

UNOFFICIAL COPY



Illinois Anti-Predatory Lending Database Program

Certificate of Exemption

Doc#: 1231316064 Fee: \$142.00
Eugene "Gene" Moore RHSP Fee: \$10.00
Cook County Recorder of Deeds
Date: 11/08/2012 02:35 PM Pg: 1 of 53

Report Mortgage Fraud
800-532-8785

The property identified as: **PIN:** 15-05-104-004

Address:

Street: 310 SOUTH WOLF ROAD.

Street line 2:

City: NORTHLAKE

State: IL

ZIP Code: 60164

Lender: CERBERUS BUSINESS FINANCE, LLC

Borrower: HI-TEMP NORTHLAKE LLC

Loan / Mortgage Amount: \$48,500,000.00

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

FIDELITY NATIONAL TITLE

999011350

2 of 3

Certificate number: B2C612B1-5BA5-4FAC-9380-739362D09BCD

Execution date: 10/23/2012

UNOFFICIAL COPY

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

by and from

**HI-TEMP NORTHLAKE LLC,
"Mortgagor"**

to

**CERBERUS BUSINESS FINANCE, LLC,
as Collateral Agent and Administrative Agent
"Mortgagee"**

Dated as of October 23, 2012

Locations: (i) 310 South Wolf Road and 75 East Lake Street, and (ii) 5400 West Lake Street

Municipalities: (i) Northlake, and (ii) Melrose Park

County: Cook

State: Illinois

Real Estate Tax Permanent Index Numbers:

15-05-104-004	15-06-216-006
15-05-104-005	15-06-216-007
15-05-104-006	15-06-216-027
15-05-104-011	15-06-216-031
15-05-300-012	15-06-400-049
15-05-300-016	
15-05-300-021	
15-05-300-050	
15-05-300-055	

FIDELITY NATIONAL TITLE 999011350

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

**This Instrument Was Prepared By,
Recording Requested By,
And When Recorded Mail To:**
Schulte Roth & Zabel LLP
919 Third Avenue
New York, New York 10022
Attention: Julian M. Wise, Esq.

2 of 3

UNOFFICIAL COPY

TABLE OF CONTENTS

	Page
ARTICLE I DEFINITIONS	2
Section 1.01 <u>Terms Defined Above</u>	2
Section 1.02 <u>Definitions</u>	2
Section 1.03 <u>Terminology</u>	6
Section 1.04 <u>Other Defined Terms</u>	7
ARTICLE II GRANT OF LIEN AND SECURITY INTEREST	7
Section 2.01 <u>Grant of Lien</u>	7
Section 2.02 <u>Grant of Security Interest</u>	7
Section 2.03 <u>No Obligation of Mortgagee</u>	8
Section 2.04 <u>Fixture Filing</u>	8
Section 2.05 <u>Future Advances</u>	8
Section 2.06 <u>Advances Secured By Mortgage</u>	9
ARTICLE III ASSIGNMENT OF LEASES AND RENTS	9
Section 3.01 <u>Assignment</u>	9
Section 3.02 <u>Revocable License</u>	9
Section 3.03 <u>Enforcement of Leases</u>	10
Section 3.04 <u>Direction to Tenants</u>	10
Section 3.05 <u>Appointment of Attorney-in-Fact</u>	11
Section 3.06 <u>No Liability of Mortgagee</u>	11
Section 3.07 <u>Mortgagor's Indemnities</u>	12
Section 3.08 <u>No Modification of Mortgagor's Obligations</u>	12
ARTICLE IV REPRESENTATIONS AND WARRANTIES	13
Section 4.01 <u>Title to Mortgaged Property and Lien of this Mortgage</u>	13
Section 4.02 <u>Taxes and Other Payments</u>	13
Section 4.03 <u>Power to Create Lien and Security</u>	13
Section 4.04 <u>Loan and Loan Documents</u>	13
Section 4.05 <u>Compliance with Law</u>	13
Section 4.06 <u>No Condemnation</u>	14
Section 4.07 <u>Flood Zone</u>	14
ARTICLE V AFFIRMATIVE COVENANTS	14
Section 5.01 <u>Lien Status</u>	14
Section 5.02 <u>Payment of Impositions</u>	15
Section 5.03 <u>Repair</u>	15
Section 5.04 <u>Insurance and Application of Insurance Proceeds</u>	15
Section 5.05 <u>Condemnation and Application of Condemnation Proceeds</u>	16
Section 5.06 <u>Maintenance of Rights-of-Way, Easements Licenses and Other Rights</u>	17
Section 5.07 <u>Payment and Performance of Obligations</u>	17
Section 5.08 <u>Compliance with Permitted Liens and Other Obligations</u>	18
Section 5.09 <u>Additional Affirmative Covenants</u>	18

UNOFFICIAL COPY

ARTICLE VI	NEGATIVE COVENANTS	18
Section 6.01	<u>Use Violations</u>	18
Section 6.02	<u>Waste</u>	18
Section 6.03	<u>Alterations</u>	18
Section 6.04	<u>No Further Encumbrances</u>	18
Section 6.05	<u>Transfer Restrictions</u>	19
Section 6.06	<u>Loan and Financing Agreement; Additional Negative Covenants</u>	19
ARTICLE VII	EVENTS OF DEFAULT AND REMEDIES	19
Section 7.01	<u>Event of Default</u>	19
Section 7.02	<u>Acceleration</u>	19
Section 7.03	<u>Foreclosure and Sale</u>	19
Section 7.04	<u>Mortgagee's Agents</u>	20
Section 7.05	<u>Judicial Foreclosure</u>	21
Section 7.06	<u>Receiver</u>	21
Section 7.07	<u>Foreclosure for Installments</u>	21
Section 7.08	<u>Separate Sales</u>	21
Section 7.09	<u>Possession of Mortgaged Property</u>	22
Section 7.10	<u>Occupancy After Acceleration</u>	22
Section 7.11	<u>Remedies Cumulative, Concurrent and Nonexclusive</u>	22
Section 7.12	<u>No Release of Obligations</u>	23
Section 7.13	<u>Release of and Resort to Collateral</u>	23
Section 7.14	<u>Waiver of Redemption, Notice and Marshalling of Assets</u>	23
Section 7.15	<u>Discontinuance of Proceedings</u>	24
Section 7.16	<u>Application of Proceeds</u>	24
Section 7.17	<u>Uniform Commercial Code Remedies</u>	25
Section 7.18	<u>Indemnity</u>	25
ARTICLE VIII	MISCELLANEOUS	26
Section 8.01	<u>Instrument Construed as Mortgage, Etc.</u>	26
Section 8.02	<u>Performance at Mortgagor's Expense</u>	26
Section 8.03	<u>Survival of Obligations</u>	26
Section 8.04	<u>Further Assurances</u>	26
Section 8.05	<u>Notices</u>	26
Section 8.06	<u>No Waiver</u>	26
Section 8.07	<u>Mortgagee's Right to Perform; Mortgagee's Expenditures</u>	27
Section 8.08	<u>Successors and Assigns</u>	27
Section 8.09	<u>Severability</u>	27
Section 8.10	<u>Entire Agreement and Modification</u>	28
Section 8.11	<u>Applicable Law</u>	28
Section 8.12	<u>Satisfaction of Prior Encumbrance</u>	28
Section 8.13	<u>No Partnership</u>	28
Section 8.14	<u>Headings</u>	29
Section 8.15	<u>Release of Mortgage</u>	29
Section 8.16	<u>Limitation of Obligations with Respect to Mortgaged Property</u>	29
Section 8.17	<u>Inconsistency with Financing Agreement</u>	29
Section 8.18	<u>Limitation on Interest Payable</u>	30

UNOFFICIAL COPY

Section 8.19 Covenants To Run With the Land30
Section 8.20 Amount Secured; Last Dollar30
Section 8.21 Defense of Claims30
Section 8.22 Exculpation Provisions31
Section 8.23 Modifications to Financing Agreement31
Section 8.24 No Merger of Estates31

ARTICLE IX STATE SPECIFIC PROVISIONS31
Section 9.01 Illinois State-Specific Provisions.....31

EXHIBIT A - LEGAL DESCRIPTION

Property of Cook County Clerk's Office

UNOFFICIAL COPY

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

THIS MORTGAGE, SECURITY AGREEMENT, ASSIGNMENT OF RENTS AND LEASES AND FIXTURE FILING (hereinafter, together with any and all amendments, supplements, modifications or restatements of any kind, referred to as this "**Mortgage**"), is made as of October 23, 2012, by **HI-TEMP NORTHLAKE LLC**, a Delaware limited liability company, having its principal place of business at 201 Brookfield Parkway, Suite 102, Greenville, South Carolina 29607 ("**Mortgagor**"), in favor of **CERBERUS BUSINESS FINANCE, LLC**, a Delaware limited liability company, having an address at 875 Third Avenue, New York, New York 10022, as collateral agent and administrative agent (in such capacity, together with its successors and assigns, "**Mortgagee**") for itself and for each of the lenders and their respective successors and assigns which from time to time shall be a "**Lender**" under the Financing Agreement (as hereinafter defined).

RECITALS:

WHEREAS, Mortgagor is the owner and holder of fee simple title in and to the Land (as hereinafter defined) described on Exhibit A attached hereto and made a part hereof;

WHEREAS, BWT LLC, a Delaware limited liability company (the "**Parent**") as the initial term loan borrower and immediately upon consummation of the Acquisition, Harbor Metals LLC, a Delaware limited liability company ("**Harbor**"), Benton Harbor LLC, a Delaware limited liability company ("**Benton**"), Hi-Temp LLC, a Delaware limited liability company ("**Hi-Temp**"), Hi-Temp Northlake LLC, a Delaware limited liability company ("**Hi-Temp Northlake**"), Brazing Concepts LLC, a Delaware limited liability company ("**Brazing**"), PIHT LLC, a Delaware limited liability company ("**PIHT**"), B&W Heat Trading LLC, a Delaware limited liability company ("**B&W**"), B&W Canada LLC, a Delaware limited liability company ("**B&W Canada**"), Saginaw LLC, a Delaware limited liability company ("**Saginaw**"), each subsidiary of Harbor, Benton, Hi-Temp, Hi-Temp Northlake, Brazing, PIHT, B&W, B&W Canada, and Saginaw listed as a "US Borrower" on the signature pages of the Financing Agreement (as hereinafter defined) (together with Parent, Harbor, Benton, Hi-Temp, Hi-Temp Northlake, Brazing, PIHT, B&W, B&W Canada, Saginaw and each other Person (as hereinafter defined) that executes a joinder agreement and becomes a "US Borrower" under the Financing Agreement, each a "**US Borrower**" and collectively, the "**US Borrowers**"), B&W Heat Trading Canada ULC, an Alberta unlimited liability company (the "**Canadian Borrower**", together with the US Borrowers, collectively and, subject to the provisions of the Financing Agreement, jointly and severally, the "**Borrowers**"), BWT Holdings LLC, a Delaware limited liability company (the "**Ultimate Parent**"), each subsidiary of the Ultimate Parent listed as a "**Guarantor**" on the signature pages of the Financing Agreement (together with the Ultimate Parent, the Canadian Borrower and each other Person that executes a joinder agreement and becomes a "Guarantor" under the Financing Agreement or otherwise guaranties all or any part of the Obligations (as hereinafter defined), each a "**Guarantor**" and collectively, the "**Guarantors**"), the lenders from time to time party to the Financing Agreement (each a "**Lender**" and collectively, the "**Lenders**"), Mortgagee, as collateral agent for the Lenders (in such capacity, together with any successor collateral agent, the "**Collateral Agent**"), and Mortgagee, as administrative agent for

UNOFFICIAL COPY

the Lenders (in such capacity, together with any successor administrative agent, the "**Administrative Agent**") are parties to that certain Financing Agreement, dated as of the date hereof (as the same may be amended, modified or otherwise supplemented and in effect from time to time, the "**Financing Agreement**");

WHEREAS, pursuant to the Financing Agreement, the Lenders extended a credit facility of \$48,500,000.00 to the Borrowers consisting of (a) a revolving credit facility provided to the US Borrowers upon completion of the Acquisition (as defined in the Financing Agreement) in an aggregate principal amount of up to \$3,000,000.00 and (b) a term loan facility in an aggregate principal amount of \$45,500,000.00, which shall consist of (i) upon completion of the Acquisition (as defined herein), a term loan "A" in the principal amount of \$42,500,000 to the US Borrowers and (ii) a term loan "B" in the principal amount of \$3,000,000 to the Canadian Borrower ((a) and (b) collectively, the "**Loan**"); and

WHEREAS, as a condition to Mortgagee executing the Financing Agreement and making the Loan to Borrowers, Mortgagee is requiring that Mortgagor grant to Mortgagee, as Collateral Agent for the Lenders, a security interest in and a first mortgage lien upon the Mortgaged Property (as hereinafter defined), to secure the payment and performance of all of the Obligations (as defined in the Financing Agreement).

NOW, THEREFORE, in order to comply with the terms and conditions of the Financing Agreement and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Mortgagor hereby agrees with Mortgagee as follows:

ARTICLE I

DEFINITIONS

Section 1.01 Terms Defined Above. As used in this Mortgage, the terms defined in the introductory paragraph to this Mortgage and in the Recitals set forth above shall have the meanings respectively assigned to such terms in such paragraph and Recitals.

Section 1.02 Definitions. As used herein, the following terms shall have the following meanings:

"Applicable UCC" means the Uniform Commercial Code as presently in effect in the State or Commonwealth where the Mortgaged Property is located.

"Bankruptcy Code" means the United States Bankruptcy Code (11 U.S.C. § 101, et seq.), as amended, and any successor statute.

"Buildings" means any and all buildings, structures, garages, utility sheds, workrooms, air conditioning towers, open parking areas and other improvements, and any and all additions, alterations, betterments or appurtenances thereto, now or at any time hereafter situated, placed or constructed upon the Land or any part thereof.

"Default" has the meaning assigned to such term in the Financing Agreement.

UNOFFICIAL COPY

"Event of Default" has the meaning assigned to such term in Section 7.01 hereof.

"FEMA" has the meaning assigned to such term in Section 4.07 hereof.

"Final Maturity Date" means October 23, 2017 or such earlier date on which the Loan shall become due and payable in accordance with the terms of the Financing Agreement and the Loan Documents.

"Fixtures" means all materials, supplies, equipment, apparatus and other items of Personalty now or hereafter acquired by Mortgagor and incorporated into the Mortgaged Property so as to constitute fixtures under the Applicable UCC or otherwise under the laws of the state or commonwealth in which such items are located.

"Governmental Authority" means any nation or government, any Federal, state, province, territory, city, town, municipality, county, local or other political subdivision thereof or thereto and any department, commission, board, bureau, instrumentality, agency or other entity exercising executive, legislative, judicial, taxing, regulatory or administrative powers or functions of or pertaining to government.

"Governmental Requirements" means any and all present and future judicial decisions, statutes, rulings, rules, regulations, permits, certificates or ordinances of any Governmental Authority in any way applicable to Mortgagor or the Mortgaged Property, including, without limitation, the ownership, use, occupancy, possession, operation, maintenance, alteration, repair or reconstruction thereof. The term "Governmental Requirement" means any such Governmental Requirements.

"Impositions" means any and all real estate and personal property taxes; water, gas, sewer, electricity and other utility rates and charges; charges for any easement, license or agreement maintained for the benefit of the Mortgaged Property; and any and all other taxes, charges and assessments, whether general or special, ordinary or extraordinary, foreseen or unforeseen, of any kind and nature whatsoever which at any time prior to or after the execution hereof may be assessed, levied or imposed upon the Mortgaged Property or the ownership, use, occupancy, benefit or enjoyment thereof, together with any interest, costs or penalties that may become payable in connection therewith.

"Indemnitee" has the meaning assigned to such term in the Financing Agreement.

"Land" means the real property or interest therein described in Exhibit A attached hereto, and all rights, titles and interests appurtenant thereto.

"Leases" means any and all leases, master leases, subleases, licenses, concessions, tenancy, occupancy, rental, use or other agreements (whether written or oral, and whether now or hereafter in effect) which grant to third Persons a possessory interest in and to, or the right to use, all or any part of the Mortgaged Property, including the Land, the Buildings, the Fixtures and/or the Personalty, together with all security and other deposits made in connection therewith and any guarantee of the obligations of the landlord or the tenant thereunder, and all amendments, modifications, renewals, extensions and substitutions of the foregoing.

UNOFFICIAL COPY

"License" has the meaning assigned to such term in Section 3.02(a) hereof.

"Lien" has the meaning assigned to such term in the Financing Agreement.

"Loan Documents" means, collectively, the Financing Agreement, any Control Agreement, the Funds Flow Agreement, the Intercompany Subordination Agreement, the Seller Subordination Agreement, any Guaranty, any Security Agreement, any Joinder, this Mortgage, the Collateral Assignment and any other agreement, certificate, instrument, and other document executed and delivered pursuant hereto or thereto or otherwise evidencing or securing the Loan or the Obligations or otherwise included in the definition of the term "Loan Documents" in the Financing Agreement.

"Losses" means all obligations, damages, claims, causes of action, costs, fines, fees, charges, penalties, deficiencies, losses, diminutions in value, expenses (including, without limitation, court costs, fees and expenses of attorneys, accountants, consultants and other experts) and other liabilities, and, with respect to any indemnity, includes all attorneys' fees and expenses incurred by the Indemnitee in connection with the enforcement and collection of such indemnity. The term "Loss" means any such Losses.

"Mortgaged Property" means all of Mortgagor's right, title, interest and estate, whether now owned or hereafter acquired, in and to the Land, the Buildings, the Fixtures and the Personalty, together with:

- (i) all rights, privileges, tenements, hereditaments, rights-of-way, easements, air rights, development rights or credits, zoning rights, appendages and appurtenances in anywise appertaining thereto, and all right, title and interest of Mortgagor in and to any streets, ways, alleys, strips or gores of land adjoining the Land or any part thereof, and all right, title and interest of Mortgagor in and to all rights, royalties and profits with respect to all minerals, coal, oil, gas and other substances of any kind or character on or underlying the Land, together with all right, title and interest of Mortgagor in and to all water and water rights (whether riparian, appropriative or otherwise and whether or not appurtenant);
- (ii) all rights of Mortgagor (but not its obligations) under any contracts and agreements, relating to the Land, the Buildings, the Fixtures or the Personalty, including, without limitation, construction contracts and architectural agreements;
- (iii) all of Mortgagor's right, title and interest in and to all permits, licenses, franchises, certificates, authorizations, consents, approvals and other rights and privileges (each, a "**Permit**") obtained in connection with the Land, the Buildings, the Fixtures or the Personalty or the use or operation thereof, to the extent assignable;
- (iv) all of Mortgagor's right, title and interest in and to all plans and specifications, designs, schematics, drawings and other information,

UNOFFICIAL COPY

materials and matters heretofore or hereafter prepared relating to the Land, the Buildings, the Fixtures or the Personalty, to the extent assignable;

- (v) all of Mortgagor's right, title and interest in and to all proceeds arising from or by virtue of the sale, lease or other disposition of the Land, the Buildings, the Fixtures or the Personalty or any part thereof or any interest therein or from the operation thereof, including without limitation, all insurance proceeds with respect thereto;
- (vi) all of Mortgagor's right, title and interest in and to all Leases now or hereafter in effect and all Rents, royalties, bonuses, issues, profits, revenues or other benefits arising from or attributable to the Land, the Buildings, the Fixtures or the Personalty;
- (vii) all of Mortgagor's right, title and interest in and to all betterments, additions, alterations, appurtenances, substitutions, replacements and revisions to the Land, the Buildings, the Fixtures or the Personalty and all reversions and remainders relating thereto;
- (viii) all of Mortgagor's right, title and interest in and to any awards, remuneration, settlements or compensation now or hereafter made by any Governmental Authority pertaining to the Land, the Buildings, the Fixtures or the Personalty, including those arising from or attributable to any vacation of, or change of grade in, any streets affecting the Land or the Buildings;
- (ix) all of Mortgagor's right, title and interest in and to any and all other security and collateral of any nature whatsoever, whether now or hereafter given, for the repayment, performance and discharge of the Obligations (as hereinafter defined);
- (x) all of Mortgagor's right, title and interest in and to all awards, payments, and proceeds of conversion, whether voluntary or involuntary, of any of the Land, the Buildings, the Fixtures, the Personalty or any of the property and rights described in the foregoing clauses (i) through (ix) including without limitation, all insurance, condemnation and tort claims, refunds of real estate taxes and assessments, rent claims and other obligations dischargeable in cash or cash equivalents, to the extent assignable;
- (xi) all options to purchase or lease the Land or the Buildings or any portion thereof or interest therein, or any other rights, interests or greater estates in the rights and properties comprising the Mortgaged Property now owned or hereafter acquired by Mortgagor;
- (xii) any interests, estates or other claims of every name, kind or nature, both in law and in equity, which Mortgagor now has or may acquire in the Land and the Buildings, or other rights, interests or properties comprising the Mortgaged Property now owned or hereafter acquired; and

UNOFFICIAL COPY

- (xiii) all other property and rights of Mortgagor of every kind and character relating to and/or used or to be used in connection with the foregoing, and all proceeds and products of any of the foregoing.

As used in this Mortgage, the term "**Mortgaged Property**" shall be expressly defined as meaning all or, where the context permits or requires, any portion of the above, and all or, where the context permits or requires, any interest therein.

"Obligations" has the meaning assigned to such term in Exhibit B.

"Permitted Liens" has the meaning assigned to such term in the Financing Agreement.

"Person" has the meaning assigned to such term in the Financing Agreement.

"Personalty" means all of Mortgagor's right, title and interest in and to all furniture, furnishings, equipment, machinery, goods, general intangibles, money, insurance proceeds, contract rights, option rights, inventory, together with all refundable, returnable or reimbursable fees, deposits or other funds or evidences of credit or indebtedness deposited by or on behalf of Mortgagor with any Governmental Authority, boards, corporations, providers of utility services, public or private (including, without limitation, all refundable, returnable or reimbursable tap fees, utility deposits, commitment fees and development costs, and all other personal property of any kind or character), in each case, to the extent assignable, and including, without limitation, all such property that is now or hereafter located or to be located upon, within or about the Land and the Buildings, or which are or hereafter used in or related to the planning, development, financing or operation of the Mortgaged Property, together with all accessories, replacements and substitutions thereto or therefor and the proceeds thereof.

"Post-Default Rate" has the meaning assigned to such term in Exhibit B.

"Principal Balance" has the meaning assigned to such term in Section 7.02 hereof.

"Rents" means all of the rents, revenues, income, proceeds, issues, profits, security and other types of deposits (after Mortgagor acquires title thereto), and other benefits paid or payable by parties (other than Mortgagor) for using, leasing, licensing, possessing, operating from, residing in, benefiting from or otherwise enjoying all or any part of the Land, the Buildings, the Fixtures and/or the Personalty.

Section 1.03 Terminology. Except as otherwise provided herein:

(a) references to Articles and Sections shall mean the corresponding Article or Section of this Mortgage;

(b) words used herein in the singular, where the context so permits, shall be deemed to include the plural and vice versa, and the definitions of words used in the singular herein shall apply to such words when used in the plural where the context so permits and vice versa; and

UNOFFICIAL COPY

(c) the words "herein," "hereof," "hereunder," and other words of similar import when used in this Mortgage refer to this Mortgage as a whole, and not to any particular Article or Section.

Section 1.04 Other Defined Terms. Any capitalized term used in this Mortgage and not otherwise defined herein shall have the meaning assigned to such term in the Financing Agreement.

ARTICLE II

GRANT OF LIEN AND SECURITY INTEREST

Section 2.01 Grant of Lien. To secure the full and timely payment of the Loan, as may be evidenced by one or more promissory notes, and to secure the full and timely payment, performance and discharge of all other Obligations, the covenants and agreements herein contained and contained in the Loan Documents, including, but not limited to the Financing Agreement, and all other sums with interest thereon advanced in accordance herewith to protect the security of this Mortgage, Mortgagor hereby irrevocably GRANTS, REMISES, RELEASES, BARGAINS, SELLS, ASSIGNS, TRANSFERS, MORTGAGES, AND WARRANTS, CONVEYS and CONFIRMS unto Mortgagee and Mortgagee's successors and assigns hereunder, WITH POWER OF SALE and right of entry and possession, for the use and benefit of Mortgagee, as Collateral Agent and Administrative Agent for the benefit of the Lenders and their successors and assigns, all right, title, interest and estate in, to and under the Mortgaged Property, subject, however, to the Permitted Liens; TO HAVE AND TO HOLD the Mortgaged Property unto Mortgagee and Mortgagee's successors and assigns hereunder, for the benefit of the Lenders and their successors and assigns, subject to the terms and conditions of this Mortgage, with POWER OF SALE, forever, and Mortgagor does hereby bind itself, its successors and assigns to WARRANT AND FOREVER DEFEND the title to the Mortgaged Property unto Mortgagee against every Person whomsoever lawfully claiming or to claim the same or any part thereof, subject, however, to the Permitted Liens and the terms and conditions contained herein. The Liens, estates and rights granted by this Mortgage shall remain fully in effect and shall not cease and terminate until all the Obligations have been fully paid, performed and discharged in accordance with the Financing Agreement and the other Loan Documents and the Loan has been repaid in full.

Section 2.02 Grant of Security Interest. This Mortgage shall be construed as a mortgage on the Land and the Buildings and it shall also constitute and serve as a "**security agreement**" within the meaning of, and shall constitute a first and prior security interest under, the Applicable UCC with respect to the Personalty and the Fixtures. To this end, Mortgagor by these presents does GRANT, BARGAIN, CONVEY, ASSIGN, SELL, TRANSFER and SET OVER unto Mortgagee, as Collateral Agent and Administrative Agent, for the benefit of the Lenders and their successors and assigns, a security interest in all of Mortgagor's right, title and interest in, to and under the Personalty and the Fixtures, to secure the full and timely payment, performance and discharge of the Obligations subject to the terms and conditions contained herein. Mortgagor hereby consents to Mortgagee filing and recording financing statements (and continuations thereof) with the appropriate filing and recording offices in order to perfect (and maintain the perfection of) the security interests granted herein.

UNOFFICIAL COPY

Section 2.03 No Obligation of Mortgagee. The assignment and security interest herein granted to Mortgagee shall not be deemed or construed to constitute Mortgagee as a mortgagee-in-possession of the Mortgaged Property, obligate Mortgagee to lease the Mortgaged Property or attempt to do the same, or to take any action, incur any expense or perform or discharge any obligation, duty or liability whatsoever.

Section 2.04 Fixture Filing. Without in any manner limiting the generality of any of the other provisions of this Mortgage: (a) some portions of the goods described or to which reference is made herein are or are to become fixtures on the Land described or to which reference is made herein or on Exhibit A attached to this Mortgage; (b) this Mortgage is to be filed of record in the real estate records as a financing statement and shall constitute a "fixture filing" for purposes of the Applicable UCC; and (c) Mortgagor is the record owner of the real estate or interests in the real estate constituting the Mortgaged Property hereunder. Information concerning the security interest herein granted may be obtained at the addresses set forth on the first page hereof. The addresses of the Secured Party (Mortgagee) and of the Debtor (Mortgagor) are set forth on the first page hereof. In that regard, the following information is provided:

<u>Name of Debtor:</u>	Hi-Temp Northlake LLC
<u>Type of Organization:</u>	limited liability company
<u>State of Organization:</u>	Delaware
<u>Address of Debtor:</u>	201 Brookfield Parkway, Suite 102, Greenville, South Carolina 29607
<u>FEIN of Debtor:</u>	71-1005565
<u>Organizational ID Number of Debtor:</u>	4165051
<u>Name of Secured Party:</u>	Cerberus Business Finance, LLC
<u>Address of Secured Party:</u>	875 Third Avenue, New York, New York 10022

Section 2.05 Future Advances. This Mortgage is given to secure Mortgagor's Obligations under, or in respect of, the Financing Agreement and any other Loan Document to which Mortgagor is a party and shall secure not only Obligations with respect to presently existing indebtedness or other extensions of credit under the foregoing documents and agreements but also any and all other indebtedness now owing which may hereafter be owing by Mortgagor to Mortgagee, the Lenders or their successors or assigns or any of them pursuant to the Financing Agreement and any other Loan Document to which Mortgagor is a party, however incurred, whether interest, discount or otherwise, and whether the same shall be deferred, accrued or capitalized, including future advances and re-advances pursuant to the Financing Agreement or other Loan Documents, whether such advances are obligatory or to be made at the option of the Lender, or otherwise, to the same extent as if such future advances or re-advances were made on the date of the execution of this Mortgage. The lien of this Mortgage shall be valid as to all indebtedness secured hereby, including future advances and re-advances, from the time

UNOFFICIAL COPY

of its filing for record in the recorder's office of the county in which the Mortgaged Property is located. This Mortgage is intended to and shall be valid and have priority over all subsequent liens and encumbrances, including statutory liens, excepting solely taxes and assessments levied on the real estate, to the extent of the maximum amount secured hereby, and Permitted Liens related thereto.

Section 2.06 Advances Secured By Mortgage. Upon failure of Mortgagor to comply with any covenants and agreements hereunder as to the payment of taxes, assessments, insurance premiums, repairs, protection of the Mortgaged Property or Mortgagee's lien thereon, and other charges and the costs of procurement of title evidence and insurance as aforesaid, Mortgagee may, at its option, pay the same, and any sums so paid by Mortgagee, together with the reasonable fees of counsel employed by Mortgagee in consultation and in connection therewith, shall be charged against Mortgagor, shall be immediately due and payable by Mortgagor, shall bear interest at the Post-Default Rate and shall be a lien upon the Mortgaged Property and be secured by the Mortgage and may be collected in the same manner as the principal debt hereby secured.

ARTICLE III

ASSIGNMENT OF LEASES AND RENTS

Section 3.01 Assignment. For Ten and No/100 Dollars (\$10.00) and other good and valuable consideration, including the indebtedness evidenced by the Financing Agreement, the receipt and sufficiency of which are hereby acknowledged and confessed, Mortgagor has presently, absolutely and irrevocably GRANTED, BARGAINED, SOLD, ASSIGNED, TRANSFERRED, CONVEYED and CONFIRMED, and by these presents does presently, absolutely and irrevocably GRANT, BARGAIN, SELL, ASSIGN, TRANSFER, CONVEY AND CONFIRM, unto Mortgagee and Mortgagee's successors and assigns hereunder, as Collateral Agent and Administrative Agent, for the benefit of the Lenders and their successors and assigns, as security for the payment, performance and discharge of the Obligations, all of the Leases and Rents (if any), subject only to the Permitted Liens applicable thereto and the License (as hereinafter defined); TO HAVE AND TO HOLD the Leases and the Rents unto Mortgagee and Mortgagee's successors and assigns hereunder, forever, and Mortgagor does hereby bind itself, its successors and assigns to warrant and forever defend the title to the Leases and the Rents unto Mortgagee against every Person whomsoever lawfully claiming or to claim the same or any part thereof; provided, however, that if Mortgagor shall pay (or cause to be paid) and perform and discharge (or cause to be performed and discharged) all of the Obligations on or before the date on which the same are to be paid, performed and discharged in accordance with the Financing Agreement and the other Loan Documents, then this assignment shall terminate, and all rights, titles and interests conveyed pursuant to this assignment shall become vested in Mortgagor.

Section 3.02 Revocable License.

(a) Mortgagee hereby grants to Mortgagor a revocable license (the "**License**"), nonexclusive with the rights of Mortgagee reserved in Sections 3.02(b), 3.04 and 3.05 hereof, to exercise, enjoy and use all incidences of the status of a lessor under the Leases

UNOFFICIAL COPY

and the Rents, including, without limitation, the right to collect, demand, sue for, attach, levy, recover and receive the Rents and to give proper receipts, releases and acquittances therefor. Mortgagor hereby agrees to receive and hold all Rents to be applied, and to apply the Rents so collected, except to the extent otherwise provided in the Financing Agreement, first to the payment, performance and discharge of the Obligations and then to the payment of the Impositions. Thereafter, Mortgagor may use the balance of the Rents collected in any manner not inconsistent with the Loan Documents.

(b) If an Event of Default shall occur and be continuing, the License shall immediately and automatically terminate without the necessity of any action by Mortgagee or any other Person, and Mortgagee shall have the right in such event to exercise the rights and remedies provided under this Mortgage or otherwise available to Mortgagee under applicable law. Upon demand by Mortgagee at any time that an Event of Default shall have occurred Mortgagor shall promptly pay to Mortgagee all security deposits under the Leases and all Rents allocable to any period commencing from and after the occurrence of such Event of Default. Any Rents received hereunder by Mortgagee shall be applied and disbursed to the payment, performance and discharge of the Obligations, subject to the terms of the Financing Agreement; provided, however, that, subject to any applicable requirement of law, any security deposits actually received by Mortgagee shall be held, applied and disbursed as provided in the applicable Leases.

Section 3.03 Enforcement of Leases. Mortgagor shall (a) submit any and all proposed Leases (including, without limitation, subleases provided to Mortgagor for approval) to Mortgagee for approval prior to the execution thereof or consent thereto, as applicable; (b) duly and punctually perform and comply with any and all representations, warranties, covenants and agreements expressed as binding upon the lessor under any Lease; (c) maintain each Lease in full force and effect during the term thereof; (d) provide Mortgagee with prompt notice of each notice of default sent to a tenant under a Lease, provide Mortgagee with prompt notice of each notice of default received from (or relating to) a tenant under a Lease, and otherwise promptly notify Mortgagee of any and all conditions or facts, as and when known to Mortgagor, that reasonably indicate that a material default or termination of a Lease may occur (other than by reason of the expiration of the term of such Lease); (e) appear in and defend any action or proceeding in any manner connected with any of the Leases; (f) deliver to Mortgagee true and complete copies of all Leases; and (g) deliver to Mortgagee all such further information, and execute and deliver to Mortgagee such further assurances and assignments, with respect to the Leases as Mortgagee may from time to time request. Without Mortgagee's prior written consent, Mortgagor shall not (i) do or knowingly permit to be done anything to impair the value of any of the Leases; (ii) except for security or similar deposits, collect any of the Rent more than one (1) month in advance of the time when the same becomes due under the terms of any Lease; (iii) discount any future accruing Rents; (iv) amend, modify, accept the surrender of or terminate any of the Leases; or (v) assign or grant a security interest in or to the License or any of the Leases or Rents.

Section 3.04 Direction to Tenants. Upon and at any time following the occurrence and during the continuance of an Event of Default, Mortgagor hereby authorizes and directs, and shall, at the direction of Mortgagee, further authorize and direct, in writing, the tenant under each Lease to pay directly to, or as directed by, Mortgagee all Rents accruing or due

UNOFFICIAL COPY

under its Lease, without proof to the tenant of the occurrence and continuance of such Event of Default. Mortgagor hereby authorizes the tenant under each Lease to rely upon and comply with any notice or demand from Mortgagee for payment of Rents to Mortgagee, and Mortgagor shall have no claim against any tenant for Rents paid by such tenant to Mortgagee pursuant to such notice or demand. All Rents actually collected by Mortgagee pursuant to this Section 3.04 shall be applied in accordance with the Financing Agreement.

Section 3.05 Appointment of Attorney-in-Fact.

(a) Mortgagor hereby constitutes and appoints Mortgagee the true and lawful attorney-in-fact, coupled with an interest, of Mortgagor and Mortgagor hereby confers upon Mortgagee the right, in the name, place and stead of Mortgagor, to, upon the occurrence and during the continuance of an Event of Default, demand, sue for, attach, levy, recover and receive any of the Rents and any premium or penalty payable upon the exercise by any third Person under any Lease of a privilege of cancellation originally provided in such Lease and to give proper receipts, releases and acquittances therefor and, after deducting expenses of collection, to apply the net proceeds as provided in the Financing Agreement. Mortgagor hereby authorizes and directs any such third Person to deliver such payment to Mortgagee in accordance with this Article III, and Mortgagor hereby ratifies and confirms all that its said attorney-in-fact, the Mortgagee, shall do or cause to be done in accordance with this Mortgage and by virtue of the powers granted hereby. The foregoing appointment is irrevocable and continuing, and such rights, powers and privileges shall be exclusive in Mortgagee, and its successors and assigns, so long as any part of the Obligations remains unpaid or unperformed and undischarged.

(b) Mortgagor hereby constitutes and appoints Mortgagee the true and lawful attorney-in-fact, coupled with an interest, of Mortgagor and Mortgagor hereby confers upon Mortgagee the right, in the name, place and stead of Mortgagor, to subject and subordinate at any time and from time to time under any Lease or any part thereof to the lien, assignment and security interest of this Mortgage and to the terms hereof, or to any other mortgage, deed of trust, assignment or security agreement, or to any ground lease or surface lease, with respect to all or a portion of the Mortgaged Property, or to request or require such subordination, in each case, where such reservation, option or authority was reserved to Mortgagor under any such Lease, or in any case where Mortgagor otherwise would have the right, power or privilege so to do. The foregoing appointment is irrevocable and continuing, and such rights, powers and privileges shall be exclusive in Mortgagee, and its successors and assigns, so long as any part of the Obligations remains unpaid or unperformed and undischarged. Mortgagor hereby represents and warrants that it has not at any time prior to the date hereof exercised (or appointed any Person as attorney-in-fact to exercise) any of the rights described in this Section 3.05(b), and Mortgagor hereby covenants not to exercise (or allow or appoint any other Person as attorney-in-fact to exercise) any such right, nor (except at Mortgagee's written request) to subordinate any such Lease to the lien of this Mortgage or to any other mortgage, deed of trust, assignment or security agreement or to any ground lease or surface lease.

Section 3.06 No Liability of Mortgagee. Neither the acceptance hereof nor the exercise of the rights and remedies hereunder nor any other action on the part of Mortgagee or any Person exercising the rights of Mortgagee or any Lender hereunder shall be construed to: (a) be an assumption by Mortgagee or any such Person or to otherwise make Mortgagee or such

UNOFFICIAL COPY

Person liable or responsible for the performance of any of the obligations of Mortgagor under or with respect to the Leases or for any Rent, security deposit or other amount delivered to Mortgagor, provided that Mortgagee or any such Person exercising the rights of Mortgagee shall be accountable for any Rents, security deposits or other amounts actually received by Mortgagee or such Person, as the case may be; or (b) obligate Mortgagee or any such Person to take any action under or with respect to the Leases or with respect to the Mortgaged Property, to incur any expense or perform or discharge any duty or obligation under or with respect to the Leases or, with respect to the Mortgaged Property, to appear in or defend any action or proceeding relating to the Leases or the Mortgaged Property, to constitute Mortgagee as a mortgagee-in-possession (unless Mortgagee actually enters and takes possession of the Mortgaged Property), or to be liable in any way for any injury or damage to Persons or property sustained by any Person in or about the Mortgaged Property, other than to the extent caused by the willful misconduct or gross negligence of Mortgagee or any Person exercising the rights of Mortgagee hereunder.

Section 3.07 Mortgagor's Indemnities. Mortgagor hereby agrees to protect, indemnify and hold harmless Mortgagee and each Indemnitee from and against any and all Losses which Mortgagee or any such Indemnitee may incur under or by reason of this Article III, or for any action taken by Mortgagee or any such Indemnitee hereunder, or by reason or in defense of any and all claims and demands whatsoever which may be asserted against Mortgagee or any such Indemnitee arising out of the Leases, including, without limitation, any claim by any third Person for credit on account of Rents paid to and received by Mortgagor, but not delivered to Mortgagee or its agents, representatives or employees, for any period under any Lease more than one (1) month in advance of the due date thereof. The foregoing indemnity shall include, in any case, such Loss as may result from the ordinary negligence of Mortgagee or any such Indemnitee, but not any such Loss that is caused by the gross negligence or willful misconduct of Mortgagee or any such Indemnitee. **WITHOUT LIMITATION, THE FOREGOING INDEMNITY SHALL APPLY TO MORTGAGEE AND EACH INDEMNITEE WITH RESPECT TO LOSSES WHICH IN WHOLE OR IN PART ARE CAUSED BY OR ARISE OUT OF ANY NEGLIGENT ACT OR OMISSION OF MORTGAGEE, SUCH INDEMNITEE OR ANY OTHER PERSON.** In the event that Mortgagee or any Indemnitee incurs any Losses covered by the indemnity set forth in this Section 3.07, the amount thereof, including, without limitation, reasonable attorneys' fees, with interest thereon at the Post-Default Rate shall be payable by Mortgagor to Mortgagee within seven (7) days after demand thereof, and shall be secured hereby and by all other security for the payment and performance of the Obligations, including, without limitation, the lien and security interest of this Mortgage and shall be subject to the provisions of Section 8.07(b) hereof. This Section 3.07, and the liabilities of Mortgagor set forth herein, shall survive the termination of this Mortgage and the payment and performance of the Obligations.

Section 3.08 No Modification of Mortgagor's Obligations. Nothing herein contained shall modify or otherwise alter the obligation of Mortgagor to make prompt payment of all Obligations as and when the same become due, regardless of whether the Rents described in this Article III are sufficient to pay the Obligations, and the security provided to Mortgagee pursuant to this Article III shall be cumulative of all other security of any and every character now or hereafter existing to secure payment of the Obligations.

UNOFFICIAL COPY

ARTICLE IV

REPRESENTATIONS AND WARRANTIES

Mortgagor hereby unconditionally represents and warrants to Mortgagee as follows:

Section 4.01 Title to Mortgaged Property and Lien of this Mortgage. Mortgagor has good, marketable and indefeasible fee simple title to the Land and the Buildings, and has good, marketable and indefeasible fee title to the Fixtures, the Personalty and the other Mortgaged Property. The Mortgaged Property is free and clear of any and all Liens, charges, encumbrances, security interests, and adverse claims whatsoever other than Permitted Liens which in the aggregate do not materially and adversely affect the value, operation or use of any of the Mortgaged Property.

Section 4.02 Taxes and Other Payments. Mortgagor has filed all federal, state, commonwealth, county, municipal and city income and other tax returns and other reports required to have been filed by it as of the date hereof and has paid all taxes, assessments and other Impositions imposed upon Mortgagor or the Mortgaged Property and which have become due pursuant to such returns or pursuant to any assessments or charges received by it as of the date hereof, and Mortgagor does not know of any basis for any additional assessment or charge in respect of any such taxes or other Impositions. Mortgagor has paid in full all sums owing or claimed for labor, material, supplies, personal property (whether or not forming a Fixture hereunder) and services of every kind and character used, furnished or installed in or on the Mortgaged Property that are now due and owing and no claim for same exists or will be permitted to be created, except such claims as may arise in the ordinary course of business and that are not yet past due.

Section 4.03 Power to Create Lien and Security. Mortgagor has full power and lawful authority to grant, bargain, sell, assign, transfer, mortgage and convey a Lien and security interest in all of the Mortgaged Property in the manner and form herein provided and without obtaining the authorization, approval, consent or waiver of any grantor, lessor, sublessor, Governmental Authority or other Person whomsoever.

Section 4.04 Loan and Loan Documents. Mortgagor has received a copy of and is fully familiar with the terms and provisions of the Financing Agreement and the other Loan Documents. All representations and warranties made by or on behalf of Mortgagor in the Financing Agreement and the other Loan Documents are incorporated herein by reference and are hereby made by Mortgagor as to itself and the Mortgaged Property as though such representations and warranties were set forth at length herein as the representations and warranties of Mortgagor.

Section 4.05 Compliance with Law. All of the improvements on the Land: (i) comply with all material requirements of all applicable laws and ordinances with respect to zoning, subdivision, construction, building and land use, including, without limitation, requirements with respect to parking, access and certificates of occupancy (and similar certificates) and (ii) comply with, and shall remain in compliance with, all applicable health, fire

UNOFFICIAL COPY

and building codes. Except as shown on the surveys delivered to Mortgagee in connection with the Loan: (a) all of the Buildings lie wholly within the boundaries and building restriction lines of the Land, (b) no improvements on adjoining properties encroach upon the Land, and no easements or other encumbrances upon the Land encroach upon or under any of the Buildings or any portion of the Mortgaged Property, and (c) all of the Buildings and the use of the Mortgaged Property materially comply with, and shall remain in material compliance with, all applicable statutes, rules, regulations and private covenants now or hereafter relating to the ownership, construction, use or operation of the Mortgaged Property, including all applicable statutes, rules and regulations pertaining to requirements for equal opportunity, anti-discrimination, fair housing, environmental protection, zoning and land use. All certifications, permits, licenses and approvals, including, without limitation, certificates of completion and occupancy permits required for the legal use, occupancy and operation of the Mortgaged Property have been obtained and are in full force and effect. Mortgagor has not received any notice of, or other communication with respect to, an alleged violation with respect to any of the foregoing.

Section 4.06 No Condemnation. No part of any property subject to this Mortgage has been taken in condemnation or other like proceeding nor, to Mortgagor's knowledge, is any proceeding pending, threatened or known to be contemplated for the partial or total condemnation or taking of the Mortgaged Property.

Section 4.07 Flood Zone. The Mortgaged Property is not located in an area identified by the Federal Emergency Management Agency ("FEMA") as having special flood hazards or if the Land or any part thereof is identified by FEMA as an area having special flood hazards (including, without limitation, those areas designated as Zone A or Zone V), then Mortgagor has obtained the insurance required under the Financing Agreement and Section 5.04(a)(v) of this Mortgage.

ARTICLE V

AFFIRMATIVE COVENANTS

Mortgagor hereby unconditionally covenants and agrees with Mortgagee as follows:

Section 5.01 Lien Status. Except as otherwise expressly permitted in the Financing Agreement, Mortgagor shall not (i) place, or permit to be placed, on the Mortgaged Property, or any portion thereof or interest therein, with any other Lien or security interest of any nature whatsoever (statutory, constitutional, contractual or otherwise), other than Permitted Liens, or (ii) otherwise mortgage, hypothecate or encumber the Mortgaged Property, or any portion thereof or interest therein, with any other Lien or security interest of any nature whatsoever (statutory, constitutional, contractual or otherwise), other than Permitted Liens. If any such Lien or security interest (other than a Permitted Lien) is asserted against the Mortgaged Property, Mortgagor shall promptly, at its own cost and expense, (a) pay the underlying claim in full (except for so long as such claim is being contested by Mortgagor in good faith and as and to the extent permitted, in accordance with the terms of the Financing Agreement) or take such other action as may be necessary to cause the same to be released and discharged of record and otherwise, and (b) within five (5) days after the date on which such Lien or security interest is so

UNOFFICIAL COPY

asserted, give Mortgagee notice of such Lien or security interest. Such notice shall specify who is asserting such Lien or security interest and shall detail the origin and nature of the underlying claim giving rise to such asserted Lien or security interest.

Section 5.02 Payment of Impositions. Mortgagor shall duly pay and discharge, or cause to be paid and discharged, all Impositions not later than the due date thereof, or the day on which any fine, penalty, interest or cost may be added thereto or imposed, or the day on which any Lien may be filed for the nonpayment thereof (if such day is used to determine the due date of the respective item); provided, however, that Mortgagor may, if permitted by applicable law and if such installment payment would not create or permit the filing of an additional Lien against the Mortgaged Property, pay the Impositions in installments. Notwithstanding the foregoing, Mortgagor may in good faith, by appropriate proceedings and upon notice to Mortgagee, contest the validity, applicability or amount of any asserted tax or assessment, subject to and in accordance with the applicable provisions of the Financing Agreement.

Section 5.03 Repair. Mortgagor shall keep the Mortgaged Property in good working order and condition (reasonable wear and tear excepted), and shall make all repairs, replacements and improvements hereof and thereto, interior and exterior, structural and non-structural, ordinary and extraordinary, which are necessary to keep the same in such order and condition. Mortgagor shall also use reasonable efforts to prevent any act or occurrence which might impair the value or usefulness of the Mortgaged Property for its intended usage.

Section 5.04 Insurance and Application of Insurance Proceeds.

(a) During the term of this Mortgage, Mortgagor, at its sole cost and expense, shall maintain, or cause to be maintained all insurance on the Mortgaged Property that is required to be maintained under the Financing Agreement. In addition, Mortgagor, at its sole cost and expense, shall maintain or cause to be maintained such other insurance as may, from time to time, be reasonably required by Mortgagee in order to protect its interests in the Mortgaged Property.

(b) All such insurance policies with respect to the Mortgaged Property shall contain a standard, non-contributory mortgagee clause naming Mortgagee, and its successors and assigns, as an additional insured under all liability insurance policies, as the first mortgagee and loss payee on all property insurance policies, and as the sole loss payee on all rental loss or business interruption insurance policies. Mortgagor shall not take out separate insurance with respect to the Mortgaged Property concurrent in form or contributing in the event of loss with that required to be maintained hereunder or under the Financing Agreement unless Mortgagee is named as an additional insured thereon under a standard mortgagee clause acceptable to Mortgagee and each such policy is otherwise in form and substance acceptable to Mortgagee.

(c) In the event of the foreclosure of this Mortgage, or in the event of any transfer of title to the Mortgaged Property, or any part thereof, by foreclosure sale or by power of sale or deed in lieu of foreclosure, the purchaser of the Mortgaged Property, or such part thereof, shall succeed to all of Mortgagor's rights with respect to the Mortgaged Property,

UNOFFICIAL COPY

including, without limitation, any rights to unexpired, unearned or returnable insurance premiums, subject to limitations on the assignment of blanket policies, but limited to such rights as relate to the Mortgaged Property or such part thereof. If Mortgagee acquires title to the Mortgaged Property, or any part thereof, in any manner, Mortgagee shall thereupon (as between Mortgagor and Mortgagee) become the sole and absolute owner of the insurance policies with respect to the Mortgaged Property, and all insurance proceeds payable thereunder with respect to the Mortgaged Property, with the sole right to collect and retain all unearned or returnable premiums thereon with respect to the Mortgaged Property, or such part thereof, if any.

(d) If any damage to, destruction or loss of or other casualty with respect to any of the Mortgaged Property shall occur, Mortgagor shall file and prosecute its claim or claims for any insurance proceeds in good faith and with due diligence and cause the same to be collected and paid over to Mortgagee, and Mortgagor hereby irrevocably authorizes and empowers Mortgagee, in the name of Mortgagor or otherwise, to collect and receipt for any such insurance proceeds and to adjust any insurance claims and to file and prosecute such claim or claims, and although it is hereby expressly agreed that the same shall not be necessary in any event, Mortgagor shall, upon demand of Mortgagee, make, execute and deliver any and all assignments and other instruments sufficient for the purpose of assigning any such insurance proceeds to Mortgagee, free and clear of any Liens whatsoever. Mortgagor hereby irrevocably appoints Mortgagee as Mortgagor's attorney-in-fact for each such purpose (which appointment is coupled with an interest) and authorizes any Person to act upon the foregoing appointment.

(e) Following any damage to, destruction or loss of or other casualty with respect to any of the Mortgaged Property, Mortgagee shall apply the entire amount of any insurance proceeds in accordance with the provisions of the Financing Agreement or, if there is no provision contained in the Financing Agreement governing how the same are to be applied, then Mortgagee shall apply the entire amount thereof to the payment of the Obligations, whether or not then due and payable, in such manner and order as Mortgagee may elect. In all events, unless expressly provided to the contrary in the Financing Agreement, Mortgagor hereby covenants and agrees to promptly commence and to diligently prosecute the restoration of the Mortgaged Property upon the occurrence of any casualty loss affecting the Mortgaged Property, without regard to the availability or adequacy of insurance proceeds and at its sole cost and expense, but in all events in a manner approved by Mortgagee. Notwithstanding any damage to, destruction or loss of or other casualty with respect to the Mortgaged Property, Mortgagor shall continue to pay the Obligations at the time and in the manner provided for in the Financing Agreement and the other Loan Documents until the Obligations have been paid in full. If the Mortgaged Property is sold, through foreclosure or otherwise, prior to the receipt by Mortgagee of such insurance proceeds, Mortgagee shall have the right, whether or not a deficiency judgment on any Loan Document shall have been sought, recovered or denied, to receive such insurance proceeds, or a portion thereof sufficient to pay the then unpaid Obligations, whichever is less.

Section 5.05 Condemnation and Application of Condemnation Proceeds.

(a) Promptly upon its obtaining knowledge of the institution or the threatened institution of any proceeding for the condemnation or other taking of the Mortgaged Property, or any portion thereof or interest therein, Mortgagor shall, if required by the terms of the Financing Agreement, notify Mortgagee of such proceeding. Mortgagor shall then, if

UNOFFICIAL COPY

requested by Mortgagee, file or defend its claim thereunder and prosecute same with due diligence to its final disposition and shall cause any awards or settlements to be paid over to Mortgagee for disposition pursuant to the terms of this Mortgage. Mortgagee shall be entitled to participate in any such proceeding, at Mortgagor's sole cost and expense, and Mortgagor shall deliver or cause to be delivered to Mortgagee such instruments as may be requested by Mortgagee from time to time to permit such participation.

(b) If the Mortgaged Property or any part thereof is taken or diminished in value, or if a consent settlement is entered by or under threat of such proceeding, the award or settlement payable to Mortgagor by virtue of its interest in the Mortgaged Property shall be, and by these presents is, assigned, transferred and set over unto Mortgagee to be held by Mortgagee, subject to the Lien and security interest of this Mortgage, and disbursed in accordance with the provisions of the Financing Agreement or, if there is no provision contained in the Financing Agreement governing how the same is to be disbursed, then Mortgagee shall apply the entire amount thereof in a manner not prohibited by the Financing Agreement. In all events, unless expressly provided to the contrary in the Financing Agreement, Mortgagor hereby covenants and agrees to promptly commence and to diligently prosecute the restoration of the Mortgaged Property upon the occurrence of any condemnation or other taking affecting the Mortgaged Property, without regard to the availability or adequacy of any award or settlement. Notwithstanding any condemnation or other taking of any of the Mortgaged Property, Mortgagor shall continue to pay the Obligations at the time and in the manner provided for in the Financing Agreement and the other Loan Documents, and the Obligations shall not be reduced until, and then only to the extent that, any condemnation award or settlement shall have been actually received and applied by Mortgagee to the discharge of the Obligations. If the Mortgaged Property is sold, through foreclosure or otherwise, prior to the receipt by Mortgagee of such condemnation award or settlement, Mortgagee shall have the right, whether or not a deficiency judgment on any Loan Document shall have been sought, recovered or denied, to receive such condemnation award or settlement, or a portion thereof sufficient to pay the then unpaid Obligations, whichever is less.

Section 5.06 Maintenance of Rights-of-Way, Easements, Licenses and Other Rights. Mortgagor shall maintain, preserve and renew all rights-of-way, easements, tenements, hereditaments, development rights and credits, zoning rights, grants, privileges, appurtenances, licenses, franchises and other rights reasonably necessary for the use or operation of the Mortgaged Property, from time to time, or otherwise relevant to the value thereof, and Mortgagor shall not, without the prior written consent of Mortgagee, initiate, join in or consent to any private restrictive covenant or other public or private restriction as to the present or future use or operation of the Mortgaged Property. Mortgagor shall, however, comply with all restrictive covenants which may at any time affect the Mortgaged Property, all applicable zoning ordinances and all other public or private restrictions relating to the use of the Mortgaged Property.

Section 5.07 Payment and Performance of Obligations. Mortgagor shall duly and punctually pay and perform all of the Obligations in accordance with the provisions of the Financing Agreement.

UNOFFICIAL COPY

Section 5.08 Compliance with Permitted Liens and Other Obligations. Mortgagor shall fully comply with any and all obligations, restrictions and requirements that may be set forth in each and every document constituting a Permitted Lien. In addition, Mortgagor shall fully comply with each and every obligation legally imposed upon it and/or relating to the Mortgaged Property pursuant to applicable law (including, without limitation, all matters described in Section 4.05 hereof), contract or other agreement. It is hereby acknowledged that Mortgagee's consent to a Permitted Lien as of the date hereof shall in no way be deemed to constitute approval of any future Lien which may be imposed upon any portion of the Mortgaged Property, or any other enforcement action affecting Mortgagor or the Mortgaged Property, as a result of Mortgagor's failure to perform or comply with its obligations under any document constituting a Permitted Lien as of the date hereof.

Section 5.09 Additional Affirmative Covenants. All affirmative covenants made by the Borrowers or the Guarantors or any of them in the Financing Agreement are incorporated herein by reference and are hereby also made by Mortgagor as to itself and the Mortgaged Property as though such covenants were set forth at length herein as the covenants of Mortgagor.

ARTICLE VI

NEGATIVE COVENANTS

Mortgagor hereby covenants and agrees with Mortgagee that, until all of the Obligations shall have been paid or performed in full and discharged in accordance with the Financing Agreement and the other Loan Documents:

Section 6.01 Use Violations. Mortgagor shall not use, maintain, operate or occupy, or allow the use, maintenance, operation or occupancy of, the Mortgaged Property in any manner which (a) violates any Governmental Requirements, (b) may be dangerous unless safeguarded as required by applicable law, (c) constitutes a public or private nuisance, or (d) makes void, voidable or cancelable, or increases the premium of, any insurance then in force with respect thereto.

Section 6.02 Waste. Mortgagor shall not commit or permit any waste with respect to the Mortgaged Property.

Section 6.03 Alterations. Mortgagor shall notify Mortgagee, in writing and in advance, with respect to all proposed alterations, improvements or additions to the Mortgaged Property which are of a material nature, and, unless and to the extent otherwise expressly provided in the Financing Agreement, Mortgagor shall not effect any material alteration, improvement or addition to the Mortgaged Property without the prior written consent of Mortgagee.

Section 6.04 No Further Encumbrances. Mortgagor shall not, without the prior written consent of Mortgagee, create, place or permit to be created or placed, or through any act or failure to act, acquiesce in the placing of, or allow to remain, any mortgage, pledge, Lien (statutory, constitutional, contractual or otherwise), security interest, encumbrance or charge on,

UNOFFICIAL COPY

or conditional sale or other title retention agreement with respect to, the Mortgaged Property, or any portion thereof or interest therein, other than the Permitted Liens, regardless of whether the same are subordinate to the Lien(s) and security interest(s) created by this Mortgage.

Section 6.05 Transfer Restrictions. Mortgagor shall not sell, lease, assign, transfer or otherwise dispose of or abandon all or any part of the Mortgaged Property (or any interest therein), except as expressly permitted by, and in accordance with the terms of, the Financing Agreement.

Section 6.06 Loan and Financing Agreement; Additional Negative Covenants. Mortgagor has received a copy of and is fully familiar with the terms and provisions of the Financing Agreement and the other Loan Documents. All negative covenants made by the Borrowers or the Guarantors or any of them in the Financing Agreement and the other Loan Documents are incorporated herein by reference and are hereby also made by Mortgagor as applicable to itself and the Mortgaged Property as though such negative covenants were set forth at length herein as the negative covenants of Mortgagor.

ARTICLE VII

EVENTS OF DEFAULT AND REMEDIES

Section 7.01 Event of Default. The "Events of Default" set forth in Article IX of the Financing Agreement are hereby incorporated herein as if fully set forth herein, and, without limiting the generality of the foregoing, the occurrence of an "Event of Default" under the Financing Agreement or any other Loan Document shall constitute an "**Event of Default**" hereunder.

Section 7.02 Acceleration. Upon the occurrence and during the continuance of any Event of Default, in addition to any other rights, powers or remedies conferred herein or by operation of law, Mortgagee, in its sole judgment and discretion, may declare the then unpaid principal balance of the Loan (the "**Principal Balance**"), the accrued interest thereon and any other accrued but unpaid portion of the Obligations to be, and they shall thereupon forthwith become, immediately due and payable without presentment, demand, protest or other notice of any kind, all of which are hereby expressly waived by Mortgagor.

Section 7.03 Foreclosure and Sale. If an Event of Default shall occur and be continuing, Mortgagee shall have the right and option to take possession of the Mortgaged Property and/or proceed with foreclosure and to sell, to the extent and in the manner permitted by applicable law, all or any portion of the Mortgaged Property and all estate, right, title and interest, claim and demand therein and all rights of redemption thereof, at one or more sales, as an entirety or in parcels, at such place or places, in such manner and upon such notice as may be required by applicable law, or, in the absence of any such requirement, as Mortgagee may deem appropriate, and to make conveyance to the purchaser or purchasers. Where the Mortgaged Property is situated in more than one county, notice as above provided shall be posted and filed in all such counties (if such notices are required by applicable law), and all such Mortgaged Property may be sold in any such county and any such notice shall designate the county where such Mortgaged Property is to be sold. Nothing contained in this Section 7.03 shall be construed

UNOFFICIAL COPY

so as to limit in any way Mortgagee's rights to sell the Mortgaged Property, or any portion thereof, by private sale if, and to the extent that, such private sale is permitted under the laws of the applicable jurisdiction or by public or private sale after entry of a judgment by any court of competent jurisdiction so ordering. Mortgagor hereby irrevocably constitutes and appoints Mortgagee as Mortgagor's attorney-in-fact (coupled with an interest) and during the continuance of an Event of Default, to perform such acts or things and execute such documents as Mortgagee, in its sole discretion, shall deem appropriate, including endorsement of Mortgagor's name on any instruments, including but not limited to any deeds, transfers, conveyances, assignments, assurances and notices. At any such sale (a) whether made under the power herein contained or any other legal enactment, or by virtue of any judicial proceedings or any other legal right, remedy or recourse, it shall not be necessary for Mortgagee to have physically present, or to have constructive possession of, the Mortgaged Property (Mortgagor hereby covenanting and agreeing to deliver to Mortgagee any portion of the Mortgaged Property not actually or constructively possessed by Mortgagee immediately upon demand by Mortgagee) and the title to and right of possession of any such property shall pass to the purchaser thereof as completely as if the same had been actually present and delivered to purchaser at such sale; (b) each instrument of conveyance executed by Mortgagee shall contain a limited warranty of title, binding upon Mortgagor and its successors and assigns; (c) each and every recital contained in any instrument of conveyance made by Mortgagee shall conclusively establish the truth and accuracy of the matters recited therein, including, without limitation, nonpayment and/or nonperformance of the Obligations and advertisement and conduct of such sale in the manner provided herein and otherwise required by applicable law; (d) any and all prerequisites to the validity thereof shall be conclusively presumed to have been performed; (e) the receipt of Mortgagee, or of such other Person or officer making the sale, shall be a sufficient discharge to the purchaser for its purchase money and neither such purchaser nor its assigns or personal representatives shall thereafter be obligated to see to the application of such purchase money, or be in any way answerable for any loss, misapplication or non-application thereof; (f) to the fullest extent permitted by applicable law, Mortgagor shall be completely and irrevocably divested of all of its right, title, interest, estate, claim and demand whatsoever, either at law or in equity (including, without limitation, any statutory or common law right of redemption, which is hereby waived to the fullest extent permitted by applicable law), in and to the property sold in any such event, and such sale shall be a perpetual bar, both at law and in equity, against Mortgagor and any and all Persons claiming by, through or under Mortgagor; and (g) to the extent and under such circumstances as are permitted by applicable law, Mortgagee may be a purchaser at any such sale, and shall have the right, after paying or accounting for all costs of said sale or sales, to credit the amount of the then unpaid Obligations to the amount of its bid (in the order of priority set forth in Section 7.16 hereof) in lieu of cash payment. Each remedy provided in this instrument is distinct from and cumulative with all other rights and remedies provided hereunder or afforded by applicable law or equity, and may be exercised concurrently, independently or successively, in any order whatsoever.

Section 7.04 Mortgagee's Agents. Mortgagee may appoint or delegate any one or more Persons as agent to perform any act or acts necessary or incident to any sale held by Mortgagee, including the posting of notices and the conduct of sale, but in the name and on behalf of Mortgagee. If Mortgagee or any successor mortgagee shall have given notice of sale hereunder, any successor may complete the sale and the conveyance of the Mortgaged Property

UNOFFICIAL COPY

pursuant thereto as if such notice had been given by Mortgagee or the successor mortgagee conducting the sale.

Section 7.05 Judicial Foreclosure. If any Event of Default shall occur and be continuing, Mortgagee shall have the right and power to proceed by a suit or suits in equity or at law, whether for the specific performance of any covenant or agreement herein contained or in aid of the execution of any power herein granted, or for any foreclosure hereunder or for the sale of the Mortgaged Property under the judgment or decree of any court or courts of competent jurisdiction, or for the appointment of a receiver pending any foreclosure hereunder or the sale of the Mortgaged Property under the order of a court or courts of competent jurisdiction or under executory or other legal process, or for the enforcement of any other appropriate legal or equitable remedy.

Section 7.06 Receiver. If any Event of Default shall occur and be continuing and/or if any of the Obligations shall become due and payable and shall not be promptly paid, Mortgagee shall have the right and power to proceed by a suit or suits in equity or at law, whether for the specific performance of Mortgagee which Mortgagee may apply for and obtain as a matter of right and without notice to Mortgagor, which notice is hereby expressly waived by Mortgagor, the appointment of a receiver to collect the Rents of the Mortgaged Property and to preserve the security hereof, either before or after any foreclosure sale or the sale of the Mortgaged Property under the order of a court or courts of competent jurisdiction or under executory or other legal process, without regard to the value of the Mortgaged Property as security for the amount then due to Mortgagee or the solvency of any entity or entities, person or persons primarily or secondarily liable for the payment of such amounts; the Rents of the Mortgaged Property, in any such event, having heretofore been assigned to Mortgagee pursuant to Section 3.01 hereof as additional security for the payment of the Obligations secured hereby. Any money advanced by Mortgagee in connection with any such receivership shall be a demand obligation (which obligation Mortgagor hereby expressly promises to pay) owing by Mortgagor to Mortgagee and shall be subject to the provisions of Section 8.07(b) hereof.

Section 7.07 Foreclosure for Installments. To the extent allowed by applicable law, Mortgagee shall also have the option to proceed with foreclosure in satisfaction of any installments of the Obligations which have not been paid when due, either through the courts or otherwise, by non-judicial power of sale in satisfaction of the matured but unpaid portion of the Obligations as if under a full foreclosure, conducting the sale as herein provided and without declaring the entire principal balance and accrued interest due. Such sale may be made subject to the unmatured portion of the Obligations, and any such sale shall not in any manner affect the unmatured portion of the Obligations, but as to such unmatured portion of the Obligations this Mortgage shall remain in full force and effect just as though no sale had been made hereunder. It is further agreed that several sales may be made hereunder without exhausting the right of sale for any unmatured part of the Obligations, it being the intent and purpose hereof to provide for a foreclosure and sale of the security for any matured portion of the Obligations without exhausting the power to foreclose and sell the Mortgaged Property for any subsequently maturing portion of the Obligations.

Section 7.08 Separate Sales. To the extent allowed by applicable law, the Mortgaged Property may be sold in one or more parcels and in such manner and order as

UNOFFICIAL COPY

Mortgagee, in its sole discretion, may elect, it being expressly understood and agreed that the right of sale arising out of any Event of Default shall not be exhausted by any one or more sales.

Section 7.09 Possession of Mortgaged Property. Mortgagor agrees to the full extent that it lawfully may, that, in case one or more of the Events of Default shall have occurred and be continuing, then, and in every such case, Mortgagee shall have the right and power to enter into and upon and take possession of all or any part of the Mortgaged Property in the possession of Mortgagor, its successors or assigns, or its or their agents or servants, and may exclude Mortgagor, its successors or assigns, and all Persons claiming by, through or under Mortgagor, and its or their agents or servants wholly or partly therefrom; and, holding the same, Mortgagee may use, administer, manage, operate and control the Mortgaged Property and conduct the business thereof to the same extent as Mortgagor, its successors or assigns, might at the time do and may exercise all rights and powers of Mortgagor, in the name, place and stead of Mortgagor, or otherwise as Mortgagee shall deem best. All costs, expenses and liabilities of every character incurred by Mortgagee in administering, managing, operating and controlling the Mortgaged Property shall constitute a demand obligation (which obligation Mortgagor hereby expressly promises to pay) owing by Mortgagor to Mortgagee and shall be subject to the provisions of Section 8.07(b) hereof. Mortgagor hereby irrevocably constitutes and appoints Mortgagee as Mortgagor's attorney-in-fact (coupled with an interest) to perform such acts and execute such documents as Mortgagee, in its sole discretion, shall deem appropriate, including, without limitation, endorsement of Mortgagor's name on any instruments. Regardless of any provision of this Mortgage, the Financing Agreement or any other Loan Document, Mortgagee shall not be considered to have accepted any property other than cash or immediately available funds in satisfaction of any obligation of Mortgagor to Mortgagee, unless Mortgagee shall have given express written notice of Mortgagee's election to the contrary.

Section 7.10 Occupancy After Acceleration. In the event that there is an acceleration of all or any part of the Obligations and Mortgagor or Mortgagor's representatives, successors or assigns or any other Person claiming any interest in the Mortgaged Property by, through or under Mortgagor, continues to occupy or use the Mortgaged Property or any part thereof, each and all shall immediately become the tenant of Mortgagee (or its successor, if applicable), which tenancy shall be a tenancy from day-to-day, terminable at the will of either the landlord or tenant, at a rent to be determined by Mortgagee (which may be in excess of fair market value); provided, however, that until Mortgagee sets forth the amount of such rent, such rent shall be a fair market rental per day based upon the value of the Mortgaged Property as a whole; and such rental shall be due daily to the Mortgagee (or its successor, if applicable). To the extent permitted by applicable law, Mortgagee (or its successor, if applicable) shall, notwithstanding any language herein to the contrary, have the sole option to demand immediate possession or to permit the occupants to remain as tenants at will. In the event that the tenant fails to surrender possession of said property upon demand, Mortgagee (and its successor, if applicable) shall be entitled to institute and maintain a summary action for possession of the Mortgaged Property (such as an action for forcible entry and detainer) in any court having appropriate jurisdiction.

Section 7.11 Remedies Cumulative, Concurrent and Nonexclusive. Every right, power and remedy herein given to Mortgagee shall be cumulative and in addition to every other right, power and remedy herein specifically given or now or hereafter existing in equity, at law

UNOFFICIAL COPY

or by statute (including, without limitation, specifically those granted by the Applicable UCC). Each such right, power and remedy, whether specifically herein given or otherwise existing, may be exercised from time to time and so often and in such order as may be deemed expedient by Mortgagee, and the exercise, or the beginning of the exercise, of any such right, power or remedy shall not be deemed a waiver of the right to exercise, at the same time or thereafter, any other right, power or remedy. Mortgagee shall be entitled to collect all costs and expenses incurred in exercising its rights hereunder as set forth in Section 8.07(b) hereof. No delay or omission by Mortgagee in the exercise of any such right, power or remedy shall impair any such right, power or remedy or operate as a waiver thereof or of any other right, power or remedy then or thereafter existing.

Section 7.12 No Release of Obligations. Neither Mortgagor, any Borrower, any Guarantor, nor any other Person now or hereafter obligated for the payment or performance of all or any part of the Obligations shall be relieved of any such obligation by reason of (a) the failure of Mortgagee to comply with any request of Mortgagor, any Borrower, any Guarantor or any other Person so obligated to foreclose the Lien of this Mortgage or to enforce any provision hereunder or under the Financing Agreement; (b) the release, regardless of consideration, of the Mortgaged Property or any portion thereof or interest therein or the addition of any other property to the Mortgaged Property; (c) any agreement or stipulation between any subsequent owner of the Mortgaged Property and Mortgagee extending, renewing, rearranging or in any other way modifying the terms of this Mortgage without first having obtained the consent of, given notice to or paid any consideration to Mortgagor, any Borrower, any Guarantor or other Person, and in any such event Mortgagor, all Borrowers, all Guarantors and all such other Persons shall continue to be liable to make payment according to the terms of any such extension or modification agreement unless expressly released and discharged in writing by Mortgagee; or (d) any other act or occurrence save and except the complete payment and performance of all of the Obligations.

Section 7.13 Release of and Resort to Collateral. Mortgagee may release, regardless of consideration, any part of the Mortgaged Property without, as to the remainder, in any way impairing, affecting, subordinating or releasing the Lien or security interest created in or evidenced by this Mortgage or its stature as a first and prior Lien and security interest in and to the Mortgaged Property, and without in any way releasing or diminishing the liability of any Person liable for the payment or performance of the Obligations. Subject to applicable Governmental Requirements, Mortgagee may resort to any other security for the payment and performance of Obligations held by Mortgagee in such manner and order as Mortgagee may elect.

Section 7.14 Waiver of Redemption, Notice and Marshalling of Assets. To the fullest extent permitted by applicable law, Mortgagor hereby irrevocably and unconditionally waives and releases (a) all benefits that might accrue to Mortgagor by virtue of any present or future moratorium law or other law exempting the Mortgaged Property from attachment, levy or sale on execution or providing for any appraisal, valuation, stay of execution, exemption from civil process, redemption or extension of time for payment; (b) except for notices expressly provided for herein or in the Financing Agreement or required by Governmental Requirements, all notices of any Event of Default or of Mortgagee's intention to accelerate maturity of the Obligations or of Mortgagee's election to exercise or actual exercise of any right, remedy or

UNOFFICIAL COPY

recourse provided for hereunder or under the Financing Agreement; (c) any right to a marshaling of assets or a sale in inverse order of alienation; and (d) subject to Section 8.17 hereof, any and all conflicts with any provisions of the Loan Documents. If any law referred to in this Mortgage and now in force, of which Mortgagor or its successor or successors might take advantage despite the provisions hereof, shall hereafter be repealed or cease to be in force, such law shall thereafter be deemed not to constitute any part of the contract herein contained or to preclude the operation or application of the provisions hereof.

Section 7.15 Discontinuance of Proceedings. In case Mortgagee shall have proceeded to invoke any right, remedy or recourse permitted hereunder or under the Financing Agreement and shall thereafter elect to discontinue or abandon same for any reason, Mortgagee shall have the unqualified right so to do and, in such an event, Mortgagor and Mortgagee shall be restored to their former positions with respect to the Obligations, this Mortgage, the Financing Agreement, the Mortgaged Property and otherwise, and the rights, remedies, recourses and powers of Mortgagee shall continue as if same had never been invoked, but no such discontinuance or abandonment shall waive any Event of Default which may then exist or the right of Mortgagee thereafter to exercise any right, remedy or recourse under the Loan Documents for such Event of Default

Section 7.16 Application of Proceeds. After the occurrence and during the continuance of an Event of Default, the proceeds of any sale of and any other amounts generated by the holding, leasing, operating or other use of the Mortgaged Property shall be applied by Mortgagee (or the receiver, if one is appointed), to the extent that funds are so available therefrom, in accordance with the provisions of the Financing Agreement or, if not so provided, then, at Mortgagee's sole discretion, (i) in a manner not prohibited by the Financing Agreement, with Mortgagor remaining liable for any remaining deficiency, or (ii) in the following order of priority, except to the extent otherwise required by applicable law:

(a) first, to the payment of the reasonable and necessary costs and expenses of taking possession of the Mortgaged Property and of holding, using, leasing, repairing, improving the same, including reasonable (i) receiver's fees, (ii) court costs, (iii) attorneys' and accountants' fees, (iv) costs of advertisement and title search fees, and (v) the payment of any and all Impositions, Liens, security interests or other rights, titles or interests equal or superior to the lien and security interest of this Mortgage (except those to which the Mortgaged Property has been sold subject to and without in any way implying Mortgagee's prior consent to the creation thereof);

(b) second, to the payment of all amounts other than the Principal Balance and accrued but unpaid interest which may be due to Mortgagee hereunder or under the other Loan Documents, together with interest thereon as provided herein;

(c) third, to the payment of the Obligations in such order and manner as Mortgagee determines in its sole discretion; and

(d) fourth, to Mortgagor or as otherwise required by any Governmental Requirement.

UNOFFICIAL COPY

Mortgagor shall be liable for any deficiency remaining.

Section 7.17 Uniform Commercial Code Remedies. Mortgagee shall have all of the rights, remedies and recourses with respect to the Personalty and the Fixtures afforded to it by the Applicable UCC, including, without limitation, the right to take possession of the Personalty and the Fixtures or any part thereof, and to take such other measures as Mortgagee may deem necessary for the care, protection and preservation of the Personalty and the Fixtures, in addition to, and not in limitation of, the other rights, remedies and recourses afforded by this Mortgage and the other Loan Documents.

Section 7.18 Indemnity. In connection with any action taken by Mortgagee and/or any Indemnatee pursuant to this Mortgage, neither Mortgagee nor any Indemnatee shall be liable for any Loss sustained by Mortgagor, including, without limitation, those resulting from (a) any assertion that Mortgagee or any Indemnatee received funds from the operations of the Mortgaged Property claimed by third Persons, or (b) any act or omission of Mortgagee or such Indemnatee in administering, managing, operating or controlling the Mortgaged Property, including, without limitation, in either case such Loss as may result from the ordinary negligence of Mortgagee or such Indemnatee or which may result from strict liability, whether under applicable law or otherwise, unless such Loss is caused by the gross negligence, willful misconduct or bad faith of Mortgagee and/or such Indemnatee, nor shall Mortgagee and/or any such Indemnatee be obligated to perform or discharge any obligation, duty or liability of Mortgagor. Mortgagor shall and does hereby agree to indemnify Mortgagee and each Indemnatee for, and to hold Mortgagee and each such Indemnatee harmless from, any and all Losses which are or may be incurred by Mortgagee or any Indemnatee by reason of this Mortgage or the exercise of rights or remedies hereunder, including, without limitation, such Losses as may result from the ordinary negligence of Mortgagee or any Indemnatee or which may result from strict liability, whether under applicable law or otherwise, unless such Loss is caused by the gross negligence, willful misconduct or bad faith of Mortgagee or such Indemnatee. **WITHOUT LIMITATION, THE FOREGOING INDEMNITY SHALL APPLY TO MORTGAGEE AND EACH INDEMNITEE WITH RESPECT TO LOSSES WHICH IN WHOLE OR IN PART ARE CAUSED BY OR ARISE OUT OF ANY NEGLIGENT ACT OR OMISSION OF MORTGAGEE, SUCH INDEMNITEE OR ANY OTHER PERSON.** Should Mortgagee and/or any Indemnatee make any expenditure on account of any such Losses, the amount thereof, including, without limitation, costs, expenses and reasonable attorneys' fees, shall be a demand obligation (which obligation Mortgagor hereby expressly promises to pay) owing by Mortgagor to Mortgagee and shall be subject to the provisions of Section 8.07(b) hereof. Mortgagor hereby assents to, ratifies and confirms any and all actions of Mortgagee with respect to the Mortgaged Property taken under this Mortgage, except for those actions which are grossly negligent or constitute the willful misconduct of Mortgagee. This Section 7.18, and the liabilities of Mortgagor set forth herein, shall survive the termination of this Mortgage and the payment and performance of the Obligations.

UNOFFICIAL COPY

ARTICLE VIII

MISCELLANEOUS

Section 8.01 Instrument Construed as Mortgage, Etc. This Mortgage may be construed as a mortgage, deed of trust, chattel mortgage, conveyance, assignment, security agreement, pledge, financing statement, hypothecation or contract, or any one or more of them, in order to fully effectuate the liens and security interests created hereby and the purposes and agreements set forth herein.

Section 8.02 Performance at Mortgagor's Expense. The cost and expense of performing or complying with any and all of the Obligations shall be borne solely by Mortgagor, and no portion of such cost and expense shall be, in any way or to any extent, credited against any installment or portion of the Obligations.

Section 8.03 Survival of Obligations. Each and all of the Obligations shall survive the execution and delivery of this Mortgage and shall continue in full force and effect until all of the Obligations shall have been fully satisfied.

Section 8.04 Further Assurances. Mortgagor, upon the request of Mortgagee, shall execute, acknowledge, deliver and record and/or file such further instruments (including, without limitation, financing statements) and do such further acts as may be necessary, desirable or proper to carry out more effectively the purpose of this Mortgage and to subject to the Liens and security interests hereof any property intended by the terms hereof to be covered hereby, including, without limitation, any renewals, additions, substitutions, replacements, betterments or appurtenances to the then Mortgaged Property.

Section 8.05 Notices. All notices or other communications required or permitted to be given pursuant to this Mortgage shall be in writing and shall be considered properly given if given in the manner prescribed by Section 12.1 of the Financing Agreement at the addresses set forth in the first paragraph of this Mortgage, and to each of the parties to the Financing Agreement at the addresses set forth in Section 12.1 thereof; provided, however, that any party shall have the right to change its address for notice hereunder to any other location within the continental United States by the giving of ten (10) days' notice to the other party in the manner set forth above.

Section 8.06 No Waiver. Any failure by Mortgagee to insist, or any election by Mortgagee not to insist, upon strict performance by Mortgagor of any of the terms, provisions or conditions of this Mortgage shall not be deemed to be a waiver of the same or of any other terms, provision or condition hereof, and Mortgagee shall have the right, at any time or times thereafter, to insist upon strict performance by Mortgagor of any and all of such terms, provisions and conditions. Mortgagee may, in Mortgagee's sole and absolute discretion, (i) in the case of a Default, determine whether such Default has been cured, and (ii) in the case of an Event of Default, accept or reject any proposed cure of an Event of Default. In no event shall any provision of this Mortgage or any other Loan Document which provides that Mortgagee shall have certain rights and/or remedies only during the continuance of an Event of Default be construed so as to require Mortgagee to accept a cure of any such Event of Default. Unless and

UNOFFICIAL COPY

until Mortgagee accepts any proposed cure of an Event of Default, such Event of Default shall be deemed to be continuing for purposes of this Mortgage and the other Loan Documents.

Section 8.07 Mortgagee's Right to Perform; Mortgagee's Expenditures.

(a) Mortgagor agrees that if Mortgagor fails to perform any act or take any action which Mortgagor is required to perform or take hereunder or under the Financing Agreement or to pay any money which Mortgagor is required to pay hereunder or under the Financing Agreement, Mortgagee may, but shall not be obligated to, perform or cause to be performed such act or take such action or pay such money.

(b) All costs and expenses incurred by Mortgagee (or any Indemnitee), including, without limitation, attorneys fees and expenses, all monies paid by (or on behalf of) Mortgagee and the monetary value of all services performed by (or on behalf of) Mortgagee in connection with a Default or an Event of Default hereunder or under any other Loan Document, including, without limitation, the (i) the enforcement of any term or provision of this Mortgage or any other Loan Document, (ii) the performance by Mortgagee of any obligation of Mortgagor under this Mortgage or any other Loan Document if Mortgagee elects to so perform, in its sole and absolute discretion, and (iii) any action Mortgagee elects to take, in its sole and absolute discretion, to protect its interest in or the value of the Mortgaged Property, shall be a demand obligation owing by Mortgagor to Mortgagee, as the case may be, and to the extent any payment is made to a third Person, Mortgagee, upon making such payment, shall be subrogated to all of the rights of the Person receiving such payment. All such costs and expenses, monies and the monetary value of such services performed shall (x) bear interest at the Post-Default Rate from the date of such incurrence, payment or performance, as applicable, until paid, and (y) constitute (together with such interest) a portion of the Obligations and shall be secured by this Mortgage and all of the other Loan Documents. If Mortgagee shall elect to pay any Imposition or other sums due with reference to the Mortgaged Property, Mortgagee may do so in reliance on any bill, statement or assessment procured from the appropriate Governmental Authority or other issuer thereof.

Section 8.08 Successors and Assigns. All of the terms hereof shall apply to, be binding upon and inure to the benefit of the parties hereto, their successors, assigns, heirs and legal representatives, and all other Persons claiming by, through or under them; provided, however, that nothing herein shall be deemed to imply any right on behalf of Mortgagor to assign its interest in any of the Mortgaged Property except as may be expressly permitted by the Financing Agreement.

Section 8.09 Severability. This Mortgage is intended to be performed in accordance with, and only to the extent permitted by, all applicable laws and regulations of applicable Governmental Authorities and the provisions hereof are intended to be limited to the extent necessary that they will not render this Mortgage invalid, unenforceable or not entitled to be recorded, registered or filed under the provisions of any applicable law. If any provision hereof or the application thereof to any Person or circumstance shall, for any reason and to any extent, be invalid or unenforceable, neither the remainder of this Mortgage nor the application of such provision to other Persons or circumstances shall be affected thereby, but rather shall be enforced to the greatest extent permitted by applicable law.

UNOFFICIAL COPY

Section 8.10 Entire Agreement and Modification. This Mortgage may not be amended, revised, waived, discharged, released or terminated orally, but only by a written instrument or instruments executed by the party against which enforcement of the amendment, revision, waiver, discharge, release, or termination is asserted. Any alleged amendment, revision, waiver, discharge, release or termination which is not so documented shall not be effective as to any party.

Section 8.11 Applicable Law. THIS MORTGAGE WAS NEGOTIATED IN THE STATE OF NEW YORK, THE LOAN WAS MADE BY MORTGAGEE IN THE STATE OF NEW YORK AND THE PROCEEDS OF THE LOAN DELIVERED PURSUANT TO THE FINANCING AGREEMENT WERE DISBURSED FROM THE STATE OF NEW YORK, WHICH STATE THE PARTIES AGREE HAS A SUBSTANTIAL RELATIONSHIP TO THE PARTIES AND TO THE UNDERLYING TRANSACTION EMBODIED BY THIS MORTGAGE AND THE FINANCING AGREEMENT, AND IN ALL RESPECTS, THIS MORTGAGE AND THE OBLIGATIONS ARISING HEREUNDER SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO CONTRACTS MADE AND PERFORMED IN SUCH STATE, EXCEPT THAT AT ALL TIMES THE PROVISIONS FOR THE CREATION, PERFECTION, AND ENFORCEMENT OF THE LIENS AND SECURITY INTERESTS CREATED PURSUANT HERETO SHALL BE GOVERNED BY AND CONSTRUED ACCORDING TO THE LAW OF THE STATE IN WHICH THE MORTGAGED PROPERTY IS LOCATED, IT BEING UNDERSTOOD THAT, TO THE FULLEST EXTENT PERMITTED BY THE LAW OF SUCH STATE, THE LAW OF THE STATE OF NEW YORK SHALL GOVERN THE CONSTRUCTION, VALIDITY AND ENFORCEABILITY OF THIS MORTGAGE AND ALL OF THE OBLIGATIONS ARISING HEREUNDER. TO THE FULLEST EXTENT PERMITTED BY LAW, MORTGAGOR HEREBY UNCONDITIONALLY AND IRREVOCABLY WAIVES ANY CLAIM OR RIGHT TO ASSERT THAT THE LAW OF ANY OTHER JURISDICTION GOVERNS THIS MORTGAGE, AND THIS SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK PURSUANT TO SECTION 5-1401 OF THE NEW YORK GENERAL OBLIGATIONS LAW.

Section 8.12 Satisfaction of Prior Encumbrance. To the extent that proceeds advanced pursuant to the Financing Agreement are used to pay indebtedness secured by any outstanding Lien, security interest, charge or prior encumbrance against the Mortgaged Property, such proceeds shall be deemed to have been advanced by Mortgagee at Mortgagor's request, and Mortgagee shall be subrogated to any and all rights, security interests and Liens owned by any owner or holder of such outstanding Liens, security interests, charges or encumbrances, irrespective of whether said Liens, security interests, charges or encumbrances are released, and it is expressly understood that, in consideration of the payment of such other indebtedness by Mortgagee, Mortgagor hereby waives and releases all demands and causes of action for offsets and payments to, upon and in connection with the said indebtedness.

Section 8.13 No Partnership. Nothing contained in this Mortgage is intended to, or shall be construed to, create to any extent and in any manner whatsoever any partnership, joint venture, or association between Mortgagor and Mortgagee, or in any way make Mortgagee a co-

UNOFFICIAL COPY

principal with Mortgagor with reference to the Mortgaged Property, and any inferences to the contrary are hereby expressly negated.

Section 8.14 Headings. The Article, Section and Subsection headings hereof are inserted for convenience of reference only and shall in no way alter, modify or define, or be used in construing, the text of such Articles, Sections or Subsections.

Section 8.15 Release of Mortgage. If all of the Obligations shall be paid, performed and discharged in accordance with the Financing Agreement and the other Loan Documents and the Financing Agreement and any Guarantees are terminated, Mortgagee shall forthwith cause satisfaction and discharge of this Mortgage to be entered upon the record, at the sole cost and expense of Mortgagor, and shall execute and deliver (or cause to be executed and delivered) such instruments of satisfaction and discharge as may be appropriate, such instruments to be duly acknowledged and in form for recording, at the sole cost and expense of Mortgagor.

Section 8.16 Limitation of Obligations with Respect to Mortgaged Property.

(a) Neither Mortgagee nor any Lender shall have any duty to protect or preserve, or any liability with respect to the protection or preservation of, any Mortgaged Property or to preserve rights pertaining thereto other than the duty to use reasonable care in the custody and preservation of any Mortgaged Property in its actual possession. Mortgagee shall be relieved of all responsibility for any Mortgaged Property in its possession upon surrendering it, or tendering surrender of it, to Mortgagor or to such other Person entitled thereto by applicable law.

(b) Nothing contained in this Mortgage shall be construed as requiring or obligating Mortgagee or any Lender, and neither Mortgagee nor any Lender shall be required or obligated, to (i) make any demand or inquiry as to the nature or sufficiency of any payment received by it, or present or file any claim or notice or take any action with respect to any Mortgaged Property or the monies due or to become due thereunder in connection therewith, (ii) ascertain or take action with respect to calls, conversions, exchanges, maturities, tenders, offers or other matters relating to any Mortgaged Property, whether or not Mortgagee or any of the Lenders have or are deemed to have knowledge or notice thereof, (iii) take any necessary steps to preserve rights against any prior parties with respect to any Mortgaged Property, or (iv) notify Mortgagor or any other Person of any decline in the value of any Mortgaged Property.

Section 8.17 Inconsistency with Financing Agreement. To the fullest extent possible, the terms and provisions of the Financing Agreement shall be read together with the terms and provisions of this Mortgage such that the terms and provisions of this Mortgage shall supplement, rather than conflict with, the terms and provisions of the Financing Agreement; provided, however, that, notwithstanding the foregoing, in the event any of the terms or provisions of this Mortgage conflict with any of the terms or provisions of the Financing Agreement, such that it is impractical for such terms or provisions to coexist, the terms or provisions of the Financing Agreement shall govern and control for all purposes; and, provided further, that the inclusion in this Mortgage of terms and provisions, supplemental rights or remedies in favor of a secured party but which are not addressed in the Financing Agreement

UNOFFICIAL COPY

shall not be deemed to be a conflict with the Financing Agreement and all such additional terms, provisions, supplemental rights or remedies contained herein shall be given full force and effect.

Section 8.18 Limitation on Interest Payable. It is the intention of the parties to conform strictly to the usury laws, whether federal or state, that are applicable to the transaction of which this Mortgage is a part. All agreements between Mortgagor and Mortgagee or any Lender, whether now existing or hereafter arising and whether oral or written, are hereby expressly limited so that in no contingency or event whatsoever shall the amount paid or agreed to be paid by Mortgagor for the use, forbearance or detention of the money to be loaned under the Financing Agreement or any other Loan Document, or for the payment or performance of any covenant or obligation contained herein or in the Financing Agreement or any other Loan Document, exceed the maximum amount permissible under applicable federal or state usury laws. If, under any circumstances, fulfillment of any such provision, at the time performance of such provision shall be due, shall involve exceeding the limit of validity prescribed by applicable law, then the obligation to be fulfilled shall be reduced to the limit of such validity. If, under any circumstances, Mortgagor shall have paid an amount of money which is deemed to be interest and such interest would exceed the highest lawful rate, such amount that would be excessive interest under applicable usury laws shall be applied to the reduction of the principal amount owing in respect of the Obligations and not to the payment of interest, or if such excessive interest exceeds the unpaid balance of principal and any other amounts due hereunder, the excess shall be refunded to Mortgagor. All sums paid or agreed to be paid for the use, forbearance or detention of the principal under any extension of credit by Mortgagee (or any Lender) shall, to the extent permitted by applicable law, and to the extent necessary to preclude exceeding the limit of validity prescribed by applicable law, be amortized, prorated, allocated and spread from the date of this Mortgage until payment in full of the Obligations so that the actual rate of interest on account of such principal amounts is uniform throughout the term hereof.

Section 8.19 Covenants To Run With the Land. All of the grants, representations, warranties, undertakings, covenants, terms, provisions and conditions in this Mortgage shall run with the Land and shall apply to and bind the successors and assigns of Mortgagor. If there shall be more than one mortgagor, the covenants, representations and warranties made herein shall be deemed to be joint and several.

Section 8.20 Amount Secured; Last Dollar. So long as the balance of the Obligations exceeds the portion of the Obligations secured by this Mortgage, no payment on account of the Obligations shall be deemed to be applied against or to reduce the portion of the Obligations secured by this Mortgage, but shall, instead, be deemed to be applied against only such portions of the Obligations that are not secured by this Mortgage.

Section 8.21 Defense of Claims. Mortgagor shall promptly notify Mortgagee in writing of the commencement of any legal proceedings affecting Mortgagor's title to the Mortgaged Property or Mortgagee's Lien on or security interest in the Mortgaged Property, or any part thereof, and shall take all such action, employing attorneys agreeable to Mortgagee, as may be necessary to preserve Mortgagor's and Mortgagee's rights affected thereby. If Mortgagor fails or refuses to adequately or vigorously, in the sole judgment of Mortgagee, defend Mortgagor's or Mortgagee's rights to the Mortgaged Property, Mortgagee may take such action on behalf of and in the name of Mortgagor and at Mortgagor's expense. Moreover, Mortgagee

UNOFFICIAL COPY

may take (or cause its agents to take) such independent action in connection therewith as Mortgagee may in Mortgagee's sole discretion deem proper, including, without limitation, the right to employ independent counsel and to intervene in any suit affecting the Mortgaged Property. All costs, expenses and attorneys' fees incurred by Mortgagee (or its agents) pursuant to this Section 8.21 or in connection with the defense by Mortgagee of any claims, demands or litigation relating to Mortgagor, the Mortgaged Property or the transactions contemplated in this Mortgage shall be paid by Mortgagor on demand, plus interest thereon from the date of the advance by Mortgagee until reimbursement of Mortgagee at the Post-Default Rate.

Section 8.22 Exculpation Provisions. Each of the parties hereto specifically agrees that it has a duty to read this Mortgage; and agrees that it is charged with notice and knowledge of the terms of this Mortgage; that it has in fact read this Mortgage and is fully informed and has full notice and knowledge of the terms, conditions and effects of this Mortgage; that it has been represented by independent legal counsel of its choice throughout the negotiations preceding its execution of this Mortgage and has received the advice of its attorney in entering into this Mortgage; and that it recognizes that certain of the terms of this Mortgage result in one party assuming the liability inherent in some aspects of the transaction and relieving the other party of its responsibility for such liability. Each party hereto agrees and covenants that it will not contest the validity or enforceability of any exculpatory provision of this Mortgage on the basis that the party had no notice or knowledge of such provision or that the provision is not "conspicuous."

Section 8.23 Modifications to Financing Agreement. This Mortgage will continue to secure the Obligations under the Financing Agreement, as the Financing Agreement may in the future be amended, restated, modified or otherwise supplemented and in effect from time to time. In the event the Financing Agreement is amended, restated modified or otherwise supplemented, there shall be no need to amend, restate, modify or otherwise supplement this Mortgage, unless required by the laws of any State or Commonwealth in which portions of the Mortgaged Property are situated.

Section 8.24 No Merger of Estates. So long as any part of the Obligations remain unpaid, unperformed or undischarged, the fee, easement and leasehold estates to the Mortgaged Property shall not merge but rather shall remain separate and distinct, notwithstanding the union of such estates either in Mortgagor, Mortgagee, any lessee, any third-party purchaser or otherwise.

ARTICLE IX

STATE SPECIFIC PROVISIONS

Section 9.01 Illinois State-Specific Provisions. In the event this Mortgage encumbers property located in the State of Illinois, the following provisions shall be applicable:

(a) Principles of Construction. In the event of any inconsistencies between the terms and conditions of this Section 9.01 and the other terms and conditions of this Mortgage, the terms and conditions of this Section 9.01 shall control.

UNOFFICIAL COPY

(b) Understanding of Loan Terms. Mortgagor and Mortgagee hereby acknowledge that (i) the amount of the debt owed under the Financing Agreement, (ii) the maturity date of the debt owed under the Financing Agreement, and (iii) the underlying interest rate as contained in the Financing Agreement (items (i), (ii), and (iii), collectively, the "**Terms**") are fully and accurately contained in this Mortgage. Mortgagor and Mortgagee recognize that the Terms are also fully and accurately contained in the Financing Agreement.

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

(i) Mortgagor and Mortgagee shall have the benefit of all of the provisions of the Act, including all amendments thereto which may become effective from time to time after the date hereof. In the event any provision of the Act which is specifically referred to herein may be repealed, Mortgagee shall have the benefit of such provision as most recently existing prior to such repeal, as though the same were incorporated herein by express reference;

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

(iii) All advances, disbursements, and expenditures made or incurred by Mortgagee before and during a foreclosure, and before and after judgment of foreclosure, and at any time prior to sale, and, where applicable, after sale, and during the pendency of any related proceedings, for the following purposes, in addition to those otherwise authorized by the Mortgage, or the Financing 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 hereinafter referred to:

(A) all advances by Mortgagee in accordance with the terms of the Mortgage or the Financing Agreement to: (i) preserve, maintain, repair, restore, or rebuild the improvements upon the Mortgaged 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 15-1302 of the Act;

(B) payments by Mortgagee of (i) principal, interest, or other obligations in accordance with the terms of any senior mortgage or other prior lien or encumbrance; (ii) real estate taxes and assessments, general and special and all other taxes and assessments of any kind or nature whatsoever which are assessed or imposed upon the Mortgaged Property or any part thereof; (iii) other obligations authorized by the Mortgage; or

UNOFFICIAL COPY

(iv) with court approval, any other amounts in connection with other liens, encumbrances, or interests reasonably necessary to preserve the status of title, as referred to in Section 15-1505 of the Act;

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

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

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

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

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

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

UNOFFICIAL COPY

Section 15-1302 of the Act. All Protective Advances shall, except to the extent, if any, that any of the same is clearly contrary to or inconsistent with the provisions of the Act, apply to and be included in:

- (i) any determination of the amount of indebtedness secured by this Mortgage at any time;
- (ii) the indebtedness found due and owing to the Mortgagee in the judgment of foreclosure and any subsequent supplemental judgments, orders, adjudications, or findings by the court of any additional indebtedness becoming due after such entry of judgment, it being agreed that in any foreclosure judgment, the court may reserve jurisdiction for such purpose;
- (iii) if right of redemption has not been waived by this Mortgage, computation of amounts required to redeem, pursuant to Sections 15-1603(d)(2) and 1603(e) of the Act;
- (iv) determination of amounts deductible from sale proceeds pursuant to Section 15-1512 of the Act;
- (v) application of income in the hands of any receiver or mortgagee in possession; and
- (vi) computation of any deficiency judgment pursuant to Sections 15-1508(b)(2), 15-1508(e) and 15-1511 of the Act.

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

Mortgagor acknowledges that the Mortgaged Property does not constitute agricultural real estate, as said term is defined in Section 15-1201 of the Act or residential real estate as defined in Section 15-1219 of the Act. Pursuant to Section 15-1601(b) of the Act, Mortgagor hereby waives any and all right of redemption.

(d) Future Advances; Revolving Credit. Mortgagee is obligated under the terms of the Financing Agreement to make advances as provided therein, and Mortgagor acknowledges and intends that all such advances, including future advances whenever hereafter made, shall be a lien from the time this Mortgage is recorded, as provided in Section 15-1302(b)(1) of the Act. That portion of the Obligations which comprises the principal amount then outstanding of any revolving loans constitutes revolving credit indebtedness secured by a mortgage on real property, pursuant to the terms and conditions of 204 ILCS 5/5(d), Mortgagor covenants and agrees that this Mortgage shall secure the payment of all loans and advances made pursuant to the terms and provisions of the Financing Agreement, whether such loans and

UNOFFICIAL COPY

advances are made as of the date hereof or at any time in the future, and whether such future advances are obligatory or are to be made at the option of Mortgagee or otherwise (but not advances or loans made more than 20 years after the date hereof), to the same extent as if such future advances were made on the date of the execution of this Mortgage and although there may be no advances made at the time of the execution of this Mortgage and although there may be no other indebtedness outstanding at the time any advance is made. The lien of this Mortgage shall be valid as to all Obligations, including future advances, from the time of its filing of record in the office of the Recorder of Deeds of the County in which the Mortgaged Property is located. The total amount of the Obligations may increase or decrease from time to time, but the total unpaid principal balance of the Obligations (including disbursements which Mortgagee may make under this Mortgage or any other document or instrument evidencing or securing the Secured) at any time outstanding shall not exceed the amount referred to in the granting clauses of this Mortgage. This Mortgage shall be valid and shall have priority over all subsequent liens and encumbrances, including statutory liens except taxes and assessments levied on the Mortgaged Property, to the extent of the maximum amount secured hereby.

(e) Interest Rate. The Obligations of Borrower pursuant to the Financing Agreement, which obligations are secured by this Mortgage, include, among other things, the obligation to pay interest on the unpaid principal balance of the loans as described in the Financing Agreement and provided herein for reference:

(i) Revolving Loans. The Revolving Loan (as such term is defined in the Financing Agreement) shall bear interest on the principal amount thereof from time to time outstanding, from the date of the making of such Loan until the date on which such principal amount is repaid in accordance herewith, as follows: (i) if the relevant Revolving Loan is a LIBOR Rate Loan, at a rate per annum equal to the LIBOR Rate plus 8.25 percentage points, and (ii) otherwise, at a rate per annum equal to the Reference Rate plus 7.75 percentage points.

(ii) Term Loan. The Term Loan (as such term is defined in the Financing Agreement) shall bear interest on the principal amount thereof from time to time outstanding, from the date of the making of such Loan until the date on which such principal amount is repaid in accordance herewith, as follows: (i) if the relevant portion of the Term Loan is a LIBOR Rate Loan, at a rate per annum equal to the LIBOR Rate plus 8.25 percentage points, and (ii) otherwise, at a rate per annum equal to the Reference Rate plus 7.75 percentage points.

(iii) Default Interest and Fees. To the extent permitted by law, upon the occurrence and during the continuance of an Event of Default, and at the election of the Agent or the Required Lenders (i) the principal of, and all accrued and unpaid interest on, all Loans, fees, indemnities or any other Obligations of the Loan Parties under this Agreement and the other Loan Documents owing to the Lenders, shall bear interest, from the date of such Event of Default until the date such Event of Default is cured or waived in writing in accordance herewith, at a rate per annum equal at all times to the Post-Default Rate. All interest at the Post-Default Rate shall be payable on demand.

All interest shall be computed on the basis of a year of 360 days for the actual number of days, including the first day but excluding the last day, elapsed.

UNOFFICIAL COPY

(f) Capitalized Terms. Capitalized terms used in this Section 9.01 and not defined herein shall have the meanings ascribed to such terms in Exhibit B, attached hereto.

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

(h) Collateral Protection Insurance. Unless Mortgagor provides Mortgagee with evidence of the insurance coverage required by the Mortgage, Mortgagee may purchase insurance at Mortgagor's expense to protect Mortgagee's interests in Mortgagor's Mortgaged Premises. This insurance may, but need not, protect Mortgagor's interests. The coverage that Mortgagee purchases may not pay any claim that Mortgagor makes or any claim that is made against Mortgagor in connection with the Mortgaged Premises. Mortgagor may later cancel any insurance purchased by Mortgagee, but only after providing Mortgagee with evidence that Mortgagor has obtained insurance as required by this paragraph. If Mortgagee purchases insurance for the Mortgaged Premises, Mortgagor will be responsible for the costs of that insurance, including interest and any other charges Mortgagee may impose in connection with the placement of the insurance, until the effective date of the cancellation or expiration of the insurance. The costs of the insurance may be added to the total outstanding balance of the Indebtedness. The cost of the insurance may be more than the cost of insurance Mortgagor may be able to obtain on its own.

(i) Maximum Indebtedness. Notwithstanding anything contained herein to the contrary, in no event shall the Indebtedness exceed an amount equal to Forty-Eight Million Five Hundred Thousand and 00/100 Dollars (\$48,500,000.00); provided, however, in no event shall the Mortgagee be obligated to advance funds in excess of the face amount of any promissory notes, except as provided in the Financing Agreement.

[Remainder of Page Intentionally Blank; Signatures to Follow]


UNOFFICIAL COPY

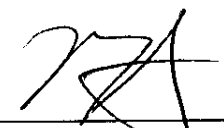
IN WITNESS WHEREOF, Mortgagor has executed this Mortgage as of the date first above written.

MORTGAGOR:

HI-TEMP NORTHLAKE LLC,
a Delaware limited liability company

By: BWT LLC, as Manager

By: 
Name: Brandon Bethea
Title: President

By: 
Name: Michael Fieldstone
Title: Vice President, Secretary and
Treasurer

Property of Cook County Clerk's Office

UNOFFICIAL COPY

ACKNOWLEDGEMENT

STATE OF New York)
) ss.:
COUNTY OF New York)

The foregoing instrument was acknowledged before me this 15th day of October, 2012, by Brandon Bethea, as a/the President of BWT LLC, the manager of HI-TEMP NORTHLAKE LLC, a Delaware limited liability company, on behalf of the company.

Property of Cook County Clerk's Office
DAPHNE S MENDEZ
Notary Public, State of New York
No 01ME6210475
Qualified in Kings County
Term Expires August 17, 2013

Daphne S. Mendez
Notary Public
My Commission Expires: August 17, 2013

ACKNOWLEDGEMENT

STATE OF New York)
) ss.:
COUNTY OF New York)

The foregoing instrument was acknowledged before me this 15th day of October, 2012, by Michael Fieldstone, as a/the Vice President, Secretary and Treasurer, the manager of HI-TEMP NORTHLAKE LLC, a Delaware limited liability company, on behalf of the company.

DAPHNE S MENDEZ
Notary Public, State of New York
No 01ME6210475
Qualified in Kings County
Term Expires August 17, 2013

Daphne S. Mendez of BWT LLC
Notary Public
My Commission Expires: August 17, 2013

UNOFFICIAL COPY

EXHIBIT A

LEGAL DESCRIPTION

PARCEL A:

THAT PART OF THE SOUTHEAST 1/4 OF THE NORTHWEST 1/4 OF SECTION 5, TOWNSHIP 39 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, DESCRIBED AS FOLLOWS:

COMMENCING AT THE SOUTHWEST CORNER OF SAID SOUTHEAST 1/4 OF NORTHWEST 1/4 OF SECTION 5; THENCE NORTH ALONG THE WEST LINE OF SAID SOUTHEAST 1/4 OF THE NORTHWEST 1/4 OF SECTION 5, A DISTANCE OF 49.95 FEET; THENCE EAST AT RIGHT ANGLES, A DISTANCE OF 175.00 FEET TO THE POINT OF BEGINNING OF THE PARCEL OF LAND HEREIN DESCRIBED; THENCE NORTH AT RIGHT ANGLES, A DISTANCE OF 204.00 FEET MORE OR LESS TO THE CENTERLINE OF LAKE STREET, ALSO KNOWN AS ELGIN ROAD; THENCE SOUTHEASTERLY ALONG SAID CENTERLINE OF LAKE STREET, ALSO KNOWN AS ELGIN ROAD, A DISTANCE OF 270.00 FEET MORE OR LESS TO A LINE DRAWN PARALLEL WITH AND SAID DISTANCE 75.00 FEET NORTHWESTERLY MEASURED AT RIGHT ANGLES FROM THE NORTHWESTERLY LINE OF A FRAME DWELLING DESIGNATED AS BUILDING NO. 214; THENCE SOUTHWESTERLY ALONG SAID LAST DESCRIBED PARALLEL LINE, A DISTANCE OF 100.00 FEET MORE OR LESS TO A POINT ON A LINE DRAWN AT RIGHT ANGLES TO THE WEST LINE OF SAID SOUTHEAST 1/4 OF THE NORTHWEST 1/4 OF SAID SECTION THROUGH THE PLACE OF BEGINNING; THENCE WESTERLY ALONG SAID RIGHT ANGLE LINE, A DISTANCE OF 215.00 FEET MORE OR LESS TO THE POINT OF BEGINNING, (EXCEPT THEREFROM THAT PART FALLING IN LAKE STREET), IN COOK COUNTY, ILLINOIS.

PARCEL B:

THAT PART OF THE SOUTHEAST 1/4 OF THE NORTHWEST 1/4 OF SECTION 5, TOWNSHIP 39 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, BOUNDED AND DESCRIBED AS FOLLOWS: TO WIT:

COMMENCING AT THE SOUTHWEST CORNER OF SAID SOUTHEAST 1/4 OF THE NORTHWEST 1/4 OF SECTION 5; THENCE NORTH ALONG THE WEST LINE OF SAID SOUTHEAST 1/4 OF THE NORTHWEST 1/4 OF SECTION 5, A DISTANCE OF 49.95 FEET TO THE POINT OF BEGINNING OF THE LAND HEREIN DESCRIBED; THENCE EAST AT RIGHT ANGLES 175.00 FEET; THENCE NORTH AT RIGHT ANGLES 204.25 FEET MORE OR LESS TO THE CENTERLINE OF LAKE STREET (UNITED STATES HIGHWAY NO. 20) AS SAID STREET WAS ORIGINALLY LOCATED AND ESTABLISHED; THENCE NORTHWESTERLY ALONG SAID CENTERLINE OF LAKE STREET 188.70 FEET MORE OR LESS TO THE WEST LINE OF SAID SOUTHEAST 1/4 OF THE NORTHWEST 1/4 OF SECTION 5; THENCE SOUTH ALONG SAID WEST LINE OF THE SOUTHEAST 1/4 OF THE NORTHWEST 1/4 OF SECTION 5, A DISTANCE OF 271.25 FEET MORE OR LESS TO THE POINT OF BEGINNING, (EXCEPT THAT PART THEREOF FALLING IN LAKE STREET), IN COOK COUNTY, ILLINOIS.

PARCEL C:

THAT PART OF THE NORTHWEST 1/4 OF THE SOUTHWEST 1/4 OF SECTION 5, TOWNSHIP 39 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, DESCRIBED AS FOLLOWS:

UNOFFICIAL COPY

EXHIBIT A

LEGAL DESCRIPTION

(Continued)

COMMENCING AT THE NORTHWEST CORNER OF SAID NORTHWEST 1/4 OF THE SOUTHWEST 1/4;

THENCE EAST ALONG THE NORTH MINE OF SAID NORTHWEST 1/4 OF THE SOUTHWEST 1/4, A DISTANCE OF 956.62 FEET; THENCE SOUTH PERPENDICULAR TO THE NORTH LINE OF SAID NORTHWEST 1/4 OF THE SOUTHWEST 1/4, A DISTANCE OF 43.4 FEET FOR A POINT OF BEGINNING; THENCE WEST ALONG A LINE 43.4 FEET SOUTH OF AND PARALLEL WITH THE NORTH LINE OF SAID NORTHWEST 1/4 OFF THE SOUTHWEST 1/4, A DISTANCE OF 50.0 FEET; THENCE SOUTH ALONG A LINE PERPENDICULAR TO THE NORTH LINE OF SAID NORTHWEST 1/4 OF THE SOUTHWEST 1/4, A DISTANCE OF 50.0 FEET; THENCE EAST ALONG A LINE 193.4 FEET SOUTH OF AND PARALLEL WITH THE NORTH LINE OF SAID NORTHWEST 1/4 OF THE SOUTHWEST 1/4 A DISTANCE OF 412.63 FEET TO THE EAST LINE OF SAID NORTHWEST 1/4 OF THE SOUTHWEST 1/4; THENCE NORTH ALONG THE EAST LINE OF SAID NORTHWEST 1/4 OF THE SOUTHWEST 1/4, A DISTANCE OF 150.07 FEET TO A LINE 43.4 FEET SOUTH OF AND PARALLEL WITH THE NORTH LINE OF SAID NORTHWEST 1/4 OF THE SOUTHWEST 1/4; THENCE WEST ALONG SAID LINE, A DISTANCE OF 367.39 FEET TO THE POINT OF BEGINNING, IN COOK COUNTY, ILLINOIS.

PARCEL D:

THAT PART OF THE NORTHWEST 1/4 OF THE SOUTHWEST 1/4 OF SECTION 5, TOWNSHIP 39 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHWEST CORNER OF SAID NORTHWEST 1/4 OF THE SOUTHWEST 1/4; THENCE EAST ALONG THE NORTH LINE OF SAID NORTHWEST 1/4 OF THE SOUTHWEST 1/4, A DISTANCE OF 956.62 FEET; THENCE SOUTH ALONG A LINE PERPENDICULAR TO THE LAST DESCRIBED COURSE' A DISTANCE OF 43.4 FEET; THENCE WEST ALONG A LINE PARALLEL WITH THE NORTH LINE OF SAID NORTHWEST 1/4 OF THE SOUTHWEST 1/4, A DISTANCE OF 50.0 FEET; THENCE SOUTH ALONG A LINE PERPENDICULAR TO THE NORTH LINE OF SAID NORTHWEST 1/4 OF THE SOUTHWEST 1/4, A DISTANCE OF 272.07 FEET TO THE INTERSECTION OF SAID LINE WITH A LINE OF 1164.71 FEET, MORE OR LESS, IN LENGTH, EXTENDING FROM THE POINT OF BEGINNING SOUTHEASTERLY, FORMING AN ANGLE OF 19 DEGREES, 11 MINUTES, 10 SECONDS FROM EAST TO SOUTHEAST WITH THE NORTH LINE OF SAID NORTHWEST 1/4 OF THE SOUTHWEST 1/4 TO A POINT IN A LINE 10DA FEET NORTHWESTERLY OF, MEASURED AT RIGHT ANGLES TO, AND PARALLEL WITH THE CENTERLINE OF ILLINOIS COMMERCE COMMISSION TRACK NO. 1267 OF THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY, AND THE TANGENT THEREOF EXTENDED SOUTHWESTERLY; THENCE NORTHWESTERLY A DISTANCE OF 959.94 FEET TO THE POINT OF BEGINNING, IN COOK COUNTY, ILLINOIS.

PARCEL E:

EASEMENT FOR DRIVEWAY PURPOSES FOR THE BENEFIT OF PARCELS C AND D AS CREATED BY DEED FROM CHICAGO AND NORTHWESTERN RAILWAY COMPANY, A CORPORATION OF WISCONSIN, TO HI-TEMP, INC., A CORPORATION OF DELAWARE, DATED JUNE 15, 1967 AND RECORDED JUNE 23, 1967 AS DOCUMENT 20176488 AND, RERECORDED JUNE 5, 1968 AS DOCUMENT 20509360 OVER AND UPON THE FOLLOWING DESCRIBED PREMISES:

UNOFFICIAL COPY

EXHIBIT A

LEGAL DESCRIPTION

(Continued)

THAT PART OF THE NORTHEAST 1/4 OF THE SOUTHWEST 1/4 AND THE SOUTHEAST 1/4 OF THE NORTHWEST 1/4 OF SECTION 5, TOWNSHIP 39 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, BOUNDED AND DESCRIBED AS FOLLOWS:

BEGINNING AT THE SOUTHWEST CORNER OF PARCEL A HEREIN DESCRIBED; THENCE SOUTHWESTERLY ALONG A STRAIGHT LINE HEREIN DESIGNATED AS "LINE A", A DISTANCE OF 410.00 FEET, MORE OR LESS, TO A POINT ON THE WEST LINE OF THE NORTHEAST 1/4 OF THE SOUTHWEST 1/4 OF SECTION 5, A DISTANCE OF 100.00 FEET NORTHWESTERLY, MEASURED AT RIGHT ANGLES, FROM THE CENTERLINE OF CHICAGO AND NORTHWESTERN RAILWAY COMPANY SPUR TRACK ILLINOIS COMMERCE COMMISSIONS NO 1267, AS NOW LOCATED AND ESTABLISHED; THENCE NORTHERLY ALONG THE WEST LINE OF SAID NORTHEAST 1/4 OF THE SOUTHWEST 1/4 OF SECTION 5, A DISTANCE OF 31000 FEET; THENCE EASTERLY ALONG A LINE AT RIGHT ANGLES TO THE LAST DESCRIBED COURSE, A DISTANCE OF 90.00 FEET, MORE OR LESS, TO A POINT DISTANT 50.00 FEET NORTHWESTERLY, MEASURED AT RIGHT ANGLES FROM SAID ABOVE DESCRIBED "LINE A"; THENCE NORTHEASTERLY ALONG A LINE PARALLEL WITH SAID "LINE A", A DISTANCE OF 65.00 FEET, MORE OR LESS, TO A LINE DRAWN AT RIGHT ANGLES TO THE WEST LINE OF THE SOUTHEAST 1/4 OF THE NORTHWEST 1/4 OF SAID SECTION 5 THROUGH THE POINT OF BEGINNING; THENCE EASTERLY ALONG SAID LAST DESCRIBED RIGHT ANGLE LINE, A DISTANCE OF 55.00 FEET, MORE OR LESS, TO THE POINT OF BEGINNING, IN COOK COUNTY, ILLINOIS.

PARCEL F:

THAT, PART OF THE NORTHWEST 1/4 OF THE SOUTHWEST 1/4 OF SECTION 5, TOWNSHIP 39 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, BOUNDED AND DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHEAST CORNER OF THE NORTHWEST 1/4 OF THE SOUTHWEST 1/4 OF SAID SECTION 5; THENCE WEST ALONG THE NORTH LINE OF SAID QUARTER-QUARTER SECTION, A DISTANCE OF 368.78 FEET; THENCE SOUTH AT RIGHT ANGLES TO THE LAST DESCRIBED COURSE, A DISTANCE OF 43.4 FEET; THENCE EAST PARALLEL WITH SAID NORTH LINE OF SAID QUARTER-QUARTER SECTION, A DISTANCE OF 367.39 FEET TO A POINT ON THE EAST LINE OF SAID QUARTER-QUARTER SECTION; THENCE NORTH ALONG SAID EAST LINE, A DISTANCE OF 43.42 FEET TO THE POINT OF BEGINNING, IN COOK COUNTY, ILLINOIS.

PARCEL G:

EASEMENT FOR THE BENEFIT OF PARCELS C AND F FOR PUBLIC UTILITIES AS CREATED BY GRANT FROM MYRTLE SIEGEL AND ROBERT SIEGEL, HER HUSBAND, TO HI-TEMP, INC., A CORPORATION OF DELAWARE, DATED AUGUST 29, 1967 AND RECORDED SEPTEMBER 9, 1968 AS DOCUMENT 20608960, OVER THE EAST 13.00 FEET OF LOT 11 IN MIDLAND DEVELOPMENT COMPANY'S FARM ADDITION TO NORTHLAKE VILLAGE, A SUBDIVISION IN THE SOUTHWEST 1/4 OF THE SOUTHEAST 1/4 OF SECTION 15, TOWNSHIP 39 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS.

PARCEL H:

UNOFFICIAL COPY

EXHIBIT A

LEGAL DESCRIPTION

(Continued)

A STRIP OF LAND IN THE NORTHWEST 1/4 OF THE SOUTHWEST 1/4 OF SECTION 5,
TOWNSHIP 39

NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, DESCRIBED AS
FOLLOWS:

BEGINNING AT THE NORTHWEST CORNER OF SAID NORTHWEST 1/4 OF THE
SOUTHWEST 1/4; THENCE SOUTH 72 DEGREES, 32 MINUTES, 50 SECONDS EAST, A
DISTANCE OF 1163.75 FEET TO A POINT IN A LINE THAT IS 100.0 FEET
NORTHWESTERLY OF, BY RIGHT ANGLE MEASUREMENT, AND PARALLEL WITH THE
CENTERLINE OF ILLINOIS COMMERCE COMMISSION TRACK NO. 1267 OF THE CHICAGO
AND NORTHWESTERN TRANSPORTATION COMPANY AND THE TANGENT THEREOF
EXTENDED SOUTHWESTERLY; THENCE NORTH 72 DEGREES, 43 MINUTES, 00 SECOND
EAST ON SAID PARALLEL LINE 224.56 FEET TO A POINT IN THE EAST LINE OF SAID
NORTHWEST 1/4 OF THE SOUTHWEST 1/4; THENCE SOUTH 0,0 DEGREE, 00 MINUTE, 00
SECOND WEST ON SAID LINE 52.35 FEET TO A POINT IN A LINE THAT IS 50.0 FEET
NORTHWESTERLY OF THE SAID CENTERLINE OF SAID RAILROAD TRACK (BY RIGHT
ANGLE MEASUREMENT); THENCE SOUTH 72 DEGREES, 43 MINUTES, 00 SECOND WEST
ON SAID LINE 277.29 FEET TO A POINT IN A LINE THAT IS 80.00 FEET SOUTHWESTERLY
OF, BY RIGHT ANGLE MEASUREMENT, OF THE AFORESAID COURSE THAT HAS A
BEARING OF SOUTH 72 DEGREES, 32 MINUTES, 30 SECONDS EAST; THENCE NORTH 72
DEGREES, 32 MINUTES, 50 SECONDS WEST ON SAID LINE 1111.07 FEET TO THE WEST
LINE OF SAID NORTHWEST 1/4 OF THE SOUTHWEST 1/4; THENCE NORTH 00 DEGREE,
04 MINUTES, 00 SECOND EAST ON SAID LINE 83.83 FEET TO THE POINT OF BEGINNING,
IN COOK COUNTY, ILLINOIS.

PARCEL I:

EASEMENT FOR THE BENEFIT OF PARCEL H AS CREATED BY DEED FROM CHICAGO
AND NORTHWESTERN TRANSPORTATION COMPANY, A CORPORATION OF DELAWARE,
TO BEATRICE FOODS, INC., DATED MAY 9, 1974 AND RECORDED JULY 11, 1974 AS
DOCUMENT 22779798 FOR ROADWAY PURPOSES ONLY, OVER AND ACROSS THE
FOLLOWING DESCRIBED LAND:

A STRIP OF LAND IN THE NORTHEAST 1/4 OF THE SOUTHWEST 1/4 OF SECTION 5,
TOWNSHIP 39 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN,
DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHWEST CORNER OF SAID NORTHEAST 1/4 OF THE
SOUTHWEST 1/4; THENCE NORTH 00 DEGREE, 00 MINUTE, 00 SECOND EAST ON THE
WEST LINE OF THE SOUTHWEST 1/4 OF THE NORTHWEST 1/4 OF SAID SECTION 49.95
FEET; THENCE NORTH 90 DEGREES, 00 MINUTE, 00 SECOND EAST AT RIGHT ANGLES
TO LAST COURSE 175.0 FEET; THENCE SOUTH 25 DEGREES, 10 MINUTES, 10 SECONDS
WEST TO A POINT IN THE WEST LINE OF SAID NORTHEAST 1/4 OF THE SOUTHWEST
1/4, SAID POINT BEING 100.00 FEET NORTHWESTERLY OF, BY RIGHT ANGLE
MEASUREMENT, AND PARALLEL WITH THE CENTERLINE OF ILLINOIS COMMERCE
COMMISSION TRACK NO. 1267 OF THE CHICAGO AND NORTHWESTERN
TRANSPORTATION COMPANY, SAID POINT BEING THE POINT OF BEGINNING OF THIS
PARCEL OF LAND; THENCE SOUTH 00 DEGREE, 00 MINUTE, 00 SECOND WEST ON SAID
WEST LINE OF THE NORTHEAST 1/4 OF THE SOUTHWEST 1/4 52.36 FEET TO A POINT

UNOFFICIAL COPY

EXHIBIT A

LEGAL DESCRIPTION

(Continued)

THAT IS 50.00 FEET NORTHWESTERLY OF, BY RIGHT ANGLE MEASUREMENT, OF SAID CENTERLINE OF RAILROAD TRACK; THENCE SOUTH 90 DEGREES, 00 MINUTE, 00 SECOND EAST AT RIGHT ANGLES TO THE LAST COURSE 28.98 FEET; THENCE NORTH 00 DEGREE, 00 MINUTE, 00 SECOND EAST PARALLEL WITH SAID WEST LINE OF THE NORTHEAST 1/4 OF THE SOUTHWEST 1/4, A DISTANCE OF 114.03 FEET TO THE AFORESAID COURSE THAT HAD A BEARING OF SOUTH 25 DEGREES, 10 MINUTES, 10 SECONDS WEST; THENCE SOUTH 25 DEGREES, 10 MINUTES, 10 SECONDS WEST ON SAID LINE 68.14 FEET TO THE POINT OF

PARCEL J:

THAT PART OF THE EAST 1/2 OF SECTION 6, TOWNSHIP 39 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT IN THE EAST LINE OF SAID SECTION 6 WHICH IS 390.46 FEET SOUTH OF THE POINT OF INTERSECTION OF SAID SECTION LINE WITH THE CENTERLINE OF LAKE STREET; THENCE NORTHWESTERLY ON A LINE WHICH FORMS AN ANGLE OF 72 DEGREES, 28 MINUTES, 20 SECONDS IN THE NORTHWEST QUADRANT WITH THE SAID EAST LINE OF SECTION 6, FOR A DISTANCE OF 249.58 FEET TO A POINT; THENCE SOUTH PARALLEL WITH THE EAST LINE OF SECTION 6, A DISTANCE OF 3:03.00 FEET TO A POINT; THENCE SOUTHEASTERLY ON A LINE WHICH IS PARALLEL WITH SAID FIRST DESCRIBED LINE FOR A DISTANCE OF 249.58 FEET TO A POINT IN SAID EAST LINE OF SECTION 6; THENCE NORTH ON SAID SECTION LINE, A DISTANCE OF 303.00 FEET TO THE POINT OF BEGINNING, IN COOK COUNTY, ILLINOIS.

PARCEL K:

THAT: PART OF THE EAST 1/2 OF THE NORTHEAST 1/4 OF SECTION 6, TOWNSHIP 39 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT IN THE EAST LINE OF SAID SECTION 6, DISTANT 315.46 FEET SOUTH FROM THE POINT OF INTERSECTION OF SAID SECTION LINE WITH THE CENTERLINE OF LAKE STREET; THENCE NORTHWESTERLY ON A LINE WHICH FORMS AN ANGLE OF 72 DEGREES, 28 MINUTES, 20 SECONDS IN THE NORTHWEST QUADRANT WITH SAID EAST LINE OF SECTION 6, A DISTANCE OF 249.58 FEET TO A POINT; THENCE SOUTH PARALLEL WITH SAID EAST LINE OF SECTION 6, A DISTANCE OF 75.00 FEET, MORE OR LESS, TO THE NORTHWEST CORNER OF THAT CERTAIN PARCEL OF LAND CONVEYED BY DEED DATED APRIL 22, 1954 AND RECORDED JUNE 23, 1954 AS DOCUMENT 15941097; THENCE SOUTHEASTERLY ALONG A LINE PARALLEL WITH THE FIRST HEREIN DESCRIBED COURSE, A DISTANCE OF 249.58 FEET TO THE AFORESAID EAST LINE OF SECTION 6, SAID PARALLEL LINE BEING ALSO THE NORTHEASTERLY LINE OF SAID PARCEL OF LAND SO CONVEYED BY THE AFORESAID DEED RECORDED JUNE 23, 1954 AS DOCUMENT 15941097; THENCE NORTH ALONG SAID EAST LINE OF SECTION 6, A DISTANCE OF 75.00 FEET TO THE POINT OF BEGINNING, IN COOK COUNTY, ILLINOIS.

UNOFFICIAL COPY

EXHIBIT A

LEGAL DESCRIPTION

(Continued)

PARCEL L:

LOT 12 IN MIDLAND DEVELOPMENT COMPANY'S FARM ADDITION TO NORTHLAKE VILLAGE, BEING A SUBDIVISION OF THE SOUTHWEST 1/4 OF THE NORTHWEST 1/4 OF SECTION 5, TOWNSHIP 39 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL

MERIDIAN, IN COOK COUNTY, ILLINOIS.

PARCEL M:

THAT PART OF THE NORTHWEST 1/4 OF SECTION 5, TOWNSHIP 39 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHWEST CORNER OF LOT 1 IN MIDLAND DEVELOPMENT COMPANY'S FARM

ADDITION TO NORTHLAKE VILLAGE, BEING A SUBDIVISION OF THE SOUTHWEST 1/4 OF THE NORTHWEST 1/4 OF SECTION 5 AFORESAID; THENCE SOUTH ALONG A LINE 60.00 FEET EAST OF AND PARALLEL WITH THE CENTERLINE OF THE OLD CONCRETE PAVEMENT OF WOLF ROAD 252.12 FEET TO THE POINT OF BEGINNING OF LAND HEREIN DESCRIBED; THENCE CONTINUE SOUTH ALONG SAID PARALLEL LINE 376.08 FEET TO THE INTERSECTION OF THE SOUTH LINE AND ITS WESTERLY EXTENSION OF LOT 3 IN SAID FARM ADDITION; THENCE WESTERLY ALONG THE WESTERLY EXTENSION OF THE SOUTH LINE OF LOT 3 AFORESAID, 60.02 FEET TO THE AFOREMENTIONED CENTERLINE OF PAVEMENT OF WOLF ROAD; THENCE NORTH ALONG SAID CENTERLINE AND ITS NORTHERLY EXTENSION 378.0 FEET TO A POINT AT RIGHT ANGLES TO THE POINT OF BEGINNING; THENCE EAST 50.00 FEET TO THE POINT OF BEGINNING, (EXCEPT THAT PART DEDICATED BY AND ON THE PLAT OF MIDLAND DEVELOPMENT COMPANY'S FARM ADDITION TO NORTHLAKE VILLAGE RECORDED JUNE 14, 1945 AS DOCUMENT 13529319, AS CORRECTED BY INSTRUMENT RECORDED AS DOCUMENT 13593942), IN COOK COUNTY, ILLINOIS.

PARCEL N:

THAT PART OF THE EAST 1/2 OF SECTION 6, TOWNSHIP 39 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT ON THE EAST LINE OF SAID SECTION 83.33 FEET SOUTH OF THE EAST 1/4 CORNER OF SAID SECTION; THENCE NORTH ALONG THE EAST LINE OF SAID SECTION 86.88 FEET MORE OR LESS, TO A POINT 693.46 FEET SOUTH OF THE CENTERLINE OF LAKE STREET (MEASURED ALONG THE EAST LINE OF SAID SECTION); THENCE NORTHWESTERLY ALONG A LINE WHICH FORMS AN ANGLE OF 72 DEGREES 28 MINUTES 20 SECONDS IN THE NORTHWEST QUADRANT WITH THE EAST LINE OF SAID SECTION, A DISTANCE OF 249.58 FEET; THENCE SOUTH PARALLEL WITH THE EAST LINE OF SAID SECTION 6, A DISTANCE OF 87.53 FEET, MORE OR LESS; TO A POINT ON A LINE DRAWN THROUGH THE POINT OF BEGINNING, AND WHICH FORMS AN ANGLE OF 72 DEGREES 36 MINUTES 50 SECONDS IN THE NORTHWEST QUADRANT WITH THE EAST LINE OF SAID SECTION; THENCE ;SOUTHEASTERLY ALONG THE LAST DESCRIBED LINE 249.39 FEET, MORE OR LESS TO THE POINT OF BEGINNING, (EXCEPT THE COAL, OIL, GAS, CAVINGHEAD GAS, METALS, ROCK AND ALL MINERALS OF EVERY KIND AND NATURE IN, ON, OR UNDER THE SURFACE OF SAID LAND AND ALL RIGHTS

UNOFFICIAL COPY

EXHIBIT A

LEGAL DESCRIPTION

(Continued)

AND EASEMENTS IN FAVOR OF SAID MINERAL ESTATE), IN COOK COUNTY, ILLINOIS.

PARCEL O:

THAT PART OF SECTION 6, TOWNSHIP 39 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, DESCRIBED AS THE WEST 17.0 FEET OF THE EAST 255.0 FEET OF SAID SECTION 6, LYING SOUTH OF A LINE DRAWN FROM A POINT ON THE EAST LINE OF SECTION 6, SAID POINT BEING 315.46 FEET SOUTH OF THE CENTER LINE OF LAKE STREET (AS MEASURED ALONG SAID EAST LINE OF SECTION 6), SAID LINE FORMING AN ANGLE OF 72 DEGREES 28 MINUTES 20 SECONDS, AS MEASURED FROM NORTH TO NORTHWEST WITH THE SAID EAST LINE OF SECTION 6 AFORESAID, AND LYING NORTH OF A LINE DRAWN FROM A POINT ON THE EAST LINE OF SECTION 6, SAID POINT BEING 693.45 FEET SOUTH OF THE CENTER LINE OF LAKE STREET (AS MEASURED ALONG SAID EAST LINE OF SECTION 6), SAID LINE FORMING AN ANGLE OF 72 DEGREES 28 MINUTES 20 SECONDS, AS MEASURED FROM NORTH TO NORTHWEST WITH THE SAID EAST LINE OF SECTION 6, IN COOK COUNTY, ILLINOIS.

Property Addresses: 310 South Wolf Road, Northlake, Illinois 60164
75 East Lake Street, Northlake, Illinois 60164
5400 West Lake St, Melrose Park, Illinois 60160

UNOFFICIAL COPY

EXHIBIT B

SELECTED DEFINITIONS

1. "**Administrative Borrower**" means the borrowing agent and attorney-in-fact for the Borrower, appointed by each entity composing the Borrower under the Financing Agreement.
2. "**Agent**" means, collectively, the Collateral Agent and the Administrative Agent.
3. "**Base LIBOR Rate**" means, for any LIBOR Rate Loan for the then current Interest Period applicable thereto, the greater of (a) 1.75% per annum and (b) the rate per annum, determined by the Administrative Agent in accordance with its customary procedures, and utilizing such electronic or other quotation sources as it considers appropriate, on the basis of the rates at which Dollar deposits are offered to major banks in the London interbank market on or about 11:00 a.m. (New York time) 2 Business Days prior to the commencement of the applicable Interest Period, for a term and in amounts comparable to the Interest Period and amount of the LIBOR Rate Loan requested by the Administrative Borrower in accordance with this Agreement, which determination shall be conclusive in the absence of manifest error.
4. "**Business Day**" means any day that is not a Saturday, Sunday, or other day on which commercial banks are authorized or required to close in New York City, except that, if a determination of a Business Day shall relate to a LIBOR Rate Loan, the term "Business Day" also shall exclude any day on which banks are closed for dealings in U.S. Dollar deposits in the London interbank market.
5. "**Dollar**", "**Dollars**" and the symbol "\$" each means lawful money of the United States of America.
6. "**Interest Period**" means, with respect to each LIBOR Rate Loan, a period commencing on the date of the making of such LIBOR Rate Loan (or the continuation of a LIBOR Rate Loan or the conversion of a Reference Rate Loan to a LIBOR Rate Loan) and ending 1, 2 or 3 months thereafter; provided, however, that (a) if any Interest Period would end on a day that is not a Business Day, such Interest Period shall be extended (subject to clauses (c)-(e) below) to the next succeeding Business Day, (b) interest shall accrue at the applicable rate based upon the LIBOR Rate from and including the first day of each Interest Period to, but excluding, the day on which any Interest Period expires, (c) any Interest Period that would end on a day that is not a Business Day shall be extended to the next succeeding Business Day unless such Business Day falls in another calendar month, in which case such Interest Period shall end on the next preceding Business Day, (d) with respect to an Interest Period that begins on the last Business Day of a calendar month (or on a day for which there is no numerically corresponding day in the calendar month at the end of such Interest Period), the Interest Period shall end on the last Business Day of the calendar month that is 1, 2 or 3 months after the date on which the Interest Period began, as applicable, and (e) the Administrative Borrower may not elect an Interest Period which will end after the Final Maturity Date.

UNOFFICIAL COPY

7. "**LIBOR Rate**" means, for each Interest Period for each LIBOR Rate Loan, the rate per annum determined by the Administrative Agent (rounded upwards if necessary, to the next 1/100%) by dividing (a) the Base LIBOR Rate for such Interest Period, by (b) 100% minus the Reserve Percentage. The LIBOR Rate shall be adjusted on and as of the effective day of any change in the Reserve Percentage.
8. "**LIBOR Rate Loan**" means each portion of a Loan that bears interest at a rate determined by reference to the LIBOR Rate.
9. "**Loan Party**" means any Borrower and any Guarantor.
10. "**Obligations**" means all present and future indebtedness, obligations, and liabilities of each Loan Party to the Agents and the Lenders arising under or in connection with the Financing Agreement or any other Loan Document, whether or not the right of payment in respect of such claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, disputed, undisputed, legal, equitable, secured, unsecured, and whether or not such claim is discharged, stayed or otherwise affected by any proceeding referred to in Section 9.01 of the Financing Agreement. Without limiting the generality of the foregoing, the Obligations of each Loan Party under the Loan Documents include (a) the obligation (irrespective of whether a claim therefor is allowed in any Insolvency Proceeding) to pay principal, interest, charges, expenses, fees, attorneys' fees and disbursements, indemnities and other amounts payable by such Person under the Loan Documents, and (b) the obligation of such Person to reimburse any amount in respect of any of the foregoing that any Agent or any Lender (in its sole discretion) may elect to pay or advance on behalf of such Person. The Obligations include, but are not limited to, the Loan as may be evidenced by one or more promissory notes.
11. "**Post-Default Rate**" means a rate of interest per annum equal to the rate of interest otherwise in effect from time to time pursuant to the terms of the Financing Agreement, as provided herein for reference, plus 2.0 percentage points, or if a rate of interest is not otherwise in effect, interest at the highest rate specified in the Financing Agreement, as provided herein for reference, for any Loan then outstanding prior to the Event of Default plus 2.0 percentage points.
12. "**Reference Bank**" means JPMorgan Chase Bank, its successors or any other commercial bank designated by the Administrative Agent to the Administrative Borrower from time to time.
13. "**Reference Rate**" means the greater of (a) 3.25% per annum and (b) the rate of interest publicly announced by the Reference Bank from time to time as its reference rate, base rate or prime rate. The reference rate, base rate, or prime rate is determined from time to time by the Reference Bank as a means of pricing some loans to its borrowers and neither is tied to any external rate of interest or index nor necessarily reflects the lowest rate of interest actually charged by the Reference Bank to any particular class or category of customers. Each change in the Reference Rate shall be effective from and including the date such change is publicly announced as being effective.

UNOFFICIAL COPY

14. "**Reference Rate Loan**" means each portion of a Loan that bears interest at a rate determined by reference to the Reference Rate.
15. "**Reserve Percentage**" means, on any day, for any Lender, the maximum percentage prescribed by the Board (or any successor Governmental Authority) for determining the reserve requirements (including any basic, supplemental, marginal, or emergency reserves) that are in effect on such date with respect to eurocurrency funding (currently referred to as "eurocurrency liabilities") of that Lender, but so long as such Lender is not required or directed under applicable regulations to maintain such reserves, the Reserve Percentage shall be zero.
16. "**Required Lenders**" means Lenders whose pro rata shares aggregate more than 50%.