

UNOFFICIAL COPY

Illinois Anti-Predatory Lending Database Program

Certificate of Exemption



1032716061

Doc#: 1032716061 Fee: \$94.00
Eugene "Gene" Moore RHSP Fee: \$10.00
Cook County Recorder of Deeds
Date: 11/23/2010 01:45 PM Pg: 1 of 30

Report Mortgage Fraud
800-532-8785

The property identified as: PIN: 08-34-404-011-0000

Address:

Street: 1325 PRATT BOULEVARD

Street line 2:

City: ELK GROVE VILLAGE

State: IL

ZIP Code: 60007

Lender: WELLS FARGO BANK, NATIONAL ASSOCIATION

Borrower: BRE/US INDUSTRIAL PROPERTIES L.L.C.

Loan / Mortgage Amount: \$514,000,000.00

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.

RECEIVED

Certificate number: 565CD95E-DE36-4C70-BCD3-A60A2A0E7D9C

Execution date: 11/18/2010

UNOFFICIAL COPY

8823036 D-1JF

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

Wells Fargo Bank, National Association
Real Estate Banking Group
375 Park Ave., 9th Floor
New York, NY 10152
Attn: Linda Horvath/Loan Administration
Loan No. 1003317

(Space Above For Recording Use)

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

NAME OF MORTGAGOR(S): BRE/US Industrial Properties L.L.C.
State Identification Number: 4877459

NAME OF BORROWER(S): BRE/US Industrial Properties L.L.C.
Additional names on page 2 of this document.

NAME OF MORTGAGEE: WELLS FARGO BANK, NATIONAL ASSOCIATION

PROPERTY ADDRESS: 1325 Pratt Boulevard, Elk Grove Village, Illinois

PERMANENT INDEX NUMBER: 08-34-404-011-0000

This Instrument Prepared by:
John J. McCarthy, Esq.
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, New York 10104

UNOFFICIAL COPY

Loan No. 1003317

THIS MORTGAGE SECURES A NOTE WHICH PROVIDES FOR A VARIABLE INTEREST RATE

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

THE PARTIES TO THIS MORTGAGE WITH ASSIGNMENT OF LEASES AND RENTS, SECURITY AGREEMENT AND FIXTURE FILING ("Mortgage"), made as of November 18, 2010, are BRE/US Industrial Properties L.L.C., a Delaware limited liability company ("Mortgagor"), and Wells Fargo Bank, National Association as administrative agent for the Lenders referred to below (in such capacity, together with its successors and assigns in such capacity, "Mortgagee").

ARTICLE 1. GRANT

- 1.1 **GRANT.** For the purposes of and upon the terms and conditions in this Mortgage and to secure the full and timely payment, performance and discharge of the Secured Obligations (as herein defined), Mortgagor irrevocably GRANTS, BARGAINS, SELLS, CONVEYS, ASSIGNS, TRANSFERS, MORTGAGES, PLEDGES, GRANTS A SECURITY INTEREST IN, and SETS OVER and has by these presents GRANTED, BARGAINED, SOLD, CONVEYED, ASSIGNED, TRANSFERRED, MORTGAGED, PLEDGED, GRANTED A SECURITY INTEREST IN, and SET OVER, to Mortgagee and its successors and assigns, to the extent permitted by applicable law, all of that real property located in the City of Elk Grove Village, County of Cook, State of Illinois, described on Exhibit A attached hereto, together with all right, title, interest, and privileges of Mortgagor in and to all streets, ways, roads and alleys used in connection with or pertaining to such real property or the improvements thereon, all development rights or credits, air rights, water, water rights and water stock related to the real property, all timber, and all minerals, oil and gas, and other hydrocarbon substances in, on or under the real property, and all licenses, appurtenances, reversions, remainders, easements, rights and rights of way appurtenant or related thereto; all Leases (as hereafter defined); all buildings, other improvements and fixtures now or hereafter located on the real property, including, but not limited to, all apparatus, equipment, and appliances used in the operation or occupancy of the real property, it being intended by the parties that all such items shall be conclusively considered to be a part of the real property, whether or not attached or affixed to the real property (the "Improvements"); all interest or estate which Mortgagor may hereafter acquire in the property described above, and all additions and accretions thereto, and the proceeds of any of the foregoing; (all of the foregoing being collectively referred to as the "Subject Property"); the listing of specific rights or property shall not be interpreted as a limit of general terms; TO HAVE AND TO HOLD the Subject Property and every privilege, hereditament and appurtenance belonging or appertaining to it unto Mortgagee, its successors and its assignees, forever, and Mortgagor does hereby bind itself, its successors and assigns, to WARRANT AND FOREVER DEFEND the title to the Subject Property unto Mortgagee against every person whomsoever lawfully claiming or to claim the same or any part thereof; provided, however, that if Mortgagor shall pay (or cause to be paid) and shall perform and discharge (or cause to be performed and discharged) the Secured Obligations on or before the date same are to be paid, performed and discharged, then the liens, security interests, estates, rights and titles granted by this Mortgage shall terminate in accordance with the provisions hereof, otherwise same shall remain in full force and effect.
- 1.2 **ADDRESS.** The address of the Subject Property is: 1325 Pratt Boulevard, Elk Grove Village, Illinois. However, neither the failure to designate an address nor any inaccuracy in the address designated shall affect the validity or priority of the lien of this Mortgage on the Subject Property as described on Exhibit A. Mortgagor warrants that the Subject Property is not used principally

UNOFFICIAL COPY

Loan No. 1003317

for agricultural or farming purposes, and that the Subject Property is not a residential or homestead property.

- 1.3 **USE OF PROCEEDS.** Mortgagor represents and warrants to Mortgagee that the proceeds of the Secured Obligations (as hereafter defined) shall be used solely for business purposes and in furtherance of the regular business affairs of Mortgagor, and the entire principal obligations secured by this Mortgage constitute (i) a "business loan" as that term is defined in, and for all purposes of the Illinois Interest Act, 815 ILCS 205/0.01, et seq., including Section 4(1)(c) thereof, and (ii) a "loan secured by a mortgage on real estate" within the purview and operation of the Illinois Interest Act, including Section 4(1)(l) thereof.

ARTICLE 2. OBLIGATIONS SECURED

- 2.1 **OBLIGATIONS SECURED.** Mortgagor makes this Mortgage for the purpose of securing the following obligations ("Secured Obligations"):
- a. Payment to Mortgagee of all sums at any time owing under those certain Promissory Notes (collectively, the "Note") of even date herewith, in the aggregate principal amount of FIVE HUNDRED FOURTEEN MILLION AND NO/100THS DOLLARS (\$514,000,000.00) executed by Mortgagor and the Other Borrowers (as hereinafter defined), collectively, as borrower, and payable to the respective order of the Lenders (as hereinafter defined); and
 - b. Payment and performance of all covenants and obligations of Mortgagor under this Mortgage; and
 - c. Payment and performance of all covenants and obligations on the part of Mortgagor under that certain Loan Agreement ("Loan Agreement") of even date herewith by and between Mortgagor, certain other borrowers party thereto (the "Other Borrowers"), certain lenders party thereto (the "Lenders") and Mortgagee, as administrative agent for the Lenders; and
 - d. Payment and performance of all covenants and obligations, if any, of any rider attached as an Exhibit to this Mortgage; and
 - e. Payment and performance of all future advances and other obligations that the then record owner of all or part of the Subject Property may agree to pay and/or perform (whether as principal, surety or guarantor) for the benefit of Mortgagee, when such future advance or obligation is evidenced by a writing which recites that it is secured by this Mortgage or any other mortgage, deed of trust or deed to secure debt executed in connection with the Loan Agreement; and
 - f. Payment and performance of all covenants and obligations of Mortgagor under any interest rate swap agreement, or other interest rate agreement executed by and between Mortgagor and Mortgagee, which agreement is evidenced by a writing which recites that it is secured by this Mortgage; and
 - g. All modifications, extensions and renewals of any of the Secured Obligations, however evidenced, including, without limitation: (i) modifications of the required principal payment dates or interest payment dates or both, as the case may be, deferring or accelerating payment dates wholly or partly; or (ii) modifications, extensions or renewals at a different rate of interest whether or not in the case of a note, the modification, extension or renewal is evidenced by a new or additional promissory note or notes.
- 2.2 **OBLIGATIONS.** The term "obligations" is used herein in its broadest and most comprehensive sense and shall be deemed to include, without limitation, all interest and charges, prepayment charges (if any), late charges and loan fees at any time accruing or assessed on any of the Secured Obligations in accordance with the terms of the Note and the Loan Agreement. It is

UNOFFICIAL COPY

Loan No. 1003317

expressly understood and agreed that the principal indebtedness secured hereby will in no event exceed \$514,000,000. The Note has an initial maturity date of November 15, 2015, and the Note bears interest at variable rates determined in accordance with the terms and conditions of the Loan Agreement.

- 2.3 **INCORPORATION.** All terms of the Secured Obligations and the documents evidencing such obligations are incorporated herein by this reference. All persons who may have or acquire an interest in the Subject Property shall be deemed to have notice of the terms of the Secured Obligations and to have notice, if provided therein, that: (a) the Note or the Loan Agreement may permit borrowing, repayment and re-borrowing so that repayments shall not reduce the amounts of the Secured Obligations; and (b) the rate of interest on one or more Secured Obligations may vary from time to time.
- 2.4 **REVOLVING CREDIT.** This Mortgage secures the payment of future advances of revolving loans which may be made after the date hereof to the same extent as if such future advances were made on the date of the execution of this Mortgage, although there may be no advance made on the date of the execution of this Mortgage, and although there may be no indebtedness outstanding at the time the advance is made. The total principal amount of the Loan secured by this Mortgage may decrease or increase from time to time but the total unpaid principal balance so secured at any one time shall not exceed \$514,000,000, plus interest thereon, and any and all disbursements made by the Mortgagee for the payment of taxes, special assessments or insurance on the Mortgaged Premises, with interest on such disbursements. The parties hereby acknowledge and intend that all advances of the revolving loans, including future advances whenever hereafter made, shall be a lien from the time this Mortgage is recorded.
- 2.5 **CROSS-DEFAULT/CROSS-COLLATERALIZATION.** Mortgagor acknowledges and agrees that any Default (as hereafter defined) under this Mortgage or any Default or Event of Default, as applicable, under any other Mortgage (as defined in the Loan Agreement) or any of the Loan Documents (as defined in the Loan Agreement) relating to the Note shall constitute a Default under this Mortgage and a Default or Event of Default, as applicable, under all other Mortgages and all of the Loan Documents relating to the Note, upon Mortgagee's election.

Mortgagor acknowledges and agrees that the liens, assignments, pledges and security interests of each of the Mortgages shall secure the Indebtedness (as defined in the Loan Agreement) which includes (without limitation) the Note, and any and all renewals, increases, modifications, rearrangements and extensions of the Note and each Mortgage, including this Mortgage. Mortgagor acknowledges and agrees that any and all collateral under each of the Mortgages and the other Loan Documents shall further secure the repayment of the Note and the other Indebtedness and the performance of the Obligations (as defined in the Loan Agreement), regardless of whether or not the Indebtedness or Obligations arose out of or with respect to such Mortgage.

ARTICLE 3. ASSIGNMENT OF LEASES AND RENTS

- 3.1 **ASSIGNMENT.** Mortgagor hereby irrevocably assigns to Mortgagee all of Mortgagor's right, title and interest in, to and under: (a) all leases of the Subject Property or any portion thereof, and all other agreements of any kind relating to the use or occupancy of the Subject Property or any portion thereof, whether now existing or entered into after the date hereof ("Leases"); and (b) the rents, revenue, income, issues, deposits and profits of the Subject Property, including, without limitation, all amounts payable and all rights and benefits accruing to Mortgagor under the Leases ("Payments"). The term "Leases" shall also include all guarantees of and security for the lessees' performance thereunder, and all amendments, extensions, renewals or modifications thereto which are permitted hereunder. This is a present and absolute assignment (subject to the License), not an assignment for security purposes only, and Mortgagee's right to the Leases and Payments is not contingent upon, and, to the extent permitted by applicable law, may be exercised without possession of, the Subject Property.

UNOFFICIAL COPY

Loan No. 1003317

- 3.2 **GRANT OF LICENSE.** Mortgagee confers upon Mortgagor a license ("License") to collect and retain the Payments as they become due and payable, until the occurrence of a Default (as hereinafter defined). Upon the occurrence and during the continuation of a Default, the License shall be automatically revoked and, to the extent permitted by applicable law, Mortgagee may collect and apply the Payments pursuant to this Mortgage without notice and without taking possession of the Subject Property. Mortgagor hereby irrevocably authorizes and directs, upon the occurrence of a Default, the lessees under the Leases to rely upon and comply with any notice or demand by Mortgagee for the payment to Mortgagee of any rental or other sums which may at any time become due under the Leases, or for the performance of any of the lessees' undertakings under the Leases, and the lessees shall have no duty to inquire as to whether any Default has actually occurred or is then existing hereunder. Mortgagor hereby relieves the lessees from any liability to Mortgagor by reason of relying upon and complying with any such notice or demand by Mortgagee. From and after the time that a Default has been fully cured, provided that no other Default shall then exist, the License shall be reinstated subject to further revocation as set forth in this Section.
- 3.3 **EFFECT OF ASSIGNMENT.** The foregoing irrevocable assignment shall not cause Mortgagee to be: (a) a mortgagee in possession; (b) responsible or liable for the control, care, management or repair of the Subject Property or for performing any of the terms, agreements, undertakings, obligations, representations, warranties, covenants and conditions of the Leases; or (c) responsible or liable for any waste committed on the Subject Property by the lessees under any of the Leases or any other parties; for any dangerous or defective condition of the Subject Property; or for any negligence in the management, upkeep, repair or control of the Subject Property resulting in loss or injury or death to any lessee, licensee, employee, invitee or other person, other than as a result of actions of Mortgagee that constitute gross negligence or willful misconduct. Mortgagee shall not directly or indirectly be liable to Mortgagor or any other person as a consequence of: (i) the exercise or failure to exercise by Mortgagee, or any of its employees, agents, contractors or subcontractors, any of the rights, remedies or powers granted to Mortgagee hereunder; or (ii) the failure or refusal of Mortgagee to perform or discharge any obligation, duty or liability of Mortgagor arising under the Leases.
- 3.4 **[RESERVED.]**
- 3.5 **COVENANTS.** All covenants of Mortgagor relating to the Subject Property and the Leases set forth in the Loan Agreement are hereby incorporated by reference into this Mortgage.
- 3.6 **ESTOPPEL CERTIFICATES.** Within thirty (30) days after written request by Mortgagee, Mortgagor shall deliver to Mortgagee and to any party designated by Mortgagee estoppel certificates certifying (if such be the case): (a) that the foregoing assignment and the Leases are in full force and effect; (b) the date of each lessee's most recent payment of rent; (c) that there are no defenses or offsets outstanding, or stating those claimed by Mortgagor or lessees under the foregoing assignment or the Leases, as the case may be; and (d) that no Default exists under any of the Loan Documents.

ARTICLE 4. SECURITY AGREEMENT AND FIXTURE FILING

- 4.1 **SECURITY INTEREST.** Mortgagor hereby grants and assigns to Mortgagee as of the date hereof a security interest, to secure payment and performance of all of the Secured Obligations, in all of the following described personal property in which Mortgagor now or at any time hereafter has any interest (collectively, the "Collateral"):

All goods, building and other materials, supplies, inventory, work in process, equipment, machinery, fixtures, furniture, furnishings, signs and other personal

UNOFFICIAL COPY

Loan No. 1003317

property and embedded software included therein and supporting information, wherever situated, which are or are to be incorporated into, used in connection with, or appropriated for use on (i) the real property described on Exhibit A attached hereto and incorporated by reference herein or (ii) any existing or future improvements on the real property; together with all rents and security deposits derived from the Subject Property; all inventory, accounts, cash receipts, deposit accounts, accounts receivable, contract rights, licenses, agreements, general intangibles, payment intangibles, software, chattel paper (whether electronic or tangible), instruments, documents, promissory notes, drafts, letters of credit, letter of credit rights, supporting obligations, insurance policies, insurance and condemnation awards and proceeds, proceeds of the sale of promissory notes, any other rights to the payment of money, trade names, trademarks and service marks arising from or related to the ownership, management, leasing, operation, sale or disposition of the Subject Property or any business now or hereafter conducted thereon by Mortgagor; all development rights and credits, and any and all permits, consents, approvals, licenses, authorizations and other rights granted by, given by or obtained from, any governmental entity with respect to the Subject Property; all water and water rights, wells and well rights, canals and canal rights, ditches and ditch rights, springs and spring rights, and reservoirs and reservoir rights appurtenant to or associated with the Subject Property, whether decreed or undeclared, tributary, non-tributary or not non-tributary, surface or underground or appropriated or unappropriated, and all shares of stock in water, ditch, lateral and canal companies, well permits and all other evidences of any of such rights; all deposits or other security now or hereafter made with or given to utility companies by Mortgagor with respect to the Subject Property; all advance payments of insurance premiums made by Mortgagor with respect to the Subject Property; all plans, drawings and specifications relating to the Subject Property; all loan funds held by Mortgagee, whether or not disbursed; all funds deposited with Mortgagee pursuant to any documents executed in connection with the Loan Agreement or this Mortgage; all reserves, deferred payments, deposits, accounts, refunds, cost savings and payments of any kind related to the Subject Property or any portion thereof; together with all replacements and proceeds of, and additions and accessions to, any of the foregoing; together with all books, records and files relating to any of the foregoing. Notwithstanding the foregoing, the Collateral shall not include any of the foregoing items of personal property owned by any tenant under the Leases, except to the extent Mortgagor shall have any right or interest therein.

As to all of the above Collateral which is or which hereafter becomes a "fixture" under applicable law, this Mortgage constitutes a fixture filing under the Illinois Uniform Commercial Code, 810 ILCS 5/1-101, et seq., as amended or recodified from time to time ("UCC"), and is acknowledged to be a "mortgage" under the UCC.

For purposes of such fixture filing: The name of Mortgagor is BRE/US Industrial Properties L.L.C.; the name of the record owner of the Subject Property upon which the fixtures and other items and types of personal property are located is BRE/US Industrial Properties L.L.C.; Mortgagor is the Debtor and Mortgagee is the Secured Party; the mailing addresses of Mortgagor and Mortgagee are as set forth in Section 7.11 of this Mortgage; and the Debtor's Organizational ID Number is 4877459. This financing statement covers the Subject Property and any proceeds or products of such Subject Property.

The filing of a financing statement covering the Collateral shall not be construed to derogate from or impair the lien or provisions of this Mortgage with respect to any property described herein which is real property or which the parties have agreed to treat as real property. Similarly, nothing in such financing statement shall be construed to alter any of the rights of Mortgagee under this Mortgage or the priority of the Mortgagee's lien

UNOFFICIAL COPY

Loan No. 1003317

created hereby, and such financing statement is declared to be for the protection of Mortgagee in the event any court shall at any time hold that notice of Mortgagee's priority of interest in any property or interests described in this Mortgage must, in order to be effective against a particular class of persons, including but not limited to the federal government and any subdivision, agency or entity of the federal government, be filed in the Uniform Commercial Code records.

- 4.2 **REPRESENTATIONS AND WARRANTIES.** Mortgagor represents and warrants that: (a) Mortgagor has, and will have, good title to the Collateral subject to the Permitted Liens (as defined in the Loan Agreement); (b) Mortgagor has not previously assigned or encumbered the Collateral, and no financing statement covering any of the Collateral has been delivered to any other person or entity, except for the Permitted Liens; (c) Mortgagor's principal place of business is located at the address shown in Section 7.11; and (d) Mortgagor's legal name is exactly as set forth on the first page of this Mortgage and all of Mortgagor's organizational documents or agreements delivered to Mortgagee are complete and accurate in every respect.
- 4.3 **COVENANTS.** Mortgagor agrees: (a) to execute and deliver such documents as Mortgagee reasonably deems necessary to create, perfect and continue the security interests contemplated hereby; (b) not to change its name, and as applicable, its chief executive office, its principal residence or the jurisdiction in which it is organized and/or registered without giving Mortgagee 30 days prior written notice thereof; (c) to cooperate with Mortgagee in perfecting all security interests granted herein, to the extent reasonably required, and in obtaining such agreements from third parties as Mortgagee reasonably deems necessary, proper or convenient in connection with the creation, preservation, perfection, priority or enforcement of any of its rights hereunder; and (d) that Mortgagee is authorized to file financing statements in the name of Mortgagor to perfect Mortgagee's security interest in Collateral.
- 4.4 **RIGHTS OF MORTGAGEE.** Subject to the terms of the Loan Agreement, in addition to Mortgagee's rights as a "Secured Party" under the UCC, to the extent permitted by applicable law, Mortgagee may, but shall not be obligated to, at any time without notice and at the expense of Mortgagor: (a) give notice to any person of Mortgagee's rights hereunder and enforce such rights at law or in equity; (b) insure, protect, defend and preserve the Collateral or any rights or interests of Mortgagee therein; (c) inspect the Collateral; and (d) endorse, collect and receive any right to payment of money owing to Mortgagor under or from the Collateral. Notwithstanding the above, in no event shall Mortgagee be deemed to have accepted any property other than cash in satisfaction of any obligation of Mortgagor to Mortgagee unless Mortgagee shall make an express written proposal thereof under UCC §9-621, or other applicable law, and the provisions of UCC §9-620 have been satisfied.
- 4.5 **RIGHTS OF MORTGAGEE ON DEFAULT.** Upon the occurrence and during the continuance of a Default (hereinafter defined) under this Mortgage, then in addition to all of Mortgagee's rights as a "Secured Party" under the UCC or otherwise at law, and subject to applicable law:
- a. Mortgagee may (i) upon written notice, require Mortgagor to assemble any or all of the Collateral and make it available to Mortgagee at a place designated by Mortgagee; (ii) without prior notice, enter upon the Subject Property or other place where any of the Collateral may be located and take possession of, collect, sell, lease, license and dispose of any or all of the Collateral, and store the same at locations acceptable to Mortgagee at Mortgagor's expense; (iii) sell, assign and deliver at any place or in any lawful manner all or any part of the Collateral and bid and become the purchaser at any such sales;
 - b. Mortgagee may, for the account of Mortgagor and at Mortgagor's expense: (i) operate, use, consume, sell, lease, license or dispose of the Collateral as Mortgagee deems appropriate for the purpose of performing any or all of the Secured Obligations; (ii) enter into any agreement, compromise, or settlement, including insurance claims, which Mortgagee may deem desirable or proper with respect to any of the Collateral; and (iii) endorse and deliver

UNOFFICIAL COPY

Loan No. 1003317

evidences of title for, and receive, enforce and collect by legal action or otherwise, all indebtedness and obligations now or hereafter owing to Mortgagee in connection with or on account of any or all of the Collateral; and

- c. In disposing of Collateral hereunder, Mortgagee may disclaim all warranties of title, possession, quiet enjoyment and the like. Any proceeds of any disposition of any Collateral may be applied by Mortgagee to the payment of expenses incurred by Mortgagee in connection with the foregoing, including reasonable attorneys' fees, and the balance of such proceeds may be applied by Mortgagee toward the payment of the Secured Obligations in such order of application as Mortgagee may from time to time elect.

Notwithstanding any other provision hereof, Mortgagee shall not be deemed to have accepted any property other than cash in satisfaction of any obligation of Mortgagor to Mortgagee unless Mortgagee shall make an express written proposal thereof under UCC §9-621, or other applicable law, and the provisions of UCC §9-620 have been satisfied. Mortgagor agrees that Mortgagee shall have no obligation to process or prepare any Collateral for sale or other disposition.

- 4.6 **POWER OF ATTORNEY.** Mortgagor hereby irrevocably appoints Mortgagee as Mortgagor's attorney-in-fact (such agency being coupled with an interest), and as such attorney-in-fact Mortgagee may, without the obligation to do so, in Mortgagee's name, or in the name of Mortgagor, prepare, execute and file or record financing statements, continuation statements, applications for registration and like papers necessary to create, perfect or preserve any of Mortgagee's security interests and rights in or to any of the Collateral, and, upon a Default hereunder, take any other action required of Mortgagor; provided, however, that Mortgagee as such attorney-in-fact shall be accountable only for such funds as are actually received by Mortgagee.
- 4.7 **POSSESSION AND USE OF COLLATERAL.** Except as otherwise provided in this Section or the other Loan Documents, so long as no Default exists under this Mortgage or any of the Loan Documents, Mortgagor may possess, use, move, transfer or dispose of any of the Collateral in the ordinary course of Mortgagor's business and in accordance with the Loan Agreement.

ARTICLE 5. RIGHTS AND DUTIES OF THE PARTIES

- 5.1 **TITLE.** Mortgagor represents and warrants that, except as disclosed to Mortgagee in a writing which refers to this warranty and the Permitted Liens, Mortgagor lawfully holds and possesses fee simple title to the Subject Property without limitation on the right to encumber, and that this Mortgage is a first and prior lien on the Subject Property. Mortgagor hereby represents and warrants that all of the Subject Property is one or more tax parcels and there are no properties included in such tax parcels other than the Subject Property. Mortgagor further covenants and agrees that it shall not cause all or any portion of the Subject Property to be replatted or for any lots or boundary lines to be adjusted, changed or altered for either ad valorem tax purposes or otherwise, and shall not consent to the assessment of the Subject Property in more than one tax parcel or in conjunction with any property other than the Subject Property.
- 5.2 **TAXES AND ASSESSMENTS.** Subject to Mortgagor's rights to contest payment of taxes as may be provided in the Loan Agreement and except as provided in Section 4.2(b) of the Loan Agreement, Mortgagor shall pay prior to delinquency all taxes, assessments, levies and charges imposed by any public or quasi-public authority or utility company which are or which may become a lien or other encumbrance upon the Subject Property and Collateral, or any interest therein. Mortgagor shall also pay prior to delinquency all taxes, assessments, levies and charges imposed by any public authority upon Mortgagee by reason of its interest in any Secured Obligation or in the Subject Property and Collateral, or by reason of any payment made to Mortgagee pursuant to any Secured Obligation; provided, however, Mortgagor shall have no

UNOFFICIAL COPY

Loan No. 1003317

obligation to pay taxes which may be imposed from time to time upon Mortgagee and which are measured by and imposed upon Mortgagee's net income.

- 5.3 **[INTENTIONALLY DELETED.]**
- 5.4 **PERFORMANCE OF SECURED OBLIGATIONS.** Mortgagor shall promptly pay and perform each Secured Obligation when due.
- 5.5 **LIENS, ENCUMBRANCES AND CHARGES.** Mortgagor shall promptly discharge any lien not permitted under the Loan Documents or approved by Mortgagee in writing that has or may attain priority over this Mortgage. Subject to the provisions of the Loan Agreement, Mortgagor shall pay when due all obligations secured by or which may become liens and encumbrances (other than Permitted Liens) which shall now or hereafter encumber all or any part of the Subject Property or Collateral or any interest therein, whether senior or subordinate hereto.
- 5.6 **DAMAGES, INSURANCE AND CONDEMNATION PROCEEDS.** Subject to the provisions of the Loan Agreement, the following (whether now existing or hereafter arising) are all absolutely and irrevocably assigned by Mortgagor to Mortgagee and, at the request of Mortgagee, shall be paid directly to Mortgagee: (i) all awards of damages and all other compensation payable directly or indirectly by reason of a condemnation or proposed condemnation for public or private use affecting all or any part of, or any interest in, the Subject Property or Collateral; (ii) Mortgagor's right to and title and interest in all other claims and awards for damages to, or decrease in value of, all or any part of, or any interest in, the Subject Property or Collateral; (iii) Mortgagor's right to and title and interest in all proceeds of any insurance policies (whether or not expressly required by Mortgagee to be maintained by Mortgagor, including, but not limited to, earthquake insurance and terrorism insurance, if any) payable by reason of loss sustained to all or any part of the Subject Property or Collateral; and (iv) all interest which may accrue on any of the foregoing.
- 5.7 **MAINTENANCE AND PRESERVATION OF THE SUBJECT PROPERTY.** Subject to the provisions of the Loan Agreement, Mortgagor covenants: (a) to insure the Subject Property and Collateral in accordance with the terms of the Loan Agreement; (b) to keep the Subject Property and Collateral in the condition and repair required by the Loan Agreement; (c) except as otherwise permitted under the Loan Agreement or this Mortgage, (i) not to remove or demolish the Subject Property or Collateral or any part thereof, (ii) not to alter, restore or add to the Subject Property or Collateral and (iii) not to initiate or acquiesce in any change in any zoning or other land classification which affects the Subject Property without Mortgagee's prior written consent (which with respect to clause (ii) shall not be unreasonably withheld) or as provided in the Loan Agreement; (d) to complete or restore promptly and in good and workmanlike manner the Subject Property and Collateral, or any part thereof which may be damaged or destroyed, without regard to whether Mortgagee elects to require that insurance proceeds be used to reduce the Secured Obligations as provided in the Loan Agreement; (e) to comply with all laws, ordinances, regulations and standards, and all covenants, conditions, restrictions and equitable servitudes, whether public or private, of every kind and character which affect the Subject Property or Collateral and pertain to acts committed or conditions existing thereon, including, without limitation, any work, alteration, improvement or demolition mandated by such laws, covenants or requirements; (f) not to commit or permit material waste of the Subject Property or Collateral; and (g) to do all other acts which from the character or use of the Subject Property or Collateral may be reasonably necessary to maintain and preserve its value.
- 5.8 **DEFENSE AND NOTICE OF LOSSES, CLAIMS AND ACTIONS.** At Mortgagor's sole expense, Mortgagor shall protect, preserve and defend the Subject Property and Collateral and title to and right of possession of the Subject Property and Collateral, the security hereof and the rights and powers of Mortgagee hereunder against all adverse claims. Mortgagor shall give Mortgagee prompt notice in writing of the assertion of any claim, of the filing of any action or proceeding, of the occurrence of any material damage to the Subject Property or Collateral and of any condemnation offer or action.

UNOFFICIAL COPY

Loan No. 1003317

5.9 [INTENTIONALLY OMITTED.]

5.10 COMPENSATION; EXCULPATION; INDEMNIFICATION.

- a. Mortgagee shall not directly or indirectly be liable to Mortgagor or any other person as a consequence of (i) the exercise of the rights, remedies or powers granted to Mortgagee in this Mortgage; (ii) the failure or refusal of Mortgagee to perform or discharge any obligation or liability of Mortgagor under any agreement related to the Subject Property or Collateral or under this Mortgage; or (iii) any loss sustained by Mortgagor or any third party resulting from Mortgagee's failure (whether by malfeasance, nonfeasance or refusal to act) to lease the Subject Property after a Default (hereinafter defined) or from any other act or omission (regardless of whether same constitutes negligence) of Mortgagee in managing the Subject Property after a Default unless the loss is caused by the gross negligence or willful misconduct of Mortgagee and no such liability shall be asserted against or imposed upon Mortgagee, and all such liability is hereby expressly waived and released by Mortgagor.
- b. **MORTGAGOR INDEMNIFIES MORTGAGEE AGAINST, AND HOLDS MORTGAGEE HARMLESS FROM, ALL ACTUAL LOSSES, DAMAGES, LIABILITIES, CLAIMS, CAUSES OF ACTION, JUDGMENTS, COURT COSTS, REASONABLE ATTORNEYS' FEES AND OTHER REASONABLE LEGAL EXPENSES, COST OF EVIDENCE OF TITLE, COST OF EVIDENCE OF VALUE, AND OTHER EXPENSES WHICH EITHER MAY SUFFER OR INCUR: (i) BY REASON OF THIS MORTGAGE; (ii) BY REASON OF THE EXECUTION OF THIS MORTGAGE OR IN PERFORMANCE OF ANY ACT REQUIRED OR PERMITTED HEREUNDER OR BY LAW; (iii) AS A RESULT OF ANY FAILURE OF MORTGAGOR TO PERFORM MORTGAGOR'S OBLIGATIONS; OR (iv) BY REASON OF ANY ALLEGED OBLIGATION OR UNDERTAKING ON MORTGAGEE'S PART TO PERFORM OR DISCHARGE ANY OF THE REPRESENTATIONS, WARRANTIES, CONDITIONS, COVENANTS OR OTHER OBLIGATIONS CONTAINED IN ANY OTHER DOCUMENT RELATED TO THE SUBJECT PROPERTY AND COLLATERAL. THE ABOVE OBLIGATION OF MORTGAGOR TO INDEMNIFY AND HOLD HARMLESS MORTGAGEE SHALL SURVIVE THE RELEASE AND CANCELLATION OF THE SECURED OBLIGATIONS AND THE RELEASE OR PARTIAL RELEASE OF THE LIEN OF THIS MORTGAGE.**
- c. Mortgagor shall pay all amounts and indebtedness arising under this Section promptly upon demand by Mortgagee together with interest thereon from the date the indebtedness arises at the rate of interest then applicable to the principal balance of the Note as specified therein.

5.11 [INTENTIONALLY OMITTED.]

5.12 **DUE ON SALE OR ENCUMBRANCE.** Except as otherwise provided in the Loan Agreement, if the Subject Property or any direct or indirect interest therein or any portion of the limited liability company interests in Mortgagor, shall be sold, transferred, mortgaged or further encumbered, whether voluntarily, involuntarily or by operation of law, without the prior written consent of Mortgagee, then Mortgagee, in its sole discretion, may declare all Secured Obligations immediately due and payable.

5.13 **RELEASES, EXTENSIONS, MODIFICATIONS AND ADDITIONAL SECURITY.** Without notice to or the consent, approval or agreement of any persons or entities having any interest at any time in the Subject Property and Collateral or in any manner obligated under the Secured Obligations ("Interested Parties"), Mortgagee may, from time to time, release any person or entity from liability for the payment or performance of any Secured Obligation, take any action or make any agreement extending the maturity or otherwise altering the terms or increasing the amount of any Secured Obligation, or accept additional security or release all or a portion of the Subject

UNOFFICIAL COPY

Loan No. 1003317

Property and Collateral and other security for the Secured Obligations. None of the foregoing actions shall release or reduce the personal liability of any of said Interested Parties, or release or impair the priority of the lien of and security interests created by this Mortgage upon the Subject Property and Collateral.

- 5.14 **RELEASES.** If the Secured Obligations are paid, performed and discharged in full in accordance with the terms of this Mortgage, the Note, and the other Loan Documents, then this Mortgage shall become null and void and be released by Mortgagee at Mortgagor's request. In connection therewith, at the request and sole expense of Mortgagor, Mortgagee shall execute and deliver to Mortgagor all releases, assignments or other documents, including, without limitation, reconveyances and termination statements, reasonably necessary or desirable for the release of such lien. Notwithstanding the foregoing, a certificate or other written statement executed on behalf of Mortgagee confirming that the Secured Obligations have not been fully and finally paid, performed or discharged shall be sufficient evidence thereof for the purpose of reliance by third parties on such fact.
- 5.15 **RECONVEYANCE.** Upon repayment in full of the Indebtedness and discharge in full of the Secured Obligations, Mortgagee shall reconvey, without warranty, the Subject Property or that portion thereof then held hereunder. To the extent permitted by law, the reconveyance may describe the grantee as "the person or persons legally entitled thereto" and the recitals of any matters or facts in any reconveyance executed hereunder shall be conclusive proof of the truthfulness thereof. Mortgagee shall not have any duty to determine the rights of persons claiming to be rightful grantees of any reconveyance. When the Subject Property has been fully reconveyed, the last such reconveyance shall operate as a reassignment of all future rents, issues and profits of the Subject Property to the person or persons legally entitled thereto.
- 5.16 **SUBROGATION.** Mortgagee shall be subrogated to the lien of all encumbrances, whether released of record or not, paid in whole or in part by Mortgagee pursuant to the Loan Documents or by the proceeds of any loan secured by this Mortgage.

ARTICLE 6. DEFAULT PROVISIONS

- 6.1 **DEFAULT.** For all purposes hereof, the term "Default" shall mean an Event of Default as defined in the Loan Agreement.
- 6.2 **RIGHTS AND REMEDIES.** At any time after Default, to the extent permitted by applicable law, Mortgagee may, at Mortgagee's option, by Mortgagee itself or otherwise, do any one or more of the following:
- a. **Right to Accelerate.** Mortgagee may, without notice, demand, presentment, notice of nonpayment or nonperformance, protest, notice of protest, notice of intent to accelerate, notice of acceleration, or any other notice or any other action, all of which are hereby waived by Mortgagor and all other parties obligated in any manner whatsoever on the Secured Obligations, declare the entire unpaid balance of the Secured Obligations immediately due and payable, and upon such declaration, the entire unpaid balance of the Secured Obligations shall be immediately due and payable. The failure to exercise any remedy available to the Mortgagee shall not be deemed to be a waiver of any rights or remedies of the Mortgagee under the Loan Documents, at law or in equity.
 - b. **Right to Perform Mortgagor's Covenants.** If Mortgagor has failed to keep or perform any covenant whatsoever contained in this Mortgage or the other Loan Documents beyond any applicable grace or cure periods, Mortgagee may, but shall not be obligated to any person to do so, perform or attempt to perform said covenant, and any payment made or expense incurred in the performance or attempted performance of any such covenant shall be and become a part of the Secured Obligations, and Mortgagor promises, upon demand, to pay to

UNOFFICIAL COPY

Loan No. 1003317

Mortgagee, at the place where the Note is payable, all sums so advanced or paid by Mortgagee, with interest from the date when paid or incurred by Mortgagee at the rate of interest then applicable on the outstanding principal balance of the Note. No such payment by Mortgagee shall constitute a waiver of any Default. In addition to the liens and security interests hereof, Mortgagee shall be subrogated to all rights, titles, liens, and security interests securing the payment of any debt, claim, tax, or assessment for the payment of which Mortgagee may make an advance, or which Mortgagee may pay.

- c. **Right of Entry.** Mortgagee may, following a Default that is continuing and in connection with any foreclosure proceedings, enter upon the Subject Property, or any part thereof, and take exclusive possession of the Subject Property and Collateral and of all books, records, and accounts relating thereto and to exercise without interference from Mortgagor any and all rights which Mortgagor has with respect to the management, possession, operation, protection, or preservation of the Subject Property and Collateral, including without limitation the right to rent the same for the account of Mortgagor and to deduct from such Payments all costs, expenses, and liabilities of every character incurred by the Mortgagee in collecting such Payments and in managing, operating, maintaining, protecting, or preserving the Subject Property and Collateral and to apply the remainder of such Payments on the Secured Obligations in such manner as Mortgagee may elect. All such costs, expenses, and liabilities incurred by the Mortgagee in collecting such Payments and in managing, operating, maintaining, protecting, or preserving the Subject Property and Collateral, if not paid out of Payments as hereinabove provided, shall constitute a demand obligation owing by Mortgagor and shall bear interest from the date of expenditure until paid at the rate of interest then applicable on the outstanding principal balance of the Note, all of which shall constitute a portion of the Secured Obligations. If necessary to obtain the possession provided for above, the Mortgagee may invoke any and all legal remedies to dispossess Mortgagor, including specifically one or more actions for forcible entry and detainer, trespass to try title, and restitution. In connection with any action taken by the Mortgagee pursuant to this subsection, the Mortgagee shall not be liable for any loss sustained by Mortgagor resulting from any failure to let the Subject Property or Collateral, or any part thereof, or from any other act or omission of the Mortgagee in managing the Subject Property and Collateral unless such loss is caused by the gross negligence or willful misconduct of the Mortgagee, nor shall the Mortgagee be obligated to perform or discharge any obligation, duty, or liability under any Lease or under or by reason hereof or the exercise of rights or remedies hereunder. **MORTGAGOR SHALL AND DOES HEREBY AGREE TO INDEMNIFY MORTGAGEE FOR, AND TO HOLD HARMLESS MORTGAGEE FROM, ANY AND ALL ACTUAL LIABILITY, LOSS, OR DAMAGE INCURRED BY MORTGAGEE UNDER ANY SUCH LEASE OR UNDER OR BY REASON HEREOF OR THE EXERCISE OF RIGHTS OR REMEDIES HEREUNDER, AND FROM ANY AND ALL CLAIMS AND DEMANDS WHATSOEVER WHICH MAY BE ASSERTED AGAINST MORTGAGEE BY REASON OF ANY ALLEGED OBLIGATIONS OR UNDERTAKINGS ON ITS PART TO PERFORM OR DISCHARGE ANY OF THE TERMS, COVENANTS, OR AGREEMENTS CONTAINED IN ANY SUCH LEASE, UNLESS SUCH LIABILITY, LOSS OR DAMAGE OR CLAIMS OR DEMANDS ARE CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE MORTGAGEE.** Should Mortgagee incur any such liability, the amount thereof, including without limitation costs, expenses, and reasonable attorneys' fees, together with interest thereon from the date of expenditure until paid at the rate of interest then applicable on the outstanding principal balance of the Note, shall be secured hereby, and Mortgagor shall reimburse the Mortgagee therefor immediately upon demand. Nothing in this subsection shall impose any duty, obligation, or responsibility upon Mortgagee for the control, care, management, leasing, or repair of the Subject Property and Collateral, nor for the carrying out of any of the terms and conditions of any such Lease; nor shall it operate to make Mortgagee responsible or liable for any waste committed on the Subject Property and Collateral by the tenants or by any other parties, or for any hazardous materials on or under the Subject Property or Collateral, or for any dangerous or defective condition of the Subject Property or Collateral or for any negligence in the management, leasing, upkeep, repair, or

UNOFFICIAL COPY

Loan No. 1003317

control of the Subject Property or Collateral resulting in loss or injury or death to any tenant, licensee, employee, or stranger. Mortgagor hereby assents to, ratifies, and confirms any and all actions of Mortgagee with respect to the Subject Property and Collateral taken under this subsection.

The remedies in this subsection are in addition to other remedies available to the Mortgagee and the exercise of the remedies in this subsection shall not be deemed to be an election of non-judicial or judicial remedies otherwise available to the Mortgagee. No action by Mortgagee, taken pursuant to this subsection, shall be deemed to be an election to dispose of personal property under Section 9-621 of the UCC. Any receipt of consideration received by Mortgagee pursuant to this subsection shall be immediately credited against the Secured Obligations (in the inverse order of maturity) and the value of said consideration shall be treated like any other payment against the Secured Obligations.

- d. **[Intentionally Omitted.]**
- e. **Mortgagee's Judicial Remedies.** Mortgagee may proceed by suit or suits, at law or in equity, to enforce the payment, performance and discharge of the Secured Obligations in accordance with the terms hereof, of the Note, and the other Loan Documents, to foreclose the liens and security interests of this Mortgage as against all or any part of the Subject Property and Collateral, and to have all or any part of the Subject Property and Collateral sold under the judgment or decree of a court of competent jurisdiction. This remedy shall be cumulative of any other non-judicial remedies available to the Mortgagee with respect to the Loan Documents. Proceeding with a request or receiving a judgment for legal relief shall not be or be deemed to be an election of remedies or bar any available non-judicial remedy of the Mortgagee.
- f. **Mortgagee's Right to Appointment of Receiver.** To the extent permitted by applicable law, Mortgagee, as a matter of right and without regard to the sufficiency of the security for payment, performance and discharge of the Secured Obligations, without notice to Mortgagor and without any showing of insolvency, fraud, or mismanagement on the part of Mortgagor, and without the necessity of filing any judicial or other proceeding other than the proceeding for appointment of a receiver, shall be entitled to the appointment of a receiver or receivers of the Subject Property and Collateral or any part thereof, and of the Payments, and Mortgagor hereby irrevocably consents to the appointment of a receiver or receivers following a Default that is continuing. Any receiver appointed pursuant to the provisions of this subsection shall have the usual powers and duties of receivers in such matters.
- g. **Mortgagee's UCC Remedies.** Mortgagee may exercise its rights of enforcement with respect to the Collateral under the UCC, and in conjunction with, in addition to or in substitution for the rights and remedies under the UCC, to the extent permitted by applicable law, Mortgagee may, and Mortgagor agrees, as follows: (i) without demand or notice to Mortgagor, enter upon the Subject Property to take possession of, assemble, receive, and collect the Collateral, or any part thereof, or to render it unusable; (ii) require Mortgagor to assemble the Collateral and make it available at a place Mortgagee designates which is mutually convenient to allow Mortgagee to take possession or dispose of the Collateral; (iii) written notice mailed to Mortgagor as provided herein at least ten (10) days prior to the date of public sale of the Collateral or prior to the date after which private sale of the Collateral will be made shall constitute reasonable notice; (iv) [intentionally omitted]; (v) in the event of a foreclosure sale made under judgment of a court, the Collateral and the Subject Property may, at the option of the Mortgagee, be sold as a whole; (vi) it shall not be necessary that the Mortgagee take possession of the Collateral, or any part thereof, prior to the time that any sale pursuant to the provisions of this subsection is conducted, and it shall not be necessary that the Collateral or any part thereof be present at the location of such sale; (vii) prior to application of proceeds of disposition of the Collateral to the Secured Obligations, such proceeds shall be applied to the reasonable expenses of retaking, holding, preparing for sale

UNOFFICIAL COPY

Loan No. 1003317

or lease, selling, leasing and the like, and the reasonable attorneys' fees and legal expenses incurred by the Mortgagee; (viii) after notification, if any, hereafter provided in this subsection, Mortgagee may sell, lease, or otherwise dispose of the Collateral, or any part thereof, in one or more parcels at public or private sale or sales, at Mortgagee's offices or elsewhere, for cash, on credit, or for future delivery. Upon the request of Mortgagee, Mortgagor shall assemble the Collateral and make it available to Mortgagee at any place designated by Mortgagee that is reasonably convenient to Mortgagor and Mortgagee. Mortgagor agrees that Mortgagee shall not be obligated to give more than ten (10) days' written notice of the time and place of any public sale or of the time after which any private sale may take place and that such notice shall constitute reasonable notice of such matters. Mortgagor shall be liable for all expenses of retaking, holding, preparing for sale, or the like, and all attorneys' fees, legal expenses, and all other costs and expenses incurred by Mortgagee in connection with the collection of the Secured Obligations and the enforcement of Mortgagee's rights under the Loan Documents. Mortgagee shall apply the proceeds of the sale of the Collateral against the Secured Obligations in accordance with the requirements of this Mortgage. Mortgagor shall remain liable for any deficiency if the proceeds of any sale or disposition of the Collateral are insufficient to pay, perform and discharge the Secured Obligations in full. Mortgagor waives all rights of marshalling in respect of the property; (ix) any and all statements of fact or other recitals made in any bill of sale or assignment or other instrument evidencing any foreclosure sale hereunder, the nonpayment of the Secured Obligations, the occurrence of any Default, the Mortgagee having declared all or a portion of such Secured Obligations to be due and payable, the notice of time, place, and terms of sale and of the properties to be sold having been duly given, or any other act or thing having been duly done by Mortgagee, shall be taken as prima facie evidence of the truth of the facts so stated and recited; and (x) Mortgagee may appoint or delegate any one or more persons as agent to perform any act or acts necessary or incident to any sale held by Mortgagee, including the sending of notices and the conduct of the sale, but in the name and on behalf of Mortgagee.

- h. **Rights Relating to Leases and Rents.** Mortgagor has, pursuant to Article 3 of this Mortgage, assigned to Mortgagee all Payments under each of the Leases covering all or any portion of the Subject Property. To the extent permitted by applicable law, Mortgagee may at any time, and without notice, either in person, by agent, or by receiver to be appointed by a court, enter and take possession of the Subject Property or any part thereof, and in its own name, sue for or otherwise collect the Payments. All Payments collected by Mortgagee shall be applied as provided for in this Mortgage; provided, however, that if the costs, expenses, and attorneys' fees shall exceed the amount of Payments collected, the excess shall be added to the Secured Obligations, shall bear interest at the rate of interest then applicable on the outstanding principal balance of the Note, and shall be immediately due and payable. The entering upon and taking possession of the Subject Property, the collection of Payments, and the application thereof as aforesaid shall not cure or waive any Default or notice of default, if any, hereunder nor invalidate any act done pursuant to such notice, except to the extent any such Default is fully cured. Failure or discontinuance by Mortgagee at any time or from time to time, to collect said Payments shall not in any manner impair the subsequent enforcement by Mortgagee of the right, power and authority herein conferred upon it. Nothing contained herein, nor the exercise of any right, power, or authority herein granted to Mortgagee shall be, or shall be construed to be, an affirmation by it of any tenancy, lease, or option, nor an assumption of liability under, nor the subordination of, the lien of this Mortgage, to any such tenancy, lease, or option, nor an election of judicial relief, if any such relief is requested or obtained as to Leases or Payments, with respect to the Subject Property or any other collateral given by Mortgagor to Mortgagee. In addition, from time to time Mortgagee may elect, and notice hereby is given to each lessee under any Lease, to subordinate the lien of this Mortgage to any Lease by unilaterally executing and recording an instrument of subordination, and upon such election the lien of this Mortgage shall be subordinate to the Lease identified in such instrument of subordination; provided, however, in each instance such subordination will not affect or be applicable to, and expressly excludes any lien, charge, encumbrance, security interest, claim, easement, restriction, option,

UNOFFICIAL COPY

Loan No. 1003317

covenant and other rights, titles, interests or estates of any nature whatsoever with respect to all or any portion of the Subject Property and Collateral to the extent that the same may have arisen or intervened during the period between the recordation of this Mortgage and the execution of the Lease identified in such instrument of subordination.

- i. **Other Rights.** Mortgagee (i) may surrender the insurance policies maintained pursuant hereto or the other Loan Documents or any part thereof, and upon receipt shall apply the unearned premiums as a credit on the Secured Obligations, in accordance herewith, and, in connection therewith, Mortgagor hereby appoints Mortgagee as agent and attorney-in-fact (which is coupled with an interest and is therefore irrevocable) for Mortgagor to collect such premiums; and (ii) apply the reserve for impositions, if any, required by the provisions of this Mortgage, toward payment of the Secured Obligations; and (iii) shall have and may exercise any and all other rights and remedies which Mortgagee may have at law or in equity, or by virtue of any Loan Document or under the UCC, or otherwise.
 - j. **Possession After Foreclosure.** If the liens or security interests hereof shall be foreclosed by judicial action or as otherwise permitted by applicable law, the purchaser at any such sale shall receive, as an incident to purchaser's ownership, immediate possession of the property purchased, and if Mortgagor or Mortgagor's successors shall hold possession of said property or any part thereof subsequent to foreclosure, Mortgagor and Mortgagor's successors shall be considered as tenants at sufferance of the purchaser at foreclosure sale (without limitation of other rights or remedies, at a reasonable rental per day, due and payable daily, based upon the value of the portion of the Subject Property and Collateral so occupied or possessed and sold to such purchaser), and anyone occupying or possessing such portion of the Subject Property and Collateral, after demand is made for possession thereof, shall be guilty of forcible detainer and shall be subject to eviction and removal, forcible or otherwise, with or without process of law, and all damages by reason thereof are hereby expressly waived.
 - k. **Discontinuance of Proceedings and Restoration of the Parties.** In case Mortgagee shall have proceeded to enforce any right, power or remedy under this Mortgage by foreclosure, entry or otherwise, and such proceedings shall have been discontinued or abandoned for any reason, or shall have been determined adversely to Mortgagee, then and in every such case, Mortgagor and Mortgagee shall be restored to their former positions and rights hereunder, and all rights, powers and remedies of Mortgagee shall continue as if no such proceeding had been taken.
- 6.3 **APPLICATION OF FORECLOSURE SALE PROCEEDS.** The proceeds from any sale, lease, or other disposition by Mortgagee made pursuant to this Mortgage, or the proceeds from the surrender of any insurance policies pursuant hereto, or any Payments collected by Mortgagee from the Subject Property and Collateral, or the reserve for impositions, if any, required by the provisions of this Mortgage or sums received pursuant to a condemnation or proceeds from insurance which Mortgagee elects to apply to the Secured Obligations, shall be applied by Mortgagee to the Secured Obligations in the order and priority set forth in the Loan Agreement. The application of proceeds of sale or other proceeds as otherwise provided herein shall be deemed to be a payment of the Secured Obligations like any other payment. The balance of the Secured Obligations remaining unpaid, if any, shall remain fully due and owing in accordance with the terms of the Note or the other Loan Documents.
- 6.4 **APPLICATION OF OTHER SUMS.** All sums received by Mortgagee hereunder, less all costs and expenses incurred by Mortgagee or any receiver hereunder, including, without limitation, attorneys' fees, shall be applied in payment of the Secured Obligations in such order as Mortgagee shall determine in its sole discretion; provided, however, Mortgagee shall have no liability for funds not actually received by Mortgagee.

UNOFFICIAL COPY

Loan No. 1003317

- 6.5 **NO CURE OR WAIVER.** Neither Mortgagee's nor any receiver's entry upon and taking possession of all or any part of the Subject Property and Collateral, nor any collection of rents, issues, profits, insurance proceeds, condemnation proceeds or damages, other security or proceeds of other security, or other sums, nor the application of any collected sum to any Secured Obligation, nor the exercise of or failure to exercise any other right or remedy by Mortgagee or any receiver shall cure or waive any breach, Default or notice of default under this Mortgage, or nullify the effect of any notice of default or sale (unless all Secured Obligations then due have been paid and performed and Mortgagor has cured all other defaults), or impair the status of the security, or prejudice Mortgagee in the exercise of any right or remedy, or be construed as an affirmation by Mortgagee of any tenancy, lease or option or a subordination of the lien of or security interest created by this Mortgage.
- 6.6 **PAYMENT OF COSTS, EXPENSES AND ATTORNEYS' FEES.** Mortgagor agrees to pay to Mortgagee immediately and without demand (and such amounts shall be payable out of proceeds of foreclosure if not paid by Mortgagor) all reasonable costs and expenses incurred by Mortgagee pursuant to Section 6.2 (including, without limitation, appraisers' fees, receiver's costs and expenses, insurance taxes, outlays for documentary and expert evidence, costs for preservation of the Subject Property, stenographer's charges, publication costs and costs of procuring all abstracts of title, title searches and examinations, guarantee policies and similar data and assurances with respect to title as Mortgagee may deem to be reasonably necessary either to prosecute such suit or to evidence to bidders at any sale which may be had pursuant to such decree the true condition of the title to or value of the Subject Property or for any other reasonable purpose, court costs and reasonable attorneys' fees, whether incurred in litigation or not) with interest from the date of expenditure until said sums have been paid at the rate of interest then applicable to the principal balance of the Note as specified therein.
- 6.7 **POWER TO FILE NOTICES AND CURE DEFAULTS.** Mortgagor hereby irrevocably appoints Mortgagee and its successors and assigns, as its attorney-in-fact, which agency is coupled with an interest, (a) to execute and/or record any notices of commencement or completion of construction of the Improvements, or any other notices that Mortgagee deems appropriate to perfect or continue perfection of Mortgagee's security interest, (b) upon the issuance of a deed pursuant to the foreclosure of the lien of this Mortgage or the delivery of a deed in lieu of foreclosure, to execute all instruments of assignment or further assurance with respect to the Collateral, Leases and Payments in favor of the grantee of any such deed, as may be necessary or desirable for such purpose, (c) to prepare, execute and file or record financing statements, continuation statements, applications for registration and like papers necessary to create, perfect or preserve Mortgagee's security interests and rights in or to any of the Collateral, and (d) subject to the provisions of the Loan Agreement, upon the occurrence of an event, act or omission which, with notice or passage of time or both, would constitute a Default, to perform any obligation of Mortgagor hereunder; provided, however, that: (i) Mortgagee as such attorney-in-fact shall only be accountable for such funds as are actually received by Mortgagee; and (ii) Mortgagee shall not be liable to Mortgagor or any other person or entity for any failure to act (whether such failure constitutes negligence) by Mortgagee under this Section.
- 6.8 **REMEDIES CUMULATIVE.** All rights and remedies of Mortgagee upon the occurrence of a Default provided hereunder are cumulative and are in addition to all rights and remedies provided by applicable law (including specifically that of judicial foreclosure of this instrument) or in any other agreements between Mortgagor and Mortgagee. No failure on the part of Mortgagee to exercise any of its rights hereunder arising upon any Default shall be construed to prejudice its rights upon the occurrence of any other subsequent Default. No delay on the part of Mortgagee in exercising any such rights shall be construed to preclude it from the exercise thereof at any time while such Default is continuing. Mortgagee may enforce any one or more remedies or rights hereunder successively or concurrently. By accepting payment or performance of any of the Secured Obligations after its due date, Mortgagee shall not thereby waive the agreement contained herein that time is of the essence, nor shall Mortgagee waive either its right to require prompt payment or

UNOFFICIAL COPY

Loan No. 1003317

performance when due of the remainder of the Secured Obligations or its right to consider the failure to so pay or perform a Default.

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

- a. Mortgagee shall have the benefit of all of the provisions of the Act, including all amendments thereto which may become effective from time to time after the date hereof. In the event any provision of the Act which is specifically referred to herein may be repealed, Mortgagee shall have the benefit of such provision as most recently existing prior to such repeal, as though the same were incorporated herein by express reference. If any provision in this Mortgage shall be inconsistent with any provision of the Act, provisions of the Act shall take precedence over the provisions of this Mortgage, but shall not invalidate or render unenforceable any other provision of this Mortgage that can be construed in a manner consistent with the Act. If any provision of this Mortgage shall grant to Mortgagee (including Mortgagee acting as a mortgagee in possession) or a receiver appointed pursuant to the provisions of this Mortgage any powers, rights or remedies prior to, upon or following the occurrence of a Default which are more limited than the powers, rights or remedies that would otherwise be vested in Mortgagee or in such receiver under the Act in the absence of said provision, Mortgagee and such receiver shall be vested with the powers, rights and remedies granted in the Act to the full extent permitted by law. Without limiting the generality of the foregoing, all expenses incurred by Mortgagee which are of the type referred to in Section 5/15 1510 or 5/15 1512 of the Act, whether incurred before or after any decree or judgment of foreclosure, and whether or not enumerated specifically in this Mortgage, shall be added to the indebtedness secured hereby and/or by the judgment of foreclosure.
- b. Wherever provision is made in this Mortgage or the Loan Agreement for insurance policies to bear mortgage clauses or other loss payable clauses or endorsements in favor of Mortgagee, or to confer authority upon Mortgagee to settle or participate in the settlement of losses under policies of insurance or to hold and disburse or otherwise control the use of insurance proceeds, from and after the entry of judgment of foreclosure, all such rights and powers of Mortgagee shall continue in Mortgagee as judgment creditor or mortgagee until confirmation of sale.
- c. In addition to any provision of this Mortgage authorizing Mortgagee to take or be placed in possession of the Property, or for the appointment of a receiver, Mortgagee shall have the right, in accordance with Sections 15-1701 and 15-1702 of the Act, to be placed in the possession of the Subject Property or at its request to have a receiver appointed, and such receiver, or Mortgagee, if and when placed in possession, shall have, in addition to any other powers provided in this Mortgage, all rights, powers, immunities, and duties and provisions for in Sections 15-1701 and 15-1703 of the Act.
- d. Mortgagor acknowledges that the Subject Property does not constitute agricultural real estate, as said term is defined in Section 15-1201 of the Act or residential real estate as defined in Section 15-1219 of the Act.
- e. To the extent permitted by applicable law, Mortgagor hereby expressly waives any and all rights of reinstatement and redemption, if any, under the Act, and the benefits of all present and future valuation, appraisal, homestead, exemption, stay, redemption and moratorium under any state or federal law, on its own behalf and on behalf of each and every person, it being the intent hereof that any and all such rights of reinstatement and redemption of Mortgagor and of all other persons are and shall be deemed to be hereby waived to the full extent permitted by the provisions of Section 5/15-1601 of the Act or other applicable law or

UNOFFICIAL COPY

Loan No. 1003317

replacement statutes.

- f. Maximum Amount Secured. The maximum principal indebtedness secured by this Mortgage shall not exceed \$514,000,000.00.
- g. Collateral Protection Insurance. The following notice is provided pursuant to paragraph (3) of 815 ILCS 180/10: Unless Mortgagor provides evidence of the insurance coverage required by the Loan Documents, Mortgagee may purchase insurance at Mortgagor's expense to protect Mortgagee's interests in Mortgagor's collateral. This insurance may, but need not, protect Mortgagor's interests. The coverage that Mortgagee purchases may not pay any claim that Mortgagor may make or any claim that is made against Mortgagor in connection with the collateral. Mortgagor may later cancel any insurance purchased by Mortgagee, but only after providing evidence that Mortgagor has obtained insurance as required by the Loan Documents. If Mortgagee purchases insurance for the collateral, Mortgagor will be responsible for the costs of that insurance, including the insurance premium, interest and any other charges that Mortgagee may impose in connection with the placement of the insurance, until the effective date of the cancellation or expiration of the insurance. The costs of the insurance may be added to the Secured Obligations. The costs of the insurance may be more than the cost of insurance that Mortgagor may be able to obtain on Mortgagor's own.
- h. Variable Rate, Additional Interest. This Mortgage secures the full and timely payment of the Secured Obligations, including, among other things, the obligation to pay interest on the unpaid principal balance at a variable rate of interest as provided in the Loan Documents.
- i. Future Advances: Revolving Credit. To the extent, if any, that Mortgagee is obligated under the terms of the Loan Documents to make advances as provided therein, Mortgagor acknowledges and intends that all such advances, including future advances whenever hereafter made, shall be secured by the lien of this Mortgage, as provided in Section 15-1302(b)(1) of the Act and that the portion of the Secured Obligations which comprises the principal amount then outstanding shall constitute revolving credit indebtedness secured by a mortgage on real property, pursuant to the terms and conditions of 205 ILCS 5/5(d). Mortgagor covenants and agrees that this Mortgage shall secure the payment of all loans and advances made as of the date hereof or at any time in the future, and whether such future advances are obligatory or are to be made at the option of Mortgagee or otherwise (but not advances or loans made more than 20 years after the date hereof), to the same extent as if such future advances were made on the date of the execution of this Mortgage and although there may be no advances made at the time of the execution of this Mortgage and although there may be no other indebtedness outstanding under the Loan Documents at the time any advance is made. The lien of this Mortgage shall be valid as to all such obligations, including future advances, from the time of its filing of record in the office of the Recorder of Deeds of the County in which the Subject Property is located. The total amount of the Secured Obligations hereby may increase or decrease from time to time. This Mortgage shall be valid and shall have priority over all subsequent liens and encumbrances, including any statutory liens except taxes and assessments levied on the Subject Property or such other liens that shall have priority by operation of law, to the extent of the maximum amount secured hereby.
- j. Protective Advances. All advances, disbursements and expenditures made by Mortgagee in accordance with the terms of this Mortgage and the other Loan Documents, either before and during a foreclosure of this Mortgage, and before and after judgment of foreclosure therein, and at any time prior to sale of the Subject Property, and, where applicable, after sale of the Subject Property, and during the pendency of any related proceeding, in addition to those otherwise authorized by the Act, shall have the benefit of all applicable provisions of the Act, including without limitation advances, disbursements and expenditures for the following purposes:

UNOFFICIAL COPY

Loan No. 1003317

- (i) all advances by Mortgagee in accordance with the terms of the Mortgage or the other Loan Documents to: (A) preserve, maintain, repair, restore or rebuild the Improvements upon the Subject Property; (B) preserve the lien of the Mortgage or the priority thereof; or (C) enforce the Mortgage, as referred to in Section 15-1302(b)(5) of the Act;
- (ii) payments by Mortgagee of (A) principal, interest or other obligations in accordance with the terms of any senior mortgage or other prior lien or encumbrance, (B) 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 Subject Property or any part thereof, (C) other obligations authorized by the Mortgage, or (D) 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;
- (iii) advances by Mortgagee in settlement or compromise of any claims asserted by claimants under senior mortgages or any other prior liens;
- (iv) attorneys' fees and other costs incurred: (A) in connection with the foreclosure of the Mortgage as referred to in Sections 15-1504(d)(2) and 15-1510 of the Act; (B) in connection with any action, suit or proceeding brought by or against Mortgagee for the enforcement of the Mortgage or arising from the interest of Mortgagee hereunder; or (C) in preparation for or in connection with the commencement, prosecution or defense of any other action related to the Mortgage or the Subject Property;
- (v) Mortgagee's fees and costs, including attorneys' fees, arising between the entry of judgment of foreclosure and the confirmation hearing as referred to in Section 15-1508(b)(1) of the Act;
- (vi) expenses deductible from proceeds of sale as referred to in Sections 15-1512(a) and (b) of the Act; and
- (vii) expenses incurred and expenditures made by Mortgagee for any one or more of the following: (A) if the Subject Property or any portion thereof constitutes one or more units under a condominium declaration, assessments imposed upon the unit owner thereof; (B) if Mortgagor's interest in the Subject Property is a leasehold estate under a lease or sublease, rentals or other payments required to be made by the lessee under the terms of the lease or sublease; (C) 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 Subject Property imposed by Section 15-1704(c)(1) of the Act; (D) repair or restoration of damage or destruction in excess of available insurance proceeds or condemnation awards; (E) payments deemed by Mortgagee to be required for the benefit of the Subject Property or required to be made by the owner of the Subject Property under any grant or declaration of easement, easement agreement, agreement with any adjoining land owners or instruments creating covenants or restrictions for the benefit of or affecting the Subject Property; (F) shared or common expense assessments payable to any association or corporation in which the owner of the Subject Property is a member in any way affecting the Subject Property; (G) if any portion of the Secured Obligations is a construction loan, costs incurred by Mortgagee for demolition, preparation for and completion of construction, as may be authorized by the Loan Documents; (H) payments required to be paid by Mortgagor or Mortgagee pursuant to any lease or other agreement for occupancy of the Subject Property; and (I) if the Mortgage is insured, payment of FHA or private mortgage insurance required to keep such insurance in force.

UNOFFICIAL COPY

Loan No. 1003317

- k. **Application of Proceeds.** Notwithstanding anything contained in the Mortgage to the contrary, the proceeds of any foreclosure sale of the Subject Property shall be distributed and applied in accordance with Section 15-1512 of the Act in the following order of priority: first, on account of all reasonable costs and expenses incident to the foreclosure proceeding or such other remedy, including all such items as are mentioned in subsection (j) above; second, on account of all reasonable costs and expenses in connection with securing possession of the Subject Property prior to such foreclosure sale, and the reasonable costs and expenses incurred by or on behalf of Mortgagee in connection with holding, maintaining and preparing the Subject Property for sale, including all such items as are mentioned in subsection (j) above; third, in satisfaction of all claims in the order of priority adjudicated in the foreclosure judgment or order confirming sale; and fourth, any remainder in accordance with the order of court adjudicating the foreclosure proceeding.

ARTICLE 7. MISCELLANEOUS PROVISIONS

- 7.1 **ADDITIONAL PROVISIONS.** The Loan Documents grant further rights to Mortgagee and contain further agreements and affirmative and negative covenants by Mortgagor which apply to this Mortgage and to the Subject Property and Collateral and such further rights and agreements are incorporated herein by this reference.
- 7.2 **MERGER.** No merger shall occur as a result of Mortgagee's acquiring any other estate in, or any other lien on, the Subject Property unless Mortgagee consents to a merger in writing.
- 7.3 **OBLIGATIONS OF MORTGAGOR, JOINT AND SEVERAL.** If more than one person has executed this Mortgage as "Mortgagor", the obligations of all such persons hereunder shall be joint and several.
- 7.4 **[Intentionally Deleted.]**
- 7.5 **WAIVER OF MARSHALLING RIGHTS.** Mortgagor, for itself and for all parties claiming through or under Mortgagor, and for all parties who may acquire a lien on, or interest in the Subject Property and Collateral, hereby waives all rights to have the Subject Property and Collateral and/or any other property which is now or later may be security for any Secured Obligation ("Other Property") marshalled upon any foreclosure of the lien of this Mortgage or on a foreclosure of any other lien or security interest against any security for any of the Secured Obligations. Any court in which foreclosure proceedings may be brought shall have the right to order a sale of, the Subject Property and any or all of the Collateral or Other Property as a whole or in separate parcels, in any order that Mortgagee may designate.
- 7.6 **RULES OF CONSTRUCTION.** When the identities of the parties or other circumstances make it appropriate the masculine gender includes the feminine and/or neuter, and the singular number includes the plural. The term "Subject Property" and "Collateral" means all and any part of the Subject Property and Collateral, respectively, and any interest in the Subject Property and Collateral, respectively.
- 7.7 **SUCCESSORS IN INTEREST.** The terms, covenants, and conditions herein contained shall be binding upon and inure to the benefit of the heirs, successors and assigns of the parties hereto.
- 7.8 **EXECUTION IN COUNTERPARTS.** To facilitate execution, this document may be executed in as many counterparts as may be convenient or required. It shall not be necessary that the signature or acknowledgment of, or on behalf of, each party, or that the signature of all persons required to bind any party, or the acknowledgment of such party, appear on each counterpart. All counterparts shall collectively constitute a single document. It shall not be necessary in making

UNOFFICIAL COPY

Loan No. 1003317

proof of this document to produce or account for more than a single counterpart containing the respective signatures of, or on behalf of, and the respective acknowledgments of, each of the parties hereto. Any signature or acknowledgment page to any counterpart may be detached from such counterpart without impairing the legal effect of the signatures or acknowledgments thereon and thereafter attached to another counterpart identical thereto except having attached to it additional signature or acknowledgment pages.

- 7.9 **CHOICE OF LAW.** WITH RESPECT TO MATTERS RELATING TO THE CREATION, PERFECTION AND PROCEDURES RELATING TO THE ENFORCEMENT OF THE LIENS CREATED PURSUANT TO THIS MORTGAGE, THIS MORTGAGE SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF ILLINOIS, IT BEING UNDERSTOOD THAT, EXCEPT AS EXPRESSLY SET FORTH ABOVE IN THIS PARAGRAPH AND TO THE FULLEST EXTENT PERMITTED BY THE LAW OF SUCH STATE, THE LAWS OF THE STATE OF NEW YORK SHALL GOVERN ALL MATTERS RELATING TO THIS MORTGAGE, THE LOAN AGREEMENT AND THE OTHER LOAN DOCUMENTS AND ALL OF THE INDEBTEDNESS OR OBLIGATIONS ARISING THEREUNDER OR HEREUNDER.
- 7.10 **INCORPORATION.** Exhibit A attached hereto is incorporated into this Mortgage by this reference.
- 7.11 **NOTICES.** All notices, demands, or other communications under this Mortgage and the other Loan Documents shall be in writing and shall be delivered to the appropriate party at the address set forth below (subject to change from time to time by written notice to all other parties to this Mortgage). All communications shall be effective (i) if mailed, upon the first to occur of receipt or the expiration of three (3) days after the deposit in the United States Postal Service mail, postage prepaid and addressed to the address of Mortgagor or Mortgagee at the address specified, (ii) if telecopied, when transmitted, (iii) if hand delivered, when delivered or (iv) if delivered via reputable overnight courier service (i.e. UPS, Federal Express), when delivered, if delivered in accordance with Section 9.5 of the Loan Agreement, to the extent applicable; provided, however, that in the case of the immediately preceding clauses (i), (ii), (iii) or (iv), non-receipt of any communication as the result of any change of address of which the sending party was not notified or as the result of a refusal to accept delivery shall be deemed receipt of such communication.

Mortgagor:	BRE/US Industrial Properties L.L.C. c/o The Blackstone Group 345 Park Avenue, 32nd Floor New York, New York 10154 Attention: William J. Stein, Global Head of Asset Management
With a copy to:	c/o The Blackstone Group 345 Park Avenue, 32nd Floor New York, New York 10154 Attention: Frank Cohen
With a copy to:	Simpson Thacher & Bartlett LLP 425 Lexington Avenue New York, New York 10017 Attn: Sasan Mehrara
Mortgagee:	Wells Fargo Bank, National Association 375 Park Avenue, 9 th Floor New York, New York 10152 Attn: Anthony Filorimo Loan #: 1003317

UNOFFICIAL COPY

Loan No. 1003317

With a copy to:	Wells Fargo Bank, National Association Minneapolis Loan Center 608 Second Avenue South, 11 th Floor Minneapolis, Minnesota 55402 Attn: Cindy Mayne Loan #: 1003317
With a copy to:	Morrison & Foerster LLP 1290 Avenue of the Americas New York, New York 10104 Attention: John J. McCarthy, Esq.

Any party shall have the right to change its address for notice hereunder to any other location within the continental United States by the giving of written notice to the other party in the manner set forth hereinabove. Mortgagor shall forward to Mortgagee, without delay, any notices, letters or other communications delivered to the Subject Property or to Mortgagor naming Mortgagee, "Lender" or any similar designation as addressee, or which could reasonably be deemed to materially or adversely affect the construction of the Improvements or the ability of Mortgagor to perform its obligations to Mortgagee under the Note or the Loan Agreement.

7.12 INTEREST PROVISIONS.

- a. **Savings Clause.** It is expressly stipulated and agreed to be the intent of Mortgagor and Mortgagee at all times to comply strictly with the applicable Illinois law governing the maximum rate or amount of interest payable on the Note or the Related Indebtedness (or applicable United States federal law to the extent that it permits Mortgagee to contract for, charge, take, reserve or receive a greater amount of interest than under Illinois law). If the applicable law is ever judicially interpreted so as to render usurious any amount (i) contracted for, charged, taken, reserved or received pursuant to the Note, any of the other Loan Documents or any other communication or writing by or between Mortgagor and Mortgagee related to the transaction or transactions that are the subject matter of the Loan Documents, (ii) contracted for, charged or received by reason of Mortgagee's exercise of the option to accelerate the maturity of the Note and/or the Related Indebtedness, or (iii) Mortgagor will have paid or Mortgagee will have received by reason of any voluntary prepayment by Mortgagor of the Note and/or the Related Indebtedness, then it is Mortgagor's and Mortgagee's express intent that all amounts charged in excess of the Maximum Lawful Rate shall be automatically cancelled, ab initio, and all amounts in excess of the Maximum Lawful Rate theretofore collected by Mortgagee shall be credited on the principal balance of the Note and/or the Related Indebtedness (or, if the Note and all Related Indebtedness have been or would thereby be paid in full, refunded to Mortgagor), and the provisions of the Note and the other Loan Documents immediately be deemed reformed and the amounts thereafter collectible hereunder and thereunder reduced, without the necessity of the execution of any new document, so as to comply with the applicable law, but so as to permit the recovery of the fullest amount otherwise called for hereunder and thereunder; provided, however, if the Note has been paid in full before the end of the stated term of the Note, then Mortgagor and Mortgagee agree that Mortgagee shall, with reasonable promptness after Mortgagee discovers or is advised by Mortgagor that interest was received in an amount in excess of the Maximum Lawful Rate, either refund such excess interest to Mortgagor and/or credit such excess interest against the Note and/or any Related Indebtedness then owing by Mortgagor to Mortgagee. Mortgagor hereby agrees that as a condition precedent to any claim seeking usury penalties against Mortgagee, Mortgagor will provide written notice to Mortgagee, advising Mortgagee in reasonable detail of the nature and amount of the violation, and Mortgagee shall have sixty (60) days after receipt of such notice in which to correct such

UNOFFICIAL COPY

Loan No. 1003317

usury violation, if any, by either refunding such excess interest to Mortgagor or crediting such excess interest against the Note and/or the Related Indebtedness then owing by Mortgagor to Mortgagee. All sums contracted for, charged or received by Mortgagee for the use, forbearance or detention of any debt evidenced by the Note and/or the Related Indebtedness shall, to the extent permitted by applicable law, be amortized or spread, using the actuarial method, throughout the stated term of the Note and/or the Related Indebtedness (including any and all renewal and extension periods) until payment in full so that the rate or amount of interest on account of the Note and/or the Related Indebtedness does not exceed the Maximum Lawful Rate from time to time in effect and applicable to the Note and/or the Related Indebtedness for so long as debt is outstanding. Notwithstanding anything to the contrary contained herein or in any of the other Loan Documents, it is not the intention of Mortgagee to accelerate the maturity of any interest that has not accrued at the time of such acceleration or to collect unearned interest at the time of such acceleration.

- b. **Definitions.** As used herein, the term "Maximum Lawful Rate" shall mean the maximum lawful rate of interest which may be contracted for, charged, taken, received or reserved by Mortgagee in accordance with the applicable laws of the State of Illinois (or applicable United States federal law to the extent that it permits Mortgagee to contract for, charge, take, receive or reserve a greater amount of interest than under Illinois law), taking into account all Charges (as herein defined) made in connection with the transaction evidenced by the Note and the other Loan Documents. As used herein, the term "Charges" shall mean all fees, charges and/or any other things of value, if any, contracted for, charged, received, taken or reserved by Mortgagee in connection with the transactions relating to the Note and the other Loan Documents, which are treated as interest under applicable law. As used herein, the term "Related Indebtedness" shall mean any and all debt paid or payable by Mortgagor to Mortgagee pursuant to the Loan Documents or any other communication or writing by or between Mortgagor and Mortgagee related to the transaction or transactions that are the subject matter of the Loan Documents, except such debt which has been paid or is payable by Mortgagor to Mortgagee under the Note.
- c. **Ceiling Election.** To the extent United States federal law permits Mortgagee to contract for, charge, take, receive or reserve a greater amount of interest than under Illinois law, Mortgagee will rely on United States federal law instead of Illinois law for the purpose of determining the Maximum Lawful Rate. Additionally, to the extent permitted by applicable law now or hereafter in effect, Mortgagee may, at its option and from time to time, utilize any other method of establishing the Maximum Lawful Rate under Illinois law or under other applicable law by giving notice, if required, to Mortgagor as provided by applicable law now or hereafter in effect.

7.13 DEFICIENCY.

- a. In the event an interest in any of the Subject Property and Collateral is foreclosed upon pursuant to a judicial or non-judicial foreclosure sale, Mortgagor agrees as follows. Mortgagor agrees that Mortgagee shall be entitled to seek a deficiency judgment from Mortgagor and any other party obligated on the Note equal to the difference between the amount owing on the Note and the amount for which the Subject Property and Collateral was sold pursuant to judicial or non-judicial foreclosure sale. Mortgagor expressly recognizes that this section constitutes a waiver of any provisions of Illinois law which would otherwise permit Mortgagor and other persons against whom recovery of deficiencies is sought or any guarantor independently (even absent the initiation of deficiency proceedings against them) to present competent evidence of the fair market value of the Subject Property and Collateral as of the date of the foreclosure sale and offset against any deficiency the amount by which the foreclosure sale price is determined to be less than such fair market value. Mortgagor further recognizes and agrees that this waiver creates an irrebuttable presumption that the foreclosure sale price is equal to the fair market value of the Subject Property and Collateral

UNOFFICIAL COPY

Loan No. 1003317

for purposes of calculating deficiencies owed by Mortgagor, any guarantor, and others against whom recovery of a deficiency is sought.

- b. Alternatively, in the event the waiver provided for in subsection (a) above is determined by a court of competent jurisdiction to be unenforceable, the following shall be the basis for the finder of fact's determination of the fair market value of the Subject Property and Collateral as of the date of the foreclosure sale: (i) the Subject Property and Collateral shall be valued in an "as is" condition as of the date of the foreclosure sale, without any assumption or expectation that the Subject Property and Collateral will be repaired or improved in any manner before a resale of the Subject Property and Collateral after foreclosure; (ii) the valuation shall be based upon an assumption that the foreclosure purchaser desires a resale of the Subject Property and Collateral for cash promptly (but no later than twelve (12) months) following the foreclosure sale; (iii) all reasonable closing costs customarily borne by the seller in commercial real estate transactions should be deducted from the gross fair market value of the Subject Property and Collateral, including, without limitation, brokerage commissions, title insurance, a survey of the Subject Property, tax proration, attorneys' fees, and marketing costs; (iv) the gross fair market value of the Subject Property and Collateral shall be further discounted to account for any estimated holding costs associated with maintaining the Subject Property and Collateral pending sale, including, without limitation, utilities expenses, property management fees, taxes and assessments (to the extent not accounted for in (iii) above), and other maintenance, operational and ownership expenses; and (v) any expert opinion testimony given or considered in connection with a determination of the fair market value of the Subject Property and Collateral must be given by persons having at least five (5) years experience in appraising property similar to the Subject Property and Collateral and who have conducted and prepared a complete written appraisal of the Subject Property and Collateral taking into consideration the factors set forth above.
- c. **Mortgagee as Purchaser.** Mortgagee may be the purchaser of the Subject Property and Collateral or any part thereof, at any foreclosure sale thereof, and Mortgagee shall, upon any such purchase, acquire good title to the Subject Property and Collateral so purchased, free of the liens and security interests hereof, unless the sale was made subject to an unmatured portion of the Secured Obligations. The Mortgagee, as purchaser, shall be treated in the same manner as any third party purchaser and the proceeds of the Mortgagee's purchase shall be applied in accordance with the requirements of this Mortgage. Upon sale of the Subject Property at any foreclosure, Mortgagee may credit bid (as determined by Mortgagee in its sole and absolute discretion) all or any portion of the Secured Obligations. In determining such credit bid, Mortgagee may, but is not obligated to, take into account all or any of the following: (i) appraisals of the Subject Property as such appraisals may be discounted or adjusted by Mortgagee in its sole and absolute underwriting discretion; (ii) expenses and costs incurred by Mortgagee with respect to the Subject Property prior to foreclosure; (iii) expenses and costs which Mortgagee anticipates will be incurred with respect to the Subject Property after foreclosure, but prior to resale, including, without limitation, costs of structural reports and other due diligence, costs to carry the Subject Property prior to resale, costs of resale (e.g. commissions, attorneys' fees, and taxes), costs of any hazardous materials clean-up and monitoring, costs of deferred maintenance, repair, refurbishment and retrofit, costs of defending or settling litigation affecting the Subject Property, and lost opportunity costs (if any), including the time value of money during any anticipated holding period by Mortgagee; (iv) declining trends in real property values generally and with respect to properties similar to the Subject Property; (v) anticipated discounts upon resale of the Subject Property as a distressed or foreclosed property; (vi) the fact of additional collateral (if any), for the Secured Obligations; and (vii) such other factors or matters that Mortgagee (in its sole and absolute discretion) deems appropriate. In regard to the above, Mortgagor acknowledges and agrees that: (w) Mortgagee is not required to use any or all of the foregoing factors to determine the amount of its credit bid; (x) this Section does not impose upon Mortgagee any additional obligations that are not imposed by law at the time the credit bid is made; (y) the amount of Mortgagee's credit bid need not have any

UNOFFICIAL COPY

Loan No. 1003317

relation to any loan-to-value ratios specified in the Loan Documents or previously discussed between Mortgagor and Mortgagee; and (z) Mortgagee's credit bid may be (at Mortgagee's sole and absolute discretion) higher or lower than any appraised value of the Subject Property.

- 7.14 **ENTIRE AGREEMENT; AMENDMENT.** THIS MORTGAGE AND THE OTHER LOAN DOCUMENTS EMBODY THE FINAL, ENTIRE AGREEMENT AMONG THE PARTIES HERETO AND SUPERSEDE ANY AND ALL PRIOR COMMITMENTS, AGREEMENTS, REPRESENTATIONS, AND UNDERSTANDINGS, WHETHER WRITTEN OR ORAL, RELATING TO THE SUBJECT MATTER HEREOF AND THEREOF AND MAY NOT BE CONTRADICTED OR VARIED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OR DISCUSSIONS OF THE PARTIES HERETO. THERE ARE NO ORAL AGREEMENTS AMONG THE PARTIES HERETO. THE PROVISIONS OF THIS MORTGAGE AND THE LOAN DOCUMENTS MAY BE AMENDED OR WAIVED ONLY BY AN INSTRUMENT IN WRITING SIGNED BY THE MORTGAGOR AND MORTGAGEE, EXCEPT AS SET FORTH IN SECTION 7.15 HEREOF.
- 7.15 **BANKRUPTCY SAVING'S CLAUSE.** Mortgagor agrees that if Mortgagor's joint and several liability for the Secured Obligations, or the security interest granted pursuant hereto, would, but for the application of this sentence, be unenforceable under applicable law, such joint and several liability and such security interest shall be valid and enforceable to the maximum extent that would not cause such joint and several liability or such security interest to be unenforceable under applicable law, and this Mortgage shall be deemed to have been automatically amended to accomplish same without any further actions by any party.


[NO FURTHER TEXT ON THIS PAGE.]

UNOFFICIAL COPY

IN WITNESS WHEREOF, Mortgagor has executed this Mortgage as of the day and year set forth above.

"MORTGAGOR"

BRE/US Industrial Properties L.L.C.,
a Delaware limited liability company

By: 
Name: Alan Yang
Title: Vice President

(ALL SIGNATURES MUST BE ACKNOWLEDGED)

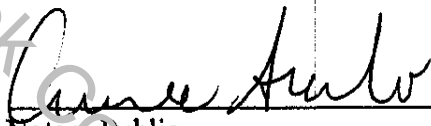
Property of Cook County Clerk's Office

UNOFFICIAL COPY

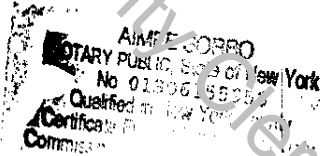
ACKNOWLEDGEMENT

STATE OF NEW YORK)
 :SS:
COUNTY OF NEW YORK)

On the 13th day of November, 2010 before me, the undersigned, a Notary Public in and for said State, personally appeared Alan Yang, known to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.



Notary Public



Property of Cook County Clerk's Office

UNOFFICIAL COPY

Loan No. 1003317

DESCRIPTION OF SUBJECT PROPERTY

Exhibit A to Mortgage with Assignment of Leases and Rents, Security Agreement and Fixture Filing executed by BRE/US Industrial Properties L.L.C., a Delaware limited liability company, as Mortgagor to Wells Fargo Bank, National Association, acting as Administrative Agent for certain lenders, as Mortgagee, dated as of November 18, 2010.

All the certain real property located in the County of Cook, State of Illinois, described as follows:

PROPERTY ADDRESS: 1325 Pratt Boulevard
Elk Grove Village, IL _____

PERMANENT INDEX NUMBER(S): 08-34-404-011-0000

UNOFFICIAL COPY

1325 Pratt Boulevard
Elk Grove Village, IL

LEGAL DESCRIPTION

LOT 133 IN CENTEX INDUSTRIAL PARK UNIT 98, BEING A SUBDIVISION IN SECTION 34, TOWNSHIP 41 NORTH, RANGE 11, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS.

TAX PARCEL #08-34-404-011-0000