constitute notice of resignation as Administrative Agent under this Mortgage. Removal of Administrative Agent pursuant to any provision of the Agency Documents shall also constitute removal as Administrative Agent under this Mortgage. Appointment of a successor Administrative Agent pursuant to the Agency Documents shall also constitute appointment of a successor Administrative Agent under this Mortgage. Upon the acceptance of any appointment as Administrative Agent by a successor Administrative Agent under the Agency Documents, that successor Administrative Agent shall thereupon succeed to and become vested with all the rights, powers, privileges and duties of the retiring or removed Administrative Agent as the Mortgagee under this Mortgage, and the retiring or removed Administrative Agent shall promptly (i) assign and transfer to such successor Administrative Agent all of its right, title and interest in and to this Mortgage and the Mortgaged Property, and (ii) execute and deliver to such successor Administrative Agent such assignments and amendments and take such other actions, as may be necessary or appropriate in connection with the assignment to such successor Administrative Agent of the liens and security interests created hereunder, whereupon such retiring or removed Administrative Agent shall be discharged from its duties and obligations under this Mortgage. After any retiring or removed Administrative Agent's resignation or removal hereunder as Administrative Agent, the provisions of this Mortgage and the Agency Documents shall inure to its benefit as to any actions taken or omitted to be taken by it under this Mortgage while it was the Administrative Agent hereunder.

Section 7.15 No Oral Change. No modification, amendment, extension, discharge, termination or waiver of any provision of this Mortgage, nor consent by Mortgagee to any departure

UNOFFICIAL COPY

therefrom, shall in any event be effective unless the same shall be in a writing signed by the party against whom enforcement is sought, and then such waiver or consent shall be effective only in the specific instance, and for the purpose, for which given. Except as otherwise expressly provided herein, no notice to or demand on Mortgagor shall entitle Mortgagor to any other or future notice or demand in the same, similar or other circumstances.

Section 7.16 Waiver of Jury Trial. EACH OF THE ADMINISTRATIVE AGENT AND MORTGAGOR IRREVOCABLY WAIVES TRIAL BY JURY IN ANY ACTION OR PROCEEDING WITH RESPECT TO THIS MORTGAGE OR ANY OTHER LOAN DOCUMENT.

ARTICLE 8

LOCAL LAW PROVISIONS

Section 8.1 Illinois Mortgage Foreclosure Act. It is the express intention of Mortgagee and Mortgagor that the rights, remedies, powers and authorities conferred upon Mortgagee pursuant to this Mortgage shall include all rights, remedies, powers and authorities that a mortgagor may confer upon a mortgagee under the Illinois Mortgage Foreclosure Act, 735 ILCS 5/15-1101 *et seq.* (the "Act") and/or as otherwise permitted by applicable law, as if they were expressly provided for herein. In the event that any provisions in this Mortgage are deemed inconsistent with any provision in the Act, the provisions of the Act shall take precedence over the provisions of this Mortgage, but shall not invalidate or render unenforceable any other provision of this Mortgage that can be construed in a manner consistent with the Act.

Section 8.2 Expenses of Foreclosure. All expenses incurred by Mortgagee (including, without limitation, attorney fees and expenses incurred in connection with the preparation, filing, and prosecution of a suit for closing this Mortgage) to the extent reimbursable under Sections 15-1510 and 15-1512 of the Act, whether incurred before or after any decree or judgment of foreclosure, and whether enumerated in the Mortgage, shall be added to the Guaranteed Obligations secured by this Mortgage or by the judgment of foreclosure.

Section 8.3 Business Loan Recital/Statutory Exemption. (a) Mortgagor acknowledges and agrees that the obligations secured hereby have been incurred by Mortgagor solely for business purposes of Mortgagor and for Mortgagor's investment or profit, as contemplated by Section 4 of "An Act in relation to the rate of interest and other charges in connection with sales on credit and the lending of money," approved May 24, 1879, as amended (815 ILCS 205/4(1)(1)).

(b) Without limiting the generality of anything contained herein, Mortgagor acknowledges and agrees that the transaction of which this Mortgage is part is a transaction which does not include either agricultural real estate (as defined in 735 ILCS 5/15-1201 (1992)) or residential real estate (as defined in 735 5/15-1219 (1992)).

Section 8.4 Maximum Principal Amount. The maximum amount of the indebtedness secured hereby shall at no time exceed the sum of \$411,392,782.54 plus interest on the principal amount of the obligations and the costs and expenses paid and incurred by Mortgagee to enforce this Mortgage and protect the Mortgaged Property.

Section 8.5 Mortgagee in Possession. In addition to any provision of this Mortgage authorizing Mortgagee to take or be placed in possession of the Mortgaged Property, or for the appointment of a receiver, Mortgagee shall have the right, in accordance with Sections 5/15-1701 and 5/15-1702 of the Act, to be placed in possession of the Mortgaged Property or at its request to have a

UNOFFICIAL COPY

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 powers, immunities, and duties as provided for in Sections 5/15-1701 and 5/15-1703 of the Act.

Section 8.6 Powers of a Receiver. The powers of a receiver listed in 735 ILCS 5/15-1704 shall be added to all the powers of a receiver listed in the Mortgage subject to any express limitations on such powers in this Mortgage.

[The remainder of this page has been intentionally left blank]

Property of Cook County Clerk's Office

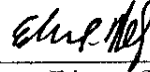
UNOFFICIAL COPY

IN WITNESS WHEREOF, Mortgagor has on the date set forth in the acknowledgement hereto, effective as of the date first above written, caused this instrument to be duly EXECUTED AND DELIVERED by authority duly given.

MORTGAGOR:

PLDSPE LLC,
a Delaware limited liability company

By:



Name: Edward S. Nekritz

Title: General Counsel and Secretary

Property of Cook County Clerk's Office

UNOFFICIAL COPY

STATE OF Colorado)
) ss.
COUNTY OF Denver)

Kara Dizman, a Notary Public in and for the County and State aforesaid, do hereby certify that Edward S. Nikrite, as the General Counsel & Secretary of PLDSPE LLC, a Delaware limited liability company, is personally known to me to be the same person whose name is subscribed to the foregoing instrument as such General Counsel & Secretary, appeared before me this day in person and acknowledged that he/she signed and delivered the said instrument as his/her own free and voluntary act, and as the free and voluntary act of said limited liability company, for the uses and purposes therein set forth.

GIVEN under my hand and Notarial Seal this 15 day of July, 2009.

Notary Public

My commission expires: 5/19/2011



UNOFFICIAL COPY

EXHIBIT A

Lot 1 in Kurgan's Resubdivision of the South 206.00 feet (as measured along the West line thereof) of Lot 22 (excepting the East 12.00 feet) in Centex Industrial Park Unit 5, being a S Subdivision in Section 35, Township 41 North, Range 11 East of the Third Principal Meridian, according to the plat thereof recorded July 5, 1979 as Document Number 3102350, in Cook County, Illinois.

Property of Cook County Clerk's Office