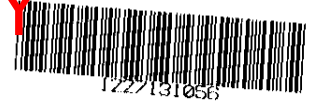


5/7

UNOFFICIAL COPY



1227131056

Doc#: 1227131056 Fee: \$142.00
Eugene "Gene" Moore RHSP Fee: \$10.00
Cook County Recorder of Deeds
Date: 09/27/2012 12:42 PM Pg: 1 of 53

Illinois Anti-Predatory Lending Database Program

Certificate of Exemption

Report Mortgage Fraud
800-532-8765

second mty 5-1 JP 8888512

Property of Cook County Clerk's Office

The property identified as: **PIN:** 08-27-303-074-0000

Address:

Street: 747 CHASE AVENUE

Street line 2:

City: ELK GROVE VILLAGE

State: IL

ZIP Code: 60007

Lender: TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA

Borrower: PROLOGIS NA2 U.S. LLC

Loan / Mortgage Amount: \$30,250,000.00

This property is located within the program area and the transaction is exempt from the requirements of 765 ILCS 7770 et seq. because the application was taken by an exempt entity.

Certificate number: 423C96C0-9244-4CDD-B132-CA5D7D7021CF

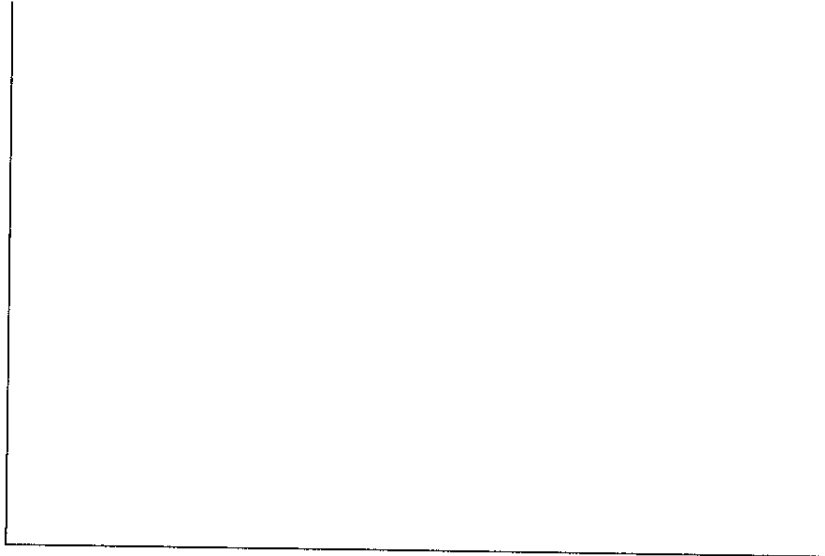
Execution date: 09/12/2012

UNOFFICIAL COPY

5/1

8888312

D-1 JTF



Property of Cook County Clerk's Office

SECOND PRIORITY MORTGAGE, ASSIGNMENT OF LEASES AND RENTS SECURITY AGREEMENT AND FIXTURE FINANCING STATEMENT

by

FROLOGIS NA2 U.S. LLC

as Mortgagor

for the benefit of

TEACHERS INSURANCE AND ANNUITY ASSOCIATION
OF AMERICA,
as Lender

Property Known As:

Elk Grove #8
747 Chase Avenue
Elk Grove Village, Cook County, Illinois 60007
Permanent Index Number: 08-27-303-074-0000

This Mortgage Was Prepared By
And After Recordation This Mortgage Should Be Returned To:

~~Richard D. Jones, Esq.
Dechert LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104~~

Return To:
Chicago Title Insurance Company
Southwest Region Commercial Center
2001 Bryan Street, Suite 1700
Dallas, Texas 75201 **214-303-5300**

UNOFFICIAL COPY

TABLE OF CONTENTS

	Page
ARTICLE I. DEFINITIONS AND RULES OF CONSTRUCTION	2
Section 1.01. Definitions.....	2
Section 1.02. Rules of Construction	2
ARTICLE II. GRANTING CLAUSES.....	2
Section 2.01. Encumbered Property.....	2
Section 2.02. Habendum Clause	4
Section 2.03. Security Agreement.	4
Section 2.04. Conditions to Grant.....	5
Section 2.05. Subordination to First Priority Mortgage.....	5
ARTICLE III. OBLIGATIONS SECURED	5
Section 3.01. The Guaranteed Obligations.....	5
Section 3.02. Future Advances	5
Section 3.03. Severability	6
ARTICLE IV. TITLE AND AUTHORITY.....	6
Section 4.01. Title to the Property	6
Section 4.02. Authority	6
ARTICLE V. PROPERTY STATUS, MAINTENANCE AND LEASES	7
Section 5.01. Status of the Property.....	7
Section 5.02. Maintenance of the Property	7
Section 5.03. Change in Use.....	7
Section 5.04. Waste.....	7
Section 5.05. Inspection of the Property	8
Section 5.06. Leases and Rents.....	8
Section 5.07. Parking	8
Section 5.08. Separate Tax Lot.....	8
Section 5.09. Changes in Zoning or Restrictive Covenants.....	8
Section 5.10. Lender's Right to Appear.....	9
ARTICLE VI. IMPOSITIONS	9
Section 6.01. Impositions.....	9

UNOFFICIAL COPY

TABLE OF CONTENTS (continued)

	Page
ARTICLE VII. INSURANCE, CASUALTY, CONDEMNATION AND RESTORATION.....	9
Section 7.01. Insurance Coverages	9
Section 7.02. Casualty and Condemnation	11
Section 7.03. Application of Proceeds	11
Section 7.04. Conditions to Availability of Proceeds for Restoration.....	12
Section 7.05. Restoration	13
ARTICLE VIII. COMPLIANCE WITH LAW AND AGREEMENTS	15
Section 8.01. Compliance with Law	15
Section 8.02. Compliance with Agreements.....	16
Section 8.03. ERISA Compliance; Anti-Terrorism and Section 6045(e) Filing.....	16
ARTICLE IX. ENVIRONMENTAL	16
Section 9.01. Environmental Representations and Warranties.....	16
Section 9.02. Environmental Covenants.....	17
ARTICLE X. FINANCIAL REPORTING.....	18
Section 10.01. Financial Reporting.....	18
ARTICLE XI. EXPENSES AND DUTY TO DEFEND.....	18
Section 11.01. Payment of Expenses	18
Section 11.02. Duty to Defend.....	19
ARTICLE XII. TRANSFERS, LIENS AND ENCUMBRANCES	19
Section 12.01. Prohibitions on Transfers, Liens and Encumbrances.....	19
Section 12.02. Right to Contest Liens	20
ARTICLE XIII. ADDITIONAL REPRESENTATIONS, WARRANTIES AND COVENANTS	20
Section 13.01. Additional Representations, Warranties and Covenants.....	20
ARTICLE XIV. DEFAULTS AND REMEDIES	20
Section 14.01. Events of Default	20
Section 14.02. Remedies.....	22
Section 14.03. General Provisions Pertaining to Remedies.....	23
Section 14.04. Cross-Collateralization	23

UNOFFICIAL COPY

TABLE OF CONTENTS

(continued)

	Page
Section 14.05. General Provisions Pertaining to Receiver and other Remedies	24
Section 14.06. General Provisions Pertaining to Foreclosures	26
Section 14.07. Application of Proceeds	26
Section 14.08. Power of Attorney	26
Section 14.09. Tenant at Sufferance	26
Section 14.10. Compliance with Illinois Mortgage Foreclosure Law	27
ARTICLE XV. LIMITATION OF LIABILITY	27
Section 15.01. Limitation of Liability	27
ARTICLE XVI. WAIVERS	27
Section 16.01. WAIVER OF STATUTE OF LIMITATIONS	27
Section 16.02. WAIVER OF NOTICE	27
Section 16.03. WAIVER OF MARSHALLING AND OTHER MATTERS	28
Section 16.04. WAIVER OF TRIAL BY JURY	28
Section 16.05. WAIVER OF COUNTERCLAIM	28
Section 16.06. WAIVER OF JUDICIAL NOTICE AND HEARING	28
Section 16.07. WAIVER OF SUBROGATION	28
Section 16.08. GENERAL WAIVER	28
Section 16.09. ILLINOIS STATUTORY WAIVERS	29
ARTICLE XVII. NOTICES	29
Section 17.01. Notices	29
Section 17.02. Change in Mortgagor's Legal Name, Place of Business or State of Formation	30
ARTICLE XVIII. MISCELLANEOUS	31
Section 18.01. Applicable Law	31
Section 18.02. Usury Limitations	31
Section 18.03. Lender's Discretion	31
Section 18.04. Unenforceable Provisions	31
Section 18.05. Survival of Mortgagor's Obligations	31
Section 18.06. Relationship Between Mortgagor and Lender; No Third Party Beneficiaries	32
Section 18.07. Partial Releases; Extensions; Waivers	32

UNOFFICIAL COPY

TABLE OF CONTENTS (continued)

	Page
Section 18.08. Service of Process	32
Section 18.09. Entire Agreement	32
Section 18.10. No Oral Amendment	33
Section 18.11. Lost or Destroyed Mortgagor's Guaranty	33
Section 18.12. Covenants Run with the Land	33
Section 18.13. Time of the Essence	33
Section 18.14. Subrogation	33
Section 18.15. Joint and Several Liability	33
Section 18.16. Successors and Assigns	33
Section 18.17. Duplicates and Counterparts	33
Section 18.18. Conflicts	34
ARTICLE XIX. STATE SPECIFIC PROVISIONS	34
Section 19.01. Special State Provisions	34
Section 19.02. Illinois Mortgage Foreclosure Law	34
Section 19.03. Business Loan	36
Section 19.04. Collateral Protection Insurance	36
Section 19.05. Material Economic Terms	36

UNOFFICIAL COPY

SECOND PRIORITY MORTGAGE, ASSIGNMENT OF LEASES AND RENTS, SECURITY AGREEMENT AND FIXTURE FINANCING STATEMENT

THIS SECOND PRIORITY MORTGAGE, ASSIGNMENT OF LEASES AND RENTS, SECURITY AGREEMENT AND FIXTURE FINANCING STATEMENT made this 25th day of September, 2012, (this "**Mortgage**") by PROLOGIS NA2 U.S. LLC ("**Mortgagor**"), a Delaware limited liability company, having its principal place of business at 4545 Airport Way, Denver, Colorado 80239, for the benefit of TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA, a New York corporation, having an address at 730 Third Avenue, New York, New York 10017 (together with its successors and assigns, "**Lender**").

RECITALS:

A. Pursuant to that certain Loan Agreement dated as of November 26, 2008 (as amended by that certain First Amendment to Loan Agreement and Other Loan Documents, dated as of March 15, 2012, by and among Lender, Mortgagor and certain affiliates thereof, the "**Original Loan Agreement**"), by and among Lender, Mortgagor and certain affiliates thereof (each a "**Borrower**" and collectively "**Borrowers**"), Lender made a loan (the "**Loan**") in the maximum principal amount of ONE HUNDRED FOUR MILLION SEVEN HUNDRED THOUSAND AND NO/100 DOLLARS (\$14,700,000.00) (such amounts, or so much as is outstanding from time to time is referred to as the "**Principal**").

B. To evidence the Loan, each Borrower (including, without limitation, Mortgagor) (a) executed a Promissory Note, dated as of November 26, 2008 (each a "**Note**" and collectively, the "**Notes**") in favor of Lender, evidencing a portion of the Loan (with the balance of the principal amounts evidenced by the Notes equal to the balance of the amount of the Loan) and providing for a maturity date of December 10, 2018 (the "**Maturity Date**"), pursuant to which each Borrower agreed to pay, to Lender, the principal sums set forth on Exhibit C attached hereto, together with interest on such amount at the Fixed Interest Rate (or the Default Interest Rate, as applicable) and (b) executed a certain Guaranty (Payment and Performance) dated as of November 26, 2008 (as the same may be amended, supplemented, extended, restated or otherwise modified from time to time, each a "**Guaranty**" and collectively, the "**Guaranties**") in favor of Lender, pursuant to which each Borrower agreed to pay and perform certain obligations of the other Borrowers (each, an "**Other Borrower**" and collectively, the "**Other Borrowers**") under the Loan Documents.

C. The Note executed by Mortgagor (as the same may be amended, supplemented, extended, restated or otherwise modified from time to time, the "**Mortgagor's Note**") evidences an initial principal amount of THIRTY MILLION TWO HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS (\$30,250,000.00) (such amount, or so much as is outstanding from time to time is referred to herein as the "**Mortgagor's Note Principal**").

D. Mortgagor secured its obligations under the Mortgagor's Note and the other Loan Documents executed by Mortgagor (other than the Mortgagor's Guaranty), by, inter

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

alia, executing that certain First Priority Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Financing Statement dated as of the date hereof (as the same may be amended, supplemented, extended, restated or otherwise modified from time to time, the "**First Priority Mortgage**") for the benefit of Lender, which First Priority Mortgage encumbers Mortgagor's interest in the real property located in Elk Grove Village, Illinois and more particularly described in Exhibit A (the "**Land**") and all improvements now or hereafter erected thereon and is to be recorded immediately prior to this Mortgage.

E. Borrowers have requested that Lender consent to certain modifications to the Original Loan Agreement and the Loan Documents (as defined in the Loan Agreement (as defined below)), including, without limitation, the substitution of the New Property (as defined in the First Amendment (as defined below)) for existing Property (as defined in the Original Loan Agreement) pursuant to the terms of the Loan Agreement (such modifications, collectively, the "**Modification**" or the "**Modifications**").

F. The Modifications are evidenced by, inter alia, that certain First Omnibus Amendment to Loan Agreement and Loan Documents, dated as of the date hereof, (the "**First Amendment**" and together with the Original Loan Agreement, as the same may be further amended, supplemented, extended, restated or otherwise modified from time to time, the "**Loan Agreement**") by and between Borrowers, Indentor and Lender.

G. As a condition to Lender consenting to the Modifications, and to secure the Mortgagor's Guaranty and the Guaranteed Obligations (as defined below), this Mortgage encumbers, among other things, the Land and all improvements now or hereafter erected thereon and is to be recorded immediately following the recordation of the First Priority Mortgage.

ARTICLE I.

DEFINITIONS AND RULES OF CONSTRUCTION

Section 1.01. **Definitions.** Capitalized terms used in this Mortgage are defined in Exhibit B or in the text with a cross-reference in Exhibit B, provided that if any such term is not defined in Exhibit B, the same shall have the meaning set forth in the Loan Agreement.

Section 1.02. **Rules of Construction.** This Mortgage will be interpreted in accordance with the rules of construction set forth in Exhibit C to the Loan Agreement.

ARTICLE II.

GRANTING CLAUSES

Section 2.01. **Encumbered Property.** Mortgagor irrevocably grants, mortgages, warrants, conveys, assigns and pledges to Lender, and grants to Lender a security interest in the following property, rights, interests and estates now or in the future owned or held by Mortgagor (collectively, the "**Property**") together with all of Mortgagor's right, title and interest now or

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

hereafter acquired in or to the Property for the uses and purposes set forth in this Mortgage forever hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of the State of Illinois (capitalized terms used in this Section 2.01 and not defined in this Mortgage have the meanings ascribed to them in the Uniform Commercial Code):

- (i) the Land;
- (ii) intentionally deleted;
- (iii) all buildings and improvements located on the Land (the **"Improvements"**);
- (iv) all easements; rights of way or use, including any rights of ingress and egress; streets, roads, ways, sidewalks, alleys and passages; strips and gores; sewer rights; water, water rights, water courses, riparian rights and drainage rights; air rights and development rights; oil and mineral rights; and tenements, hereditaments and appurtenances, in each instance adjoining or otherwise appurtenant to or benefiting the Land or the Improvements;
- (v) all General Intangibles (including Software) and Goods, including Fixtures, Equipment and Consumer Goods attached to, contained in or used in connection with the Land or the Improvements (excluding personal property owned by tenants);
- (vi) all agreements, ground leases, grants of easements or rights of way, permits, declarations of covenants, conditions and restrictions, disposition and development agreements, planned unit development agreements, cooperative, condominium or similar ownership or conversion plans, management, leasing, brokerage or parking agreements or other material documents affecting Mortgagor or the Land, the Improvements or the Fixtures and Personal Property, including any documents listed on the title insurance policy issued to Lender in connection with the closing of the Modification but expressly excluding the Leases (the **"Property Documents"**);
- (vii) all Inventory held for sale, lease or resale or furnished or to be furnished under contracts of service, or used or consumed in the ownership, use or operation of the Land, the Improvements or the Fixtures and Personal Property, and all Documents of title evidencing any part of any of the foregoing;
- (viii) all Accounts, Documents, Goods, Instruments, money, Deposit Accounts, Chattel Paper, Letter-of-Credit Rights, Investment Property, General Intangibles and Supporting Obligations relating to the Property, including all deposits held from time to time by the Pledge Agent to provide reserves for Debt Service Payments, Taxes, Assessments, Insurance Premiums, and Replacements together with interest thereon, if any;
- (ix) all awards and other compensation paid after the date of this Mortgage for any Condemnation (the **"Condemnation Awards"**);

UNOFFICIAL COPY

Application #: AAA-6849
 Mortgage #: 0006698-00
 Property: Elk Grove #8

(x) all proceeds of and all unearned premiums on the Policies (the "**Insurance Proceeds**");

(xi) all licenses, certificates of occupancy, contracts, management agreements, operating agreements, operating covenants, franchise agreements, permits and variances relating to the Land, the Improvements or the Fixtures and Personal Property;

(xii) all books, records and other information, wherever located, which are in Mortgagor's possession, custody or control or to which Mortgagor is entitled at law or in equity and which are related to the Property, including all computer hardware and software or other equipment used to record, store, manage, manipulate or access the information; and

(xiii) all after-acquired title to or remainder or reversion in any of the property described in this Section; all Proceeds (excluding, however, sales or other dispositions of Inventory in the ordinary course of the business of operating the Land or the Improvements), replacements, substitutions, products, accessions and increases within any one or more of the following types of collateral: Goods, Equipment, Inventory, Instruments, Investment Property, Chattel Paper, Letter-of-Credit Rights, Documents, Accounts or General Intangibles, all additions, accessions and extensions to, improvements of and substitutions or replacements for any of the Property described in this Section; and all additional lands, estates, interests, rights or other property acquired by Mortgagor after the date of this Mortgage for use in connection with the Land or the Improvements, all without the need for any additional mortgage, assignment, pledge or conveyance to Lender but Mortgagor will execute and deliver to Lender, upon Lender's request, any documents reasonably requested by Lender to further evidence the foregoing.

Section 2.02. **Habendum Clause.** TO HAVE AND TO HOLD the Property unto Lender, forever, and Mortgagor does hereby bind itself, its successors and assigns to warrant and forever defend the title to the Property unto Lender against every person whomsoever lawfully claiming the same or any part thereof; provided, however, that if Mortgagor shall pay (or cause to be paid) the Guaranteed Obligations as and when the same shall become due and payable and shall perform and discharge (or cause to be performed or discharged) all other Guaranteed Obligations on or before the date same are to be performed or discharged, then the liens, security interests, estates and rights granted herein shall terminate; otherwise the same shall remain in full force and effect.

Section 2.03. **Security Agreement.**

(a) The Property includes both real and personal property and this Mortgage is a real property mortgage and also a "security agreement" and a "financing statement" within the meaning of the Uniform Commercial Code as in effect in the State of Illinois. By executing and delivering this Mortgage, Mortgagor grants to Lender, as security for the Guaranteed Obligations, a security interest in the Property to the full extent that any of the Property may be subject to the Uniform Commercial Code as in effect in the State of Illinois.

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

(b) This Mortgage constitutes a fixture financing statement under the Laws of the state or commonwealth in which the Property is located and for such purpose, Mortgagor represents, as of the date hereof, that the following information set forth in clauses (i), (v) and (vi), is true and correct:

(i) The Exact Legal Name and address of Debtor is: ProLogis NA2 U.S. LLC, a Delaware limited liability company, 4545 Airport Way, Denver, Colorado 80239.

(ii) Name and address of Secured Party: Teachers Insurance and Annuity Association, a New York corporation, together with its successors and assigns, 730 Third Avenue, New York, New York 10017.

(iii) Description of the types (or items) of property covered by this Financing Statement: all of the property described in sections ii-xiii of the Section entitled "Encumbered Property" described or referred to herein and included as part of the Property.

(iv) Description of real estate to which collateral is attached or upon which it is located: Described in Exhibit A.

(v) Organizational Identification Number of Debtor: 3501937.

(vi) Debtor's chief executive office is located in the State of Colorado, and Debtor's state of organization is the State of Delaware.

(vii) Debtor is the owner of the Property.

Lender may file this Mortgage, or a reproduction thereof, in the Office of the Recorder of the county in which the Property is located or other appropriate index, as a financing statement for any of the items specified above as part of the Property. Any reproduction of this Mortgage or of any other security agreement or financing statement is sufficient as a financing statement.

Section 2.04. Conditions to Grant. This Mortgage is made on the express condition that if each Obligor (or any Obligor) pays and performs all Guaranteed Obligations in full in accordance with the Loan Documents, then, unless expressly provided otherwise in the Loan Documents, the Loan Documents will be released at each Obligor's expense.

Section 2.05. Subordination to First Priority Mortgage. This Mortgage, (including, without limitation, the security interests granted hereunder) is subject and subordinate in all respects to the right, title and interest granted Lender under the First Priority Mortgage.

ARTICLE III.

OBLIGATIONS SECURED

UNOFFICIAL COPY

Application #: AAA-6849

Mortgage #: 0006698-00

Property: Elk Grove #8

Section 3.01. The Guaranteed Obligations. This Mortgage secures Mortgagor's obligations under the Mortgagor's Guaranty to, inter alia, timely pay and perform all obligations of the Other Borrowers under the Loan Documents to which such Other Borrowers are a party (the "**Guaranteed Obligations**") (provided that the Guaranteed Obligations do not include the obligations of any Other Borrower which arise solely under the Guaranty executed by such Other Borrower). The Guaranteed Obligations, include, without limitation, the obligations of each Other Borrower to timely (a) pay (i) a portion of the Principal amount of the Loan equal to the Principal amount of all the Other Notes (which collectively evidence an initial principal amount of SEVENTY-FOUR MILLION FOUR HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS (\$74,450,000.00)), (ii) Interest on the Other Notes, (iii) Late Charges attributable to amounts due under the Other Notes or with respect to the Other Property owned by the Other Borrowers, (iv) Prepayment Premiums due under the Other Notes or with respect to any Other Property, and (v) any additional advances made by Lender with respect to any Other Property or any Other Borrower (including, without limitation, any disbursements made for the payment of Taxes and Assessments, levies or insurance on the Other Property and any Protective Advances made by or on behalf of Lender), and (b) pay or perform all other obligations and covenants to be performed by the Other Borrowers under the Loan Documents (other than obligations and covenants arising solely under the Guaranties executed by the Other Borrowers). Mortgagor's obligations hereunder are subject to the limitations on liability set forth in Section 11.1 of the Loan Agreement.

Section 3.02. Future Advances. The Guaranteed Obligations also include, inter alia, all future or additional advances for construction, improvements, preservation, maintenance and operation of the Other Properties and for the security for the Guaranteed Obligations as may be made by Lender, whether the future or additional advances are obligatory or are made at Lender's option to Mortgagor, for any purpose (all of which are secured hereby). All the future or additional advances must be made within twenty (20) years from the date of this Mortgage, or within any lesser period of time as may be provided hereafter by Law as a prerequisite for the sufficiency of actual notice or record notice of the optional future or additional advances as against the rights of creditors or subsequent purchasers for valuable consideration, to the same extent as if the future or additional advances were made on the date hereof. The total amount of the monetary obligations comprising a portion of the Guaranteed Obligations may decrease or increase from time to time, but the total unpaid balance of such obligations secured at any one time hereunder will not exceed twice the face amount of the Other Notes, plus all costs of enforcement and collection of this Mortgage and the Other Notes, plus the total amount of any advances made pursuant to this Mortgage to protect the collateral and the security interests and lien created hereby (including, without limitation, any disbursements made for the payment of Taxes and Assessments, levies or insurance on the Other Properties) together with interest on all of the foregoing as provided herein.

Section 3.03. Severability. Any and all references to the Guaranteed Obligations shall include all of the Guaranteed Obligations, and in the event any portion of the Guaranteed Obligations or the security granted with respect thereto shall be deemed unenforceable for any reason (or if any of the liens granted hereunder with respect to any Guaranteed Obligations shall

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

be avoided), the remainder of the Guaranteed Obligations and all security with respect thereto shall remain in full force and effect (without loss of priority and without impairment of any of Lender's rights with respect to the remaining Guaranteed Obligations).

ARTICLE IV.

TITLE AND AUTHORITY

Section 4.01. Title to the Property.

(a) Mortgagor has and will continue to have good and marketable title in fee simple absolute to the Land and Improvements and good and marketable title to the Fixtures and Personal Property, all free and clear of liens, encumbrances and charges except the Permitted Exceptions. To Mortgagor's knowledge, there are no facts or circumstances that might give rise to a lien, encumbrance or charge on the Property other than the Permitted Exceptions.

(b) Mortgagor owns and will continue to own all of the other Property free and clear of all liens, encumbrances and charges except the Permitted Exceptions.

(c) This Mortgage is and will remain a valid and enforceable second lien on and security interest in the Property, subject only to the Permitted Exceptions.

Section 4.02. Authority. The provisions of Article V of the Loan Agreement are hereby incorporated by reference in their entirety, provided that references to any Obligor in such Article shall be deemed to refer to the Mortgagor named herein (and any representations, warranties or covenants in said Article V which are expressly limited to Obligors other than the Mortgagor named herein hereby excluded from the above-referenced incorporation by reference).

ARTICLE V.

PROPERTY STATUS, MAINTENANCE AND LEASES

Section 5.01. Status of the Property.

(a) Mortgagor has obtained and will maintain in full force and effect all certificates, licenses, permits and approvals that are required by Law or by any entity having jurisdiction over the Property or over Mortgagor or that are necessary for the Permitted Use, for occupancy and operation of the Property, for the granting of this Mortgage or for the conduct of Mortgagor's business on the Property in accordance with the Permitted Use.

(b) The Property is and will continue to be serviced by all public utilities required for the Permitted Use of the Property.

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

(c) All roads and streets necessary for service of and access to the Property for the current or contemplated use of the Property have been completed and are and will continue to be serviceable, physically open and dedicated to and accepted by the Government for use by the public.

(d) The Property is free from damage caused by a Casualty.

(e) All costs and expenses of labor, materials, supplies and equipment used in the construction of the Improvements have been paid in full.

Section 5.02. Maintenance of the Property. Mortgagor will maintain the Property in thorough repair and good and safe condition, suitable for the Permitted Use, including, to the extent necessary, replacing the Fixtures and Personal Property with property at least equal in quality and condition to that being replaced and free of liens. Mortgagor will not erect any new buildings, building additions or other material structures on the Land or otherwise materially alter the Improvements without Lender's prior consent which may be withheld in Lender's sole discretion, provided that Lender's consent shall not be required with respect to any customary maintenance, alterations and repairs to the Property pursuant to the terms of the Leases in existence as of the date hereof, or any Lease amended or entered into from and after the date hereof in accordance with the terms of the Loan Documents. The Property will be managed by a property manager satisfactory to Lender pursuant to a management agreement satisfactory to Lender and terminable by Mortgagor upon thirty (30) days notice to the property manager.

Section 5.03. Change in Use. Mortgagor will use and permit the use of the Property for the Permitted Use and for no other purpose.

Section 5.04. Waste. Mortgagor will not commit or permit any waste (including economic and non-physical waste), impairment or deterioration of the Property or any alteration, demolition or removal of any of the Property without Lender's prior consent which may be withheld in Lender's sole discretion.

Section 5.05. Inspection of the Property. Subject to the rights of tenants under the Leases, Lender has the right to enter and inspect the Property on reasonable prior notice, except during the existence of an Event of Default, when no prior notice is necessary. Lender has the right to engage an independent expert to review and report on Mortgagor's compliance with Mortgagor's obligations under this Mortgage to maintain the Property, comply with Law and refrain from waste, impairment or deterioration of the Property and the alteration, demolition or removal of any of the Property except as may be permitted by the provisions of this Mortgage. If the independent expert's report discloses any material failure to comply with such obligations or if Lender engages the independent expert after the occurrence of an Event of Default, then the independent expert's review and report will be at Mortgagor's expense, payable upon delivery of an invoice therefor. Upon request thereof, Lender will provide a copy of any such report to Mortgagor, provided that Mortgagor first executes Lender's standard confidentiality and waiver of liability letter.

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

Section 5.06. Leases and Rents.

(a) Mortgagor assigns the Leases and the Rents to Lender absolutely and unconditionally and not merely as additional collateral or security for the payment and performance of the Guaranteed Obligations, but subject to a license back to Mortgagor of the right to collect the Rents during the existence of an Event of Default at which time the license will terminate automatically, all as more particularly set forth in the Assignment, the provisions of which are incorporated in this Mortgage by reference.

(b) Mortgagor appoints Lender as Mortgagor's attorney-in-fact to execute unilaterally and record, at Lender's election, a document subordinating this Mortgage to the Leases, provided that the subordination will not affect (i) the priority of Lender's entitlement to Insurance Proceeds or Condemnation Awards or (ii) the priority of this Mortgage over intervening liens or liens arising under or with respect to the Leases.

Section 5.07. Parking Mortgagor will provide, maintain and light parking areas within the Property, including any sidewalks, aisles, streets, driveways, sidewalk cuts and rights-of-way to and from the adjacent public streets in a manner consistent with the Permitted Use required by applicable Leases and sufficient to accommodate the greater of: (i) the number of parking spaces required by Law; or (ii) the number of parking spaces required by the Leases and the Property Documents. The parking areas will be reserved and used exclusively for ingress, egress and parking for Mortgagor and the tenants under the Leases and their respective employees, customers and invitees and in accordance with the Leases and the Property Documents.

Section 5.08. Separate Tax Lot. The Property is and will remain assessed for real estate tax purposes as one or more wholly independent tax lots, separate from any property that is not part of the Property.

Section 5.09. Changes in Zoning or Restrictive Covenants Mortgagor will not (i) initiate, join in or consent to any change in any Laws pertaining to zoning, any restrictive covenant or other restriction which would restrict the Permitted Uses for the Property; (ii) permit the Property to be used to fulfill any requirements of Law for the construction or maintenance of any improvements on property that is not part of the Property; (iii) permit the Property to be used for any purpose not included in the Permitted Use; or (iv) impair the integrity of the Property as a single, legally subdivided zoning lot separate from all other property.

Section 5.10. Lender's Right to Appear. Lender has the right to appear in and defend any Proceeding brought regarding the Property and to bring any Proceeding, in the name and on behalf of Mortgagor or in Lender's name, which Lender, in its reasonable discretion, determines should be brought to protect Lender's interest in the Property.

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

ARTICLE VI.

IMPOSITIONS

Section 6.01. Impositions. The provisions of Section 6.1 of the Loan Agreement are hereby incorporated by reference in their entirety.

ARTICLE VII.

INSURANCE, CASUALTY, CONDEMNATION AND RESTORATION

Section 7.01. Insurance Coverages.

(a) Subject to the provisions of Section 6.3 of the Loan Agreement, Mortgagor will maintain such insurance coverages and endorsements in form and substance and in amounts as Lender may require in its commercially reasonable discretion (consistent with the then current insurance requirements of similar institutional lenders with respect to mortgage loans similar in size to the Loan and secured by industrial warehouse properties), from time to time. Until Lender notifies Mortgagor of changes in Lender's requirements, Mortgagor will maintain not less than the insurance coverages and endorsements Lender required for closing of the Modification. Nothing contained herein shall require Lender to agree to permit Mortgagor to maintain insurance coverages and endorsements which are not at least equivalent to the insurance coverages and endorsements Lender required for closing of the Modification.

(b) The insurance, including renewals, required under this Section will be issued on valid and enforceable policies and endorsements satisfactory to Lender (the "**Policies**"). Each Policy will contain a standard waiver of subrogation and a replacement cost endorsement and will provide that Lender will receive not less than thirty (30) days' prior written notice of any cancellation, termination or non-renewal of a Policy or any material change other than an increase in coverage and that Lender will be named under a standard mortgage endorsement as loss payee.

(c) The insurance companies issuing the Policies (the "**Insurers**") must be authorized to do business in the State or Commonwealth where the Property is located, must have been in business for at least 5 years, must carry an A.M. Best Company, Inc. policy holder rating of A or better and an A.M. Best Company, Inc. financial category rating of Class X (or an equivalent rating from S&P (as defined in the Loan Agreement)) or better and must be otherwise satisfactory to Lender. Notwithstanding Lender's right to approve the Insurers and to establish credit rating standards for the Insurers, Lender will not be responsible for the solvency of any Insurer.

UNOFFICIAL COPY

Application #: AAA-6849
 Mortgage #: 0006698-00
 Property: Elk Grove #8

(d) Notwithstanding Lender's rights under this Article, Lender will not be liable for any loss, damage or injury resulting from the inadequacy or lack of any insurance coverage.

(e) Mortgagor will comply with the provisions of the Policies and with the requirements, notices and demands imposed by the Insurers and applicable to Mortgagor or the Property.

(f) Mortgagor will pay the Insurance Premiums for each Policy not less than forty-five (45) days after the expiration date of the Policy being replaced or renewed and will deliver to Lender (i) not less than 15 days prior to the expiration date of the Policy being replaced or renewed certificates of insurance on the Acord 27 form evidencing the renewed or new Policy and (ii) immediately following payment of the applicable Insurance Premiums in accordance with this clause (f), evidence that said Insurance Premiums have been paid in full.

(g) Mortgagor will not carry separate insurance concurrent in kind or form or contributing in the event of loss with any other insurance carried by Mortgagor.

(h) Mortgagor will not carry any of the insurance required under this Section on a blanket or umbrella policy without in each instance Lender's prior approval which may be withheld in Lender's sole discretion. If Lender approves, Mortgagor will deliver to Lender a certified copy of the blanket policy which will allocate to each Property the amount of coverage required under this Section and otherwise will provide the same coverage and protection as would a separate policy insuring only such Property. Lender hereby acknowledges that as of the date of the Modification, Mortgagor carries insurance on a blanket or umbrella policy acceptable to Lender, and agrees that Mortgagor may continue to carry insurance on a blanket or umbrella policy during the Term, provided such Policy(ies) are acceptable to Lender.

(i) Mortgagor will give the Insurers prompt notice of any change in ownership or occupancy of any Property. This subsection does not abrogate the prohibitions on transfers set forth in this Mortgage or in any other Loan Document.

(j) If the Property is sold at a foreclosure sale or otherwise is transferred so as to extinguish the Guaranteed Obligations, all of Mortgagor's right, title and interest in and to the Policies then in force will be transferred automatically to the purchaser or transferee.

Section 7.02. Casualty and Condemnation.

(a) Mortgagor will give Lender notice of any material Casualty (*i.e.* any Casualty resulting in a loss in excess of 10% of the insurable value of the Property as determined by Lender in its reasonable discretion) immediately after it occurs and will give Lender notice of any Condemnation Proceeding immediately after Mortgagor receives notice of commencement or notice that such a Condemnation Proceeding will be commencing. Mortgagor immediately will deliver to Lender copies of all documents Mortgagor delivers or receives relating to the Casualty or the Condemnation Proceeding, as the case may be.

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

(b) Mortgagor authorizes Lender, at Lender's option, to act on Mortgagor's behalf (i) to collect, adjust and compromise any claims for loss, damage or destruction under the Policies on such terms as Lender determines in Lender's sole discretion, and (ii) in connection with any Condemnation Proceeding. Mortgagor will execute and deliver to Lender all documents requested by Lender and all documents as may be required by Law to confirm such authorizations. Nothing in this Section will be construed to limit or prevent Lender from joining with Mortgagor either as a co-defendant or as a co-plaintiff in any Condemnation Proceeding.

(c) If Lender elects not to act on Mortgagor's behalf as provided in this Section, or in Section 7.02 of the First Priority Mortgage, then Mortgagor promptly will file and prosecute all claims (including Lender's claims) relating to the Casualty and will prosecute or defend (including defense of Lender's interest) any Condemnation Proceeding, which prosecution and defense shall be performed by Mortgagor in the exercise of its prudent business judgment. Notwithstanding the provisions of this Section 7.02, absent an Event of Default, Mortgagor will have the sole authority to settle or compromise any claims or Condemnation Proceeding, as the case may be, resulting in an aggregate settlement or compromise which is equal to or less than \$1,000,000.00; it being agreed that any settlement or compromise that exceeds such \$1,000,000.00 amount shall be subject to Lender's prior consent which may be withheld in Lender's sole discretion. Any check for Insurance Proceeds or Condemnation Awards, as the case may be (the "**Proceeds**"), will be made payable to Lender and Mortgagor. Mortgagor will endorse any such check to Lender immediately upon Lender presenting the check to Mortgagor for endorsement or if Mortgagor receives any such check first, will endorse the check immediately upon receipt and forward it to Lender. If any Proceeds are paid to Mortgagor, Mortgagor immediately will deposit the Proceeds with Lender, to be applied or disbursed in accordance with the provisions of the First Priority Mortgage, provided that after payment in full (and performance of all) of the obligations secured by the First Priority Mortgage all Proceeds (or, as the case may be, remaining Proceeds) shall be deposited with Lender to be applied or disbursed in accordance with the provisions of this Mortgage. Lender will be responsible for only the Proceeds actually received by Lender.

Section 7.03. Application of Proceeds. After deducting the documented costs incurred by Lender in collecting the Proceeds, Lender may, in its sole discretion, (i) apply any Proceeds deposited with Lender hereunder as a credit against the Guaranteed Obligations without Prepayment Premium; (ii) apply any Proceeds deposited with Lender hereunder to restore the Improvements, provided that Lender will not be obligated to see to the proper application of such Proceeds and provided further that any amounts released for Restoration will not be deemed a payment on the Debt; or (iii) deliver any Proceeds deposited with Lender hereunder to Mortgagor.

Section 7.04. Conditions to Availability of Proceeds for Restoration. Notwithstanding the preceding Sections, after a Casualty or a Condemnation (a "**Destruction Event**"), the Proceeds will be made available for Restoration in accordance with the provisions of the First Priority Mortgage, provided that after payment in full (and performance of all) of the obligations secured by the First Priority Mortgage, Lender will make all Proceeds deposited with Lender in

UNOFFICIAL COPY

Application #: AAA-6849
 Mortgage #: 0006698-00
 Property: Elk Grove #8

accordance with the terms hereof (less any costs incurred by Lender in collecting the Proceeds) available for Restoration in accordance with the conditions for disbursements set forth in the Section entitled "**Restoration**", provided that the following conditions are met:

(i) the entity identified in the first paragraph hereof as Mortgagor or the transferee under a Permitted Transfer permitted in accordance with the terms of the Loan Agreement, if any, continues to be Mortgagor at the time of the Destruction Event and at all times thereafter until the Proceeds have been fully disbursed;

(ii) no default under the Loan Documents exists at the time of the Destruction Event and no Event of Default has occurred during the 12 months prior to the Destruction Event;

(iii) Lender shall be satisfied, in its reasonable discretion, that the Debt Service Coverage Ratio following Restoration shall be at least 1.25 to 1.00 and all Property Documents in effect immediately prior to the Destruction Event that are essential to the use and operation of the Property continue in full force and effect notwithstanding the Destruction Event;

(iv) if the Destruction Event is a Condemnation, Mortgagor delivers to Lender evidence reasonably satisfactory to Lender that the Improvements can be restored or used to an economically and architecturally viable unit;

(v) Mortgagor delivers to Lender evidence reasonably satisfactory to Lender that the Proceeds are sufficient to complete Restoration or if the Proceeds are insufficient to complete Restoration, Mortgagor first deposits with Lender funds ("**Additional Funds**") that when added to the Proceeds will be sufficient to complete Restoration;

(vi) if the Destruction Event is a Casualty, Mortgagor delivers to Lender evidence reasonably satisfactory to Lender that the Insurer under each affected Policy has not denied liability under the Policy as to Mortgagor or the insured under the Policy;

(vii) Lender is reasonably satisfied that the proceeds of any business interruption insurance in effect together with other available gross revenues from the Property are sufficient to pay Debt Service Payments after paying the Impositions, Insurance Premiums, reasonable and customary operating expenses and capital expenditures until Restoration is complete;

(viii) Lender is satisfied that Restoration will be completed on or before the date (the "**Restoration Completion Date**") that is the earliest of: (A) 6 months prior to the Maturity Date; (B) 12 months after the Destruction Event; (C) the earliest date required for completion of Restoration under any Lease or any Property Document; or (D) any date required by Law; and

(ix) the annual Rents (as defined in the Loan Agreement) under Leases (as defined in the Loan Agreement) in effect on the date of the Destruction Event are providing a

UNOFFICIAL COPY

Application #: AAA-6849
 Mortgage #: 0006698-00
 Property: Elk Grove #8

Debt Service Coverage Ratio of 1.15 to 1.00 after payment of annual Insurance Premiums, Impositions and operating expenses of the Property (including ground rent, if any), provided that, if the Rents do not provide such debt service coverage, then Mortgagor expressly authorizes and directs Lender to apply an amount from the Proceeds to reduction of Principal (without payment of any Prepayment Premium) in order to reduce the annual Debt Service Payments sufficiently for such debt service coverage to be achieved. The reduced debt service payments will be calculated using the Fixed Interest Rate and the outstanding Principal balance following the application referenced in the preceding sentence. Mortgagor will execute any documentation that Lender deems reasonably necessary to evidence the reduced Principal and debt service payments.

Section 7.05: Restoration.

(a) If the total Proceeds for any Destruction Event are \$1,000,000.00 or less and Lender is obligated by Law or under this Article to make the Proceeds available for Restoration, Lender will disburse to Mortgagor the entire amount received by Lender, if any, and Mortgagor will commence Restoration promptly after the Destruction Event and complete Restoration not later than the Restoration Completion Date.

(b) If the Proceeds for any Destruction Event exceed \$1,000,000.00 and Lender is obligated by Law or under this Article to make the Proceeds available for Restoration, Lender will disburse the Proceeds and any Additional Funds deposited under the First Priority Mortgage or this Mortgage (collectively, the "**Restoration Funds**") in accordance with the terms of the First Priority Mortgage and if the obligations secured by the First Priority Mortgage have been paid in full Lender will disburse the Restoration Funds (or, as the case may be, the remaining Restoration Funds) upon Mortgagor's request as Restoration progresses, generally in accordance with normal construction lending practices for disbursing funds for construction costs, provided that the following conditions are met:

(i) Mortgagor commences Restoration promptly after the Destruction Event and completes Restoration on or before the Restoration Completion Date,

(ii) if Lender requests, Mortgagor delivers to Lender prior to commencing Restoration, for Lender's approval (which approval shall not be unreasonably withheld), plans and specifications and a detailed budget for the Restoration;

(iii) Mortgagor delivers to Lender satisfactory evidence of the costs of Restoration incurred prior to the date of the request, and such other documents as Lender may request including mechanics' lien waivers and title insurance endorsements;

(iv) Mortgagor pays all costs of Restoration whether or not the Restoration Funds are sufficient and, if at any time during Restoration, Lender determines that the undisbursed balance of the Restoration Funds is insufficient to complete Restoration, Mortgagor shall within thirty (30) days of receiving notice of the deficiency from Lender either: (A) deposit with Lender, as part of the Restoration Funds, an amount equal to such deficiency; or

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

(B) deliver to Lender an irrevocable letter of credit (payable on sight draft) in the face amount of such deficiency, naming Lender as the sole beneficiary thereof (any such letter of credit, a "**Letter of Credit**"). The Letter of Credit shall: (1) be perpetual or for a term of one year with automatic renewals unless Lender receives written notice of non-renewal from the issuing financial institution at least ninety (90) days prior to the expiration of the then current Letter of Credit; (2) be issued by a domestic financial institution that is acceptable to Lender; (3) permit full or partial draws without condition or charge to the beneficiary of the Letter of Credit; (4) be freely transferable by the beneficiary of the Letter of Credit (and each successor as beneficiary) without restriction or charge; and (5) otherwise be reasonably acceptable to Lender in all respects. Mortgagor shall cause the Letter of Credit to remain valid and effective until such time as Lender shall agree in writing that the related deficiency no longer exists and no Event of Default then exists hereunder; and

(v) there is no default under the Loan Documents at the time Mortgagor requests funds or at the time Lender disburses funds.

(c) If an Event of Default occurs at any time after the Destruction Event, then Lender will have no further obligation to make any remaining Proceeds available for Restoration and after payment in full of the obligations under the First Priority Mortgage may apply any remaining Proceeds as a credit against any portion of the Guaranteed Obligations selected by Lender in its sole discretion.

(d) Lender may elect at any time prior to commencement of Restoration or while work is in progress to retain, at Mortgagor's expense, an independent engineer or other consultant to review the plans and specifications, to inspect the work as it progresses and to provide reports. If any matter included in a report by the engineer or consultant is reasonably unsatisfactory to Lender, Lender may suspend disbursement of the Restoration Funds until the unsatisfactory matters contained in the report are resolved to Lender's reasonable satisfaction.

(e) If Mortgagor fails to commence and complete Restoration in accordance with the terms of this Article, then in addition to the Remedies, Lender may after application of the Restoration Funds in accordance with the First Priority Mortgage elect to restore the Improvements on Mortgagor's behalf and reimburse itself out of the Restoration Funds for costs and expenses incurred by Lender in restoring the Improvements, or Lender may apply the Restoration Funds as a credit against any portion of the Guaranteed Obligations selected by Lender in its sole discretion.

(f) Lender may commingle the Restoration Funds with its general assets and will not be liable to pay any interest or other return on the Restoration Funds unless otherwise required by Law. Lender will not hold any Restoration Funds in trust. Lender may elect to deposit the Restoration Funds with a depository satisfactory to Lender under a disbursement and security agreement satisfactory to Lender.

(g) Mortgagor will pay all of Lender's documented third party expenses incurred in connection with a Destruction Event or Restoration. If Mortgagor fails to do so, then

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

in addition to the Remedies, Lender may from time to time reimburse itself out of the Restoration Funds.

(h) If any excess Proceeds remain after Restoration, Lender may elect, in its sole discretion after application of such excess in accordance with the terms of the First Priority Mortgage either to apply the excess as a credit against any portion of the Guaranteed Obligations as selected by Lender in its sole discretion without Prepayment Premium or to deliver the excess to Mortgagor. Proceeds disbursed and applied in accordance with the terms hereof shall be deemed to be released from the security interest created in such Proceeds under Sections 2.1(ix) or (x), as applicable.

(i) Prior to any settlement or compromise of any claim or Condemnation Proceeding, Mortgagor may in connection with any "substantial" Casualty or Condemnation (as determined by Lender) elect to substitute a property in place of the Property pursuant to and in accordance with the terms of Section 4.2 of the Loan Agreement.

ARTICLE VIII.

COMPLIANCE WITH LAW AND AGREEMENTS

Section 8.01. Compliance with Law. Mortgagor, the Property and the use of the Property comply and will continue to comply with Law and with all material agreements and conditions necessary to preserve and extend all rights, licenses, permits, privileges, franchises and concessions (including zoning variances, special exceptions and non-conforming uses) relating to the Property or Mortgagor. Mortgagor will notify Lender of the commencement of any investigation or Proceeding relating to a possible violation of Law which could have a Material Adverse Effect on Mortgagor or the Property or on Lender's interest in the Property or under the Loan Documents immediately after Mortgagor receives notice thereof and will deliver promptly to Lender copies of all documents Mortgagor receives or delivers in connection with any such investigation or Proceeding. Mortgagor will not alter the Property in any manner that would materially increase Mortgagor's responsibilities for compliance with Law. Without limiting any other provision contained herein, for purposes of this Section 8.01, (a) any Proceeding or investigation against or affecting Mortgagor or the Property will be deemed to have a Material Adverse Effect on Mortgagor or the Property if the same is reasonably likely to result in costs to Mortgagor in excess of \$2,000,000.00 or may result in a Lien which will prime the Lien of this Mortgage and (b) any alteration which is reasonably likely to result in costs of compliance with Law (including, but not limited to, ongoing duties relating to supervision, monitoring and similar obligations) in excess of \$1,000,000.00 shall be deemed to "materially increase Mortgagor's responsibilities for compliance with Law".

Section 8.02. Compliance with Agreements. Except as disclosed to Lender in connection with the closing of the Modification and expressly acknowledged by Lender in writing, there are no defaults, events of default or events by Mortgagor, or, to Mortgagor's knowledge, any third party which, with the passage of time or the giving of notice or both, would constitute an event of default by Mortgagor, or to Mortgagor's knowledge, any third party under

UNOFFICIAL COPY

Application #: AAA-6849

Mortgage #: 0006698-00

Property: Elk Grove #8

the Property Documents. Mortgagor will pay and perform all of its obligations under the Property Documents as and when required by the Property Documents. Mortgagor will cause all other parties to the Property Documents to pay and perform their material obligations under the Property Documents as and when required by the Property Documents. Mortgagor will not amend or waive any material provisions of the Property Documents; exercise any options under the Property Documents; give any approval required or permitted under the Property Documents that would adversely affect the Property or Lender's rights and interests under the Loan Documents; cancel or surrender any material Property Documents; or release or discharge or permit the release or discharge of any party to or entity bound by any material Property Documents, without, in each instance, Lender's prior approval (excepting therefrom all service contracts or other agreements entered into in the normal course of business that are cancelable upon not more than thirty (30) days notice). Mortgagor promptly will deliver to Lender copies of any notices of default or of termination that Mortgagor receives or delivers relating to any Property Document.

Section 8.03. ERISA Compliance; Anti-Terrorism and Section 6045(e) Filing. The provisions of Sections 7.3, 7.4 and 7.5 of the Loan Agreement are hereby incorporated by reference in their entirety, provided that specific references to any particular Obligor in such Sections shall be deemed to refer to the Mortgagor named herein.

ARTICLE IX.

ENVIRONMENTAL

Section 9.01. Environmental Representations and Warranties.

(a) Except as disclosed in the Environmental Report and to Mortgagor's knowledge as of the date of this Mortgage:

(i) no Environmental Activity has occurred or is occurring on the Property other than the use, storage, and disposal of Hazardous Materials which (A) is in the ordinary course of business consistent with the Permitted Use; (B) is in compliance with all Environmental Laws and (C) has not resulted in Material Environmental Contamination of the Property; and

(ii) no Environmental Activity has occurred or is occurring on any property in the vicinity of the Property which has resulted in Material Environmental Contamination of the Property.

Section 9.02. Environmental Covenants.

(a) Mortgagor will not cause or permit any Material Environmental Contamination of the Property.

UNOFFICIAL COPY

Application #: AAA-6849

Mortgage #: 0006698-00

Property: Elk Grove #8

(b) No Environmental Activity will occur on the Property other than the use, storage and disposal of Hazardous Materials which (A) is in the ordinary course of business consistent with the Permitted Use; (B) is in compliance with all Environmental Laws; and (C) does not create a risk of Material Environmental Contamination of the Property.

(c) Mortgagor will notify Lender immediately upon Mortgagor becoming aware of (i) any Material Environmental Contamination of the Property or (ii) any Environmental Activity with respect to the Property that is not in accordance with the preceding subsection (b). Mortgagor promptly will deliver to Lender copies of all documents delivered to or received by Mortgagor regarding the matters set forth in this subsection, including notices of Proceedings or Investigations concerning any Material Environmental Contamination of the Property or Environmental Activity or concerning Mortgagor's status as a potentially responsible party (as defined in the Environmental Laws). Mortgagor's notification of Lender in accordance with the provisions of this subsection will not be deemed to excuse any default under the Loan Documents resulting from the violation of Environmental Laws or the Material Environmental Contamination of the Property or Environmental Activity that is the subject of the notice. If Mortgagor receives notice of a suspected violation of Environmental Laws in the vicinity of the Property that poses a risk of Material Environmental Contamination of the Property, Mortgagor will give Lender notice and copies of any documents received relating to such suspected violation.

(d) From time to time at Lender's request, Mortgagor will deliver to Lender any information known and documents available to Mortgagor relating to the environmental condition of the Property.

(e) Lender may perform or engage an independent consultant to perform an assessment of the environmental condition of the Property and of Mortgagor's compliance with this Section at any time for reasonable cause or after an Event of Default. In connection with the assessment: (i) Lender or consultant may enter and inspect the Property and perform tests of the air, soil, ground water and building materials; (ii) Mortgagor will cooperate and use best efforts to cause tenants and other occupants of the Property to cooperate with Lender or consultant; (iii) Mortgagor will receive a copy of any final report prepared after the assessment, to be delivered to Mortgagor not more than ten (10) days after Mortgagor requests a copy and executes Lender's standard confidentiality and waiver of liability letter; (iv) Mortgagor will accept custody of and arrange for lawful disposal of any Hazardous Materials required to be disposed of as a result of the tests; (v) Lender will not have liability to Mortgagor with respect to the results of the assessment; and (vi) Lender shall not be responsible for any damage to the Property resulting from the tests described in this subsection and Mortgagor will look solely to the consultants to reimburse Mortgagor for any such damage, provided that such consultant maintains general liability insurance coverage. The consultant's assessment and reports will be at Mortgagor's expense (x) if the reports disclose any material adverse change in the environmental condition of the Property from that disclosed in the Environmental Report; (y) if Lender engaged the consultant when Lender had reasonable cause to believe Mortgagor was not in compliance with the terms of this Article and, after written notice from Lender, Mortgagor failed to provide

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

promptly reasonable evidence that Mortgagor is in compliance; or (z) if Lender engaged the consultant after the occurrence of an Event of Default.

(f) If Lender has reasonable cause to believe that there is Environmental Activity at the Property, Lender may elect in its sole discretion to release from the lien of this Mortgage any portion of the Property affected by the Environmental Activity and Mortgagor will accept the release.

ARTICLE X.

FINANCIAL REPORTING

Section 10.01 Financial Reporting. The provisions of Article VIII of the Loan Agreement are hereby incorporated by this reference in their entirety, provided that specific references to any particular Obligor in such Sections shall be deemed to refer to the Mortgagor named herein.

ARTICLE XI.

EXPENSES AND DUTY TO DEFEND

Section 11.01. Payment of Expenses.

(a) Mortgagor is obligated to pay all fees and expenses (the "**Expenses**") incurred by Lender or that are otherwise payable in connection with the Loan, the Modification, the Property or Mortgagor, including attorneys' fees and expenses and any fees and expenses relating to (i) the preparation, execution, acknowledgment, delivery, and recording or filing of the Loan Documents; (ii) any Proceeding or other claim asserted against Lender or any Proceeding described in the Section entitled "**Lender's Right to Appear**"; (iii) any inspection, assessment, survey and test permitted under the Loan Documents and performed by a third party; (iv) any Destruction Event; (v) the preservation of Lender's security and the exercise of any rights or remedies available at Law in connection therewith, in equity or otherwise; (vi) administration of the Loan (not including any "standard servicing fees", which phrase shall not include, inter alia, any fees relating to the special servicing of the Loan); (vii) the Leases and the Property Documents; and (viii) any Proceeding in or for bankruptcy, insolvency, reorganization or other debtor relief or similar Proceeding relating to Mortgagor, the Property or any person liable under any guarantee, indemnity or other credit enhancement delivered in connection with the Loan. Notwithstanding the foregoing, Expenses shall not include (x) attorney's fees of Lender's in-house counsel, (y) travel expenses incurred by, or salaries or other compensation paid to, Lender's employees, or (z) travel expenses incurred by third party consultants.

(b) Mortgagor will pay the Expenses ten (10) days after demand, together with any applicable interest, premiums or penalties. If Lender pays any of the Expenses, Mortgagor will reimburse Lender the amount paid by Lender immediately upon demand, together with interest on such amount at the Default Interest Rate from the date Lender paid the

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

Expenses through and including the date Mortgagor reimburses Lender. The Expenses together with any applicable interest, premiums or penalties constitute a portion of the Guaranteed Obligations secured by this Mortgage.

Section 11.02. Duty to Defend. If Lender or any of its trustees, officers, participants, employees or affiliates is a party in any Proceeding relating to the Property, Mortgagor or the Loan (other than any Proceeding resulting solely from the acts or failures to act of Lender or any of its trustees, officers, participants, employees or Affiliates), Mortgagor will indemnify and hold harmless the party and will defend the party with attorneys and other professionals retained by Mortgagor and reasonably approved by Lender; PROVIDED, HOWEVER, THAT MORTGAGOR SHALL NOT HAVE ANY OBLIGATION HEREUNDER TO INDEMNIFY OR HOLD HARMLESS ANY PARTY FOR DAMAGES ARISING OUT OF THE GROSS NEGLIGENCE, ILLEGAL ACTS, FRAUD OR WILLFUL MISCONDUCT OF LENDER OR ANY OF ITS TRUSTEES, OFFICERS, PARTICIPANTS, EMPLOYEES OR AFFILIATES. Lender may elect to engage its own attorneys and other professionals, at Mortgagor's expense, to defend or to assist in the defense of the party. In all events, case strategy will be determined by Lender if Lender so elects and no Proceeding will be settled without Lender's prior approval which may be withheld in its sole discretion.

ARTICLE XII.

TRANSFERS, LIENS AND ENCUMBRANCES

Section 12.01. Prohibitions on Transfers, Liens and Encumbrances. The provisions of Article IX of the Loan Agreement are hereby incorporated by this reference in their entirety, provided that references to any Obligor in such Sections shall be deemed to refer to the Mortgagor named herein.

Section 12.02. Right to Contest Liens. Mortgagor, at its own expense, may contest the amount, validity or application, in whole or in part, of any mechanic's, materialmen's or environmental liens in which event Lender will refrain from exercising any of the Remedies, provided that the following conditions are met:

- (i) Mortgagor delivers to Lender notice of the proposed contest not more than thirty (30) days after the lien is filed;
- (ii) the contest is by a Proceeding promptly initiated and conducted in good faith and with due diligence;
- (iii) there is no Event of Default other than the Event of Default arising from the filing of the lien;
- (iv) the Proceeding suspends enforcement or collection of the lien, imposition of criminal or civil penalties and sale or forfeiture of the Property and Lender will not be subject to any civil suit;

UNOFFICIAL COPY

Application #: AAA-6849

Mortgage #: 0006698-00

Property: Elk Grove #8

(v) the Proceeding is permitted under and is conducted in accordance with the Leases and the Property Documents;

(vi) Mortgagor sets aside reserves or furnishes a bond or other security satisfactory to Lender, in either case in an amount sufficient to pay the claim giving rise to the lien, together with all interest and penalties, or Mortgagor pays the contested lien under protest; and

(vii) with respect to an environmental lien, Mortgagor is using best efforts to mitigate or prevent any deterioration of the Property resulting from the alleged violation of any Environmental Laws or the alleged Environmental Activity.

ARTICLE XIII.

ADDITIONAL REPRESENTATIONS, WARRANTIES AND COVENANTS

Section 13.01. Additional Representations, Warranties and Covenants. The provisions of Sections 14.2 of the Loan Agreement are hereby incorporated by reference in their entirety provided that specific references to any particular Obligor in such Sections shall be deemed to refer to the Mortgagor named herein.

ARTICLE XIV.

DEFAULTS AND REMEDIES

Section 14.01. Events of Default. The term "Event of Default" means the occurrence of any of the following events:

(i) if any Obligor fails to pay any amount due under the Loan Documents and such failure continues beyond any applicable notice or cure period expressly set forth in such Loan Documents;

(ii) if Mortgagor makes a general assignment for the benefit of creditors or generally is not paying, or is unable to pay, or admits in writing its inability to pay, its debts as they become due; or if Mortgagor or any other party commences any Proceeding (A) relating to bankruptcy, insolvency, reorganization, conservatorship or relief of debtors, in each instance with respect to Mortgagor; (B) seeking to have an order for relief entered with respect to Mortgagor; (C) seeking attachment, distraint or execution of a judgment with respect to Mortgagor; (D) seeking to adjudicate Mortgagor as bankrupt or insolvent; (E) seeking reorganization, arrangement, adjustment, winding-up, liquidation, dissolution, composition or other relief with respect to Mortgagor or Mortgagor's debts; or (F) seeking appointment of a Receiver, trustee, custodian, conservator or other similar official for Mortgagor or for all or any substantial part of Mortgagor's assets, provided that if the Proceeding is commenced by a party other than Mortgagor or any of Mortgagor's general partners or members, Mortgagor will have

UNOFFICIAL COPY

Application #: AAA-6849

Mortgage #: 0006698-00

Property: Elk Grove #8

one hundred twenty (120) days to have the Proceeding dismissed or discharged before an Event of Default occurs;

(iii) if Mortgagor is in default beyond any applicable grace and cure period under any other mortgage, deed of trust, deed to secure debt or other security agreement encumbering the Property whether junior or senior to the lien of this Mortgage;

(iv) if there is a default beyond any applicable grace and cure period under any indemnity or guaranty in favor of Lender delivered to Lender in connection with the Loan or in connection with any loan cross-collateralized with the Loan;

(v) if there is an Event of Default under any other Loan Document;

(vi) Intentionally Omitted;

(vii) if a Transfer occurs except in accordance with the provisions of the Loan Agreement;

(viii) if Mortgagor abandons the Property or ceases to conduct its business at the Property; or

(ix) if there is a default in the performance of any other material provision of this Mortgage or any other Loan Document (which does not otherwise constitute an Event of Default under this Mortgage or any other Loan Document) or if there is any material inaccuracy or falsehood in any representation or warranty contained in this Mortgage or any other Loan Document (which does not otherwise constitute an Event of Default under this Mortgage or any other Loan Document) which is not remedied within thirty (30) days after Mortgagor receives notice thereof, provided that if the default, inaccuracy or falsehood is of a nature that it cannot be cured within the thirty (30) day period and during that period Mortgagor commences to cure, and thereafter diligently continues to cure, the default, inaccuracy or falsehood, then the thirty (30) day period will be extended for a reasonable period not to exceed one hundred eighty (180) days after the notice to Mortgagor.

Section 14.02. Remedies.

(a) If an Event of Default occurs, Lender may take any of the following actions (the "**Remedies**") without notice to Mortgagor:

(i) declare all or any portion of the Guaranteed Obligations immediately due and payable ("**Acceleration**");

(ii) pay or perform any Guaranteed Obligation;

(iii) institute a Proceeding for the specific performance of any Guaranteed Obligation;

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

(iv) apply for and obtain the appointment of a Receiver to be vested with the fullest powers permitted by Law, without bond being required, which appointment may be made ex parte, as a matter of right and without regard to the value of the Property, the amount of the Guaranteed Obligations or the solvency of Mortgagor or any other person liable for the payment or performance of any portion of the Guaranteed Obligations;

(v) directly, by its agents or representatives or through a Receiver appointed by a court of competent jurisdiction, enter on the Land and Improvements, take possession of the Property, dispossess Mortgagor and exercise Mortgagor's rights with respect to the Property, either in Mortgagor's name or otherwise;

(vi) institute a Proceeding for the foreclosure of this Mortgage;

(vii) institute proceedings for the partial foreclosure of this Mortgage for the portion of the Guaranteed Obligations then due and payable under any of the Loan Documents, subject to the continuing lien of this Mortgage for the balance of the Guaranteed Obligations not then due;

(viii) exercise any and all rights and remedies granted to a secured party under the Uniform Commercial Code; and

(ix) pursue any other right or remedy available to Lender under any other Loan Document at Law, in equity or otherwise.

(b) If an Event of Default occurs, the license granted to Mortgagor in the Loan Documents to collect Rents will terminate automatically without any action required of Lender. Pursuant to the provisions of 765 ILCS 5/31.5, the mere recordation of the Assignment entitles Lender immediately to collect and receive Rents upon the occurrence of an Event of Default, as defined in Section 14.1, without first taking any acts of enforcement under applicable law, including providing notice to Mortgagor, filing foreclosure proceedings, or seeking the appointment of a receiver. Further, Lender's right to the Rents does not depend on whether or not Lender takes possession of the Property as permitted under Section 14.2(v). In Lender's sole discretion, Lender may choose to collect Rents either with or without taking possession of the Property.

Section 14.03. General Provisions Pertaining to Remedies.

(a) The Remedies are cumulative and non-exclusive, to the extent permitted by Law, and may be pursued by Lender concurrently or otherwise, at such time and in such order as Lender may determine in its sole discretion and without presentment, demand, protest or further notice of any kind, all of which are expressly waived by Mortgagor. In addition, the Remedies are cumulative with those set forth in any of the other Loan Documents and otherwise permitted by Law, and may be pursued concurrently with such other rights and remedies or otherwise, at such time and in such order as Lender may determine in its sole discretion and

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

without presentment, demand, protest or further notice of any kind all of which are expressly waived by Mortgagor.

(b) The enumeration in the Loan Documents of specific rights or powers will not be construed to limit any general rights or powers or impair Lender's rights with respect to the Remedies.

(c) If Lender exercises any of the Remedies, Lender will not be deemed a mortgagee-in-possession unless Lender has elected affirmatively to be a mortgagee-in-possession.

(d) Lender will not be liable for any act or omission of Lender in connection with the exercise of the Remedies.

(e) Lender's right to exercise any Remedy will not be impaired by any delay in exercising or failure to exercise the Remedy and the delay or failure will not be construed as extending any cure period or constitute a waiver of the default or Event of Default.

(f) If an Event of Default occurs, Lender's payment or performance or acceptance of payment or performance will not be deemed a waiver or cure of the Event of Default.

(g) Lender's acceptance of partial payment or receipt of Rents will not extend or affect any grace period, constitute a waiver of a default or Event of Default or constitute a rescission of Acceleration.

Section 14.04. Cross-Collateralization. Mortgagor acknowledges that (a) it has also (i) executed the First Priority Mortgage encumbering the Property described herein as security for the obligations under the Mortgagor's Note and (ii) executed first and second priority Mortgages with respect to certain property that Mortgagor owns, not comprising of the Property, and which Mortgagor intends to be cross-collateralized pursuant to the terms of this Mortgage, and (b) each Other Borrower has executed first and second priority Mortgages with respect to each Other Property as additional security for either (i) each respective Other Borrower's obligations under the Other Note executed by such Other Borrower or (ii) each respective Other Borrower's obligations under the Guaranty executed by such Other Borrower (each such other Mortgage described in (a) and (b) above, a "**Crossed Mortgage**" and collectively, the "**Crossed Mortgages**"). Upon the occurrence of an Event of Default, Lender shall have the right to institute a proceeding or proceedings for the total or partial foreclosure of this Mortgage and any or all of the Crossed Mortgages whether by court action or otherwise, under any applicable provision of this Mortgage, and the Crossed Mortgages shall continue in full force and effect without loss of priority as liens and security interests securing the payment of that portion of the Debt and other obligations secured hereby or thereby (including, without limitation, the Guaranteed Obligations) then due and payable but still outstanding. Neither the acceptance of this Mortgage, the Crossed Mortgages or the other Loan Documents nor the enforcement thereof in any one state, commonwealth or county, whether by court action, foreclosure or otherwise,

UNOFFICIAL COPY

Application #: AAA-6849
 Mortgage #: 0006698-00
 Property: Elk Grove #8

shall prejudice or in any way limit or preclude enforcement by court action, foreclosure or otherwise, of this Mortgage or the other Loan Documents, or the Crossed Mortgages or any of the documents evidencing or securing the Debt and other obligations secured hereby or as the case may be thereby through one or more additional proceedings in that state, commonwealth or county or in any other state, commonwealth or county. Any and all sums received by Lender under this Mortgage, the Crossed Mortgages or the other Loan Documents shall be applied to the Debt and such other obligations in such order and priority, as Lender shall determine in its sole discretion.

Section 14.05. General Provisions Pertaining to Receiver and other Remedies.

(a) If an Event of Default occurs, any court of competent jurisdiction will, upon application by Lender, appoint a Receiver as designated in the application and issue an injunction prohibiting Mortgagor from interfering with the Receiver, collecting Rents, disposing of any Rents or any part of the Property, committing waste or doing any other act that will tend to affect the preservation of the Leases, the Rents and the Property and Mortgagor approves the appointment of the designated Receiver or any other Receiver appointed by the court. Mortgagor agrees that the appointment may be made ex parte and as a matter of right to Lender, either before or after sale of the Property, without further notice, and without regard to the solvency or insolvency, at the time of application for the Receiver, of the person or persons, if any, liable for the payment of any portion of the Guaranteed Obligations and the performance of any portion of the Guaranteed Obligations and without regard to the value of the Property or whether the Property is occupied as a homestead and without bond being required of the applicant.

(b) The Receiver will be vested with the fullest powers permitted by Law including all powers necessary or usual in similar cases for the protection, possession and operation of the Property and all the powers and duties of Lender as a mortgagee-in-possession as provided in this Mortgage and may continue to exercise all the usual powers and duties until the Receiver is discharged by the court. The powers of a receiver listed in 735 ILCS 5/15-1704 shall be added to all the powers of a receiver listed in the Mortgage subject to any express limitations on such powers in the Mortgage.

(c) In addition to the Remedies and all other available rights, Lender or the Receiver may take any of the following actions:

(i) take exclusive possession, custody and control of the Property and manage the Property so as to prevent waste;

(ii) require Mortgagor to deliver to Lender or the Receiver all keys, security deposits, operating accounts, prepaid Rents, past due Rents, the Books and Records and all original counterparts of the Leases and the Property Documents;

(iii) collect, sue for and give receipts for the Rents and, after paying all expenses of collection, including reasonable receiver's, broker's and attorney's fees, apply the

UNOFFICIAL COPY

Application #: AAA-6849
 Mortgage #: 0006698-00
 Property: Elk Grove #8

net collections to any portion of the Guaranteed Obligations selected by Lender in its sole discretion;

(iv) enter into, modify, extend, enforce, terminate, renew or accept surrender of Leases and evict tenants except that in the case of a Receiver, such actions may be taken only with the written consent of Lender as provided in this Mortgage and/or the other applicable Loan Documents;

(v) enter into, modify, extend, enforce, terminate or renew Property Documents except that in the case of a Receiver, such actions may be taken only with the written consent of Lender as provided in this Mortgage and/or the other applicable Loan Documents;

(vi) appear in and defend any Proceeding brought in connection with the Property and bring any Proceeding to protect the Property as well as Mortgagor's and Lender's respective interests in the Property (unless any such Proceeding has been assigned previously to Lender, or if so assigned, Lender has not expressly assigned such Proceeding to the Receiver and consented to such appearance or defense by the Receiver); and

(vii) perform any act in the place of Mortgagor that Lender or the Receiver deems necessary (A) to preserve the value, marketability or rentability of the Property; (B) to increase the gross receipts from the Property; or (C) otherwise to protect Mortgagor's and Lender's respective interests in the Property.

(d) Mortgagor appoints Lender as Mortgagor's attorney-in-fact, at Lender's election, to perform any actions and to execute and record any instruments necessary to effectuate the actions described in this Section, in each instance only at Lender's election and only to the extent Mortgagor has failed to comply with the provisions of this Section.

Section 14.06. General Provisions Pertaining to Foreclosures. The following provisions will apply to any Proceeding to foreclose and to any sale of the Property pursuant to a judgment of foreclosure and sale:

(i) Lender's right to institute a Proceeding to foreclose will not be exhausted by a Proceeding or a sale that is defective or not completed;

(ii) any sale may be postponed or adjourned by Lender by public announcement at the time and place appointed for the sale without further notice;

(iii) with respect to any sale pursuant to a judgment of foreclosure and sale, the Property may be sold as an entirety or in parcels, at one or more sales, at the time and place, on terms and in the order that Lender deems expedient in its sole discretion;

(iv) if a portion of the Property is sold pursuant to this Article, the Loan Documents will remain in full force and effect with respect to any unmatured portion of the Guaranteed Obligations and this Mortgage will continue as a valid and enforceable first lien on

UNOFFICIAL COPY

Application #: AAA-6849
 Mortgage #: 0006698-00
 Property: Elk Grove #8

and security interest in the remaining portion of the Property, subject only to the Permitted Exceptions, without loss of priority and without impairment of any of Lender's rights and remedies with respect to the unmatured portion of the Guaranteed Obligations;

(v) Lender may bid for and acquire the Property at a sale and, in lieu of paying cash, may credit the amount of Lender's bid against any portion of the Guaranteed Obligations selected by Lender in its sole discretion after deducting from the amount of Lender's bid the expenses of the sale, costs of enforcement and other amounts that Lender is authorized to deduct at Law, in equity or otherwise; and

(vi) Lender's receipt of the proceeds of a sale will be sufficient consideration for the portion of the Property sold and Lender will apply the proceeds as set forth in this Mortgage.

Section 14.07. Application of Proceeds. Lender may apply the proceeds of any sale of the Property pursuant to a judgment of foreclosure and sale and any other amounts collected by Lender in connection with the exercise of the Remedies to payment of the Guaranteed Obligations in such priority and proportions as Lender may determine in its sole discretion or in such priority and proportions as required by Law.

Section 14.08. Power of Attorney. Mortgagor appoints Lender as Mortgagor's attorney-in-fact to perform any actions necessary and incidental to exercising the Remedies.

Section 14.09. Tenant at Sufferance. If Lender or a Receiver enters the Property in the exercise of the Remedies and Mortgagor is allowed to remain in occupancy of the Property, Mortgagor will pay to Lender or the Receiver, as the case may be, in advance, a reasonable rent for the Property occupied by Mortgagor. If Mortgagor fails to pay the rent, Mortgagor may be dispossessed by the usual Proceedings available against defaulting tenants.

Section 14.10. Compliance with Illinois Mortgage Foreclosure Law

(a) If any provision of this Mortgage is inconsistent with any applicable provision of the Illinois Mortgage Foreclosure Law, 735 ILCS 5/15-1101, et seq. (the "**Act**"), the provisions of the Act shall take precedence over the provisions of this Mortgage, but shall not invalidate or render unenforceable any other provision of this Mortgage that can fairly be construed in a manner consistent with the Act.

(b) Without in any way limiting any of Lender's rights, remedies, powers and authorities under this Mortgage, and in addition to all of such rights, remedies, powers, and authorities, the Lender shall also have all rights, remedies, powers and authorities permitted to the holder of a mortgage under the Act, as the same may be amended from time to time. If any provision of this Mortgage shall grant to Lender any rights, remedies, powers or authorities upon default of the Mortgagor which are more limited than what would be vested in Lender under the Act in the absence of said provision, Lender shall have what would be vested under the Act.

UNOFFICIAL COPY

Application #: AAA-6849

Mortgage #: 0006698-00

Property: Elk Grove #8

(c) Without limitation, all expenses (including attorneys' fees and expenses) incurred by Lender, to the extent reimbursable under 735 ILCS 5/15 1510, 5/15 1512, or any other provision of the Act, whether incurred before or after any judgment of foreclosure, and whether enumerated in this Mortgage shall be added to the indebtedness secured by this Mortgage and included in the judgment of foreclosure.

ARTICLE XV.

LIMITATION OF LIABILITY

Section 15.01. Limitation of Liability. The provisions of Article XI of the Loan Agreement are hereby incorporated by reference in their entirety.

ARTICLE XVI.

WAIVERS

Section 16.01. WAIVER OF STATUTE OF LIMITATIONS. TO THE EXTENT PERMITTED BY APPLICABLE LAW, MORTGAGOR WAIVES THE RIGHT TO CLAIM ANY STATUTE OF LIMITATIONS AS A DEFENSE TO MORTGAGOR'S PAYMENT AND PERFORMANCE OF THE GUARANTEED OBLIGATIONS.

Section 16.02. WAIVER OF NOTICE. MORTGAGOR WAIVES THE RIGHT TO RECEIVE ANY NOTICE FROM LENDER WITH RESPECT TO THE LOAN DOCUMENTS EXCEPT FOR THOSE NOTICES THAT LENDER IS EXPRESSLY REQUIRED TO DELIVER PURSUANT TO THE LOAN DOCUMENTS.

Section 16.03. WAIVER OF MARSHALLING AND OTHER MATTERS. MORTGAGOR WAIVES THE BENEFIT OF ANY RIGHTS OF MARSHALLING OR ANY OTHER RIGHT TO DIRECT THE ORDER IN WHICH ANY PROPERTY OR PLEDGED COLLATERAL WILL BE (i) SOLD; OR (ii) MADE AVAILABLE TO ANY ENTITY IF THE PROPERTY IS SOLD PURSUANT TO A JUDGMENT OF FORECLOSURE AND SALE. MORTGAGOR ALSO WAIVES THE BENEFIT OF ANY LAWS RELATING TO APPRAISEMENT, VALUATION, STAY, EXTENSION, REINSTATEMENT, MORATORIUM, HOMESTEAD AND EXEMPTION RIGHTS OR A SALE IN REVERSE ORDER OF ALIENATION.

Section 16.04. WAIVER OF TRIAL BY JURY. TO THE EXTENT PERMITTED BY APPLICABLE LAW, MORTGAGOR WAIVES TRIAL BY JURY IN ANY PROCEEDING BROUGHT BY, OR AGAINST, OR COUNTERCLAIM OR CROSS-COMPLAINT ASSERTED BY OR AGAINST, LENDER RELATING TO THE LOAN, THE PROPERTY DOCUMENTS OR THE LEASES.

Section 16.05. WAIVER OF COUNTERCLAIM. TO THE EXTENT PERMITTED BY APPLICABLE LAW, MORTGAGOR WAIVES THE RIGHT TO ASSERT A

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

COUNTERCLAIM OR CROSS-COMPLAINT, OTHER THAN COMPULSORY OR MANDATORY COUNTERCLAIMS OR CROSS-COMPLAINTS, IN ANY PROCEEDING LENDER BRINGS AGAINST MORTGAGOR RELATING TO THE LOAN, INCLUDING ANY PROCEEDING TO ENFORCE REMEDIES.

Section 16.06. WAIVER OF JUDICIAL NOTICE AND HEARING. MORTGAGOR WAIVES ANY RIGHT MORTGAGOR MAY HAVE UNDER LAW TO NOTICE OR TO A JUDICIAL HEARING PRIOR TO THE EXERCISE OF ANY RIGHT OR REMEDY PROVIDED BY THE LOAN DOCUMENTS TO LENDER AND MORTGAGOR WAIVES THE RIGHTS, IF ANY, TO SET ASIDE OR INVALIDATE ANY SALE DULY CONSUMMATED IN ACCORDANCE WITH THE PROVISIONS OF THE LOAN DOCUMENTS ON THE GROUND (IF SUCH BE THE CASE) THAT THE SALE WAS CONSUMMATED WITHOUT A PRIOR JUDICIAL HEARING.

Section 16.07. WAIVER OF SUBROGATION. MORTGAGOR WAIVES ALL RIGHTS OF SUBROGATION TO LENDER'S RIGHTS OR CLAIMS RELATED TO OR AFFECTING THE PROPERTY OR ANY OTHER SECURITY FOR THE LOAN UNTIL THE LOAN IS PAID IN FULL AND ALL FUNDING OBLIGATIONS UNDER THE LOAN DOCUMENTS HAVE BEEN TERMINATED.

Section 16.08. GENERAL WAIVER. MORTGAGOR ACKNOWLEDGES THAT (A) MORTGAGOR AND MORTGAGOR'S PARTNERS, MEMBERS OR PRINCIPALS, AS THE CASE MAY BE, ARE KNOWLEDGEABLE GUARANTORS OF COMMERCIAL FUNDS AND EXPERIENCED REAL ESTATE DEVELOPERS OR INVESTORS WHO UNDERSTAND FULLY THE EFFECT OF THE ABOVE PROVISIONS; (B) LENDER WOULD NOT HAVE ENTERED INTO THE MODIFICATION WITHOUT THE PROVISIONS OF THIS ARTICLE; (C) THE LOAN IS A COMMERCIAL OR BUSINESS LOAN UNDER THE LAWS OF THE STATE OR COMMONWEALTH WHERE THE PROPERTY IS LOCATED NEGOTIATED BY LENDER AND MORTGAGOR AND THEIR RESPECTIVE ATTORNEYS AT ARMS LENGTH; AND (D) ALL WAIVERS BY MORTGAGOR IN THIS ARTICLE HAVE BEEN MADE VOLUNTARILY, INTELLIGENTLY AND KNOWINGLY, AFTER MORTGAGOR FIRST HAS BEEN INFORMED BY COUNSEL OF MORTGAGOR'S OWN CHOOSING AS TO POSSIBLE ALTERNATIVE RIGHTS, AND HAVE BEEN MADE AS AN INTENTIONAL RELINQUISHMENT AND ABANDONMENT OF A KNOWN RIGHT AND PRIVILEGE. THE FOREGOING ACKNOWLEDGMENT IS MADE WITH THE INTENT THAT LENDER AND ANY SUBSEQUENT HOLDER OF THE GUARANTY WILL RELY ON THE ACKNOWLEDGMENT.

Section 16.09. ILLINOIS STATUTORY WAIVERS. THE MORTGAGOR, ON BEHALF OF ITSELF AND ALL PERSONS NOW OR HEREAFTER INTERESTED IN THE PROPERTY, VOLUNTARILY AND KNOWINGLY HEREBY ACKNOWLEDGES THAT THE TRANSACTION OF WHICH THIS MORTGAGE IS A PART IS A TRANSACTION WHICH DOES NOT INCLUDE EITHER AGRICULTURAL REAL ESTATE (AS DEFINED

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

IN THE ACT), OR RESIDENTIAL REAL ESTATE (AS DEFINED IN THE ACT). THE MORTGAGOR, ON ITS OWN BEHALF AND ON BEHALF OF EACH AND EVERY PERSON ACQUIRING ANY INTEREST IN OR TITLE TO THE PROPERTY SUBSEQUENT TO THE DATE OF THIS MORTGAGE, HEREBY IRREVOCABLY WAIVES PURSUANT TO 735 ILCS 5/15-1601 OF THE ACT ANY AND ALL RIGHTS OF REINSTATEMENT (INCLUDING, WITHOUT LIMITATION, ALL RIGHTS OF REINSTATEMENT PROVIDED FOR IN 735 ILCS 5/15 1602) OR REDEMPTION FROM SALE OR FROM OR UNDER ANY ORDER, JUDGMENT OR DECREE OF FORECLOSURE OF THIS MORTGAGE (INCLUDING, WITHOUT LIMITATION, ALL RIGHTS OF REDEMPTION PROVIDED FOR IN 735 ILCS 5/15 1603) OR UNDER ANY POWER CONTAINED HEREIN OR UNDER ANY SALE PURSUANT TO ANY STATUTE, ORDER, DECREE OR JUDGMENT OF ANY COURT.

ARTICLE XVII.**NOTICES**

Section 17.01. Notices. All acceptances, approvals, consents, demands, notices, requests, waivers and other communications (the "Notices") required or permitted to be given under the Loan Documents must be in writing and (a) delivered personally by a process server providing a sworn declaration evidencing the date of service, the individual served, and the address where the service was made; (b) sent by certified mail, return receipt requested; or (c) delivered by nationally recognized overnight delivery service that provides evidence of the date of delivery (for next morning delivery if sent by overnight delivery service), in all cases with charges prepaid addressed to the appropriate party at its address listed below:

If to Lender:

Teachers Insurance and Annuity Association of America
730 Third Avenue
New York, New York 10017
Attention: Director Portfolio Management
Mortgage and Real Estate
Application #AAA-6849
Mortgage #0006698-00

with a courtesy
copy to:

Teachers Insurance and Annuity Association of America
730 Third Avenue
New York, New York 10017
Attention: Managing Counsel - New York - Investment
Management Law
Application #AAA-6849
Mortgage #0006698-00

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

If to Mortgagor: ProLogis
4545 Airport Way
Denver, CO 80239
Attention: Treasury Department

with a courtesy
copy to: ProLogis
4545 Airport Way
Denver, CO 80239
Attention: Legal Department

Lender and Mortgagor each may change from time to time the address to which Notices must be sent, by notice given in accordance with the provisions of this Section. All Notices given in accordance with the provisions of this Section will be deemed to have been received on the earliest of (i) actual receipt; (ii) Mortgagor's rejection of delivery; or (iii) three (3) Business Days after having been deposited in any mail depository regularly maintained by the United States postal service, if sent by certified mail, or one (1) Business Day after having been deposited with a nationally recognized overnight delivery service, if sent by overnight delivery or on the date of personal service, if served by a process server.

Section 17.02. Change in Mortgagor's Legal Name, Place of Business or State of Formation. Mortgagor will notify Lender in writing prior to any change in Mortgagor's legal name, place of business or state or commonwealth of organization / formation / incorporation, including as a result of, or in connection with, any Transfer, including any Permitted Transfer.

ARTICLE XVIII.**MISCELLANEOUS**

Section 18.01. Applicable Law. The Loan Documents are governed by and will be construed in accordance with the Laws of the State of New York, except for matters relating to the creation, perfection and foreclosure of liens and security interests and the enforcement of Remedies against the Property which will be governed by and construed in accordance with the Laws of the State or commonwealth where the Property is located, except to the extent that the Uniform Commercial Code requires otherwise.

Section 18.02. Usury Limitations. Mortgagor and Lender intend to comply with all Laws with respect to the charging and receiving of interest. Any amounts charged or received by Lender for the use or forbearance of the Principal to the extent permitted by Law, will be amortized and spread throughout the Term until payment in full so that the rate or amount of interest charged or received by Lender on account of the Principal does not exceed the Maximum Interest Rate. If any amount charged or received under the Loan Documents that is deemed to be interest is determined to be in excess of the amount permitted to be charged or received at the Maximum Interest Rate, the excess will be deemed to be a prepayment of Principal when paid,

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

without premium, and any portion of the excess not capable of being so applied will be refunded to Mortgagor. If during the Term the Maximum Interest Rate, if any, is eliminated, then for the purposes of the Loan, there will be no Maximum Interest Rate.

Section 18.03. Lender's Discretion. Wherever under the Loan Documents any matter is required to be satisfactory to Lender, Lender has the right to approve or determine any matter or Lender, as an election, Lender's approval, determination or election will be made in Lender's reasonable discretion unless expressly provided to the contrary.

Section 18.04. Unenforceable Provisions. If any provision in the Loan Documents is found to be illegal or unenforceable or would operate to invalidate any of the Loan Documents, then the provision will be deemed expunged and the Loan Documents will be construed as though the provision was not contained in the Loan Documents and the remainder of the Loan Documents will remain in full force and effect.

Section 18.05. Survival of Mortgagor's Obligations. Mortgagor's representations, warranties and covenants contained in the Loan Documents will continue in full force and effect and survive (i) satisfaction of the Guaranteed Obligations; (ii) release of the lien of this Mortgage; (iii) assignment or other transfer of all or any portion of Lender's interest in the Loan Documents or the Property; (iv) Lender's exercise of any of the Remedies or any of Lender's other rights under the Loan Documents; (v) a Transfer; (vi) amendments to the Loan Documents; and (vii) any other act or omission that might otherwise be construed as a release or discharge of Mortgagor.

Section 18.06. Relationship Between Mortgagor and Lender; No Third Party Beneficiaries.

(a) Lender is not a partner or joint venturer with Mortgagor or any other entity as a result of the Loan or Lender's rights under the Loan Documents; the relationship between Lender and Mortgagor is strictly that of creditor and debtor. Each Loan Document is an agreement between the parties to that Loan Document for the mutual benefit of the parties and no entities other than the parties to that Loan Document will be a third party beneficiary or will have any claim against Lender or Mortgagor by virtue of the Loan Document. As between Lender and Mortgagor, any actions taken by Lender under the Loan Documents will be taken for Lender's protection only, and Lender has not and will not be deemed to have assumed any responsibility to Mortgagor or to any other entity by virtue of Lender's actions.

(b) All conditions to Lender's performance of its obligations under the Loan Documents are imposed solely for the benefit of Lender. No entity other than Lender will have standing to require satisfaction of the conditions in accordance with their provisions or will be entitled to assume that Lender will refuse to perform its obligations in the absence of strict compliance with any of the conditions.

Section 18.07. Partial Releases; Extensions; Waivers. Lender may: (i) release any part of the Property or any entity obligated for any of the Guaranteed Obligations; (ii) extend the time

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

for payment or performance of any of the Guaranteed Obligations or otherwise amend the provisions for payment or performance by agreement with any entity that is obligated for any of the Guaranteed Obligations or that has an interest in the Property; (iii) accept additional security for the payment and performance of any of the Guaranteed Obligations; and (iv) waive any entity's performance of any Guaranteed Obligation, release any entity or individual now or in the future liable for the performance of any Guaranteed Obligation or waive the exercise of any Remedy or option. Lender may exercise any of the foregoing rights without notice, without regard to the amount of any consideration given, without affecting the priority of the Loan Documents, without releasing any entity not specifically released from the Guaranteed Obligations, without releasing any guarantor(s) or surety(ies) of any of the Guaranteed Obligations, without effecting a novation of the Loan Documents and, with respect to a waiver, without waiving future performance of the Guaranteed Obligations or exercise of the Remedy waived.

Section 18.08. Service of Process. Mortgagor irrevocably consents to service of process by registered or certified mail, postage prepaid, return receipt requested, to Mortgagor at its address set forth in the Article entitled "Notices".

Section 18.09. Entire Agreement. Oral agreements or commitments between Mortgagor and Lender to lend money, to extend credit or to forbear from enforcing repayment of a debt, including promises to extend or renew the debt, are not enforceable. Any agreements between Mortgagor and Lender relating to the Loan are contained in the Loan Documents, which contain the complete and exclusive statement of the agreement between Mortgagor and Lender, except as Mortgagor and Lender may later agree in writing to amend the Loan Documents. The language of each Loan Document will be construed as a whole according to its fair meaning and will not be construed against the party by or for whom it was drafted.

Section 18.10. No Oral Amendment. The Loan Documents may not be amended, waived or terminated orally or by any act or omission made individually by Mortgagor or Lender but may be amended, waived or terminated only by a written document signed by the party against which enforcement of the amendment, waiver or termination is sought.

Section 18.11. Lost or Destroyed Mortgagor's Guaranty. If the Mortgagor's Guaranty is lost, mutilated, destroyed or stolen, Mortgagor will deliver to Lender a new, substitute guaranty containing the same provisions as the Mortgagor's Guaranty, provided that Mortgagor is furnished with reasonably satisfactory evidence of the loss, mutilation, destruction or theft of the Mortgagor's Guaranty.

Section 18.12. Covenants Run with the Land. Subject to the restrictions on transfer contained in the Article entitled "TRANSFERS, LIENS AND ENCUMBRANCES", all of the covenants of this Mortgage and the Assignment will run with the Land, will bind all parties hereto and all tenants and subtenants of the Land or the Improvements and their respective heirs, executors, administrators, successors and assigns, and all occupants and subsequent owners of the Property, and will inure to the benefit of Lender and all subsequent holders of the Guaranty and this Mortgage.

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

Section 18.13. Time of the Essence. Time is of the essence with respect to Mortgagor's payment and performance of the Guaranteed Obligations.

Section 18.14. Subrogation. If the Principal or any other amount advanced by Lender is used directly or indirectly to pay off, discharge or satisfy all or any part of an encumbrance affecting the Property, then Lender is subrogated to the encumbrance and to any security held by the holder of the encumbrance, all of which will continue in full force and effect in favor of Lender as additional security for the Guaranteed Obligations.

Section 18.15. Joint and Several Liability. If Mortgagor consists of more than one person or entity, the obligations and liabilities of each such person or entity under this Mortgage are joint and several.

Section 18.16. Successors and Assigns. The Loan Documents bind the parties to the Loan Documents and their respective successors, assigns, heirs, administrators, executors, agents and representatives and inure to the benefit of Lender and its successors, assigns, heirs, administrators, executors, agents and representatives.

Section 18.17. Duplicates and Counterparts. Duplicate counterparts of any of the Loan Documents, other than the Notes, may be executed and together will constitute a single original document.

Section 18.18. Conflicts. As set forth in Exhibit C to the Loan Agreement, in the event of any conflict between the terms of this Mortgage and the Loan Agreement, the terms and conditions of the Loan Agreement shall govern and control; provided, however, in no event shall the terms and conditions of the Loan Agreement govern and control over Article XIX of this Mortgage.

ARTICLE XIX.

STATE SPECIFIC PROVISIONS

Section 19.01. Special State Provisions. Subject to the provisions of Section 14.10 hereof, if the provisions of this Article 19 shall be inconsistent with the provisions set forth elsewhere in this Mortgage, the provisions of this Article 19 shall control:

Section 19.02. Illinois Mortgage Foreclosure Law. It is the intention of Mortgagor and Lender that the enforcement of the terms and provisions of this Mortgage shall be accomplished in accordance with the Illinois Mortgage Foreclosure Law (the "Act"), Illinois Compiled Statutes, 735 ILCS 5/15-1101 et. seq., and with respect to such Act, Mortgagor agrees and covenants that:

(a) Mortgagor and Lender 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

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

repealed, Lender 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;

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

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

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

(ii) payments by Lender of (i) principal, interest or other obligations in accordance with the terms of any senior mortgage or other prior lien or encumbrances; (ii) real estate taxes and assessments, general and special, and all other taxes and assessments of any kind or nature whatsoever which are assessed or imposed upon the Property or any part thereof; (iii) other obligations authorized by the Mortgage, the Loan Agreement or any other Loan Document; or (iv) with court approval, any other amounts in connection with other liens, encumbrances or interests reasonably necessary to preserve the status of title, as referred to in Section 5/15-1505 of the Act;

(iii) advances by Lender 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: (i) in connection with the foreclosure of the Mortgage as referred to in Section 5/15-1504(d)(2) and 5/15-1510 of the Act; (ii) in connection with any action, suit or proceeding brought by or against the Lender for the enforcement of the Mortgage or arising from the interest of the Lender hereunder; or (iii) in preparation for or in connection with the commencement, prosecution or defense of any other action related to this Mortgage or the Property;

UNOFFICIAL COPY

Application #: AAA-6849
 Mortgage #: 0006698-00
 Property: Elk Grove #8

(v) Lender's fees and costs, including attorneys' fees, arising between the entry of judgment of foreclosure and the confirmation hearings as referred to in Section 5/15-1508 (b) (1) of the Act;

(vi) expenses deductible from proceeds of sale as referred to in Section 5/15-1512 (a) and (b) of the Act;

(vii) expenses incurred and expenditures made by Lender for any one or more of the following: (i) if the Property or any portion thereof constitutes one or more units under a condominium declaration, assessments imposed upon the unit owner thereof; (ii) if Mortgagor's interest in the Property is a leasehold estate under a lease or sublease, rentals or other payments required to be made by the lessee under the terms of the lease or sublease; (iii) premiums for casualty and liability insurance paid by Lender whether or not Lender 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 Property imposed by Section 5/15-1704 (c) (1) of the Act; (iv) repair or restoration of damage or destruction in excess of available insurance proceeds or condemnation awards; (v) payment deemed by Lender to be required for the benefit of the Property or required to be made by the owner of the Mortgaged property under any grant or declaration of easement, easement agreement, agreement with any adjoining land owners or instruments creating covenants or restrictions for the benefit of or affecting the Property; (vi) shared or common expense assessments payable to any association or corporation in which the owner of the Property is a member in any way affecting the Property; (vii) if the loan secured hereby is a construction loan, costs incurred by Lender for demolition, preparation for and completion of construction, as may be authorized by the applicable commitment, loan agreement or other agreement; (viii) payments required to be paid by Mortgagor or Lender pursuant to any lease or other agreement for occupancy of the Property; and (ix) if the Mortgage is insured, payment of FHA or private mortgage insurance required to keep such insurance in force;

(d) All Protective Advances shall be so much additional indebtedness secured by this Mortgage, and shall become immediately due and payable without notice and with interest thereon from the date of the advance until paid at the rate of interest payable after default under the terms of the Note;

(e) This Mortgage shall be a lien for all Protective Advances as to subsequent purchasers and judgment creditors from the time this Mortgage is recorded pursuant to Subsection (b) (5) of Section 5/15-1302 of the Act.

(f) In addition to any provision of this Mortgage authorizing the Lender to take or be placed in possession of the Property, or for the appointment of a receiver, Lender shall have the right, in accordance with Sections 5/15-1701 and 5/15-1702 of the Act, to be placed in possession of the Property or, at its request, to have a receiver appointed, and such receiver, or Lender, if and when placed in possession, shall have, in addition to any other powers provided in this Mortgage, all rights, powers, immunities and duties, as provided fore in Sections 5/15-1701 and 5/15-1703 of the Act; and

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

Section 19.03. Business Loan. The proceeds of the Loan shall be used solely for business purposes and in furtherance of the regular business affairs of Mortgagor and the Other Borrowers, and the entire principal obligation secured hereby constitutes (a) a “business loan” as that term is defined in, and for all purposes of, 815 ILCS 205/4 (1) (c); and, (b) a “loan secured by a mortgage on real estate” within the purview and operation of 815 ILCS 204/4 (1) (1).

Section 19.04. Collateral Protection Insurance. If at any time Mortgagor fails to provide Lender with evidence of the insurance coverage required by this Mortgage and the Loan Agreement, Lender may purchase insurance at Mortgagor’s expense to protect Lender’s interest in the Property. This insurance may, but need not, protect Mortgagor’s interests. The coverage that Lender purchases may not pay any claim that Mortgagor may make or any claim that is made against Mortgagor in connection with the Property. Mortgagor may later cancel any insurance purchased by Lender, but only after providing Lender with evidence that Mortgagor has obtained insurance as required by this Mortgage and the Loan Agreement. If Lender purchases insurance for the Property, Mortgagor will be responsible for the costs of that insurance, including interest and any other charges that Lender imposes 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 Mortgagor’s total outstanding balance or obligation secured hereby. The costs of the insurance may be more than the costs of insurance that Mortgagor may be able to obtain through Mortgagor’s own efforts.

Section 19.05. Maturity Date, Fixed Interest Rate and Other Material Economic Terms. The Maturity Date, Fixed Interest Rate, Default Interest Rate and other material economic terms are set forth throughout this Mortgage, including, without limitation, in the recitals to this Mortgage, as well as Exhibit B attached hereto.

[SIGNATURE APPEARS ON NEXT PAGE]

UNOFFICIAL COPY

IN WITNESS WHEREOF, Mortgagor has executed and delivered this Mortgage as of the date first set forth above.

MORTGAGOR:

PROLOGIS NA2 U.S. LLC,
a Delaware limited liability company

By: ProLogis NA2 Fund,
a Delaware general partnership,
its sole member

By: ProLogis NA2 Fund GP LLC,
a Delaware limited liability company,
its managing general partner

By: ProLogis NA2 Sub Holdings LLC,
a Delaware limited liability company,
its sole member

By: ProLogis NA2 Holdings LP,
a Delaware limited partnership,
its sole member

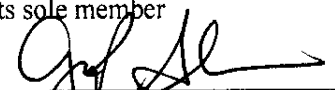
By: ProLogis NA2 Direct LLC,
a Delaware limited liability company,
its general partner

By: ProLogis NA2 REIT II LLC,
a Delaware limited liability company,
its sole member

By: ProLogis NA2 Sub LP,
a Delaware limited partnership,
its managing member

By: ProLogis NA2 Sub GP LLC,
a Delaware limited liability company,
its general partner

By: ProLogis Logistics Services Incorporated,
a Delaware corporation,
its sole member

By: 
Name: Gayle P Starr
Title: SVP

Property of COOK COUNTY Clerk's Office

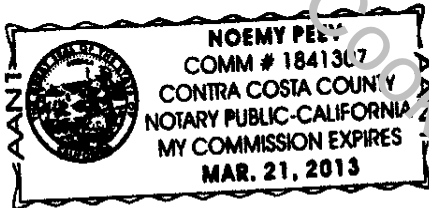
UNOFFICIAL COPY

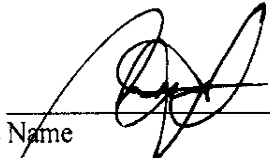
STATE OF CALIFORNIA)

) SS:
COUNTY OF SAN FRANCISCO)

On September 12th, 2012, before me, the undersigned, a Notary Public in and for said State, personally appeared GAYLE P. STARR, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.



Name 

UNOFFICIAL COPY

Application #: AAA-6849

Mortgage #: 0006698-00

Property: Elk Grove #8

EXHIBIT A

LEGAL DESCRIPTION

LOT 395 IN CENTEX INDUSTRIAL PARK UNIT 242, BEING A SUBDIVISION IN THE SOUTH ½ OF SECTION 27, TOWNSHIP 41 NORTH, RANGE 11, EAST OF THE THIRD PRINCIPAL MERIDIAN, ACCORDING TO THE PLAT THEREOF RECORDED AUGUST 6, 1979 AS DOCUMENT 25085633, IN COOK COUNTY, ILLINOIS.

Permanent Index Number: 08-27-303-074-0000

Address of real estate: 747 Chase Avenue, Elk Grove Village, Illinois

UNOFFICIAL COPY

Application #: AAA-6849
 Mortgage #: 0006698-00
 Property: Elk Grove #8

EXHIBIT B

DEFINITIONS

“**Acceleration**” is defined in Section 14.02(a)(i).

“**Act**” is defined in Section 19.02.

“**Additional Funds**” is defined in Section 7.04(v).

“**Allocated Loan Amount**” is defined as a certain portion of the original aggregate principal amount of the Loan allocated to each Property, as the same shall be reduced by deemed reductions attributable to any partial prepayment made in accordance with the terms of the Loan Documents. The Allocated Loan Amounts shall at all times equal the then outstanding aggregate principal balance of the Loan. The initial Allocated Loan Amounts are set forth on Exhibit A of the Loan Agreement.

“**Assessments**” is defined as all assessments now or hereafter levied, assessed or imposed against the Property.

“**Assignment**” is defined as the Second Priority Assignment of Leases and Rents dated of even date with this Mortgage made by Mortgagor, its assignor thereunder, for the benefit of Lender, pursuant to which Mortgagor assigned to Lender all of its right, title and interest in and to the Leases with respect to the Property.

“**Bankruptcy Code**” means Title 11 of the United States Code

“**Borrower**” and “**Borrowers**” each as defined in the Recitals.

“**Business Days**” is defined as any day on which commercial banks are not authorized or required by Law to close in New York, New York.

“**Casualty**” is defined as damage to or destruction of the Property by fire or other casualty.

“**Condemnation**” is defined as the permanent or temporary taking of all or any portion of the Property, or any interest therein or right accruing thereto, by the exercise of the right of eminent domain (including any transfer in lieu of or in anticipation of the exercise of the right), inverse condemnation or any similar injury or damage to or decrease in the value of the Property, including severance and change in the grade of any streets and a Condemnation will be deemed to have occurred on the date title to the Property taken passes or if the Condemnation is temporary, on the date Mortgagor no longer has use of the Property.

“**Condemnation Awards**” is defined in Section 2.01(viii).

“**Condemnation Proceeding**” is defined as a Proceeding that could result in a Condemnation.

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

“**Crossed Mortgage**” and “**Crossed Mortgages**” are defined in Section 14.04 hereof.

“**Debt**” is defined as the Principal, the Interest, the Late Charges, the Prepayment Premiums, the Expenses, any additional advances made by Lender to any Borrower in connection with the Property, the other Properties or the Loan and all other amounts payable by any Borrower under the Loan Documents.

“**Debt Service Coverage Ratio**” has the meaning set forth in the Loan Agreement.

“**Debt Service Payments**” is defined as the monthly installments of principal and interest payable by each Borrower to Lender as set forth in the Notes.

“**Default Interest Rate**” is defined as the lower of 11.38% per annum or the Maximum Interest Rate, if any.

“**Destruction Event**” is defined in Section 7.04.

“**Environmental Activity**” is defined as any actual, suspected or threatened abatement, cleanup, disposal, generation, handling, manufacture, possession, release, remediation, removal, storage, transportation, treatment or use of any Hazardous Material. The actual, suspected or threatened presence of any Hazardous Material or the actual, suspected or threatened noncompliance with any Environmental Laws, will be deemed Environmental Activity.

“**Environmental Laws**” is defined as all Laws pertaining to health, safety, protection of the environment, natural resources, conservation, wildlife waste management, Environmental Activities and pollution.

“**Environmental Report**” has the meaning set forth in the Loan Agreement.

“**Event of Default**” is defined in Section 14.01.

“**Expenses**” is defined in Section 11.01(a).

“**First Priority Mortgage**” is defined in the Recitals.

“**Fixed Interest Rate**” is defined as 6.38% per annum.

“**Fixtures**” is defined as all of the Property that constitutes “fixtures” as defined on the Uniform Commercial Code.

“**Government**” is defined as any federal, state or municipal governmental or quasi-governmental authority including any executive, legislative or judicial branch and any division, subdivision or agency of any of them and any entity to which any of them has delegated authority.

“**Guarantied Obligations**” has the meaning set forth in Section 3.01.

UNOFFICIAL COPY

Application #: AAA-6849

Mortgage #: 0006698-00

Property: Elk Grove #8

“Guaranty” is defined in the Recitals.

“Hazardous Materials” is defined as any by-product, chemical, compound, contaminant, pollutant, product, substance, waste or other material (i) that is hazardous or toxic or (ii) the abatement, cleanup, discharge, disposal, emission, exposure to, generation, handling, manufacture, possession, presence, release, removal, remediation, storage, transportation, treatment or use of which is controlled, prohibited or regulated by any Environmental Laws, including asbestos, petroleum and petroleum products and polychlorinated biphenyls.

“Impositions” is defined as all Taxes, Assessments, ground rent, if any, water and sewer rents, fees and charges, levies, permit, inspection and license fees and other dues, charges or impositions, including all charges and license fees for the use of vaults, chutes and similar areas adjoining the Land, maintenance and similar charges and charges for utility services, in each instance whether now or in the future, directly or indirectly, levied, assessed or imposed on the Property or Mortgagor and whether levied, assessed or imposed as excise, privilege or property taxes.

“Improvements” is defined in Section 2.01(ii).

“Insurance Premiums” is defined as all present and future premiums and other charges due and payable on policies of fire, rental value and other insurance covering the Property and required pursuant to the provisions of this Mortgage.

“Insurance Proceeds” is defined in Section 2.01(ix).

“Insurers” is defined in Section 7.01(c).

“Interest” is defined as the fixed interest payable under each Note at the Fixed Interest Rate and any other sums which are deemed to be interest under Law.

“Land” is defined in the Recitals.

“Late Charge” is defined in each Note.

“Law” is defined as all present and future codes, constitutions, cases, opinions, rules, manuals, regulations, determinations, laws, orders, ordinances, requirements and statutes, as amended, of any Government that affect or that may be interpreted to affect the Property, Mortgagor or the Loan, including amendments and all guidance documents and publications promulgated thereunder.

“Leases” is defined as all present and future leases, subleases, licenses, and other agreements for the use and occupancy of the Land and/or Improvements, any related guarantees and any use and occupancy arrangements created pursuant to Section 365(h) of the Bankruptcy Code or otherwise in connection with the commencement or continuation of any bankruptcy, reorganization,

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

arrangement, insolvency, dissolution, receivership or similar Proceedings, or any assignment for the benefit of creditors, in respect of any tenant or other occupant of the Land and Improvements.

“**Lender**” is defined in the introductory paragraph.

“**Letter of Credit**” is defined in Section 7.05(b)(iv).

“**Lien**” is defined as any mortgage, pledge, hypothecation, assignment, deposit arrangement, encumbrance, lien (statutory or otherwise), preference, priority or other security agreement or preferential arrangement of any kind or nature whatsoever (including, without limitation, any conditional sale or other title retention agreement, the filing of any financing statement under the Uniform Commercial Code or comparable law of any jurisdiction in respect of any of the foregoing and a mechanics’ or materialman’s lien).

“**Loan**” is defined in the Recitals.

“**Loan Agreement**” is defined in the Recitals.

“**Loan Documents**” is defined as the Loan Agreement, the Notes, this Mortgage, the other Security Instruments, the Assignment, the other Assignments of Leases and Rents, and all documents now or hereafter executed by any Borrower, Mortgagor, any other Obligor or held by Lender or Mortgagor relating to the Loan, including all amendments but excluding any indemnities or guaranties delivered in connection with the Loan, other than the Guaranty, as any of the same may be amended, restated, replaced, supplemented or otherwise modified in accordance with the terms of this Mortgage and the other Loan Documents.

“**Material Environmental Contamination**” is defined as contamination of the Property with Hazardous Materials (i) that constitutes a violation of one or more Environmental Laws; (ii) for which there is a significant possibility that remediation will be required under Environmental Laws; (iii) that results in a material risk of liability or expense to Lender; or (iv) that diminishes the value of the Property.

“**Maturity Date**” is defined in the Recitals.

“**Maximum Interest Rate**” is defined as the maximum rate of interest, if any, permitted by Law as of the date of this Mortgage to be charged with respect to the Loan.

“**Mortgage**” is defined as this Second Priority Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Financing Statement.

“**Mortgagor**” is defined in the introductory paragraph.

“**Mortgagor’s Guaranty**” is defined as that certain Guaranty, dated November 26, 2008, made by Mortgagor for the benefit of Lender, as the same may be amended, restated or otherwise modified from time to time.

UNOFFICIAL COPY

Application #: AAA-6849
 Mortgage #: 0006698-00
 Property: Elk Grove #8

“**Mortgagor’s Note**” is defined in the Recitals.

“**Mortgagor’s Note Principal**” is defined in the Recitals.

“**Note**” or “**Notes**” each as defined in the Recitals.

“**Note Payments**” is defined in the Note.

“**Notices**” is defined in Section 17.01.

“**Obligor**” has the meaning set forth in the Loan Agreement.

“**Other Borrower**” or “**Other Borrowers**” each as defined in the Recitals.

“**Other Note**” has the meaning set forth in the Loan Agreement.

“**Other Property**” has the meaning set forth in the Loan Agreement.

“**Permitted Exceptions**” is defined as the matters shown in Schedule B, Part 1 and 2 of the title insurance policy insuring the lien of this Mortgage. The Permitted Exceptions include the First Priority Mortgage.

“**Permitted Transfer**” has the meaning set forth in the Loan Agreement.

“**Permitted Use**” is defined as use as a warehouse distribution or light industrial facility with maximum office finish of 35% and physical attributes (ceiling height, parking, turning radius, etc.) that in Lender’s reasonable opinion render the Property competitive in the local industrial market for attracting high quality industrial tenants.

“**Personal Property**” is defined as the Property, other than Fixtures, the Land or the Improvements.

“**Pledge Agent**” has the meaning set forth in the Loan Agreement.

“**Policies**” is defined in Section 7.01(b).

“**Prepayment Premium**” is defined in the Notes.

“**Principal**” is defined in the Recitals.

“**Proceeding**” is defined as a pending or threatened action, claim or litigation before a legal, equitable or administrative tribunal having proper jurisdiction.

“**Proceeds**” is defined in Section 7.02(c).

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

“Properties” is defined, collectively, as each real property listed on Exhibit A of the Loan Agreement, together with any Substitute Property added as collateral for the Loan in accordance with the terms of Section 4.2 thereof, until such time as any such real property is released from the Lien of the applicable Mortgage in accordance with the provisions of Section 4.1 or 4.2 of the Loan Agreement.

“Property” is defined in Section 2.01.

“Property Documents” is defined in Section 2.01(v).

“Receiver” is defined as a receiver, custodian, trustee, liquidator or conservator of the Property.

“Remedies” is defined in Section 14.02(a).

“Rents” is defined as all present and future rents, prepaid rents, percentage, participation or contingent rents, issues, profits, proceeds, parking fees, revenues and other consideration accruing under or in connection with the Leases or otherwise derived from the use and occupancy of the Land or the Improvements, including tenant contributions to expenses, security deposits and royalties, if any, all other fees or payments paid to or for the benefit of Mortgagor, including liquidated damages after a default under a Lease, any termination, cancellation, modification or other fee or premium payable by a tenant for any reason, the proceeds of any rental insurance and any payments received pursuant to Sections 502(b) or 365 of the Bankruptcy Code or otherwise in connection with the commencement or continuance of any bankruptcy, reorganization, arrangement, insolvency, dissolution, receivership or similar proceedings, or any assignment for the benefit of creditors, in respect of any tenant or other occupant of the Land or the Improvements and all claims as a creditor in connection with any of the foregoing.

“Restoration” is defined as the restoration of the Property after a Destruction Event as nearly as possible to or better than its condition immediately prior to the Destruction Event, in a workmanlike manner using materials at least substantially equivalent in quality and character to those used for the original improvements, in accordance with Law and free and clear of all liens, encumbrances or other charges other than this Mortgage and the Permitted Exceptions.

“Restoration Completion Date” is defined in Section 7.04(viii).

“Restoration Funds” is defined in Section 7.05(b).

“Security Instrument” is defined, collectively, as this Mortgage together with each other Security Instrument, as defined in the Loan Agreement, as the same may be amended, restated, replaced, supplemented or otherwise modified in accordance with the terms of this Mortgage and the other Loan Documents.

“Taxes” is defined as all present and future real estate taxes or personal property taxes, if any, levied, assessed or imposed against the Property.

UNOFFICIAL COPY

Application #: AAA-6849
Mortgage #: 0006698-00
Property: Elk Grove #8

“**Term**” is defined as the scheduled term of the Loan commencing on the date Lender makes the first disbursement of the Loan and terminating on the Maturity Date.

“**Transfer**” has the meaning set forth in the Loan Agreement.

“**Uniform Commercial Code**” is defined as the Uniform Commercial Code as in effect from time to time in the jurisdiction where the Land is located or, to the extent required by the Uniform Commercial Code, where the Mortgagor is located, as applicable.

Property of Cook County Clerk's Office