

Illinois Anti-Predatory
Lending Database
Program

Certificate of Exemption



Doc#: 1022210050 Fee: \$82.00
Eugene "Gene" Moore RHSP Fee:\$10.00
Cook County Recorder of Deeds
Date: 08/10/2010 12:24 PM Pg: 1 of 24

Report Mortgage Fraud
800-532-8785

The property identified as: PIN: 13-30-210-029-0000

Address:

Street: 3037 N. Normandy Avenue

Street line 2:

City: Chicago

State: IL

ZIP Code: 60634

Lender: Bank of America, N.A

Borrower: Stephen Rosenberg/ Mortgagor: NDP Properties, Inc.

Loan / Mortgage Amount: \$33,000,000.00

This property is located within the program area and the transaction is exempt from the requirements of 765 ILCS 77/70 et seq. because the application was taken by an exempt entity.

Certificate number: 65E98C90-5688-48EB-8AE0-9C565A0366B0

Execution date: 06/29/2010

UNOFFICIAL COPY

(Space above for recorder's use only)

PREPARED UNDER THE SUPERVISION OF AN ILLINOIS
LICENSED ATTORNEY (ANDREW T. WHITE, ESQ.,
GREENBERG TRAURIC, LLP, 77 WEST WACKER DRIVE,
SUITE 3100 CHICAGO, IL 60601) BY AND UPON
RECORDATION RETURN TO:

Kilpatrick Stockton LLP
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309-4530
Attention: Eric J. Berardi, Esq.

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

NDP PROPERTIES, INC., a Delaware Corporation, as Mortgagor
to
BANK OF AMERICA, N.A., as Mortgagee

Dated as of June 29, 2010

THIS MORTGAGE SECURES FUTURE ADVANCES

**THIS INSTRUMENT IS TO BE INDEXED AS BOTH A MORTGAGE AND AS A FIXTURE FILING FILED
AS A FINANCING STATEMENT.**

UNOFFICIAL COPY

MORTGAGE, SECURITY AGREEMENT, FIXTURE FILING AND ASSIGNMENT OF RENTS

THIS MORTGAGE, SECURITY AGREEMENT, FIXTURE FILING AND ASSIGNMENT OF RENTS (this "*Mortgage*") is made and effective as of the 29th day of June, 2010; by **NDP PROPERTIES, INC.**, a Delaware corporation (hereinafter the "*Mortgagor*"), having an address of c/o Greystone & Co., Inc., 152 West 57th Street, 60th Floor, New York, NY 10019, Attention: General Counsel, in favor of and for the benefit of **BANK OF AMERICA, N.A.**, in its capacity as Lender (hereinafter the "*Mortgagee*"), having an office at Bank of America, N.A., Banking Center: Commercial Department, 22 Bull Street, Savannah, Georgia 31401.

As used herein, the term "*Loan Agreement*" shall mean that certain Loan Agreement dated as of even date herewith, executed by and among Stephen Rosenberg (the "*Borrower*"), NDP Properties, Inc., SR 2008 LLC and Greystone Funding Corporation, as guarantors and Bank of America, N.A., as lender. Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Loan Agreement. Notwithstanding anything to the contrary contained herein, this Mortgage and the Liens granted hereunder are subject to the terms and conditions of the Loan Agreement.

WITNESSETH:

THAT FOR AND IN CONSIDERATION OF THE SUM OF TEN AND NO/100 DOLLARS (\$10) AND OTHER GOOD AND VALUABLE CONSIDERATION, THE RECEIPT AND SUFFICIENCY WHEREOF ARE HEREBY ACKNOWLEDGED, AND IN ORDER TO SECURE THE SECURED OBLIGATIONS AND OTHER OBLIGATIONS OF MORTGAGOR HEREINAFTER SET FORTH, MORTGAGOR HEREBY IRREVOCABLY GRANTS, BARGAINS, SELLS, WARRANTS, CONVEYS, MORTGAGES, ALIENS, REMISES, RELEASES, ASSIGNS, SETS OVER AND CONFIRMS TO MORTGAGEE AND ITS SUCCESSORS, SUCCESSORS-IN-TITLE AND ASSIGNS, AS PROVIDED BELOW, all of the following described interests in land, estates, easements, rights, improvements, personal property, fixtures, equipment, furniture, furnishings, appliances and appurtenances (hereinafter collectively referred to as the "*Perishes*"):

A. All of the right, title and interest of the Mortgagor in and to all that tract or parcel of land in Cook County (the "*County*"), State of Illinois, described on Exhibit A, attached hereto and incorporated herein by reference, such tract or parcel of land being hereinafter called the "*Land*";

B. The buildings, structures and improvements now or hereafter located on the Land (the "*Improvements*"), all of which are declared to be a part of the real estate encumbered hereby, and all interest of Mortgagor in and to the streets and roads abutting the Land to the center lines thereof, the strips and gores within or adjoining the Land, the air space and right to use said air space above the Land, all rights of ingress and egress by pedestrians and motor vehicles to parking facilities on or within the Land, and all easements now or hereafter affecting the Land, royalties and all rights appertaining to the use and enjoyment of the Land, including, without limitation, alley, drainage, sewer, mineral, water, oil and gas rights, rights-of-way, vaults, ways, passages, water courses, water rights and powers, and all estates, rights, titles, interests, privileges, liberties, tenements, hereditaments and appurtenances whatsoever, in any way belonging, relating or appertaining to the Land or any part thereof, or which

UNOFFICIAL COPY

hereafter shall in any way belong, relate or be appurtenant thereto and the reversion and reversions, remainder and remainders thereof;

C. All fixtures and articles of personal property and all other Collateral (as defined in the Loan Agreement), and all appurtenances and additions thereto and substitutions or replacements thereof, now or hereafter attached to, contained in, used or intended to be incorporated in or used in connection with the Premises or placed on any part thereof, though not attached thereto, including, but not limited to, all furniture, fixtures, and equipment, and all trade names, trademarks, trade styles, service marks, copyrights, service contracts, computers and computer software, telephone equipment and systems, warranties, guarantees, business and building licenses and permits, architects and engineers plans, blueprints and drawings relating to the Premises (all of the items described in this paragraph C are herein collectively referred to herein as the "*Personal Property*");

D. All leases, lettings and licenses of the Premises or any part thereof now or hereafter entered into by the Mortgagor as landlord (the "*Leases*"), and the rents, receipts, issues, profits, accounts receivable and revenues of the Premises from time to time accruing under the Leases (including without limitation all rental payments, tenant security deposits and escrow funds) including, without limitation, the right to receive and collect the rents, issues and profits payable thereunder (collectively, the "*Rents*");

E. All extensions, improvements, betterments, renewals, substitutions and replacements of, and all additions and appurtenances to, the foregoing, hereafter acquired by, or released to, Mortgagor, or constructed, assembled or placed thereon, and all conversions of the security constituted thereby, which immediately upon such acquisition, release, construction, assembling, placement or conversion, as the case may be, and in each such case, without any further conveyance, assignment or other act by Mortgagor, shall become subject to the lien of this Mortgage as fully and completely, and with the same effect, as though now owned by Mortgagor and specifically described herein;

F. All unearned premiums, accrued, accruing or to accrue under insurance policies now or hereafter obtained by Mortgagor in respect of any of the foregoing and all proceeds of the conversion, voluntary or involuntary, of the foregoing or any part thereof into cash or liquidated claims, including, without limitation, proceeds of claims under hazard and title insurance policies and all awards and compensation heretofore and hereafter made to the present and all subsequent owners of the foregoing by any governmental or other lawful authorities for the taking by eminent domain, condemnation or otherwise, of all or any part of the Premises or any easement therein, including awards for any change of grade of streets; and

G. All products and proceeds of any of the foregoing including all such proceeds acquired with cash proceeds in whatever form, whether real or personal property and, if personalty, whether such property shall constitute "*goods*," "*accounts*," "*inventory*," "*equipment*," "*instruments*," "*chattel paper*," "*documents*" or "*general intangibles*," all as defined under Article 9 of the Uniform Commercial Code in effect in the State of Illinois.

TO HAVE AND TO HOLD the Premises, together with all of the rights, privileges and appurtenances thereunto belonging, and every part thereof unto Mortgagee, its successors and assigns forever.

UNOFFICIAL COPY

AND Mortgagor covenants that Mortgagor is lawfully seized and possessed of a good and marketable title and has good right to convey the same, that the same are unencumbered, except for Permitted Liens, and that Mortgagor does warrant and will forever defend the title thereto against the claims of all persons whomsoever.

PROVIDED, HOWEVER, that if (i) all of the "*Obligations*" as such term is defined in the Loan Agreement (collectively, the "*Secured Obligations*") are paid in full (such payment to be final and irrevocable under the then applicable bankruptcy laws), (ii) no other *Obligations* are outstanding under the Loan Agreement, (iii) Mortgagor performed all covenants contained herein in a timely manner, and (iv) the Maturity Date occurred in the Loan Agreement, then upon the date on which the last to occur of the foregoing has occurred, this Mortgage and the estate created hereby shall cease, terminate, and be utterly null and void; otherwise this Mortgage and said estate shall be and remain in full force and effect and if an Event of Default occurs, Mortgagee is authorized to foreclose and sell the Premises in accordance with applicable law and as provided herein.

THIS INSTRUMENT IS A MORTGAGE pursuant to the laws of the State of Illinois governing mortgages, and is also a security agreement granting a present and continuing security interest and security title in the portion of the Premises constituting personal property or fixtures, and a financing statement filed as a fixture filing, pursuant to the Uniform Commercial Code of the State of Illinois. This Mortgage is made and intended to secure payment and performance of all of the Secured Obligations, including, without limitation: (i) the obligations evidenced by (a) that certain note made by the Borrower in favor of the Lender and dated on or about this same date in the principal amount of ELEVEN MILLION AND NO/100 DOLLARS (\$11,000,000.00) together with all notes issued and accepted in substitution or exchange therefor, and as may from time to time be modified, extended, renewed, consolidated, restated or replaced, are hereinafter sometimes referred to as the "*Note*"), bearing interest and default interest (if applicable), and being payable as therein provided whether for principal, interest (including without limitation interest which but for the filing of a petition in bankruptcy would accrue on such Secured Obligations), fees and other amounts, and whether such Secured Obligations are from time to time reduced and thereafter increased or entirely extinguished and thereafter reincurred; (ii) Mortgagor's obligations as a guarantor under that certain Affiliate Guaranty dated on or about this same date and made by Mortgagor and the other Guarantors (the "*Affiliate Guaranty*"), pursuant to which Mortgagor guaranteed the payment of all "*Guaranteed Obligations*" as defined therein (the "*Guaranteed Obligations*"); (iii) all other Secured Obligations of Mortgagor that may now exist or hereafter arise under any of the other Loan Documents (as such term is defined in the Loan Agreement); (iv) any and all renewal or renewals, extension or extensions, modification or modifications of any of the documents evidencing any of the foregoing, and substitution or substitutions therefor, either in whole or in part; (v) all duties and obligations of Mortgagor under this Mortgage plus (vi) all interest and default interest (if applicable) due and payable in connection with the Note, all advances, if any, made by Mortgagee pursuant to the terms of this Mortgage and all out-of-pocket expenses incurred incident to the collection of the Secured Obligations and all other expenditures and expenses incurred by Mortgagee in connection with this Mortgage (including, without limitation, reasonable attorneys' fees).

Mortgagor hereby further covenants and agrees with Mortgagee as follows:

UNOFFICIAL COPY

ARTICLE I

COVENANTS

Section 1.1 Junior Encumbrances. Without the prior written consent of Mortgagee, Mortgagor shall not create or permit to exist any liens or encumbrances on the Premises (other than Permitted Liens).

Section 1.2 Performance of Obligations by Mortgagor.

(a) **Payment Obligations.** Mortgagor shall pay, when due and payable: (i) the Guaranteed Obligations of Mortgagor as a guarantor under the Affiliate Guaranty in accordance with the terms and conditions thereof; (ii) all taxes, all assessments, general or special regulatory fees, and all other charges levied or imposed upon or assessed or placed or made against the Premises, this Mortgage, any other Loan Document, the Obligations or any interest of Mortgagee in the Premises, this Mortgage, any other Loan Document or the Guaranteed Obligations; (iii) premiums on policies of fire and casualty insurance covering the Premises required by this Mortgage or the Loan Agreement or now or hereafter required by Mortgagee; (iv) premiums on all other insurance policies required by this Mortgage or the Loan Agreement or now or hereafter required by Mortgagee in connection with the Premises or the Guaranteed Obligations or any part of either; and (v) all ground rents, lease rentals and other payments respecting the Premises payable by Mortgagor. Mortgagor shall promptly deliver to Mortgagee, upon request by Mortgagee, receipts showing payment in full of all of the foregoing items.

(b) **Performance Obligations.** Mortgagor shall also fully and timely perform all Guaranteed Obligations not described in subparagraph (a) above.

Section 1.3 Mortgagee's Acts on Behalf of Mortgagor. In the event Mortgagor shall either fail or refuse to pay or cause to be paid, as the same shall become due and payable, any item (including all items specified in **Section 1.2** hereof) which Mortgagor is required to pay hereunder or which Mortgagor may pay to cure a default under this Mortgage, or in the event Mortgagor shall either fail or refuse to do or perform any act which Mortgagor is obligated to do or perform under this Mortgage or which Mortgagor may do or perform to cure a default under this Mortgage, or in the event Mortgagee shall be required, or shall find it necessary or desirable in Mortgagee's discretion, to defend, enforce or protect any of the rights and benefits accruing to Mortgagee under any provision of this Mortgage (including, without limitation, Mortgagee's interest in the Premises, insurance and condemnation proceeds and the Rents), then Mortgagee, at Mortgagee's option, may make such payment or do or perform such act on behalf of Mortgagor, or proceed in any manner to defend, enforce or protect any such rights and benefits. All such payments made by Mortgagee and all costs and expenses incurred by Mortgagee in doing or performing all such acts shall be and shall become part of the Secured Obligations and shall bear interest at the Default Rate as set forth in the Loan Agreement from the date paid or incurred by Mortgagee, and the interest thereon shall also be part of the Secured Obligations.

Section 1.4 Further Assurances. Mortgagor shall at any time, and from time to time, upon request by Mortgagee, make, execute and deliver, or cause to be made, executed and delivered, any and all other and further instruments, documents, certificates, agreements, letters, representations and other writings as may be reasonably necessary or desirable, in the opinion of Mortgagee, in order

UNOFFICIAL COPY

to effectuate, complete, correct, perfect or continue and preserve the liability and obligation of Mortgagor for payment of the Obligations and the lien, security interest and security title of Mortgagee under this Mortgage. Mortgagor shall, upon request by Mortgagee, certify in writing to Mortgagee, or to any proposed assignee of this Mortgage, the amount of principal and interest then owing on the Obligations and whether or not any setoffs or defenses exist against all or any part of the Obligations.

Section 1.5 Rents and Leases. Cumulative of all rights and remedies herein provided for, Mortgagor hereby assigns to Mortgagee, as additional security for the Secured Obligations, all existing and future Rents. Mortgagor shall fully and faithfully perform all of the duties and obligations of the lessor, landlord or owner of the Premises under the Leases and observe, satisfy and comply with all of the terms, covenants, conditions, agreements, requirements, restrictions and provisions of the Leases, and do all acts otherwise necessary to maintain and preserve the Rents and prevent any diminishment or impairment of the value of the Leases or the Rents or the interest of Mortgagor or Mortgagee therein or thereunder. Without the prior written consent of Mortgagee, Mortgagor shall not further assign the Rents or the Leases, shall not terminate, alter, modify, or amend in any respect, or accept the surrender of, any of the Leases, and shall not collect Rents for more than one (1) month in advance. Mortgagor shall procure and deliver to Mortgagee upon request estoppel letters or certificates from each lessee, tenant, and other occupant in possession of the Premises or any part thereof under a written or an unwritten lease agreement, as required by and in form and substance satisfactory to Mortgagee, and shall deliver to Mortgagee a recordable assignment of all of Mortgagor's interest in all Leases, which assignment shall be in form and substance satisfactory to Mortgagee, together with proof of due service of a copy of such assignment on each lessee, tenant, and other occupant in possession of the Premises or any part thereof; provided, however, that Mortgagor shall not be required to procure and deliver an estoppel letter or a certificate from, or an assignment with respect to occupants in possession of the Premises for only a temporary basis and not in possession of the Premises or any part thereof pursuant to a written or an unwritten lease agreement. Notwithstanding anything to the contrary in this Mortgage, Mortgagor shall not enter into any Leases without the consent of Mortgagee, in its sole discretion. The assignment of Rents and Leases set forth in this **Section 1.5** shall be and constitute an absolute assignment effective upon execution of this Mortgage by Mortgagor. The rights and remedies in favor of Mortgagee granted by the assignment of Rents and Leases set forth in this **Section 1.5** shall be in addition to and shall not in any way constitute a limitation upon the rights and remedies available to Mortgagee under applicable law.

Section 1.6 Maintenance and Repair. Mortgagor shall maintain the Premises in good condition and repair, shall not commit or suffer any actual or threatened waste to the Premises, and shall comply in all material respects with, or cause to be complied in all material respects with, Mortgagor's obligations under the Loan Agreement and any other Loan Documents and all statutes, ordinances, rules, regulations and directives of any governmental authority relating to the Premises or any part thereof or the use or occupancy of the Premises or any part thereof, including, without limitation, the Americans With Disabilities Act of 1990, 42 U.S.C. §12101 et seq., and the regulations promulgated thereunder, and all other federal, state or local laws, ordinances, governmental rules and regulations regarding public accommodations (collectively "**Public Accommodation Laws**"). Mortgagor hereby represents and warrants that the Premises currently complies with all requirements of all such statutes, ordinances, rules, regulations, and directives (including, without limitation, all Public Accommodation Laws). No part of the Premises, including

UNOFFICIAL COPY

but not limited to any of the Improvements, shall be removed, demolished or materially altered without the prior written consent of the Mortgagee, which will not be unreasonably withheld so long as no Event of Default is outstanding and continuing under this Mortgage and such action would not impair Mortgagee's collateral position with respect to the Premises.

Section 1.7 Insurance. Mortgagor shall keep the Premises insured against loss or damage by fire and such other casualties and risks as the Mortgagee may require from time to time either with insurance companies as more particularly set forth in the Loan Agreement or the other Loan Documents. Such policies shall insure Mortgagee's interest in the Premises pursuant to a first mortgage endorsement, name Mortgagee as an insured party thereunder without Mortgagee being liable for any premiums or other costs or expenses, provide that losses thereunder shall be payable to Mortgagee pursuant to such forms of loss payable clauses as Mortgagee may approve and provide that no cancellation or reduction in coverage shall be effective unless the insurer first gives Mortgagee thirty (30) days prior written notice. Mortgagor shall also procure and maintain comprehensive general liability insurance coverage as required by the Loan Agreement (or the other Loan Documents), naming Mortgagee as an additional insured thereunder and providing that no cancellation or reduction in coverage thereunder shall be effective unless the insurer first gives Mortgagee thirty (30) days prior written notice. In the event of damage to or destruction of the Premises or any part thereof, Mortgagee may adjust, settle or compromise claims under such policies, and the proceeds therefrom shall be paid to Mortgagee and applied to the payment, performance and discharge of the Secured Obligations in the order as set forth in the Loan Agreement.

Section 1.8 Condemnation. Notwithstanding any injury or damage to, or loss of, the Premises or any part thereof as a result of the exercise of the right of eminent domain, Mortgagor shall continue to pay the Guaranteed Obligations in accordance with the terms and conditions of the Affiliate Guaranty. All sums paid or payable to Mortgagor by reason of any injury or damage to, or loss of, the Premises or any part thereof as a result of the exercise of the right of eminent domain shall be applied to the payment, performance and discharge of the Secured Obligations in the manner and order set forth in the Loan Agreement.

Section 1.9 Inspection. Mortgagor shall permit any person designated by the Mortgagee to visit and inspect the Premises.

Section 1.10 Restriction on Transfer. Except to the extent expressly permitted by, and subject to the terms and conditions of, the Loan Agreement and any other Loan Document, without the prior written consent thereof of Mortgagee (which consent may be granted or withheld at Mortgagee's sole and absolute discretion) and the recordation of such consent in the public deed records of the County in which the Premises or any part thereof is located, prior to the cancellation, satisfaction and release by Mortgagee of this Mortgage, neither Mortgagor nor any party comprising Mortgagor shall grant, bargain, sell, convey, transfer, assign or exchange all or any portion of the Premises or the interest of Mortgagor or such other party in the Premises.

Section 1.11 Subrogation. Mortgagee shall be subrogated to all right, title, equity, liens and claims of all persons to whom Mortgagee has paid or pays money in settlement of claims, liens, encumbrances or charges or in the acquisition of any right or title for Mortgagee's benefit under this Mortgage or for the benefit and account of Mortgagor.

UNOFFICIAL COPY

Section 1.12 Hazardous Materials. The provisions of the Loan Agreement regarding environmental matters (including, without limitation, Section 4.1(w) thereof) shall apply to Mortgagor and the Premises. In addition to and without limiting the generality of any other provisions of this Mortgage, Mortgagor shall and hereby does indemnify and hold Mortgagee and each of their respective officers, directors, employees, shareholders, partners, representatives and agents harmless from and against any and all losses, damages, expenses, fees, claims, demands, causes of action, judgments, costs, and liabilities, including, but not limited to, reasonable attorneys' fees and costs of litigation, and costs and expenses of response, remedial and corrective work and other clean up activities, arising out of or in any manner connected with (i) the "release" or "threatened release" (as those terms are defined in CERCLA and the rules and regulations promulgated thereunder, as from time to time amended) of any Hazardous Materials by Mortgagor or Mortgagor's employees, agents, delegates, invitees, licensees, concessionaires, contractors or representatives, (ii) the presence of Hazardous Materials on or about the Premises; (iii) any failure by Mortgagor to comply with any Environmental Law or environmental permits applicable to the Premises or any use thereof; or (iv) the filing of a lien against the Premises or any part thereof in favor of any governmental entity under any Environmental Laws or environmental permits applicable to the Premises or any use thereof. The indemnification provisions contained hereinabove shall survive any payment or satisfaction of the Obligations and any acquisition of the Premises by Mortgagee pursuant to the foreclosure procedure contained in this Mortgage, by judicial foreclosure, by conveyance in lieu of foreclosure or otherwise, and such provisions shall remain in full force and effect as long as the possibility exists that Mortgagee may suffer or incur any such losses, damages, expenses, fees, claims, demands, causes of action, judgments, costs and liabilities. Notwithstanding the foregoing, Mortgagor's indemnifications shall not extend to Hazardous Materials which first originate on the Premises subsequent to Mortgagee's succession to title by virtue of a foreclosure or acceptance of a deed in lieu of foreclosure.

Section 1.13 Security Agreement.

(a) With respect to the machinery, apparatus, equipment, fittings, fixtures, building supplies and materials, articles of personal property, chattels, chattel paper, documents, inventory, accounts, consumer goods and general intangibles referred to or described in this Mortgage, or in any way connected with the use and enjoyment of the Premises (the "UCC Collateral"), this Mortgage is hereby made and declared to be a security agreement granting to Mortgagee a present and continuing security interest in each and every item of such property included herein to secure the Secured Obligations in compliance with the provisions of the Uniform Commercial Code as enacted in the State of Illinois. Mortgagor hereby authorizes Mortgagee to file Uniform Commercial Code financing statements without Mortgagor's signature to perfect such security interest.

(b) Mortgagor warrants that (i) Mortgagor's (that is "Debtor's") name, identity or corporate structure and residence or principal place of business are as set forth in the Loan Agreement; (ii) Mortgagor (that is "Debtor") is and has been using or operating under said name, identity or corporate structure without change; and (iii) the location of the UCC Collateral is or will be upon the Land. Mortgagor covenants and agrees that Mortgagor will furnish Mortgagee with notice of any change in the matters addressed by clauses (i), (ii) or (iii) of this Section 1.13(b) within thirty (30) days of the effective date of any such change and Mortgagor will promptly execute any financing statements or other instruments deemed necessary by Mortgagee to prevent any filed financing statement from becoming misleading or losing its perfected status.

UNOFFICIAL COPY

Section 1.14 Expenses. Mortgagor will pay or reimburse Mortgagee, upon demand therefor, for all reasonable out-of-pocket attorneys' fees, costs and expenses incurred by Mortgagee in any suit, action, legal proceeding or dispute of any kind in which Mortgagee is made a party or appears as party plaintiff or defendant, affecting the Secured Obligations, this Mortgage or the interest created herein, or the Premises, including, but not limited to, any condemnation action involving the Premises or any action to protect the security hereof; and any such amounts paid by Mortgagee shall be added to the Secured Obligations and shall be secured by this Mortgage.

ARTICLE II

DEFAULTS & REMEDIES

Section 2.1 Defaults. The terms "*Event of Default*" or "*Events of Defaults*", wherever used in this Mortgage, shall mean any one or more of the following events: (a) the occurrence of any Event of Default, as defined in the Loan Agreement; or (b) Mortgagor either (i) fails to pay or reimburse Mortgagee for any expense reimbursable under this Mortgage or under any other Loan Document (as defined in the Loan Agreement) within twenty (20) days following Mortgagee's demand for such reimbursement or payment of expenses, or (ii) fails or neglects to perform, keep, comply with, or observe any of the other terms, conditions, covenants and agreements contained in this Mortgage, the Loan Agreement, the Affiliate Guaranty or any other Loan Document to which Mortgagor is a party and the same shall remain unremedied for thirty (30) days or more; or (c) except for the breach of any warranty of title, which breach shall be governed by **Section 2.1(e)** below, any warranty or representation of Mortgagor contained in this Mortgage or in any of the other Loan Documents proves to be untrue or misleading in any material respect; or (d) Mortgagor further encumbers, pledges, conveys, transfers, assigns or sells all or any portion of Mortgagor's interest in the Premises, or any part thereof, without the prior written consent of Mortgagee, except as may be permitted by the Loan Agreement or the other Loan Documents; or (e) any federal or state tax lien or claim of lien for labor or material is filed of record against Mortgagor or the Premises and is not removed by payment or transfer of lien to bond within thirty (30) days from the date of recording; or (f) foreclosure proceedings (whether judicial or otherwise) be instituted on any mortgage or any lien of any kind secured by any portion of the Premises.

Mortgagor agrees that nothing contained in this **Section 2.1** shall be construed to require Mortgagee to delay in exercising any remedy other than beyond any applicable grace or curative period. Any periods of grace, cure or notice expressly provided for the benefit of Mortgagor in this Mortgage and in the other Loan Documents shall run concurrently and not consecutively. Except as specifically set forth in this **Article II** and the other Loan Documents, Mortgagor shall not be entitled to receive any notice of or time to cure an Event of Default under the provisions of this Mortgage.

Section 2.2 Acceleration of Maturity. If an Event of Default shall have occurred and is continuing, then the entire Secured Obligations shall, at the option of Mortgagee, be accelerated and immediately become due and payable without presentment, demand, protest, or notice of any kind, except as specifically provided herein, in the Note, or in the other Loan Documents, time being of the essence of this Mortgage, and no omission on the part of Mortgagee to exercise such option when entitled to do so shall be construed as a waiver of such right.

UNOFFICIAL COPY

Section 2.3 Right to Enter and Take Possession.

(a) If an Event of Default shall have occurred and is continuing, then Mortgagor, upon demand of Mortgagee, shall forthwith surrender to Mortgagee the actual possession of the Premises, and if, and to the extent, permitted by law, Mortgagee itself, or by such officers or agents as it may appoint, may, if, and to the extent permitted by applicable law, (i) enter and take possession of all the Premises, without the appointment of a receiver, or an application therefor, and (ii) exclude Mortgagor and its agents and employees wholly therefrom, and have joint access with Mortgagor to the books, papers and accounts of Mortgagor relating to the Premises.

(b) If an Event of Default shall have occurred and is continuing, Mortgagee may, if, and to the extent, permitted by law, seek to obtain a judgment or decree conferring upon Mortgagee the right to immediate possession or requiring Mortgagor to deliver immediate possession of the Premises to Mortgagee, and Mortgagor hereby specifically covenants and agrees that Mortgagor will not oppose, contest or otherwise hinder or delay Mortgagee in any action or proceeding by Mortgagee to obtain such judgment or decree. Mortgagor will pay to Mortgagee, upon demand, all reasonable expenses of obtaining such judgment or decree, including reasonable compensation to Mortgagee's attorneys and agents as shall have been incurred, and all such expenses and compensation shall, until paid, become part of the Secured Obligations and shall be secured by this Mortgage.

(c) Upon every such entering upon or taking of possession, if, and to the extent, permitted by law, Mortgagee may hold, store, use, operate, manage and control and maintain the Premises and conduct the business thereof, and, from time to time (i) make all necessary and proper maintenance, repairs, renewals, replacements, additions, betterments and improvements thereto and thereon and purchase or otherwise acquire additional fixtures, personalty and other property; (ii) insure or keep the Premises insured; (iii) manage and operate the Premises and exercise all the rights and power of Mortgagor to the same extent as Mortgagor could in its own name or otherwise with respect to the same; and (iv) enter into any and all agreements with respect to the exercise by others of any of the powers herein granted Mortgagee, all as Mortgagee from time to time may determine in its sole discretion. If, and to the extent, permitted by law, Mortgagee may collect and receive all the income, rents, issues, profits and revenues from the Premises, including those past due as well as those accruing thereafter, and Mortgagee may apply any money and proceeds received by Mortgagee, in the priority set forth in the Loan Agreement, to the payment of (i) all expenses of taking, holding, managing and operating the Premises (including reasonable compensation for the services of all persons employed for such purposes); (ii) the cost of all such maintenance, repairs, renewals, replacements, additions, betterments, improvements, purchases and acquisitions; (iii) the cost of such insurance; (iv) such taxes, assessments and other similar charges as Mortgagee may at its option pay; (v) other proper charges upon the Premises or any part thereof; (vi) the reasonable compensation, expenses and disbursements of the attorneys and agents of Mortgagee; (vii) accrued interest; (viii) other sums required to be paid under this Mortgage; (ix) overdue installments of principal; and (x) any other Secured Obligations. Anything in this Section 2.3 to the contrary notwithstanding, Mortgagee shall not be obligated to discharge or perform the duties of a landlord to any tenant that accrued prior to Mortgagee's actual physical possession of the Premises or incur any liability as the result of any exercise by Mortgagee of its rights under this Mortgage, nor shall Mortgagee be responsible or liable for any waste committed on the Premises by any tenant or other person or for any dangerous or defective condition of the Premises, or for any negligence in the management, upkeep, repair or control of the Premises resulting in any loss, injury or death to any

UNOFFICIAL COPY

tenant, licensee, employee, or stranger, and Mortgagee shall be liable to account only for the rents, incomes, issues, profits and revenues actually received by Mortgagee. For the purpose of carrying out the provisions of this **Section 2.3(c)**, Mortgagor hereby constitutes and appoints Mortgagee the true and lawful attorney-in-fact of Mortgagor to do and perform, from time to time, any and all actions necessary and incidental to such purpose and does, by these presents, ratify and confirm any and all actions of said attorney-in-fact.

Section 2.4 Performance by Mortgagee. If Mortgagor shall default in the payment, performance or observance of any term, covenant or condition of this Mortgage and after the expiration of any applicable notice and cure period, if any, then Mortgagee may, at its option, pay, perform or observe the same, and all payments made or out-of-pocket costs or expenses incurred by Mortgagee in connection therewith shall be secured hereby and shall be, upon demand, immediately repaid by Mortgagor to Mortgagee with interest thereon at the Default Rate.

Section 2.5 Receiver.

(a) If an Event of Default (including, without limitation, any failure of Mortgagor to pay the Obligations after any acceleration thereof pursuant to the terms and provisions of this Mortgage or of the Loan Agreement or any other Loan Document in connection therewith) shall have occurred and is continuing, then Mortgagee, upon application to a court of competent jurisdiction, shall be entitled as a matter of strict right without notice and without regard to the adequacy or value of any security for the indebtedness secured hereby or the solvency of any party bound for its payment, to the appointment of a receiver to take possession of and to operate the Premises and to collect and apply the rents, issues, profits and revenues thereof. The receiver shall have all the rights and powers permitted under the laws of the State of Illinois. Mortgagor will pay to Mortgagee upon demand all reasonable expenses, including receiver's fees, attorneys' fees, costs and agent's compensation, incurred pursuant to the provisions of this **Section 2.5**, and any such amounts paid by Mortgagee shall be added to the Secured Obligations and shall be secured by this Mortgage.

(b) Any receiver appointed pursuant to the provisions of this **Section 2.5** shall have the usual powers and duties of receivers in such matters. Such appointment may be made either before or after sale, without regard to the solvency or insolvency of Mortgagor at the time of application for such receiver and without regard to the then value of the Premises, and Mortgagee hereunder may be appointed as such receiver. Such receiver shall have the power: (i) to collect the Rents during the pendency of such foreclosure suit and, in the case of a sale and a deficiency, during the full statutory period of redemption, if any, whether there be redemption or not, as well as during any further times when Mortgagor, except for the intervention of such receiver, would be entitled to collect such Rents; (ii) to extend or modify any Leases and to make new Leases, which extensions, modifications and new Leases may provide for terms to expire, or for options to lessees to extend to renewal terms to expire, beyond the Maturity Date and beyond the date of the issuance of a deed or deeds to a purchaser or purchasers at a foreclosure sale, it being understood and agreed that any such Leases, and the options or other such provisions to be contained therein, shall be binding upon Mortgagor and all persons whose interests in the Premises are subject to the lien hereof and upon the purchaser or purchasers at any foreclosure sale, notwithstanding any redemption from any judgment or decree of foreclosure, discharge of the mortgage indebtedness, satisfaction of any foreclosure decree, or issuance of any certificate of sale or deed to any purchaser; and (iii) all other powers which may be necessary or are usual in such cases for the protection, possession, control, management and operation of the Premises during the whole of said period. The court from time to time may

UNOFFICIAL COPY

authorize the receiver to apply the net income in its hands in payment in whole or in part to: (x) the Obligations or any tax, special assessment or other lien which may be or become superior to the lien hereof or of such decree, provided such application is made prior to any foreclosure sale; and (y) the deficiency in case of a sale and deficiency.

Section 2.6 Enforcement. If an Event of Default shall have occurred and be continuing, and if, and to the extent, permitted by law, Mortgagee may:

(a) Bring a court action at law or in equity (i) to foreclose this Mortgage, (ii) to sue the Mortgagor for damages on account of said default, (iii) for specific performance of any provision herein, or (iv) to enforce the provisions of any of the Obligations, Secured Obligations or other obligations secured by this Mortgage, any or all, concurrently or otherwise, and one action or suit shall not abate or be a bar to or waiver of Mortgagee's right to institute or maintain the other, provided that Mortgagee shall have only one payment and satisfaction of the Secured Obligations;

(b) If an Event of Default exists, the Mortgagee, at its option, shall have the right, power and authority, without taking possession, in the Mortgagee's own name, to demand, collect, receive, sue for, attach and levy all of the Rents, profits, issues and revenues from the Premises, to give proper receipts, releases and acquittances therefor, and to apply the proceeds thereof as set forth in **Section 2.9** hereof; or

(c) Sell the Premises (or such part or parts thereof as Mortgagee may from time to time elect to sell) at public auction to the highest bidder at the courthouse in the county where said Premises is located (or such other place as may be specified or required by applicable law), either in person or by auctioneer, after having first given notice of the time, place and terms of sale, together with a description of the Premises to be sold, by publication in accordance with applicable law. Upon payment of the purchase money, Mortgagee or any person conducting the sale for Mortgagee is authorized to execute to the purchaser at said sale a deed and conveyance to the Premises or part thereof so purchased, with or without warranty of any kind (at Mortgagee's discretion or as may be permitted or required by applicable law), including warranties of title, merchantability or fitness. Mortgagee may bid at said sale and purchase said Premises, or any part thereof, if the highest bidder therefor, and may make settlement for the purchase price by crediting upon the Secured Obligations the net sales price after deducting therefrom the expenses of the sale and the costs of the action and any other sums which Mortgagee is authorized to deduct under this Mortgage. At the foreclosure sale, the Premises or any part thereof (real property, personal property or mixed) may be offered for sale and sold en masse without first offering it in any other manner or may be offered for sale and sold in any other manner Mortgagee may elect in its sole and absolute discretion. The proceeds of any such sale en masse shall be accounted for in one account without distinction between the items included therein and without assigning to them any portion of such proceeds, Mortgagor hereby waiving the application of any doctrine of marshaling or like proceeding. In the event Mortgagee, in the exercise of the power of sale herein given, elects to sell the Premises in parts or parcels, sales thereof may be held from time to time, and the power of sale granted herein shall not be fully exercised until all of the Premises not previously sold has been sold or all of the Secured Obligations shall have been paid in full. If Mortgagee adjourns or postpones any sale or sales, announcement of such postponement or adjournment shall be made at the time and place of sale without any requirement for additional publication. Mortgagor shall be liable to Mortgagee and shall pay to Mortgagee on demand any deficiency which may remain after such sale. If any of the Premises is sold hereunder, it need not be at the place of sale. Mortgagor shall, at Mortgagee's request, assemble

UNOFFICIAL COPY

all the Premises and make it available to Mortgagee at places within the county where all or part of the Premises is located or in any contiguous county where Mortgagee may select, whether at the Premises or elsewhere, and shall make available to Mortgagee all premises and facilities of Mortgagor for the purpose of Mortgagee's taking possession of the Premises or remaining or putting the Premises in salable form.

Section 2.7 UCC Remedies. In addition to the foregoing rights, remedies and powers, Mortgagee shall have and may exercise with respect to any or all of the UCC Collateral, all rights, remedies and powers of a secured party under the Illinois Uniform Commercial Code (and other applicable similar statutes) including without limitation, the right and power to sell at public or private sale or sales or otherwise dispose of, lease or utilize the Personal Property and any part or parts thereof in any manner to the fullest extent authorized or permitted under the Illinois Uniform Commercial Code, without regard to preservation of the Premises or its value and without the necessity of a court order.

Section 2.8 Waiver of Rights. Mortgagor waives all rights to direct the order or manner in which any of the Premises will be sold in the event of any sale under this Mortgage, and also any right to have any of the Premises marshalled upon any sale. Mortgagee may in its discretion sell all the personal and real property together or in parts, in one or more sales, and in any sequence Mortgagee selects.

Section 2.9 Application of Proceeds of Sale. In the event of a foreclosure or a sale of all or any portion of the Premises under the power herein granted, the proceeds of said foreclosure or sale shall be applied: first, to the payment of the out-of-pocket costs and expenses of such foreclosure or sale, or other realization, including reasonable compensation to Mortgagee and its agents and counsel, and all expenses, liabilities and advances made or incurred by Mortgagee in connection therewith; second, to the payment of the Secured Obligations in the order as set forth in the Loan Agreement; and third, only after indefeasible payment in full of all Secured Obligations, to Mortgagor, or its respective successors or permitted assigns, or to whomsoever may be lawfully entitled to receive the same or as a court of competent jurisdiction may direct, of any surplus then remaining from such proceeds.

Section 2.10 Waiver of Appraisal, Valuation, Etc. Mortgagor agrees to the full extent permitted by law, that in case of an Event of Default on the part of Mortgagor hereunder and after expiration of any applicable cure period, if any, neither Mortgagor nor anyone claiming through or under Mortgagor shall or will set up, claim or seek to take advantage of any moratorium, reinstatement, forbearance, appraisal, valuation, stay, extension, homestead or exemption 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 Premises, or the delivery of possession thereof immediately after such sale to the purchaser at such sale, and Mortgagor, for itself and all who may at any time claim through or under it, hereby waives to the full extent that it may lawfully so do, the benefit of all such laws, and any and all right to have the assets subject to the security interest of this Mortgage marshalled upon any foreclosure or sale under the power herein granted.

Section 2.11 Waiver of Homestead. If, and to the extent, permitted by law, Mortgagor hereby waives and renounces all homestead and exemption rights provided for by the Constitution and the laws of the United States and of any state, in and to the Premises as against the collection of the Secured Obligations, or any part thereof.

UNOFFICIAL COPY

Section 2.12 Discontinuance of Proceedings. In case Mortgagee shall have proceeded to enforce any right, power or remedy under this Mortgage by foreclosure, entry or otherwise, and such proceeding shall have been withdrawn, discontinued or abandoned for any reason, or shall have been determined adversely to Mortgagee, then and in every such case (i) Mortgagor and Mortgagee shall be restored to their former positions and rights, (ii) all rights, powers and remedies of Mortgagee shall continue as if no such proceeding had been taken, (iii) each and every Event of Default declared or occurring prior or subsequent to such withdrawal, discontinuance or abandonment and not cured shall be a continuing Event of Default, and (iv) none of the Loan Documents, the Secured Obligations, or any other instrument concerned therewith, shall be or shall be deemed to have been reinstated or otherwise affected by such withdrawal, discontinuance or abandonment, and if, and to the extent, permitted by law, Mortgagor hereby expressly waives the benefit of any statute or rule of law now provided, or which may hereafter be provided, which would produce a result contrary to or in conflict with the above.

Section 2.13 Remedies Cumulative. No right, power or remedy conferred upon or reserved to Mortgagee by this Mortgage or by any of the other Loan Documents is intended to be exclusive of any other right, power or remedy, but each and every such right, power and remedy shall be cumulative and concurrent and shall be in addition to any other right, power and remedy given hereunder or now or hereafter existing at law or in equity or by statute.

Section 2.14 Waiver. No delay or omission of Mortgagee or its assigns under the Loan Agreement, the Affiliate Guaranty or this Mortgage, or of any holder of the Note to exercise any right, power or remedy accruing upon any breach or Event of Default shall exhaust or impair any such right, power or remedy or shall be construed to be a waiver of any such breach or Event of Default, or acquiescence therein, and every right, power and remedy given by this Mortgage to Mortgagee may be exercised from time to time and as often as may be deemed expedient by Mortgagee. No consent or waiver, expressed or implied, by Mortgagee to or of any breach or default by Mortgagor in the performance of the obligations thereof hereunder shall be deemed or construed to be a consent or waiver to or of any other breach or default in the performance of the same or any other obligations of Mortgagor hereunder. Failure on the part of Mortgagee to complain of any act or failure to act or to declare an Event of Default, irrespective of how long such failure continues, shall not constitute a waiver by Mortgagee of its rights hereunder or impair any rights, powers or remedies of Mortgagee hereunder, except as expressly provided in any of the Loan Documents or in any instrument or instruments executed by Mortgagee. Acceptance by Mortgagee or by any holder of the Note of any sum or payment from or on behalf of Mortgagor that is less than the then currently outstanding amount due under the Note or any of the other Loan Documents, including, but not limited to, late charges, default interest, additional interest charges, accrued interest, escrow delinquencies, or payments on principal, or any combination thereof, shall not be construed to be a waiver of any of Mortgagee's or such holder's rights, powers or remedies under any of the Loan Documents to collect or to enforce payment of any such delinquent amount which remains due and owing after application of such lesser amount to the then current balance as provided in the Loan Documents.

Section 2.15 WAIVER OF MORTGAGOR'S RIGHTS. BY EXECUTION OF THIS MORTGAGE MORTGAGOR EXPRESSLY: (A) ACKNOWLEDGES THE RIGHT OF MORTGAGEE TO ACCELERATE ALL OR ANY PORTION OF THE SECURED OBLIGATIONS (INCLUDING, WITHOUT LIMITATION, THE OBLIGATIONS EVIDENCED BY THE LOAN AGREEMENT, THE AFFILIATE GUARANTY OR ANY OF THE OTHER

UNOFFICIAL COPY

LOAN DOCUMENTS (AS DEFINED IN THE LOAN AGREEMENT)) AND ANY OTHER INDEBTEDNESS OR OBLIGATIONS SECURED HEREBY; (B) WAIVES ANY AND ALL RIGHTS WHICH MORTGAGOR MAY HAVE UNDER THE CONSTITUTION OF THE UNITED STATES (INCLUDING, WITHOUT LIMITATION, THE FIFTH AND FOURTEENTH AMENDMENTS THEREOF), THE VARIOUS PROVISIONS OF THE CONSTITUTIONS FOR THE SEVERAL STATES, OR BY REASON OF ANY OTHER APPLICABLE LAW, CONCERNING THE APPLICATION, RIGHTS OR BENEFITS OF ANY STATUTE OF LIMITATION OR ANY MORATORIUM, REINSTATEMENT, MARSHALLING, FORBEARANCE, APPRAISEMENT, VALUATION, STAY, EXTENSION, HOMESTEAD OR EXEMPTION LAWS WITH RESPECT TO THE EXERCISE BY MORTGAGEE OF ANY RIGHT OR REMEDY HEREIN PROVIDED TO MORTGAGEE AFTER AN EVENT OF DEFAULT; (C) ACKNOWLEDGES THAT MORTGAGOR HAS READ THIS MORTGAGE AND ANY AND ALL QUESTIONS REGARDING THE LEGAL EFFECT OF THIS MORTGAGE AND ITS PROVISIONS HAVE BEEN EXPLAINED FULLY TO MORTGAGOR AND MORTGAGOR HAS CONSULTED WITH COUNSEL OF MORTGAGOR'S CHOICE PRIOR TO EXECUTING THIS MORTGAGE; AND (D) ACKNOWLEDGES THAT ALL WAIVERS OF THE AFORESAID RIGHTS OF MORTGAGOR HAVE BEEN MADE KNOWINGLY, INTENTIONALLY AND WILLINGLY BY MORTGAGOR AS PART OF A BARGAINED FOR LOAN TRANSACTION AND THAT THIS MORTGAGE IS VALID AND ENFORCEABLE BY MORTGAGEE AGAINST MORTGAGOR IN ACCORDANCE WITH ALL THE TERMS AND CONDITIONS HEREOF.

ARTICLE III

Section 3.1 Successors and Assigns. This Mortgage shall inure to the benefit of and be binding upon Mortgagor and Mortgagee and their respective heirs, executors, legal representatives, successors, successors-in-title and permitted assigns. Whenever a reference is made in this Mortgage to Mortgagor or Mortgagee such reference shall be deemed to include a reference to the heirs, executors, legal representatives, partners, successors, successors-in-title and permitted assigns of Mortgagor and Mortgagee, as the case may be.

Section 3.2 Terminology. All personal pronouns used in this Mortgage, whether used in the masculine, feminine or neuter gender, shall include all other genders; the singular shall include the plural, and vice versa. Titles of articles and sections are for convenience only and neither limit nor amplify the provisions of this Mortgage, and all references herein to articles, sections, subsections, paragraphs or subparagraphs thereof, shall refer to the corresponding articles, sections, subsections, paragraphs or subparagraphs of this Mortgage unless specific reference is made to articles, sections, subsections, paragraphs or subparagraphs of another document or instrument.

Section 3.3 Severability. If any term, provision, covenant or restriction of this Mortgage is held by a court of competent jurisdiction or other governmental entity to be invalid, void or unenforceable, (i) the remainder of the terms, provisions, covenants and restrictions of this Mortgage shall remain in full force and effect and shall in no way be affected, impaired or invalidated, and (ii) to the fullest extent possible, the provisions of this Mortgage (including, without limitation, all portions of any section of this Mortgage containing such provision held to be invalid, illegal or unenforceable that are not themselves invalid, illegal or unenforceable) shall be construed so as to give effect to the intent manifested by the provision held invalid, illegal or unenforceable.

UNOFFICIAL COPY

Section 3.4 Maximum Lawful Rate. No provision herein or in any instrument, agreement or document referred to herein shall require or permit the collection of interest in excess of the maximum lawful rate which Mortgagor may stipulate and agree to pay as determined by a court of competent jurisdiction. If it is so determined that any excess interest is provided for, then this **Section 3.4** shall govern and such excess shall be applied first to any other amounts not constituting interest due or which may become due under this Mortgage or any instrument, agreement or document referred to herein (including any of the Loan Documents) and the balance, if any, shall be held by, and Mortgagor hereby pledges such balance to, Mortgagee as security for the full and faithful performance by Mortgagor of the Secured Obligations and any other obligations to Mortgagee under this Mortgage, every instrument, agreement or document referred to herein and any other agreements among Mortgagor, Mortgagee and Borrower; provided, however, that in no event shall Mortgagor be obligated to pay, and Mortgagee hereby waives payment of, the amount of interest to the extent it is in excess of the amount permitted by applicable law.

Section 3.5 Applicable Law. Mortgagor acknowledges that this Mortgage shall be governed by, interpreted and enforced in accordance with the laws of the State of Illinois, without regard to the principles of choice of law of that state or of any other jurisdiction.

Section 3.6 Notices, Demands and Requests. Any and all notices, elections or demands permitted or required to be made under this Mortgage shall be in writing, signed by or on behalf of the party giving such notice, election or demand, and shall be given, sent, or delivered and deemed given, sent or delivered in accordance with the applicable terms and provisions of the Loan Agreement.

Section 3.7 Assignment. This Mortgage is assignable by Mortgagee, and any assignment hereof by Mortgagee shall operate to vest in the assignee all rights and powers herein conferred upon and granted to Mortgagee. This Mortgage may not be assigned by Mortgagor without the prior, written consent of Mortgagee. It is specifically acknowledged that any successor or assign of Mortgagee assuming the role of Administrative Agent under the Loan Agreement shall be entitled to the rights and benefits of "Mortgagee" under this Mortgage.

Section 3.8 Time of the Essence. Time is of the essence with respect to each and every covenant, agreement and obligation of Mortgagor under this Mortgage, the Note and any and all other instruments now or hereafter evidencing, securing or otherwise relating to the Obligations.

Section 3.9 Notices to Mortgagee. Mortgagor further covenants and agrees with Mortgagee that the Mortgagor will furnish Mortgagee with notice of (i) any change in ownership of the Premises, and (ii) any change in the Mortgagor's jurisdiction of organization or its name or identity, including trade names. Any such notice shall be delivered to Mortgagee within thirty (30) days of the effective date of any such change. Further, Mortgagor will promptly execute any and all additional financing statements, security agreements or other instruments deemed necessary by Mortgagee in order to prevent any filed Financing Statement filed in connection herewith from becoming seriously misleading or losing its perfected status.

Section 3.10 Waiver. Mortgagor hereby represents and warrants to Mortgagee that it has no defense, set-off, or counterclaim of any kind or nature whatsoever against Mortgagee with respect to the Loan Documents, or any action previously taken or not taken by Mortgagee with respect

UNOFFICIAL COPY

thereto or with respect to any security interest, encumbrance, lien, or collateral in connection therewith to secure the Secured Obligations.

Section 3.11 Loan Documents. It is understood that the proceeds of any loans or indebtedness evidenced by the Loan Agreement or any of the Loan Documents are to be used in accordance with the terms of the Loan Agreement, to which document reference is made for all purposes to the same extent and effect as if fully set forth herein.

Section 3.12 Reinstatement. This Mortgage shall remain in full force and effect and continue to be effective should any petition be filed by or against Mortgagor for liquidation or reorganization, should Mortgagor become insolvent or make an assignment for the benefit of any creditor or creditors or should a receiver or trustee be appointed for all or any significant part of Mortgagor's assets, and shall continue to be effective or be reinstated, as the case may be, if at any time payment and performance of the Secured Obligations, or any part thereof, is, pursuant to applicable law, rescinded or reduced in amount, or must otherwise be restored or returned by any obligee of the Secured Obligations, whether as a "voidable preference," "fraudulent conveyance," or otherwise, all as though such payment or performance had not been made. In the event that any payment, or any part thereof, is rescinded, reduced, restored or returned, the Secured Obligations shall be reinstated and deemed reduced only by such amount paid and not so rescinded, reduced, restored or returned.

Section 3.13 Mortgage and/or Intangible Tax. Mortgagor shall, at its sole cost and expense, protect, defend, indemnify, release and hold harmless Mortgagee from and against any and all losses imposed upon or incurred by or asserted against Mortgagee and directly or indirectly arising out of or in any way relating to any tax on the making and/or recording of this Mortgage or any of the other Loan Documents.

Section 3.14 Future Advances. This Mortgage is given to secure not only existing Secured Obligations, but also future advances, whether such advances are obligatory or are to be made at the option of Mortgagee, or otherwise, to the same extent as if such future advances were made on the date of execution hereof, including any advances to be made under any other Loan Document on the date hereof or hereafter. Without the prior written consent of Mortgagee, which Mortgagee may grant or withhold in its sole discretion, Mortgagor shall not file for record any notice limiting the maximum principal amount that may be secured by this Mortgage to a sum less than the maximum principal amount set forth in this section.

ARTICLE IV

ADDITIONAL ILLINOIS SPECIFIC PROVISIONS

The following additional Illinois-specific provisions shall, in the event of any conflict between such Illinois provisions and any other provisions of this Mortgage, be deemed to control:

UNOFFICIAL COPY

Section 4.1 Protective Advances. Without limitation on the foregoing, all advances, disbursements and expenditures made 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 this Mortgage or by the Illinois Mortgage Foreclosure Act, 735 II CS 5/15-1101 et seq. ("*Act*"), shall have the benefit of all applicable provisions of the Act, including those provisions of the Act hereinbelow referred to (collectively, "*Protective Advances*"):

(a) all advances by Mortgagee in accordance with the terms of this Mortgage to: (i) preserve or maintain, repair, restore or rebuild any improvements upon the Premises; (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) when due installments of principal, interest or other obligations in accordance with the terms of any senior mortgage or other prior lien or encumbrance; (ii) when due installments of 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 Premises or any part thereof; (iii) other obligations authorized by this 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) reasonable attorneys' fees and other reasonable out-of-pocket expenses 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 the Mortgagee for the enforcement of this Mortgage or arising from the interest of the Mortgagee hereunder; or (iii) in the preparation for the commencement or defense of any such foreclosure or other action;

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

(f) reasonable out-of-pocket expenses deductible from proceeds of sale as referred to in subsections (a) and (b) of Section 15-1512 of the Act; and

(g) reasonable out-of-pocket expenses incurred and expenditures made by Mortgagee for any one or more of the following: (i) if all or any portion thereof constitutes one or more units under a condominium declaration, assessments imposed upon the unit owner thereof; (ii) if any interest in the Premises 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 Premises imposed by subsection (c)(1) of Section 15-1704 of the Act; (iv) repair or restoration of damage or destruction in excess of available insurance proceeds or condemnation awards; (v)

UNOFFICIAL COPY

payments required or deemed by Mortgagee to be for the benefit of the Premises or required to be made by the owner of the Premises 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 Premises; (vi) shared or common expense assessments payable to any association or corporation in which the owner of the Premises is a member in any way affecting the Premises; (vii) costs incurred by Mortgagee for demolition, preparation for and completion of construction; and (viii) pursuant to any lease or other agreement for occupancy of the Premises.

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)(1) 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: (i) determination of the amount of indebtedness secured by this Mortgage at any time; (ii) the indebtedness found due and owing to the 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; (iii) if right of redemption is deemed not to be waived by this Mortgage, computation of amount required to redeem, pursuant to subsections (d)(2) and (e) of Section 15-1603 of the Act; (iv) determination of amounts deductible from sale proceeds pursuant to Section 15-1512 of the Act; (v) application of income in the hands of any receiver or Mortgagee in possession; and (vi) computation of any deficiency judgment pursuant to subsections (b)(2) and (e) of Section 15-1508 and Section 15-1511 of the Act.

Section 4.2 Business Loan Recital/Statutory Exemption.

(a) Mortgagor acknowledges and agrees that (i) the proceeds of the Loan will be used in conformance with subparagraph (1)(l) of 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)); (ii) that the indebtedness secured hereby constitutes a business loan which comes within the purview of said Section 4; and (iii) that the secured indebtedness is an exempted transaction under the Truth-in-Lending Act, 15 U.S.C. Sec. 1601 et seq.

(b) Mortgagor acknowledges and agrees that the transaction of which this Mortgage is a part is a transaction which does not include 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 4.3 Maximum Mortgage Loan Secured. In no event shall the total amount of the Obligations plus such additional amounts secured hereby exceed 300% of the original principal amount of the Note.

Section 4.4 Right to Possession. In any case in which under the provisions of this Mortgage Mortgagee has a right to foreclose the lien hereof, Mortgagor shall, forthwith, upon demand by Mortgagee, surrender to Mortgagee, and Mortgagee shall be entitled to take actual possession of, the Premises or any part thereof personally or by its agent or attorneys. In such event, Mortgagee in its discretion may, in accordance with law, enter upon and take and maintain possession of all or any part of the Premises together with all documents, books, records, papers and accruals of Mortgagor or the then owner of the Premises relating thereto and may exclude Mortgagor its agents or servants wholly therefrom and may, as attorney in fact, as agent for Mortgagor or in its

UNOFFICIAL COPY

own name as Mortgagee, and under the powers herein granted, hold, operate, manage and control the Premises and conduct the business, if any, thereof, either personally or by its agents, and with full power to use such measures, legal or equitable, as in its discretion or in the discretion of its successors or assigns may be deemed proper or necessary to enforce the payment or security of the Rents of the Premises, including actions for the recovery of Rents, actions in forcible detainer and actions in distress for rent, and with full power: (a) to cancel or terminate any Leases for any cause or on any ground which would entitle Mortgagor to cancel the same; (b) to elect to disaffirm any Leases which are then subordinate to the lien hereof, unless such Leases are covered by a nondisturbance agreement signed by Mortgagee; (c) to extend or modify any then existing Leases and to make new Leases which extensions, modifications and new Leases may provide for terms to expire, or for options to lessees to extend or renew terms to expire, beyond the Maturity Date and beyond the date of the issuance of a deed or deeds to a purchaser or purchasers at a foreclosure sale, it being understood and agreed that any such Leases, and the options or other such provisions to be contained therein, shall be binding upon Mortgagor and all persons whose interests in the Premises are subject to the lien hereof and upon the purchaser or purchasers at any foreclosure sale, notwithstanding any redemption from sale, discharge of the mortgage indebtedness, satisfaction of any foreclosure decree, or issuance of any certificate of sale or deed to any purchaser; (d) to make all necessary or proper repairs, decorating, renewals, replacements, alterations, additions, betterments and improvements to the Premises as to it may seem judicious; (e) to insure and reinsure the same and all risks incidental to Mortgagee's possession, operation and management thereof; and (f) to receive all of such Rents; Mortgagor hereby granting full power and authority to exercise each and every of the rights, privileges and powers herein granted at any and all times hereafter, without notice to Mortgagor. Without limitation on the foregoing, in addition to any rights granted Mortgagee hereunder or under applicable law, Mortgagee shall have all powers, rights and duties as provided for in Sections 15-1701, 15-1702 and 15-1703 of the Act.

Section 4.5 Waiver of Statutory Rights.

TO THE FULLEST EXTENT PERMITTED UNDER APPLICABLE LAW, MORTGAGOR SHALL NOT AND WILL NOT APPLY FOR OR AVAIL ITSELF OF ANY HOMESTEAD, APPRAISEMENT, VALUATION, STAY, EXTENSION OR EXEMPTION LAWS, OR ANY SO CALLED "MORATORIUM LAW," NOW EXISTING OR HEREAFTER ENACTED, IN ORDER TO PREVENT OR HINDER THE ENFORCEMENT OR FORECLOSURE OF THIS MORTGAGE, BUT HEREBY WAIVES THE BENEFIT OF SUCH LAWS. MORTGAGOR FOR ITSELF AND ALL WHO MAY CLAIM THROUGH OR UNDER IT WAIVES ANY AND ALL RIGHT TO HAVE THE PROPERTY AND ESTATES COMPRISING THE PREMISES MARSHALLED UPON ANY FORECLOSURE OF THE LIEN HEREOF AND AGREE THAT ANY COURT HAVING JURISDICTION TO FORECLOSE SUCH LIEN MAY ORDER THE PREMISES SOLD AS AN ENTIRETY. MORTGAGOR HEREBY WAIVES AND ANY ALL RIGHTS OF REDEMPTION FROM SALE UNDER ANY ORDER OR DECREE OF FORECLOSURE OF THIS MORTGAGE ON ITS BEHALF AND ON BEHALF OF EACH AND EVERY PERSON ACQUIRING ANY INTEREST IN OR TITLE TO THE PREMISES SUBSEQUENT TO THE DATE OF THIS MORTGAGE. THE FOREGOING WAIVER OF THE RIGHT OF REDEMPTION IS MADE PURSUANT TO SECTION 15-1601 OF THE ACT. TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, MORTGAGOR FURTHER WAIVES DILIGENCE, DEMAND, PRESENTMENT, PROTEST AND NOTICE OF

UNOFFICIAL COPY

EVERY KIND IN CONNECTION WITH THE DELIVERY, ACCEPTANCE, PERFORMANCE,
DEFAULT OR ENFORCEMENT OF THIS MORTGAGE AND THE OBLIGATIONS.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

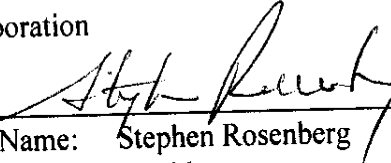
Property of Cook County Clerk's Office

UNOFFICIAL COPY

IN WITNESS WHEREOF, Mortgagor has caused this Mortgage to be executed in its name and attested by its duly authorized representative, on the day and year first above written.

MORTGAGOR:

NDP PROPERTIES, INC., a Delaware corporation

By: 
Name: Stephen Rosenberg
Title: President

STATE OF NEW YORK)
) ^{ss.}
COUNTY OF NEW YORK)

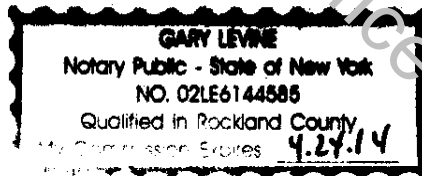
I, Gary Levine, a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY that STEPHEN ROSENBERG, the President of NDP Properties, Inc., a Delaware corporation, personally known to me to be the same person whose name is subscribed to the foregoing instrument as such officer, appeared before me this day in person and acknowledged that he/she signed and delivered said instrument as such officer of said corporation, as his/her own free and voluntary act and as the free and voluntary act of the corporation for the uses and purposes therein set forth.

GIVEN under my hand and Notarial Seal this 25th day of June, 2010.



Notary Public

My Commission Expires: April 24, 2014



UNOFFICIAL COPY

EXHIBIT A

Legal Description of the Land

3037 N. Normandy Ave., Chicago, Illinois

Lot 47 (except the North 80 feet thereof) in First Addition to Mont Clare Gardens, being a Subdivision of the West 1/2 of the Northeast 1/4 (except that part taken for railroad) of Section 30, Township 40 North, Range 13 East, of the Third Principal Meridian, in Cook County, Illinois.

PIN: 13-30-210-029-0000