

Illinois Anti-Predatory Lending Database Program

Certificate of Exemption

Doc#: 1500922020 Fee: \$134.0  
RHSP Fee: \$9.00 RPRF Fee: \$1.00  
Karen A. Yarbrough  
Cook County Recorder of Deeds  
Date: 01/09/2015 09:15 AM Pg: 1 of 49



Doc#: 1502322062 Fee: \$142.00  
RHSP Fee: \$9.00 RPRF Fee: \$1.00  
Karen A. Yarbrough  
Cook County Recorder of Deeds  
Date: 01/23/2015 01:17 PM Pg: 1 of 53

Report Mortgage Fraud  
800-532-8785

The property identified as: PIN: 03-02-316-034-0000

Address:

Street: 156 W. Dundee Rd.

Street line 2:

City: Wheeling

State: IL

ZIP Code: 60090

Lender: Texas Capital Bank, NA

Borrower: Wheeling Memory Care, LLC

Loan / Mortgage Amount: \$16,786,265.00

This property is located within the program area and is exempt from the requirements of 735 ILCS 77/70 et seq. because it is commercial property.

THIS PAGE IS ATTACHED SOLEY FOR THE PURPOSE OF RE-RECORDING THE MORTGAGE TO ADD THE LEGAL DESCRIPTION AND PERMITTED EXCEPTIONS.

Certificate number: 060D5A7C-97EE-4A7D-9893-CD6686E6C14A

Execution date: 12/09/2014

CTT BOX 334

1400895

20150067 581185 49905102

Property of Cook County Clerk's Office

52 #9

# UNOFFICIAL COPY

After recording return to:

Kim Johnston  
McGuire, Craddock & Strother, P.C.  
2501 N. Harwood, Suite 1800  
Dallas, Texas 75201

Property Address:

156 W Dunder Rd.

Wheeling, Illinois

PINs: 03-02-316-034

03-02-316-033

03-02-316-020

(The Above Space for Recorder's Use Only)

## MORTGAGE, ASSIGNMENT OF LEASES AND RENTS, SECURITY AGREEMENT AND FINANCING STATEMENT

Date: December 11, 2014

Mortgagor: WHEELING MEMORY CARE, LLC, a Delaware limited liability company

Mortgagor's Address: 545 E. John Carpenter Fwy, Ste. 500  
Irving, Texas 7506  
Attn: Brenda K. Brantley

With a copy to:

545 E. John Carpenter Fwy, Ste. 500  
Irving, Texas 7506  
Attn: General Counsel

Mortgagee: TEXAS CAPITAL BANK, NATIONAL ASSOCIATION

Mortgagee's Address: 2000 McKinney Avenue, Suite 700  
Dallas, TX 75201  
Attn: Corporate Lending

Legal Description of Property: See Exhibit A

1400895

# UNOFFICIAL COPY

THIS MORTGAGE, ASSIGNMENT OF LEASES AND RENTS, SECURITY AGREEMENT, AND FINANCING STATEMENT (this "*Mortgage*"), is executed and delivered by Mortgagor for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged by Mortgagor.

This Mortgage secures sums to be advanced upon execution hereof and sums to be advanced in the future, and the total principal indebtedness that may be outstanding at any given time which is secured hereby is \$16,786,265.00, which shall be deemed the face amount of this Mortgage. The maturity date of the indebtedness secured hereby, exclusive of any option to renew or extend the term, is December 10, 2019. The Loan Agreement provides for the extension of such maturity date to an outside date of December 10, 2020 upon the satisfaction of certain terms and conditions set forth therein.

## SECTION I DEFINITIONS

1.1 **Definitions.** As used herein, the following terms shall have the following meanings:

"*Anti-Terrorism Laws*" means any and all present and future judicial decisions, statutes, rulings, rules, regulations, permits, certificates, orders, and ordinances of any Governmental Authority relating to terrorism or money laundering, including, without limiting the generality of the foregoing, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Pub. L. No. 107-56); the Trading with the Enemy Act (50 U.S.C.A. App. 1 *et seq.*); the International Emergency Economic Powers Act (50 U.S.C.A. § 1701-06); Executive Order No. 13224 on Terrorist Financing, effective September 24, 2001 (relating to "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism") and the United States Treasury Department's Office of Foreign Assets Control list of "Specifically Designated National and Blocked Persons" (as published from time to time in various mediums, including, without limitation, at <http://www.treas.gov/ofac/t11sdn.pdf>).

"*CGL*" means the broadest available form of commercial general liability insurance (utilizing the then prevailing ISO form or an equivalent form acceptable to Mortgagor in its sole discretion).

"*Constituent Party*" means any (a) partner of Grantor or (b) any signatory to this Mortgage that signs on Grantor's behalf that is a limited liability company, but not any individual.

"*Contracts*" means, to the extent assignable, all of the right, title, and interest of Grantor, including equitable rights, in, to, and under all: (a) contracts for the purchase or sale of all or any portion of the Mortgaged Property, whether such contracts are now or at any time hereafter existing, including without limitation, all earnest money or other deposits escrowed or to be escrowed or letters of credit provided or to be provided by the purchasers under the contracts, including all amendments, supplements, and restatements thereof, and together with all payments, earnings, income, profits, and all other sums due or to become due arising from the sale of any portion of the Mortgaged Property or from the contracts, and together with any and all earnest money, security, letters of credit, or other deposits under any of the contracts; (b) except to the extent limited, protected by, restricted by or subject to Privacy Laws, contracts, licenses, permits, and rights relating to living unit equivalents or other entitlements for water, wastewater, and other utility services whether executed, granted, or issued by a private person or entity or a governmental or quasi-governmental agency, which are directly or indirectly related to the development, ownership, maintenance, or operation of the Mortgaged Property, whether such contracts, licenses, and permits are now or hereafter existing, including without limitation, all rights of living unit equivalents or other entitlements with respect to water, wastewater, and other utility services, certificates,

# UNOFFICIAL COPY

licenses, zoning variances, permits, and no-action letters from each Governmental Authority required (i) to evidence compliance by Grantor and all improvements constructed or to be constructed on the Mortgaged Property with all Legal Requirements applicable to the Mortgaged Property, and (ii) to develop and/or operate the Mortgaged Property as a commercial and/or residential project, as the case may be; (c) financing arrangements relating to the financing or purchase of any portion of the Mortgaged Property by future purchasers; (d) contracts for construction or supplying of Improvements to the Property; and (e) other contracts which in any way relate to the use, enjoyment, occupancy, operation, maintenance, repair, management, or ownership of the Mortgaged Property (save and except the Leases), including without limitation maintenance and service contracts and management agreements.

**“Disposition”** means any sale, lease, exchange, assignment, mortgage, conveyance, transfer, trade, or other disposition of (a) all or any portion of the Mortgaged Property (or any interest therein) or (b) all or any part of the legal or beneficial ownership interest in Grantor or the Managing Member, excluding the following changes in the beneficial ownership of Grantor, which shall not constitute a “Disposition”: (i) a transfer by devise or descent or by operation of law upon the death of an owner of Grantor (**“Owner”**) or a member, partner or shareholder of an Owner; (ii) the sale or pledge, in one or a series of transactions after the date hereof, of not more than ten percent (10%) of the non-managing membership interests in Grantor; or (iii) the transfer in one or a series of transactions after the date hereof of the Capital Stock in an Owner among the Owners as of the date hereof.

**“Event of Default”** means any happening or occurrence described in *Section 6*.

**“Financial Statements”** means all balance sheets, income statements, statements of profit and loss, surplus reconciliation statements, statements of cash flow, statements of sources and uses of funds, and all other financial data, statements, and reports (whether of Grantor, any Guarantor, or otherwise) that are required to be furnished, have been furnished, or may from time to time be furnished to Mortgagee pursuant to or in connection with the Loan Documents.

**“Fixtures”** means all materials, supplies, equipment, systems, apparatus, and other items now owned or hereafter acquired by Grantor and now or hereafter attached to, installed in, or used in connection with (temporarily or permanently) any of the Improvements or the Land, including without limitation, all partitions, dynamos, window screens and shades, draperies, rugs and other floor coverings, awnings, motors, engines, boilers, furnaces, pipes, call and sprinkler systems, alarm and security systems, intercom systems, fire extinguishing apparatus and equipment, water tanks, swimming pools, heating, ventilating, refrigeration, plumbing, laundry, lighting, generating, cleaning, waste disposal, transportation systems (of people or things, including without limitation stairways, elevators, escalators, and conveyors), incinerating, air conditioning and air cooling equipment and systems, gas and electric machinery, appurtenances, and equipment, disposals, dishwashers, refrigerators, ranges, recreational equipment and facilities of all kinds, lighting, traffic control, raw and potable water, gas, electrical, storm and sanitary sewer, telephone and cable television facilities, and all other utilities whether or not situated in easements, together with all accessions, appurtenances, replacements, betterments, and substitutions for any of the foregoing and the proceeds thereof.

**“Grantor”** means the entity described as Grantor in the initial paragraph of this Mortgage and the successors, assigns therefor, and all subsequent owners of all of any part of the Mortgaged Property (without hereby implying Mortgagee’s consent to any Disposition of all or any part of the Mortgaged Property but only during periods of ownership of all or any part of the Mortgaged Property).

**“Impositions”** means: (a) all real estate and personal property taxes, charges, assessments, standby fees, excises, and levies and any interest, costs, or penalties with respect thereto, general and special, ordinary and extraordinary, foreseen and unforeseen, of any kind and nature whatsoever which at

# UNOFFICIAL COPY

any time before or after the execution hereof may be assessed, levied, or imposed upon the Mortgaged Property or the ownership, use, occupancy, or enjoyment thereof, or any portion thereof, or the sidewalks, streets, or alleyways adjacent thereto; (b) any charges, fees, license payments, or other sums payable under any easement, license, or agreement maintained for the benefit of the Mortgaged Property; (c) water, gas, sewer, electricity, and other utility charges and fees relating to the Mortgaged Property; and (d) assessments and charges arising under any subdivision, condominium, planned unit development, or other declarations, restrictions, regimes, or agreements affecting the Mortgaged Property.

**“Improvements”** means any and all buildings, covered garages, air conditioning towers, open parking areas, structures, and other improvements as more particularly described in the Plans and all other improvements of any kind or nature, 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.

**“Land”** means all of that certain real property or interest therein situated in Cook County, Illinois, more particularly described in *Exhibit A*, together with all right, title, interest, and privilege of Grantor in and to: (a) all streets, ways, roads, alleys, easements, rights-of-way, licenses, rights of ingress and egress, vehicle parking rights, and public places, existing or proposed, abutting, adjacent, used in connection with, or pertaining to such real property or the improvements thereon; (b) any strips or gores of real property between such real property and abutting or adjacent properties; (c) all air rights, all water and water rights, sands, gravel, rocks and soil, timber and crops pertaining to such real property; and (d) all other appurtenances, reversions, and remainders in or to such real property.

**“Lease Rent Notice”** has the meaning set forth in *Section 7.1(h)*.

**“Leases”** means, to the extent assignable and except to the extent limited, protected by, or subject to Privacy Laws, all leases, master leases, subleases, licenses, concessions, or other agreements (whether written or oral or now or hereafter in effect) which grant to third parties a possessory interest in and to, or the right to use or occupy, all or any part of the Mortgaged Property, together with all security deposits and other deposits or payments made in connection therewith.

**“Lessee”** means individually or collectively, a lessee or tenant under any of the Leases.

**“Loan Agreement”** means that certain Construction Loan Agreement of even date herewith between Grantor, as Borrower, and Mortgagee, as Lender.

**“Material Adverse Event”** means any act, event, condition, or circumstance which could materially and adversely affect (a) the business condition (financial or otherwise), operations, prospects, results of operations, capitalization, liquidity, or any properties of Grantor or Guarantor, taken as a whole, (b) the value of the Mortgaged Property, (c) the ability of Grantor or any Guarantor to perform its obligations under any Loan Document to which it is a party or by which it is bound, or (d) the enforceability of any Loan Document.

**“Minerals”** means all substances in, on, under, or above the Land which are now, or may become in the future, intrinsically valuable (that is, valuable in themselves) and which now or may be in the future enjoyed through extraction or removal from the property, including without limitation oil, gas, and all other hydrocarbons, coal, lignite, carbon dioxide, and all other non-hydrocarbon gases, uranium and all other radioactive substances, and gold, silver, copper, iron, and all other metallic substances or ores.

**“Mortgaged Property”** means the interest of Grantor created in and to the Land, Minerals, Fixtures, Equipment, Improvements, Personalty, Contracts, Leases, Rents, Plans, if any, and any interest of Grantor now owned or hereafter acquired therein, together with an interest in the Rents, and all other

# UNOFFICIAL COPY

security and collateral of any nature now or hereafter given for the performance and discharge of the Obligations. Where the context permits or requires, the term “*Mortgaged Property*” means all or any portion of the above.

“*Mortgagee*” means TEXAS CAPITAL BANK, NATIONAL ASSOCIATION, a national banking association, whose address for notice hereunder is 2000 McKinney, Suite 700, Dallas, Texas 75201, Attention: Ms. Leslie Tieszen, Senior Vice President, and the subsequent holder or holders, from time to time, of the Note.

“*Mortgagee’s Agent*” means Grantor, solely for the purpose of collecting Rents and applying Rents as set forth in *Section 7.1(h)* and *Section 9*, which agency shall never be deemed to be that of Mortgagee for any purpose, and which agency relationship cannot be terminated by Grantor so long as the Loan Documents are in effect.

“*Operating Expenses*” means all expenses related to the ownership, operation, management, repair, and leasing of the Land and Improvements, including garage operation expenses, Mortgaged Property insurance charges and premiums, ad valorem taxes and other Impositions, waste prevention costs, ordinary repairs and maintenance costs, environmental audit costs, property management fees, security fees, normal accountant fees, reasonable marketing and promotional expenses, reasonable legal expenses, Lease obligation costs, and Governmental Authority compliance costs.

“*PBGC*” means the Pension Benefit Guaranty Corporation, and any successor to all or any of the Pension Benefit Guaranty Corporation’s functions under ERISA.

“*Pension Plan*” means the employee benefit pension plans of Grantor and any Subsidiaries in effect from time to time (if any), as the term is defined in ERISA.

“*Permitted Exceptions*” means the liens, easements, restrictions, security interests, and other matters (if any) described on *Exhibit B* and the liens and security interests created by the Loan Documents.

“*Personalty*” means all of the right, title, and interest of Grantor in and to: (a) furniture, furnishings, equipment, machinery, and goods (including, without limitation, crops, farm products, timber and timber to be cut, and as-extracted collateral); (b) except to the extent limited, protected by, restricted by or subject to Privacy Laws, general intangibles, money, insurance proceeds, accounts, contract and subcontract rights, trademarks, trade names, copyrights, chattel paper, instruments, investment property, letter of credit rights, and inventory; (c) all cash funds, fees (whether refundable, returnable, or reimbursable), deposit accounts, or other funds or evidences of cash, credit, or indebtedness deposited by or on behalf of Grantor with any governmental agencies, boards, corporations, providers of utility services, public or private, including, without limitation, all refundable, returnable, or reimbursable tap fees, utility deposits, commitment fees, development costs, any awards, remunerations, reimbursements, settlements, or compensation heretofore made or hereafter to be made by any Governmental Authority pertaining to the Land, Improvements, Fixtures, Contracts, or other personalty, including, but not limited to, those for any vacation of, or change of grade in, any streets affecting the Land or the Improvements and those for municipal utility district or other utility costs incurred or deposits made in connection with the Land; (d) the Plans, and (e) all other personal property of any kind or character as defined in and subject to the provisions of the UCC (Article 9 - Secured Transactions); any and all of which are now owned or hereafter acquired by Grantor, and which are now or hereafter situated in, on, or about the Land or the Improvements, or used in or necessary to the complete and proper planning, development, construction, financing, use, occupancy, or operation thereof, or acquired (whether delivered to the Land or stored elsewhere) for use in or on the Land or the Improvements, together with all accessions,

# UNOFFICIAL COPY

replacements, and substitutions thereto or therefor and the proceeds thereof; provided, however, the Personalty shall not include any interest in the personal property owned by the residents of the Improvements (if being understood and agreed that such property is exempt from and shall not be conveyed by this Mortgage).

“**Prohibited Person**” means any person or entity that (a) is specifically named or listed in, or otherwise subject to, any Anti-Terrorism Laws, (b) is owned or controlled by, or acting for or on behalf of any person or entity specifically named or listed in, or otherwise subject to, any Anti-Terrorism Laws, or (c) Mortgagee is prohibited from dealing with, or engaging in any transaction with, pursuant to any Anti-Terrorism Laws.

“**Rents**” means all rents, issues, incomes and profits in any manner arising under the Leases.

“**Subordinate Mortgage**” means any mortgage, deed of trust, pledge, lien (statutory, constitutional, or contractual), security interest, encumbrance, charge, conditional sale agreement, or other title retention agreement covering all or any portion of the Mortgaged Property executed and delivered by Grantor, the lien of which is subordinate and inferior to the lien of this Mortgage.

“**Tax Code**” means the U.S. Internal Revenue Code of 1986, as amended, any and all U.S. Department of Treasury Regulations issued pursuant thereto in temporary or final form, and any and all federal, state, county, municipal and city rules and rulings, notices, requirements, statutes, regulations or laws governing or relating to taxes and/or taxation, and any and all successor statutes thereof.

**1.2 Additional Definitions; Interpretive Provisions.** As used herein, the following terms shall have the following meanings:

- (a) “**hereof**,” “**hereby**,” “**hereto**,” “**hereunder**,” and similar terms mean of, by, to, under, and with respect to, this Mortgage;
- (b) “**heretofore**” means before, “**hereafter**” means after, and “**herewith**” means concurrently with, the date of this Mortgage;
- (c) “**including**” means including without limitation;
- (d) words of any gender shall include the other gender where appropriate;
- (e) all terms used herein, whether or not defined in *Section 1.1*, and whether used in singular or plural form, shall be deemed to refer to the object of such term whether such is singular or plural in nature, as the context may suggest or require;
- (f) all references to a particular *Section* shall refer to a *Section* in this Mortgage, unless otherwise specifically stated; and
- (g) capitalized terms used but not otherwise defined herein shall have the meanings assigned to such terms in the Loan Agreement.

## SECTION II GRANT

**2.1 Grant.** To secure the full and timely payment of the Indebtedness and the full and timely performance and discharge of the Obligations, Mortgagor does hereby GRANT, SELL, CONVEY,

# UNOFFICIAL COPY

MORTGAGE and ASSIGN unto Mortgagee, the Mortgaged Property, subject, however, to the Permitted Exceptions; provided, however, that if Mortgagor shall pay (or cause to be paid) the Indebtedness as and when the same shall become due and payable and shall fully perform and discharge (or cause to be fully performed and discharged) the Obligations on or before the date same are to be performed and discharged, then the liens, security interests, estates, and rights granted by the Loan Documents shall terminate, in accordance with the provisions hereof, otherwise same shall remain in full force and effect. A certificate or other written statement executed on behalf of Mortgagee confirming that the Indebtedness has not been fully paid or the Obligations have not been fully performed or discharged shall be sufficient evidence thereof for the purpose of reliance by third parties on such fact.

## SECTION III REPRESENTATIONS AND WARRANTIES

Grantor hereby unconditionally represents and warrants to Mortgagee, as of the date hereof and at all times during the term of this Mortgage, as follows:

**3.1 Organization and Power.** If Grantor or any Constituent Party is a corporation, limited liability company, general partnership, limited partnership, joint venture, trust, or other entity, then Grantor and any Constituent Party, if any, (a) is either a corporation duly incorporated, a limited liability company duly organized with a legal status separate from its affiliates, or a partnership, trust, joint venture, or other entity duly organized, validly existing, and in good standing under the laws of the state of its formation or existence; (b) has complied with all conditions prerequisite to its doing business in the state in which the Mortgaged Property is located; and (c) has all requisite power and all governmental certificates of authority, licenses, permits, qualifications, and documentation to own, lease, and operate its properties and to carry on its business as now being, and as proposed to be, conducted.

**3.2 Validity of Loan Documents.** The execution, delivery, and performance by Grantor of and under the Loan Documents (other than the Guaranty) (a) if Grantor, or any signatory who signs on its behalf, is a corporation, general partnership, limited partnership, limited liability company, joint venture, trust, or other entity, are within Grantor's and each Constituent Party's powers and have been duly authorized by Grantor's and each Constituent Party's board of directors, shareholders, partners, members, managers, venturers, trustees, or other necessary parties, and all requisite actions for such authorization have been taken, (b) have received all requisite prior governmental approvals in order to be legally binding and enforceable, and (c) does not materially violate, conflict with, result in a breach of, or constitute (with due notice, lapse of time, or both) a default under or violation of any Legal Requirement or result in the creation or imposition of any lien, charge, or encumbrance of any nature upon any of Grantor's and any Constituent Party's or Guarantor's property or assets, except as contemplated by the Loan Documents. The Loan Documents constitute the legal, valid, and binding obligations of Grantor under the Loan Documents, enforceable pursuant to their respective terms.

**3.3 Information.** All information, financial statements, reports, papers, and data given or to be given to Mortgagee regarding Grantor, Guarantor or the Mortgaged Property are, or at the time of delivery will be, accurate, complete, and correct in all material respects and do not, or will not, omit any fact that is necessary to prevent the facts contained therein from being materially misleading. Since the date of the financial statements of Grantor and any Guarantor previously furnished to Mortgagee, no Material Adverse Event has occurred, and except as previously disclosed in writing to Mortgagee, neither Grantor nor any Guarantor has incurred any material liability, direct or indirect, fixed or contingent. Grantor acknowledges and understands that Mortgagee may be required, and hereby authorizes Mortgagee, to obtain, verify, and record information that identifies Grantor and/or Guarantor that may include the names and addresses of such parties and other information that will allow Mortgagee to identify such parties in accordance with the requirements of Anti-Terrorism Laws. Grantor has no



# UNOFFICIAL COPY

material guarantees, contingent liabilities and liabilities for taxes, or any long-term leases or unusual forward or long-term commitments, or any Hedge Agreement or other transaction or obligation in respect of derivatives, that are not reflected in the most recent financial statements referred to in this paragraph.

**3.4 Title and Lien.** Grantor has good and indefeasible title to the Land (in fee simple) and Improvements, and good and indefeasible title to the Fixtures and Personalty, in each case free of any Liens, charges, rights of first refusal or first offer, encumbrances, claims, easements, restrictions, options, leases (other than the Leases), covenants and other rights, titles or estates of any nature, except for the Permitted Exceptions. This Mortgage constitutes a valid, subsisting first lien on the Mortgaged Property. Grantor has the power and authority to encumber the Mortgaged Property and assign the Rents subject to the Assignment of Rents contained herein; all in accordance with the terms hereof, and all subject to the Permitted Exceptions.

**3.5 Business Purposes.** The loan evidenced by the Note is solely for the purpose of carrying on or acquiring a business of Grantor, and is not for personal, family, household, or agricultural purposes. The Mortgaged Property forms no part of any property owned, used, or claimed by Grantor as a residence or business homestead and is not exempt from forced sale under the laws of the State in which the Mortgaged Property is located. Grantor disclaims and renounces all claims to all or any portion of the Mortgaged Property as a homestead.

**3.6 Taxes.** Grantor and Guarantor (a) have filed on or before their respective due dates all federal, state, county, municipal, city income, and other tax returns required to have been filed by them, including, without limitation, those required under the Tax Code, (or have obtained extensions for filing those tax returns), (b) are not delinquent in filing those returns or extensions, if any, and (c) have paid all taxes and related liabilities that are due pursuant to those returns or pursuant to any assessments received by that party to the extent those taxes have become due. Neither Grantor nor, to Grantor's knowledge, Guarantor knows of any basis for any additional assessment regarding any such taxes and related liabilities. Grantor and, to Grantor's knowledge, Guarantor believe that their respective tax returns properly reflect the income and taxes of Grantor and Guarantor for the periods covered thereby, subject only to reasonable adjustments required by the Internal Revenue Service or other applicable tax authority upon audit.

**3.7 Mailing Address.** Grantor's mailing address, as set forth on the first page hereof or as changed pursuant to the provisions hereof, is true and correct.

**3.8 Relationship of Grantor and Mortgagee.** Notwithstanding any prior business or personal relationship between Grantor and Mortgagee or any officer, director, or employee of Mortgagee, the relationship between Grantor and Mortgagee is solely that of debtor and creditor. Mortgagee has no fiduciary or other special relationship with Grantor. Grantor and Mortgagee are not partners or joint venturers and nothing contained in the Loan Documents shall be construed to suggest that the relationship between Grantor and Mortgagee is other than that of debtor and creditor.

**3.9 Control Persons.** Grantor is not, and no Person having "control" (as that term is defined in 12 U.S.C. §375b or in regulations promulgated pursuant thereto) of Grantor is, an "executive officer," "director," or "person who directly or indirectly or in concert with one or more persons, owns, controls, or has the power to vote more than 10% of any class of voting securities" (as those terms are defined in 12 U.S.C. §375b or in regulations promulgated pursuant thereto) of Mortgagee, of a holding company of which Mortgagee is a subsidiary, or of any other subsidiary of a holding company of which Mortgagee is a subsidiary, of any bank at which Mortgagee maintains a correspondent account, or of any bank which maintains a correspondent account with Mortgagee.

# UNOFFICIAL COPY

**3.10 Experience; No Reliance on Mortgagee.** Grantor is experienced in the ownership and operation of properties similar to the Mortgaged Property. Grantor and Mortgagee are relying upon Grantor's expertise and business plan in connection with the ownership and operation of the Mortgaged Property. Grantor is not relying on Mortgagee's expertise or business acumen regarding the Mortgaged Property. In its transactions with Mortgagee, Grantor and its principals have been represented by (or have had the opportunity to be represented by) legal counsel independent of Mortgagee and independent of counsel for Mortgagee.

**3.11 No Litigation.** There are no (a) judicial, administrative, mediation, or arbitration actions, suits, or proceedings, at law or in equity, before any Governmental Authority or arbitrator pending or, to the knowledge of Grantor, threatened against or affecting Grantor or the Mortgaged Property; (b) outstanding or unpaid judgments against Grantor, any Guarantor, or the Mortgaged Property; or (c) defaults by Grantor with respect to any order, writ, injunction, decree, or demand of any Governmental Authority or arbitrator.

**3.12 ERISA.** Grantor (a) does not maintain or contribute to any employee benefit plan subject to Title IV of ERISA, (b) has not incurred any accumulated funding deficiency within the meaning of ERISA, and (c) has not incurred any liability to the PBGC in connection with any employee benefit plan established or maintained by Grantor. Grantor is not and shall not be (i) an "employee benefit plan," as defined in Section 3(3) of ERISA, (ii) a "governmental plan" within the meaning of Section 3(32) of ERISA, or (iii) a "plan" within the meaning of Section 4975(e) of the Tax Code. The assets of Grantor do not and shall not constitute "plan asset," within the meaning of the United States Department of Labor Regulations set forth in Section 2510.3-101 of Title 29 of the Code of Federal Regulations. Transactions by or with Grantor are not and shall not be subject to state statutes applicable to Grantor regulating investments of fiduciaries with respect to governmental plans. Grantor shall not engage in any transaction that would cause any Obligation or any action taken or to be taken hereunder (or the exercise by Mortgagee of any of its rights under this Mortgage or any of the other Loan Documents) to be a non-exempt (under a statutory or administrative class exemption) prohibited transaction under ERISA or Section 4975 of the Tax Code. Grantor agrees to deliver to Mortgagee such certifications or other evidence of compliance with the provisions of this *Section 3.12* as Mortgagee may from time to time request.

**3.13 O.S.H.A.** Each of Grantor, each Guarantor, and any Constituent Party have duly complied with and their respective facilities, business assets, property, leaseholds and equipment are in compliance, in all material respects, with the provisions of the Federal Occupational Safety and Health Act and all rules and regulations thereunder and all similar state and local laws, rules and regulations, to the extent required thereby. There are no outstanding citations, notices or orders of non-compliance issued to Grantor, any Guarantor, or any Constituent Party or relating to their respective businesses, assets, property, leaseholds or equipment under any such laws, rules or regulations, or with respect to the Mortgaged Property.

**3.14 Labor Relations.** Grantor is not a party to any collective bargaining agreement.

**3.15 No Bankruptcy.** No bankruptcy or insolvency proceedings are pending or contemplated by Grantor or, to the best knowledge, information, and belief of Grantor, against Grantor or by or against any endorser, cosigner, or guarantor of the Note.

**3.16 Compliance with Legal Requirements.** The Land and the Improvements and the intended use thereof by Grantor shall, upon completion of the Improvements, comply in all material respects with all applicable Legal Requirements, including, without limitation, all applicable restrictive covenants, zoning ordinances, subdivision and building codes, handicap or disability legislation, flood

# UNOFFICIAL COPY

disaster laws, applicable health and subject to the Environmental Report, environmental laws and regulations, and all other ordinances, orders or requirements issued by any state, federal, or municipal authorities having or claiming jurisdiction over the Mortgaged Property. Grantor has complied in all material respects with all Legal Requirements relating to the Mortgaged Property that are applicable to Grantor, any Constituent Party, or the Mortgaged Property, including, without limitation, Environmental Laws.

**3.17 Separate Tax Parcel; Legal Lot.** The Mortgaged Property is taxed separately without regard to any other real estate and the Land shall, upon completion of the Improvements, constitute a legally subdivided lot under all applicable Legal Requirements (or, if not subdivided, no subdivision or platting of the Land is required under applicable Legal Requirements), and for all purposes may be mortgaged, conveyed, or otherwise dealt with as an independent parcel.

**3.18 Utilities; Access.** All utility services necessary and sufficient for the full use, occupancy, operation and disposition of the Land and the Improvements for their intended purposes are available to the Mortgaged Property, including water, storm sewer, sanitary sewer, gas, electric, cable and telephone facilities, through public rights-of-way or duly recorded perpetual private easements; all streets, roads, highways, bridges and waterways necessary for access to and full use, occupancy, operation and disposition of the Land and the Improvements have been or, upon completion of the Improvements, will be completed, have been or, upon completion of the Improvements, will be dedicated to and accepted by the appropriate municipal authority and are or, upon completion of the Improvements, will be open and available to the Land and the Improvements without further condition or cost to Grantor; all curb cuts, driveways and traffic signals shown on the survey delivered to Mortgagee prior to the execution and delivery of this Mortgage are existing and have been fully approved by the appropriate Governmental Authority.

**3.19 Money Laundering; Anti-Terrorism Laws.**

(a) No funds for the purchase or operation of the Mortgaged Property have been or will be derived from sources that are described in 18 U.S.C.A. §§ 1956 and 1957 as funds or property derived from “specified unlawful activity.”

(b) Neither Grantor nor any Guarantor (nor any person or entity owning an interest in Grantor or Guarantor) (i) is a Prohibited Person, or (ii) has violated any Anti-Terrorism Laws. No Prohibited Person holds or owns any interest of any nature whatsoever in Grantor or Guarantor, as applicable, and none of the funds of Grantor or Guarantor have been derived from any activity in violation of Anti-Terrorism Laws.

**3.20 No Foreign Person.** Neither Grantor nor Guarantor is a “foreign person” within the meaning of § 1445(f)(3) of the Tax Code.

**3.21 No-Defaults.** There exists no material default (or event that, with the giving of notice or passage of time, or both, would result in a default) under the provisions of any instrument or agreement evidencing, governing, securing, or otherwise relating to any Debt of Grantor or any Guarantor, or pertaining to any of the Permitted Exceptions.

**3.22 Non-contravention.** The execution, delivery, and performance by each Grantor and any Guarantor of the Loan Documents to which that Person is a party or otherwise bound are not in contravention of the terms of any indenture, agreement, or undertaking to which that Person is a party or bound, unless those terms have been waived or the failure to comply with those terms would not result in a Material Adverse Event.

# UNOFFICIAL COPY

**3.23 Consents, Approvals and Filings, Etc.** Except as previously obtained or expressly provided in this Mortgage, no authorization, consent, approval, license, qualification, or formal exemption from, nor any filing, declaration, or registration with, any Governmental Authority and no material authorization, consent, or approval from any other Person, is required in connection with the execution, delivery, and performance by Grantor and any Guarantor of any Loan Document to which it is a party. All authorizations, consents, approvals, licenses, qualifications, exemptions, filings, declarations, and registrations that have previously been obtained or made are in full force and effect and are not the subject of any attack, or, to the best knowledge of Grantor, any threatened attack, in any material respect, by appeal, direct proceeding, or otherwise.

**3.24 Contracts and Agreements.** Neither Grantor nor any Guarantor is in default (beyond any applicable period of grace or cure) under any material contract, agreement, indenture, or instrument to which it is a party or by which it or any of its properties or assets are bound, where that default would result in a Material Adverse Event.

**3.25 Leases.** There are no Leases.

**3.26 No Investment Company.** Neither Grantor nor any Guarantor are an "investment company" within the meaning of the Investment Company Act of 1940, as amended, nor are any of them "controlled" by an "investment company" within the meaning of the Investment Company Act of 1940, as amended.

**3.27 No Margin Stock.** Neither Grantor nor any Guarantor are engaged principally, or as one of their important activities, directly or indirectly, in the business of extending credit for the purpose of purchasing or carrying margin stock, and none of the proceeds of the Note shall be used, directly or indirectly, to purchase or carry any margin stock or made available by Grantor or any Guarantor in any manner to any other Person to enable or assist that Person in purchasing or carrying margin stock, or shall be otherwise used or made available for any other purpose that might violate the provisions of Regulations G, T, U, or X of the Board of Governors of the Federal Reserve System.

**3.28 Financial Statements.** The Financial Statements previously furnished to Mortgagee have been prepared under Recognized Accounting Principles. The Financial Statements prepared by LaSalle and its Affiliates fairly present the financial condition of Grantor and, as applicable, the consolidated financial condition of Grantor and those other Person(s) that the Financial Statements purport to present, and the results of their respective operations as of the dates and for the periods covered by those Financial Statements and, to the best of Mortgageor's knowledge, the Financial Statements prepared by third parties fairly present the financial condition of Grantor and, as applicable, the consolidated financial condition of Grantor and those other Person(s) that the Financial Statements purport to present, and the results of their respective operations as of the dates and for the periods covered by those Financial Statements. Since the date(s) of the Financial Statements, there has been no material adverse change in the financial condition of Grantor. Neither Grantor nor any Guarantor has any material contingent obligations, liabilities for taxes, long-term leases, or long-term commitments not disclosed by, or reserved against in, those Financial Statements. As of this Mortgage's date, each Guarantor is solvent, able to pay its respective debts as they mature, has capital sufficient to carry on its business, and has assets whose fair market value exceed its liabilities (excluding, however, contingent liabilities). Neither Grantor nor any Guarantor shall be rendered insolvent, under-capitalized, or unable to pay debts generally as they become due by the execution or performance of any Loan Document to which it is a party or by which it is otherwise bound.

**3.29 Single Purpose Entities; Nature of Grantor.** Grantor is a single purpose entity the only business of which is the financing, ownership, maintenance and operation of the Mortgaged Property and

# UNOFFICIAL COPY

whose only asset is the Mortgaged Property and other assets directly related to the operation of the Mortgaged Property. Section 5.5 of the Loan Agreement is incorporated herein by reference as if fully set forth herein for all purposes.

**3.30 No Commencement.** As of the date of this Mortgage, no construction has been commenced on the Land, including, without limitation, steps to clear or otherwise prepare the Land for construction or the delivery of material for use in construction; and no contract or other agreement for construction on the Land has been entered into, for furnishing materials for that construction or for any other purpose, the performance of which by the other party to it would give rise to a Lien except a Design Services Contract and a contract for survey services.

## SECTION IV AFFIRMATIVE COVENANTS

Grantor hereby unconditionally covenants and agrees with Mortgagee, until the entire Indebtedness shall have been paid in full and all of the Obligations shall have been fully performed and discharged, as follows:

**4.1 Payment and Performance.** Grantor shall pay the Indebtedness as and when specified in the Loan Documents, and shall perform and discharge all of the Obligations, in full and on or before the dates same are to be performed.

**4.2 Existence.** Grantor shall (a) preserve and maintain its existence and preserve and maintain those rights, licenses, and privileges as are material to the business and operations conducted by it, (b) qualify and remain qualified to do business in each jurisdiction in which the Land is located and where that qualification is material to its business and operations or ownership of its properties, (c) continue to conduct and operate its business substantially as conducted and operated during the present and preceding calendar year, and (d) at all times maintain, preserve, and protect all of its franchises and trade names and preserve all the remainder of its property in, excluding ordinary wear and tear, shall keep it in good repair, working order, and condition.

**4.3 Compliance with Legal Requirements.** Grantor shall promptly, in all material respects, comply with, conform to, and obey all Legal Requirements, whether the same shall necessitate structural changes in, improvements to, or interfere with the use or enjoyment of, the Mortgaged Property. Grantor shall apply for, obtain, and maintain in effect all authorizations, consents, approvals, licenses, qualifications, exemptions, filings, declarations, and registrations (whether with any Governmental Authority, securities exchange, or otherwise) that are necessary in connection with the execution, delivery, or performance by Grantor or Guarantor under the Loan Documents.

**4.4 First Lien Status.** Grantor shall protect and preserve the first lien and security interest status of this Mortgage and the other Loan Documents and shall not permit to be created or to exist concerning the Mortgaged Property or any part thereof any lien or security interest on a parity with, superior to, or inferior to any of the liens or security interests hereof, except for the Permitted Exceptions and except as otherwise specifically permitted herein or in the Loan Documents.

**4.5 Payment of Impositions.** Subject to *Section 8.11* below, Grantor shall duly pay and discharge, or cause to be paid and discharged when due all Impositions not later than the earlier to occur of (a) the due date thereof, (b) the date any fine, penalty, interest, or cost may be added thereto or imposed thereon or (c) the date before any lien may be filed for the nonpayment thereof (if such date is used to determine the due date of the respective item), and, upon receipt of written request from Mortgagee,

# UNOFFICIAL COPY

Grantor shall promptly deliver to Mortgagee a written receipt evidencing the payment of the each Imposition.

**4.6 Maintenance and Repair.** Grantor shall keep the Mortgaged Property in first-class order and condition, reasonable and normal wear and tear excepted, and shall make all repairs, replacements, renewals, additions, betterments, improvements, and alterations thereof and thereto, interior and exterior, structural and nonstructural, ordinary and extraordinary, foreseen and unforeseen, that are necessary or reasonably appropriate to keep same in such order and condition. Grantor shall prevent any act, occurrence, or neglect which might impair the value or usefulness of the Mortgaged Property for its intended use. If repairs, replacements, renewals, additions, betterments, improvements, or alterations are required in and to the Mortgaged Property on an emergency basis to prevent loss, damage, waste, or destruction thereof, then Grantor shall proceed to repair, replace, add to, better, improve, or alter same, or cause same to be repaired, replaced, added to, bettered, improved, or altered, notwithstanding anything to the contrary contained in *Section 5.2* hereof; *provided, however*, that if such emergency measures are required, then Grantor shall notify Mortgagee in writing of the commencement of same and the measures to be taken, and, when same are completed, the completion date and the measures actually taken.

**4.7 Insurance.** Grantor shall, at Grantor's own expense, obtain and maintain and keep in full force and effect insurance as set forth in the Loan Agreement.

**4.8 Inspection.** Grantor shall permit Mortgagee, and its respective agents, representatives, and employees, to inspect the Mortgaged Property as set forth in the Loan Agreement.

**4.9 Property Reports.** Grantor shall maintain full and accurate books of account and other records reflecting the results of the operations of the Mortgaged Property and, subject to Privacy Laws, shall timely furnish, or cause to be furnished, to Mortgagee the reports and information required under the Loan Agreement.

**4.10 Financial Reporting Requirements.** Grantor shall timely deliver or cause to be delivered the financial reporting required under the Loan Agreement.

**4.11 Leases.**

(a) Excluding Permitted Residency Agreements, Grantor shall obtain the prior written consent of Mortgagee prior to entering into any Lease.

(b) Upon request of Mortgagee, Grantor shall deliver to Mortgagee a copy of the current form of Permitted Residency Agreement.

(c) Excluding Permitted Residency Agreements, all Leases must contain a written provision acceptable to Mortgagee in which all rights of the Lessee in the Lease and the Mortgaged Property are subordinated to the liens and security interests granted in the Loan Documents. If requested by Mortgagee, Grantor shall cause to be executed and delivered to Mortgagee a subordination, non-disturbance, and attornment agreement, in form and substance acceptable to Mortgagee, relating to each Lease, fully executed by Mortgagee, Grantor, and the applicable Lessee.

**4.12 Payment for Labor and Materials.** Subject to certain contest rights contained in *Section 8.11*, Grantor shall promptly pay all bills for labor, materials, and specifically fabricated materials incurred in connection with the Mortgaged Property and shall not permit to exist in respect of the Mortgaged Property or any part thereof any lien or security interest, even though inferior to the liens and

# UNOFFICIAL COPY

security interests hereof, for any such bill, and in any event never permit to be created or exist in respect of the Mortgaged Property or any part thereof any other or additional lien or security interest on a parity with, superior, or inferior to any of the liens or security interests hereof, except for the Permitted Exceptions.

**4.13 Further Assurances and Corrections.** From time to time, upon the reasonable request of Mortgagee, Grantor shall (a) promptly correct any defect, error, or omission which may be discovered in the contents of this Mortgage or in any other Loan Document or in the execution or acknowledgment thereof, (b) execute, acknowledge, deliver, record, and/or file such further instruments (including, without limitation, further deeds of trust, pledges, mortgages, lien instruments, security agreements, consents, acknowledgments, subordinations, financing statements, continuation statements, and assignments of rents) and perform such further acts and provide such further assurances as may be necessary or proper, in Mortgagee's reasonable opinion, to carry out more effectively the purposes of this Mortgage and the Loan Documents and (c) subject to the absolute assignments, liens, and security interests hereof and thereof any property intended by the terms hereof or thereof to be covered hereby or thereby, including, without limitation, any renewals, additions, substitutions, replacements, or appurtenances to the Mortgaged Property, (c) execute, acknowledge, deliver, procure, file, and/or record any document or instrument (including, without limitation, any financing statement) deemed advisable by Mortgagee in Mortgagee's reasonable discretion to protect the liens and the security interests herein granted against the rights or interests of third persons, (d) promptly deliver to Mortgagee any certification or other evidence requested by Mortgagee confirming compliance by Grantor, each Constituent Party and Guarantor with all Anti-Terrorism Laws, and confirming that Grantor is not a Prohibited Person, and (e) pay all costs connected with any of the foregoing.

**4.14 Tax on Mortgage.** If at any time any law shall be enacted imposing or authorizing the imposition of any tax upon this Mortgage, or upon any rights, titles, liens, or security interests created hereby, or upon the Indebtedness or any part thereof (whether pursuant to the Tax Code or otherwise), Grantor shall immediately pay all such taxes, *provided that*, if such law as enacted makes it unlawful for Grantor to pay such tax, Grantor shall not pay nor be obligated to pay such tax.

**4.15 Statement of Unpaid Balance.** At any time and from time to time, Grantor shall furnish promptly, upon the request of Mortgagee, a written statement or affidavit, in form satisfactory to Mortgagee, stating the unpaid balance of the Indebtedness and that there are no offsets or defenses against full payment of the Indebtedness and the terms hereof, or if there are any such offsets or defenses, specifying them.

**4.16 Expenses.** Subject to the provisions of *Section 8.12* hereof, Grantor shall pay on demand all reasonable and bona fide out-of-pocket costs, fees, expenses, and other expenditures, including, without limitation, title insurance fees, examination charges, survey costs, insurance premiums, filing and recording fees, loan broker fees, out-of-pocket expenses incurred by Mortgagee for reasonable visits by Mortgagee's employees and agents to inspect the Mortgaged Property, and reasonable attorneys' fees and expenses actually paid or incurred by Mortgagee to third parties incident to this Mortgage or any other Loan Document (including, without limitation, reasonable attorneys' fees and expenses in connection with the negotiation, preparation, and execution hereof and of any other Loan Document and any amendment hereto or thereto, any release hereof, any consent, approval, or waiver hereunder or under any other Loan Document, the making of any advance under the Note, and any suit to which Mortgagee is a party involving this Mortgage or the Mortgaged Property) or incident to the enforcement of the Indebtedness or the Obligations or the exercise of any right or remedy of Mortgagee under any Loan Document.

# UNOFFICIAL COPY

**4.17 Address.** Grantor shall give written notice to Mortgagee of any change of address of Grantor at least five (5) business days prior to the effective date of such change of address. Absent such official written notice of a change in address for Grantor, Mortgagee shall be entitled for all purposes under the Loan Documents to rely upon Grantor's address as set forth in the initial paragraph of this Mortgage, as same may have been theretofore changed in accordance with the provisions hereof.

**4.18 Disclosures.** If at any time Grantor shall become aware of the existence or occurrence of any financial or economic conditions or natural disasters which might have a Material Adverse Event, Grantor shall promptly notify Mortgagee of the existence or occurrence thereof and of Grantor's opinion as to what effect such event may have on the Mortgaged Property or Grantor. Grantor shall also give prompt notice to Mortgagee of (a) any material litigation or dispute, threatened or pending against or affecting Grantor, the Mortgaged Property or any Guarantor which could have a Material Adverse Event, (b) any Event of Default, (c) any default by Grantor or any acceleration of any indebtedness owed by Grantor under any contract to which Grantor is a party; (d) any default by Guarantor or any acceleration of any indebtedness owed by any Guarantor under any contract to which Guarantor is a party, and any material change in the character of Grantor's business as it existed on the date hereof. If at any time Grantor obtains knowledge that Grantor or Guarantor is, or becomes, a Prohibited Person or are indicted, arraigned or custodially detained on charges or allegations involving or relating to any Anti-Terrorism Laws, Grantor shall immediately notify Mortgagee in writing of same.

**4.19 ERISA.** If and to the extent that Grantor is obligated under any plan governed by or subject to ERISA, Grantor shall (a) fully discharge and satisfy all of its obligations and funding requirements under such plan, ERISA, and the Tax Code, (b) comply in all material respects with any and all applicable provisions of ERISA and the Tax Code and shall not incur or permit to exist any unfunded liabilities to the PBGC or to such plan under ERISA or the Tax Code, (c) as soon as possible but in any event not later than thirty (30) days after Grantor knows of an occurrence of a "reportable event" or "prohibited transaction" within the meaning of ERISA or that the PBGC has instituted or shall institute proceedings under ERISA to terminate that plan, Grantor shall deliver to Mortgagee a certificate of a responsible officer of Grantor setting forth details as to such reportable event and the action which Grantor or an affiliate of Grantor (as defined under ERISA), as the case may be, proposes to take with respect to same, together with a copy of any notice of such reportable event that may be required to be filed with the PBGC, or any notice delivered by the PBGC evidencing its intent to institute those proceedings or any notice to the PBGC that the plan is to be terminated, as the case may be, and (d) furnish to Mortgagee (or cause the plan administrator to furnish to Mortgagee) a copy of the annual return (including all schedules and attachments) for each pension plan covered by ERISA and filed with the Internal Revenue Service, not later than thirty (30) days after the report has been filed. For all purposes of this *Section 4.19*, Grantor is deemed to have all knowledge of all facts attributable to the plan administrator under ERISA.

**4.20 Delivery of Contracts.** Within twenty (20) days after a request by Mortgagee from time to time, Grantor shall prepare and deliver to Mortgagee a complete listing of all Contracts, showing date, term, parties, subject matter, concessions, whether any defaults exist, and any other information specified by Mortgagee, regarding each of those Contracts.

**4.21 Sources and Uses of Funds.** Grantor has taken, and shall continue to take until the Obligations are satisfied in full, such measures that are required by any and all Anti-Terrorism Laws to assure that the funds invested in Grantor and/or used to make payments on the Indebtedness or the Obligations are derived from (a) transactions and sources that do not violate any Anti-Terrorism Laws or, to the extent such funds originate outside the United States, do not violate the laws of the jurisdiction from which they originated, and (b) permissible sources under Anti-Terrorism Laws or, to the extent such funds originate outside the United States, under the laws of the jurisdiction from which they originated. If



# UNOFFICIAL COPY

Mortgagee reasonably believes that Grantor or any Guarantor may have breached any of the representations, warranties, or covenants set forth in this Mortgage or the other Loan Documents relating to any Anti-Terrorism Laws or the identity of any Person as a Prohibited Person, then, Mortgagee shall have the right, with or without notice to Grantor unless otherwise specified, to (i) notify the appropriate Governmental Authority and to take such action as such governmental authority or applicable Anti-Terrorism Laws may direct; (ii) withhold Loan advances and segregate the assets constituting the Loan or any of Grantor's funds or assets deposited with or otherwise controlled by Mortgagee pursuant to the Loan Documents; (iii) decline any payment (or deposit such payment with an appropriate United States Governmental Authority) or decline any prepayment or consent request; and/or (iv) with notice to Grantor declare an Event of Default and immediately accelerate the Indebtedness in connection therewith. Grantor agrees that except with respect to Mortgagee's gross negligence or willful misconduct, none of Grantor or any Guarantor shall assert any claim (and hereby waives, for itself and on behalf of such other Persons, any claim that they may now or hereafter have) against Mortgagee or any of its affiliates, successors, assigns, representatives, or agents for any form of damages as a result of any of the foregoing actions, regardless of whether or not Mortgagee's reasonable belief is ultimately demonstrated to be accurate.

**4.22 Surveys.** Upon completion of the construction of the Improvements, Grantor shall furnish to Mortgagee an "as-built" survey of the Mortgaged Property at Grantor's expense. Thereafter, during the existence of an Event of Default, Grantor shall furnish to Mortgagee, at any time and from time to time, upon Mortgagee's request and at Grantor's expense, a survey of the Land and Improvements. All surveys must be in form and substance acceptable to Mortgagee.

**4.23 Estoppel Certificates.** Grantor shall promptly deliver to Mortgagee, upon Mortgagee's request from time to time, but not more often than two (2) times in any calendar year unless an Event of Default then exists or otherwise is required by a Governmental Authority, estoppel certificates or written statements, duly acknowledged, stating the amount advanced to Grantor under the Loan Documents, the amount due on the Note, and whether Grantor claims that any offsets or defenses exist against payment of the Indebtedness or performance of the Obligations.

**4.24 Personalty and Fixtures.** Grantor shall deliver to Mortgagee, from time to time on demand, but not more often than two (2) times in any calendar year unless an Event of Default then exists or otherwise is required by a Governmental Authority, any contracts, bills of sale, statements, receipted vouchers, or agreements under which Grantor claims title to any Equipment, Fixtures, or other items of personal property incorporated into the Improvements or subject to the lien of this Mortgage or other security agreement that secures the Obligations.

## SECTION V NEGATIVE COVENANTS

Grantor hereby unconditionally covenants and agrees with Mortgagee that, until the entire Indebtedness shall have been paid in full and all of the Obligations shall have been fully performed and discharged:

**5.1 Use Violations.** Grantor shall not use, maintain, operate, or occupy, or allow the use, maintenance, operation, or occupancy of, the Mortgaged Property in any manner that (a) materially violates any Legal Requirement, (b) constitutes a public or private nuisance, or (c) makes void, voidable, or cancelable, or increases the premium of, any insurance then in force regarding the Mortgaged Property.

**5.2 Waste; Alterations.** Grantor shall not commit or permit any waste or impairment of the Mortgaged Property and shall not (subject to the provisions of *Sections 4.3* and *4.6* hereof), without the

# UNOFFICIAL COPY

prior written consent of Mortgagee, make or permit to be made any alterations or additions to the Mortgaged Property of a material nature.

**5.3 Replacement of Fixtures and Personalty.** Grantor shall not, without the prior written consent of Mortgagee, permit any of the Fixtures or Personalty to be removed at any time from the Land or Improvements unless (a) such item is removed temporarily for maintenance and repair or (b) if removed permanently and not obsolete, such item is replaced by an article of equal suitability and value, owned by Grantor, free of any lien or security interest except as may be approved in writing by Mortgagee.

**5.4 Change in Zoning.** Without Mortgagee's prior written consent, Grantor shall not (a) seek or acquiesce in a zoning reclassification, zoning variance, or special exception to zoning of all or any portion of the Mortgaged Property if same would result in the use of the Mortgaged Property as a senior living facility becoming a non-conforming use under applicable Legal Requirement, (b) grant or consent to any easement, dedication, plat, or restriction (or allow any easement to become enforceable by prescription), or (c) seek or acquiesce to any imposition of any addition of a Legal Requirement or any amendment or modification thereof, covering all or any portion of the Mortgaged Property.

**5.5 No Drilling.** Grantor shall not, without the prior written consent of Mortgagee, cause or consent to any drilling or exploration for any Minerals or any extraction, removal, or production of any Minerals from the surface or subsurface of the Land regardless of the depth thereof or the method of mining or extraction thereof.

**5.6 No Subordinate Mortgages.** Grantor shall not 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 Subordinate Mortgage regardless of whether such Subordinate Mortgage is expressly subordinate to the liens or security interests of the Loan Documents with respect to the Mortgaged Property, other than the Permitted Exceptions.

**5.7 Additional Debt.**

(a) Guaranties. Grantor shall not guarantee, endorse, or otherwise become contingently liable in connection with any obligation of any other Person, except guaranties in favor of and satisfactory to Mortgagee and endorsements for deposit or collection in the ordinary course of business.

(b) Debt. Grantor shall not create or incur any additional liability, whether contingent or non-contingent, with respect to either Grantor or the Mortgaged Property, except (a) the Indebtedness and other debt from time to time outstanding and owing to Mortgagee, and (b) trade payables or accrued expenses incurred in the ordinary course of business of operating the Mortgaged Property, together with other indebtedness consented to in writing by Mortgagee from the members of Grantor so long as the promissory notes evidencing said indebtedness are subordinated to the Indebtedness in form and substance satisfactory to Mortgagee. Other provisions of the Mortgage are not intended to permit Grantor to incur Debt prohibited under this *Section 5.7*.

**5.8 Encumbrances.** Grantor shall not create, incur, assume, or (subject to certain contest rights under *Section 8.11*) suffer to exist any Lien on the all or any part of the Mortgaged Property, except for the Permitted Exceptions.

# UNOFFICIAL COPY

**5.9 New Construction.** Except as expressly permitted under the Loan Agreement, Grantor shall not undertake to construct any building or other significant Improvement on the Land without the prior written consent of Mortgagee.

**5.10 Mergers or Dispositions.** Grantor shall not and no Guarantor shall (a) enter into any merger or consolidation, whether or not that Person shall be the surviving entity, or (b) make a Disposition.

**5.11 Acquisitions.** Grantor shall not (a) purchase, acquire, or become obligated for the purchase of all or substantially all of the assets or business interests of any Person or any ownership interests of any Person, or (b) in any other manner effectuate or attempt to effectuate an expansion of its present business by acquisition.

**5.12 Dividends.** Grantor shall not declare or pay dividends except as expressly permitted under the Loan Agreement.

**5.13 Investments.** Grantor shall not make or allow to remain outstanding any investment in (whether that investment is of the character of investment in shares of stock, evidences of indebtedness, other securities, or otherwise) any loans, advances, or extensions of credit to any Person other than any investment in direct obligations of the United States of America, any agency of the United States of America, or in certificates of deposit issued by Mortgagee, all of which shall be maintained consistent with Grantor's business practices prior to the date of this Mortgage; *provided, however*, that no investment shall mature more than ninety (90) days after the date when made or issued.

**5.14 Transactions with Affiliates.** Grantor shall not enter into any transaction with any of its stockholders, officers, employees, partners, members or any of its Affiliates, except under transactions in the ordinary course of business and on terms not less favorable than would be usual and customary in similar transactions between Persons dealing at arm's length other than unsecured advances by Affiliates of Grantor for operating costs during the ordinary course of business which have been subordinated in form and substance satisfactory to Mortgagee. Mortgagee hereby consents to Grantor's execution of the Marketing Agreement and the Management Agreement.

**5.15 Defaults on Other Obligations.** Grantor shall not fail to duly perform, observe, or comply with any material covenant, agreement, or other obligation to be performed, observed, or complied with by Grantor, any Constituent Party, or any Guarantor, subject to any applicable grace periods, which failure could result in a Material Adverse Event.

**5.16 Prepayment of Debt.** Grantor shall not prepay any Debt (or take any actions that impose an obligation to prepay any Debt), except for prepayment of the Indebtedness subject to the terms of the Loan Documents.

**5.17 Pension Plans.** Except in compliance with the Loan Documents, Grantor shall not enter into, maintain, or make any contribution to, directly or indirectly, any pension plan that is subject to ERISA.

**5.18 Subordinate Debt.** Grantor shall not subordinate any Debt due to Grantor from any Person to Debt of other creditors of that Person.

**5.19 No Further Negative Pledges.** Grantor shall not enter into or become subject to any agreement (other than the Loan Documents) that (a) prohibits Grantor, any Constituent Party, or any Guarantor from guaranteeing any obligations, (b) prohibits the creation or assumption of any Lien on the

# UNOFFICIAL COPY

properties or assets of Grantor, any Constituent Party, or any Guarantor, whether now owned or later acquired; or (c) requires an obligation to become secured (or further secured) if another obligation is secured or further secured.

**5.20 Accounts Receivable.** Grantor shall not sell or assign any account (as defined in the UCC), account receivable, note or trade acceptance, except to Mortgagee.

**5.21 No License Restrictions.** Grantor shall not permit any restriction in any license or other agreement that restricts Grantor, any Constituent Party, or any Guarantor from granting a Lien to Mortgagee on any such parties' rights under that license or agreement.

## SECTION VI EVENTS OF DEFAULT

The term "*Event of Default*," as used in this Mortgage and in the other Loan Documents, shall mean the occurrence or happening and the continued existence thereof, at any time and from time to time, of any one or more of the following:

**6.1 Payment of Indebtedness.** Grantor fails, refuses, or neglects to pay, in full, any installment or portion of the Indebtedness within five (5) days after the same is due, whether on the due date stipulated in the Loan Documents, on acceleration, or otherwise.

**6.2 False Representation.** Any representation, warranty, or statement made by Grantor, Guarantor, or others under or in connection with the Loan Documents or any affidavit or other instrument executed or delivered regarding the Loan Documents or the Obligations is determined by Mortgagee to be false or misleading in any material respect as of the date hereof or when made.

**6.3 Default Under Other Lien Document.** Grantor shall default or commit an event of default under and pursuant to any other mortgage or security agreement which covers or affects any part of the Mortgaged Property.

**6.4 Insolvency; Bankruptcy.** Grantor or any Guarantor does any of the following or the occurrence of any of the following:

(a) executes an assignment for the benefit of creditors or an admission in writing by such Person of its inability to pay, or its failure to pay, debts generally as the debts become due;

(b) allows a levy against all or any part of the Mortgaged Property (or, in the case of Guarantor, any material portion of Guarantor's assets), and any execution, attachment, sequestration, or other writ is not vacated within sixty (60) days after the levy;

(c) allows the appointment of a receiver, trustee, or custodian of such Person or of all or part of the Mortgaged Property (or, in the case of Guarantor, any material portion of Guarantor's assets), and such receiver, trustee, or custodian is not discharged within sixty (60) days after the appointment;

(d) files as a debtor a petition, case, proceeding, or other action pursuant to, or voluntarily seeks the benefit or benefits of Debtor Relief Laws, or takes any action under Debtor Relief Laws;

# UNOFFICIAL COPY

(e) files a petition, complaint, answer, or other instrument that seeks to effect a suspension of, or that has the effect of suspending, any of the rights or powers of Mortgagee granted in any of the Loan Documents; or

(f) the filing of a petition, case, proceeding, or other action against it as a debtor under Debtor Relief Laws or the appointment of a receiver, trustee, custodian, or liquidator of such Person or of all or any part of the Mortgaged Property, or of any significant portion of Grantor's other property (or, in the case of Guarantor, any material portion of Guarantor's assets), and:

(i) admits, acquiesces in, or fails to contest diligently the material allegations of that petition, case, proceeding, or other action;

(ii) the petition, case, proceeding, or other action results in the entry of an order for relief or order granting the relief sought; or

(iii) the petition, case, proceeding, or other action is not permanently dismissed or discharged on or before the earlier of trial on that matter or sixty (60) days following the date of filing.

**6.5 Dissolution; Disability.** Grantor or any Guarantor, (a) who is an individual dies or becomes mentally incompetent unless a replacement guarantor reasonable acceptable to Mortgagee is put in place within sixty (60) days following such event, or (b) which is an entity, dissolves, terminates, liquidates, merges with or is consolidated into any other entity.

**6.6 No Further Encumbrances.** Except as otherwise specifically permitted herein or in the other Loan Documents, Grantor creates, places, or permits to be created or placed, or through any act or failure to act, acquiesces in the placing of, or allows to remain, any Lien or Subordinate Mortgage against the Mortgaged Property (other than the Permitted Exceptions), regardless of whether such Lien or Subordinate Mortgage is expressly subordinate to the liens or security interests of the Loan Documents.

**6.7 Disposition of Mortgaged Property or Beneficial Interest in Grantor.** Grantor makes a Disposition or allows a Disposition to be made, without the prior written consent of Mortgagee.

**6.8 Condemnation.** Any condemnation proceeding is instituted or threatened that would, in Mortgagee's sole judgment, materially impair the use and enjoyment of the Mortgaged Property for its intended purposes.

**6.9 Destruction of Improvements.** Any part of the Mortgaged Property is demolished, destroyed, or substantially damaged so that Mortgagee determines in good faith that it is not economically, financially, and practically feasible to repair and restore the Mortgaged Property to substantially its previous condition, with such repairs and restorations being completed prior to the Maturity Date.

**6.10 Abandonment.** Grantor abandons or removes all or any material portion of the Improvements, Personalty, or Fixtures.

**6.11 Discontinuance of Operations.** Grantor vacates, or discontinues operations of or from, any material portion of the Mortgaged Property.

# UNOFFICIAL COPY

**6.12 Other Debt.** Any default by Grantor or any Guarantor in the payment of any Debt (other than the Indebtedness, which is the subject of *Section 6.1*) in excess of \$250,000, or in the observance or performance of any related obligations and, in each case, continuation of such default beyond any applicable grace or cure period.

**6.13 Judgments.** The rendering of one or more judgments or decrees for the payment of money against Grantor or any Guarantor in excess of \$100,000, and such judgment or decree has not been vacated, bonded, or stayed by appeal or otherwise within sixty (60) days after the date of entry.

**6.14 ERISA.** The failure by Grantor, any Constituent Party, or any Guarantor, to meet the minimum funding requirements under ERISA with respect to any Pension Plan established or maintained by it; the occurrence of any "reportable event", as defined in ERISA, that could constitute grounds for termination by the PBGC of any Pension Plan or for the appointment of a trustee by the appropriate United States District Court to administer that Pension Plan, and the reportable event is not corrected and the determination is not revoked within thirty (30) days after notice has been given to the plan administrator or Grantor, any Constituent Party, or any Guarantor; or the institution of any proceedings by the PBGC to terminate that Pension Plan or to appoint a trustee by the appropriate United States District Court to administer that Pension Plan.

**6.15 Loan Documents.** Any Loan Document, at any time after its execution and delivery and for any reason other than satisfaction in full of all the Indebtedness and Obligations, ceases to be in full force and effect or any Lien with respect to the Mortgaged Property ceases to be, or is not, valid, perfected, and prior to all other Liens or is terminated, revoked, or declared void.

**6.16 Event of Default under Loan Agreement or other Loan Documents.** The occurrence and continued existence of any Event of Default as defined in the Loan Agreement or the other Loan Documents.

## SECTION VII REMEDIES

**7.1 Mortgagee's Remedies Upon Default.** Upon the occurrence of an Event of Default, Mortgagee may, at Mortgagee's option, do any one or more of the following:

(a) **Right to Perform Grantor's Covenants.** If Grantor has failed to keep or perform any covenant contained in this Mortgage or the other Loan Documents, Mortgagee may, but shall have no obligation to, perform or attempt to perform said covenant, and any payment made or expense incurred in the performance or attempted performance of any such covenant shall constitute part of the Indebtedness, and Grantor promises, upon demand, to pay to Mortgagee, at the place where the Note is payable, all sums so advanced or paid by Mortgagee, with interest at the Default Rate from the date when paid or incurred by Mortgagee. No performance or payment by Mortgagee shall constitute a waiver of any Event of Default. In addition to the liens and security interests hereof, Mortgagee shall be subrogated to all rights, titles, liens, and security interests securing the payment of any debt, claim, tax, or assessment for which Mortgagee makes any payment or advance.

(b) **Right of Entry.** Mortgagee may, before or after the institution of any foreclosure proceedings, enter upon the Mortgaged Property and take exclusive possession of the Mortgaged Property and, subject to Privacy Laws, all related books, records, and accounts and may exercise, without interference from Grantor, all rights of Grantor regarding the management, possession, operation, protection, or preservation of the Mortgaged Property, including, without limitation,

# UNOFFICIAL COPY

the rights to lease the same for the account of Grantor and to apply the Rents as set forth in *Section 9.3* of the Assignment of Rents below. All costs, expenses, and liabilities incurred by Mortgagee in collecting such Rents and in managing, operating, maintaining, protecting, or preserving the Mortgaged Property, if not paid out of Rents as set forth in *Section 9.3* of the Assignment of Rents below, shall be added to the Indebtedness and shall bear interest at the Default Rate from the date of expenditure until paid. If necessary to obtain the possession provided for above, Mortgagee may invoke all legal remedies to dispossess Grantor, including, without limitation, one or more actions for forcible entry and detainer, trespass to try title, and restitution. In connection with any action taken by Mortgagee pursuant to this subsection, (i) Mortgagee shall not be liable for any loss sustained by Grantor resulting from any failure to lease the Mortgaged Property, or any part thereof, or from any other act or omission of Mortgagee in managing the Mortgaged Property unless such loss is caused by the gross negligence or willful misconduct of Mortgagee, and (ii) Mortgagee shall not be obligated to perform or discharge any obligation, duty, or liability under any Lease or this Mortgage, or to exercise any rights or remedies hereunder. **GRANTOR SHALL INDEMNIFY MORTGAGEE FOR, AND DEFEND AND HOLD MORTGAGEE HARMLESS FROM, ALL LIABILITY, LOSS, OR DAMAGE, THAT MORTGAGEE MAY INCUR UNDER ANY SUCH LEASE, FROM THE EXERCISE OF RIGHTS OR REMEDIES HEREUNDER, AND FROM ALL CLAIMS AND DEMANDS THAT MAY BE ASSERTED AGAINST MORTGAGEE BY REASON OF ANY ALLEGED OBLIGATIONS OR UNDERTAKINGS ON ITS PART TO PERFORM OR DISCHARGE ANY OF THE TERMS, COVENANTS, OR AGREEMENTS CONTAINED IN ANY SUCH LEASE EVEN IF RESULTING FROM MORTGAGEE'S OWN NEGLIGENCE OR ARISING IN STRICT LIABILITY, BUT NOT MORTGAGEE'S OWN GROSS NEGLIGENCE OR WILLFUL MISCONDUCT.** Should Mortgagee incur any such liability, the amount thereof, including, without limitation, all costs, expenses, and reasonable attorneys' fees actually incurred, together with interest at the Default Rate from the date of expenditure until paid, shall be added to the Indebtedness, and Grantor shall reimburse Mortgagee therefor immediately upon demand. Nothing in this subsection shall impose any duty, obligation, or responsibility upon Mortgagee for the control, care, management, leasing, or repair of the Mortgaged Property, nor for the performance of any of the terms and conditions of any such Lease; nor shall it operate to make Mortgagee responsible or liable for any waste committed on the Mortgaged Property by the tenants or by any other parties, or for any Hazardous Substance in, on or under the Mortgaged Property, or for any dangerous or defective condition of the Mortgaged Property or for any negligence in the management, leasing, upkeep, repair, or control of the Mortgaged Property resulting in loss, injury, or death to any tenant, licensee, employee, or stranger. Grantor hereby ratifies, confirms, and agrees with all actions that Mortgagee takes under this subsection with respect to the Mortgaged Property.

The remedies in this subsection are in addition to other remedies available to Mortgagee and the exercise of the remedies in this subsection shall not be deemed to be an election of non-judicial or judicial remedies otherwise available to Mortgagee. The remedies in this *Section 7* are available under and governed by the real property laws of Texas and are not governed by the personal property laws of Texas, including, without limitation, the power to dispose of personal property in a commercially reasonable manner under Section 9.610 of the UCC. No action by Mortgagee, taken pursuant to this subsection, shall be deemed to be an election to retain personal property under Section 9.620 of the UCC. Any receipt of consideration received by Mortgagee pursuant to this subsection shall be immediately credited against the Indebtedness (in the inverse order of maturity) and the value of said consideration shall be treated like any other payment against the Indebtedness.

# UNOFFICIAL COPY

(c) Right to Accelerate. Mortgagee may declare the entire unpaid balance of the Indebtedness immediately due and payable, without notice, demand, presentment, notice of nonpayment or nonperformance, protest, notice of protest, notice of intent to accelerate, notice of acceleration, or any other notice or any other action, all of which are hereby waived by Grantor and all other parties obligated in any manner on the Indebtedness. Upon such declaration, the entire unpaid balance of the Indebtedness shall be immediately due and payable. The failure to exercise any remedy available to Mortgagee shall not be deemed to be a waiver of any rights or remedies of Mortgagee under the Loan Documents, at law, or in equity. Notwithstanding the foregoing, in the case of an Event of Default under *Section 6.5*, and notwithstanding the lack of any notice, demand or declaration by Mortgagee, the entire Indebtedness remaining unpaid and outstanding shall automatically become due and payable in full, and any commitment by Mortgagee to make any further Advances under the Loan Agreement shall be automatically and immediately terminated without any requirement of notice or demand by Mortgagee upon Grantor or any other Person, all of which are expressly waived by Grantor.

(d) Foreclosure-Power of Sale. Mortgagee may proceed with foreclosure under the power of sale as set forth below:

(i) Public Sale. Mortgagee is authorized and empowered to sell the Mortgaged Property, or any part thereof, at public auction to the highest bidder for cash, with or without having taken possession of the Mortgaged Property. Any such sale (including notice thereof) shall comply with the applicable requirements, at the time of the sale, of applicable law governing sales of real property under powers of sale conferred by mortgages.

(ii) Right to Require Proof of Financial Ability and/or Cash Bid. At any time prior to or during the bidding, Mortgagee may require a bidding party, as conditions for submitting bids at the foreclosure sale, (A) to disclose its full name, state and city of residence, occupation, specific business office location, and the name and address of the principal who the bidding party is representing (if applicable), and (B) to demonstrate reasonable evidence of the bidding party's financial ability (or, if applicable, the financial ability of the bidding party's principal). If any such bidding party (the "*Questioned Bidder*") declines to comply with the above conditions, or if such Questioned Bidder does respond but Mortgagee, in Mortgagee's sole and absolute discretion, deems the responses to be inadequate, then Mortgagee may continue the bidding with reservation. If the Mortgagee continues the bidding with reservation, then (1) Mortgagee may caution the Questioned Bidder concerning the legal obligations to be incurred in submitting bids, and (2) if the Questioned Bidder is not the highest bidder at the sale, or if having been the highest bidder the Questioned Bidder fails to deliver the cash purchase price payment promptly to Mortgagee, all bids by the Questioned Bidder shall be void. Mortgagee may, in Mortgagee's sole and absolute discretion, determine that a credit bid is in the best interest of Grantor and Mortgagee, and elect to sell the Mortgaged Property for credit or for a combination of cash and credit; *provided, however*, that Mortgagee shall have no obligation to accept any bid except an all-cash bid. If Mortgagee requires a cash bid and cash is not delivered within a reasonable time after conclusion of the bidding process, as specified by Mortgagee, but in no event later than 3:45 p.m., Dallas, Texas time, on the day of sale, then such sale shall be void, the bidding process may be recommenced, and any subsequent bids or sale shall be made as if no prior bids were made or accepted.

(iii) Sale Subject to Unmatured Indebtedness. In addition to the rights and powers of sale granted above, if an Event of Default exists in the payment of any installment of the Indebtedness, then Mortgagee, at Mortgagee's option, immediately or at any time thereafter while any matured installment remains unpaid, without declaring the entire Indebtedness to be



# UNOFFICIAL COPY

due and payable, may enforce this trust and to sell the Mortgaged Property subject to such unmatured Indebtedness and to the rights, powers, liens, security interests, and assignments securing or providing recourse for payment of such unmatured Indebtedness, in the same manner under the power of sale as set forth above. Sales made under this **Section 7.1(d)(iii)** shall not exhaust or affect in any way Mortgagee's power of sale and shall not affect the unmatured balance of the Indebtedness or the rights, powers, liens, security interests, and assignments securing or providing recourse for payment of the Indebtedness.

(iv) **Partial Foreclosure.** Mortgagee, under the power of sale granted in this **Section 7.1(d)**, (A) may sell the Mortgaged Property, as a unit and as part of a single sale, or (B) may sell at any time or from time to time any part or parts of the Mortgaged Property separately from the remainder of the Mortgaged Property. Sale of a part of the Mortgaged Property shall not exhaust the power of sale, and sales may be made from time to time until the Obligations are performed and discharged in full. It shall not be necessary to have present or to exhibit any of the Mortgaged Property at any sale.

(v) **Mortgagee's Deeds.** After any sale under this **Section 7.1(d)**, Mortgagee shall make good and sufficient deeds, assignments, and other conveyances to the purchaser(s) thereunder in the name of Grantor, conveying the Mortgaged Property or any part thereof so sold to the purchaser(s) with special warranty of title by Grantor. In any deeds, assignments, or other conveyances given by Mortgagee, all statements of fact or other recitals therein made regarding the identity of Mortgagee, the occurrence or existence of any Event of Default, the notice of intention to accelerate, or acceleration of, the maturity of the Indebtedness, the request to sell, notice of sale, time, place, terms, and manner of sale, and receipt, distribution, and application of the money realized therefrom, the due and proper appointment of a substitute Mortgagee, and any other action by or on behalf of Mortgagee shall be taken by all courts of law and equity as *prima facie* evidence that such statements or recitals are true, correct, and complete and are to be accepted without further question, and Grantor does hereby ratify and confirm all acts that Mortgagee may lawfully do in the premises by virtue hereof.

(e) **Mortgagee's Judicial Remedies.** Mortgagee may proceed by suit or suits, at law or in equity, to enforce the payment of the Indebtedness and the performance and discharge of the Obligations pursuant to this Mortgage, the Note, and the other Loan Documents, to foreclose the liens and security interests of this Mortgage against all or any part of the Mortgaged Property, and to have all or any part of the Mortgaged Property sold under the judgment or decree of a court of competent jurisdiction. This remedy shall be cumulative of any other non-judicial remedies available to Mortgagee with respect to the Loan Documents. Proceeding with a request or receiving a judgment for legal relief shall not be or be deemed to be an election of remedies or bar any available non-judicial remedy of Mortgagee.

(f) **Mortgagee's Right to Appointment of Receiver.** Mortgagee, as a matter of right and without regard to the sufficiency of the security for repayment of the Indebtedness and the performance and discharge of the Obligations, without notice to Grantor and without any showing of insolvency, fraud, or mismanagement on the part of Grantor, and without the necessity of filing any judicial or other proceeding other than the proceeding for appointment of a receiver, shall be entitled to the appointment of a receiver or receivers of the Mortgaged Property or any part thereof, and of the rents, and Grantor irrevocably consents to the appointment of a receiver or receivers. Any such appointed receiver shall have the usual powers and duties of receivers in such matters.

# UNOFFICIAL COPY

(g) Mortgagee's Uniform Commercial Code Remedies. Mortgagee may exercise its rights of enforcement with respect to Fixtures and Personalty under the UCC, and in conjunction with, in addition to, or in substitution for the rights and remedies under the UCC:

(i) Mortgagee may, without demand or notice to Grantor, enter upon the Mortgaged Property to take possession of, assemble, receive, and collect the Personalty, or any part thereof, or to render it unusable;

(ii) Mortgagee may require Grantor to assemble the Personalty and make it available at a place Mortgagee designates which is mutually convenient to allow Mortgagee to take possession or dispose of the Personalty;

(iii) reasonable written notice shall be delivered to Grantor as provided herein at least ten (10) days before (A) the date of public sale of the Personalty or (B) the date after which a private sale of the Personalty will be made;

(iv) any sale of Personalty made pursuant to this *Section 7.1(g)* shall be deemed to have been a public sale conducted in a commercially reasonable manner if held contemporaneously with the sale of the other Mortgaged Property under power of sale as provided herein upon giving the same notice with respect to the sale of the Personalty or Fixtures hereunder as is required for such sale of the other Mortgaged Property under power of sale, and such sale shall be deemed to be pursuant to a security agreement covering both real and personal property under Section 9.604(a) of the UCC;

(v) if a foreclosure sale occurs, whether made by Mortgagee under the power of sale, or under judgment of a court, the Personalty and the other Mortgaged Property may, at the option of Mortgagee, be sold as a whole;

(vi) it shall not be necessary that Mortgagee take possession of the Personalty, or any part thereof, prior to the time that any sale pursuant to the provisions of this subsection is conducted, and it shall not be necessary that the Personalty or any part thereof be present at the location of such sale;

(vii) after notice to Grantor, Mortgagee may sell, lease, or otherwise dispose of the Personalty, or any part thereof, in one or more parcels at public or private sale or sales, at Mortgagee's offices or elsewhere, for cash, on credit, or for future delivery. Grantor shall be liable for all expenses of retaking, holding, preparing for sale or lease, selling, leasing, and the like, and all reasonable attorneys' fees, legal expenses, and all other costs and expenses incurred by Mortgagee in connection with the collection of the Indebtedness and the enforcement of Mortgagee's rights under the Loan Documents. Mortgagee shall apply the proceeds of the sale of the Personalty against the Indebtedness in accordance with the provisions of *Section 7.4*. Grantor shall remain liable for any deficiency if the proceeds of any sale or disposition of the Personalty are insufficient to pay the Indebtedness in full. Grantor waives all rights of marshalling in respect of the Personalty;

(viii) all statements of fact or other recitals made in any bill of sale or assignment or other instrument evidencing any foreclosure sale hereunder regarding the nonpayment of the Indebtedness, the existence of any Event of Default, Mortgagee having declared all or a portion of such Indebtedness to be due and payable, the notice of time, place, and terms of sale and of the properties to be sold having been duly given, or any other action by Mortgagee, shall be taken as *prima facie* evidence of the truth of the facts so stated and recited;

# UNOFFICIAL COPY

(ix) Mortgagee may dispose of the Personalty or Fixtures “as-is”, has no duty to repair or clean the Personalty or Fixtures before sale, and may disclaim warranties of title, possession, quiet enjoyment, and the like with respect to the Personalty or Fixtures, all without affecting the commercial reasonableness of the sale;

(x) Mortgagee may appoint or delegate any one or more persons as agent to perform any act or acts necessary or incident to any sale held by Mortgagee, including sending notices and conducting the sale, but in the name and on behalf of Mortgagee; and

(xi) Mortgagee shall have the right at any time to enforce Grantor’s rights against account debtors and obligors.

(h) Rights Relating to Rents. Grantor has, pursuant to *Section 9.1* hereof, assigned absolutely all Rents to Mortgagee, and granted a security interest to Mortgagee in and to, all existing and future Rents to secure the Indebtedness and the Obligations under each of the Leases covering all or any portion of the Mortgaged Property. Mortgagee may, at any time, and without notice, either in person, by agent, or by receiver to be appointed by a court, enter and take possession of the Mortgaged Property or any part thereof, and in its own name, sue for or otherwise collect the Rents. Mortgagee may (in its sole discretion), upon the occurrence of an Event of Default, terminate the limited license granted to Grantor in *Section 9.2*, and thereafter direct the Lessees by written notice (“*Lease Rent Notice*”) to pay directly to Mortgagee the Rents due and to become due under the Leases and attorn in respect of all other obligations thereunder directly to Mortgagee without any obligation on the part of Lessee to determine whether an Event of Default does in fact exist or has in fact occurred. All Rents collected by Mortgagee shall be applied as provided for in *Section 9.3*, *provided, however*, that if the costs, expenses, and reasonable attorneys’ fees shall exceed the amount of Rents collected, the excess shall be added to the Indebtedness, shall bear interest at the Default Rate, and shall be immediately due and payable. The entrance upon and possession of the Mortgaged Property, the collection of Rents, and the application thereof as set forth above shall not cure or waive any Event of Default or notice of default, if any, hereunder nor invalidate any action pursuant to such notice. Failure or discontinuance by Mortgagee at any time or from time to time, to collect said Rents shall not in any manner impair the subsequent enforcement by Mortgagee of the right, power, and authority herein conferred upon it. Nothing contained herein, nor the exercise of any right, power, or authority herein granted to Mortgagee shall be, or shall be construed to be, an affirmation by it of any tenancy, lease, or option, nor an assumption of liability under, nor the subordination of, the lien or charge of this Mortgage, to any such tenancy, lease, or option, nor an election of judicial relief, if any such relief is requested or obtained as to Leases or Rents, with respect to the Mortgaged Property or any collateral given by Grantor to Mortgagee. In addition, from time to time, Mortgagee may elect, and notice hereby is given to each Lessee of such right, to subordinate the lien of this Mortgage to any Lease by unilaterally executing and recording an instrument of subordination, and upon such election, the lien of this Mortgage shall be subordinate to the Lease identified in such instrument of subordination; *provided, however*, in each instance, such subordination will not affect or be applicable to (and will expressly exclude any) lien, charge, encumbrance, security interest, claim, easement, restriction, option, covenant, and other rights, titles, interests, or estates of any nature regarding all or any portion of the Mortgaged Property to the extent that the same may have arisen or intervened during the period between the recordation of this Mortgage and the execution of the Lease identified in such instrument of subordination.

(i) Other Rights. Mortgagee (i) may surrender the insurance policies, or any part thereof, maintained pursuant to *Section 4.7*, and upon receipt shall apply the unearned premiums

# UNOFFICIAL COPY

as a credit on the Indebtedness, in accordance with the provisions of *Section 7.4*, and, in connection therewith, Grantor hereby appoints Mortgagee as agent and attorney-in-fact (which is coupled with an interest and is therefore irrevocable) for Grantor to collect such premiums; (ii) may apply the reserve for Impositions and insurance premiums, if any, required under this Mortgage, toward payment of the Indebtedness; and (iii) shall have and may exercise all other rights and remedies which Mortgagee may have at law or in equity, or by virtue of any Loan Document or under the UCC, or otherwise.

(j) Mortgagee as Purchaser. Mortgagee may be the purchaser of the Mortgaged Property or any part thereof, at any sale thereof, whether such sale be under Mortgagee's power of sale, upon any other foreclosure of the liens and security interests hereof, or otherwise, and Mortgagee shall, upon any such purchase, acquire good title to the purchased Mortgaged Property, free of the liens and security interests hereof, unless the sale was made subject to an unmatured portion of the Indebtedness. Mortgagee, as purchaser, shall be treated in the same manner as any third party purchaser and the proceeds of Mortgagee's purchase shall be applied to the Indebtedness pursuant to *Section 7.4*.

**7.2 Other Rights of Mortgagee.** Should any part of the Mortgaged Property come into the possession of Mortgagee, whether before or after default, Mortgagee may (for itself or by or through other persons, firms, or entities) hold, lease, manage, use, or operate the Mortgaged Property for such time and upon such terms as Mortgagee may deem prudent under the circumstances (making any repairs, alterations, additions, and improvements thereto and taking any other action that Mortgagee may from time to time deem necessary or desirable) for the purpose of preserving the Mortgaged Property or its value, pursuant to the order of a court of competent jurisdiction, or pursuant to any other rights held by Mortgagee regarding the Mortgaged Property. Grantor covenants to promptly reimburse and pay to Mortgagee on demand, at the place where the Note is payable, the amount of all reasonable expenses (including without limitation the cost of any insurance, Impositions, or other charges) incurred by Mortgagee in connection with Mortgagee's custody, preservation, use, or operation of the Mortgaged Property, together with interest at the Default Rate from the date incurred by Mortgagee; and all such expenses, costs, taxes, interest, and other charges shall constitute a part of the Indebtedness. The risk of loss or damage to the Mortgaged Property, however, is on Grantor, and Mortgagee shall have no liability for a decline in value of the Mortgaged Property, for failure to obtain or maintain insurance, or for failure to determine whether the insurance in force is adequate in amount or for the risks insured. Possession by Mortgagee shall not be deemed an election of judicial relief, if any such possession is requested or obtained, regarding any Mortgaged Property or collateral not in Mortgagee's possession.

**7.3 Possession After Foreclosure.** If the liens or security interests in this Mortgage are foreclosed by Mortgagee's power of sale, by judicial action, or otherwise, the purchaser at any such sale shall receive, as an incident to purchaser's ownership, immediate possession of the purchased property, and if Grantor or Grantor's successors shall hold possession of said property or any part thereof subsequent to foreclosure, Grantor and Grantor's successors shall be considered as tenants at sufferance of the purchaser at foreclosure sale (without limitation of other rights or remedies, at a reasonable rental per day, due and payable daily, based upon the value of the portion of the Mortgaged Property so occupied and sold to such purchaser), and anyone occupying such portion of the Mortgaged Property after demand is made for possession thereof shall be guilty of forcible detainer and shall be subject to eviction and removal, forcible or otherwise, with or without process of law, and all damages by reason thereof are hereby expressly waived.

**7.4 Application of Proceeds.** The proceeds from any sale, lease, or other disposition made pursuant to this *Section 7*, or the proceeds from the surrender of any insurance policies pursuant to *Section 7.1(i)*, or any Rents collected by Mortgagee from the Mortgaged Property (following any

# UNOFFICIAL COPY

application of such Rents in accordance with *Section 9.3* below), or the reserve for Impositions and insurance premiums, if any, required by the provisions of this Mortgage, or condemnation proceeds received pursuant to *Section 8.1*, or insurance proceeds which Mortgagee elects to apply to the Indebtedness pursuant to *Section 8.2*, shall be applied by Mortgagee, as the case may be, to the Indebtedness in the following order and priority: (a) to the payment of all expenses of advertising, selling, leasing, and conveying all or any part of the Mortgaged Property, and/or prosecuting or otherwise collecting rents, proceeds, premiums, or other sums including reasonable attorneys' fees; (b) to the remainder of the Indebtedness as follows: first, to the remaining accrued but unpaid interest, second, to the matured portion of principal of the Indebtedness, and third, to prepayment of the unmatured portion, if any, of principal of the Indebtedness applied to installments of principal in inverse order of maturity; (c) the balance, if any and to the extent applicable, remaining after the full and final payment of the Indebtedness and full performance and discharge of the Obligations to the holder or Mortgagee of any inferior liens covering the Mortgaged Property, if any, in order of the priority of such inferior liens (*provided that* Mortgagee is entitled to rely exclusively upon a commitment for title insurance or abstractor's certificate issued to determine such priority); and (d) the cash balance, if any, to Grantor. The application of proceeds of sale or other proceeds as otherwise provided herein shall be deemed to be a payment of the Indebtedness like any other payment. The balance of the Indebtedness remaining unpaid, if any, shall remain fully due and owing in accordance with the terms of the Note or other Loan Documents.

**7.5 Abandonment of Sale; Dismissal of Suit.** If Mortgagee commences a foreclosure sale pursuant to *Section 7.1(d)*, then Mortgagee may, at any time before completion of the sale, abandon such sale and Mortgagee may then institute a suit for the collection of the Indebtedness and for the foreclosure of the liens and security interests in this Mortgage and the other Loan Documents. Alternatively, if Mortgagee institutes a suit for the collection of the Indebtedness and for a foreclosure of the liens and security interests, then Mortgagee may, at any time before the entry of a final judgment, dismiss the suit and sell all or any part of the Mortgaged Property in accordance with the terms of this Mortgage.

**7.6 Payment of Fees.** If the Note or any other part of the Indebtedness is collected by, or if any of the Obligations are enforced by, legal proceedings in a probate or bankruptcy court or otherwise, or is placed in the hands of an attorney for collection after maturity, whether matured by the expiration of time or by an option given to Mortgagee to mature same, or if Mortgagee becomes a party to any suit in which this Mortgage or the Mortgaged Property or any part thereof is involved, then Grantor shall pay Mortgagee's reasonable attorneys' fees and expenses incurred, and such fees shall be added to the Indebtedness and shall bear interest at the Default Rate from the date such costs are incurred.

**7.7 Miscellaneous.**

(a) Discontinuance of Remedies. If Mortgagee invokes any right or remedy, or recourse permitted under the Loan Documents, then Mortgagee may discontinue or abandon same for any reason and Grantor and Mortgagee shall be restored to their former positions regarding the Indebtedness, the Loan Documents, the Mortgaged Property, or otherwise, and the rights, remedies, recourses, and powers of Mortgagee shall continue as if they had never been invoked.

(b) Other Remedies. In addition to the remedies set forth in this *Section 7*, upon the occurrence of an Event of Default, Mortgagee shall have all other remedies available at law or in equity.

(c) Remedies Cumulative; Non-Exclusive; Etc. All rights, remedies, and recourses of Mortgagee granted in the Note, this Mortgage, the other Loan Documents, any other pledge of collateral, or otherwise available at law or equity (including, without limitation, those granted by

# UNOFFICIAL COPY

the UCC and applicable to the Mortgaged Property or any portion thereof): (i) are cumulative and concurrent; (ii) may be pursued separately, successively, or concurrently against Grantor, the Mortgaged Property, or any one or more of them, at the sole discretion of Mortgagee; (iii) may be exercised as often as occasion therefor shall arise, and the exercise or failure to exercise any of same shall not be construed as a waiver or release thereof or of any other right, remedy, or recourse; (iv) are nonexclusive; (v) are not conditioned upon Mortgagee exercising or pursuing any remedy in relation to the Mortgaged Property before bringing suit to recover the Indebtedness or suit on the Obligations; and (vi) if Mortgagee elects to bring suit on the Indebtedness and/or the Obligations and obtains a judgment against Grantor before exercising any remedies in relation to the Mortgaged Property, then all liens and security interests, including the lien of this Mortgage, shall remain in full force and effect and may be exercised at Mortgagee's option.

(d) Partial Release; Change of Security; Etc. Mortgagee may release from time to time any part of the Mortgaged Property, regardless of consideration, without impairing, subordinating, or affecting in any way the lien, security interest, and other rights hereof against the remainder of the Mortgaged Property, and without affecting the obligations of Grantor or any other party to perform and discharge the Obligations. The taking of additional collateral, or the amendment, extension, renewal, or rearrangement of the Indebtedness or Obligations, or any part thereof, shall not release or impair the lien, security interest, and other rights granted in this Mortgage, or affect the liability of any endorser or guarantor, or improve the right of any junior lien holder, and all collateral shall be considered taken and held as cumulative. This Mortgage, as well as any instrument given to secure any amendment, extension, renewal, or rearrangement of the Indebtedness or Obligations, or any part thereof, shall be and remain a first and prior lien, except as otherwise provided herein, on all of the Mortgaged Property not expressly released until the Indebtedness is indefeasibly paid in full and the Obligations are fully performed and discharged. Mortgagee may resort to any collateral, in such order and manner as Mortgagee may elect, for payment of the Indebtedness.

(e) Waiver and Release by Grantor. Grantor irrevocably and unconditionally waives and releases: (i) all benefits that Grantor might accrue under any present or future law exempting the Mortgaged Property from attachment, levy, or sale or execution or providing for any appraisal, valuation, stay of execution, exemption from civil process, redemption, or extension of time for payment; (ii) all notices of any Event or Default (unless such notice is expressly required under any of the Loan Documents); and (iii) any right to a marshaling of assets or a sale in inverse order of alienation.

(f) No Implied Covenants. There are no, nor shall there be any, implied covenants of good faith and fair dealing or other similar covenants or agreements in this Mortgage and the other Loan Documents. All agreed contractual duties are set forth in this Mortgage, the Note, and the other Loan Documents.

(g) Real Property Laws Govern. If Mortgagee elects to proceed as to the Fixtures and Personalty together with the other Mortgaged Property, then the remedies in this **Section 7** shall be available under and governed by the real property laws of the State in which the Mortgaged Property is located.

**7.8 Partnership Waiver.** Intentionally deleted.

**7.9 Waiver of Benefits of Deficiency Statute.**

# UNOFFICIAL COPY

(a) Waiver. If an interest in all or any of the Mortgaged Property is foreclosed upon pursuant to a judicial or non-judicial foreclosure sale, Grantor agrees that, notwithstanding the provisions of applicable law (as the same may be amended from time to time), and to the extent permitted by law, Mortgagee is entitled to seek a deficiency judgment from Grantor and any other party obligated on the Note equal to the difference between the amount owing on the Note and the amount for which the Mortgaged Property is sold pursuant to the foreclosure sale. Grantor expressly recognizes that this **Section 7.9** constitutes a waiver of the right provided under applicable law for Grantor and other persons against whom recovery of deficiencies is sought or Guarantor independently (even absent the initiation of deficiency proceedings against them) to present competent evidence of the fair market value of the Mortgaged Property as of the date of the foreclosure sale and offset against any deficiency the amount by which the foreclosure sale price is less than fair market value as determined by the trier of fact.

(b) Alternative to Waiver. Alternatively, if the waiver provided for in **subsection (a)** above is determined by a court of competent jurisdiction to be unenforceable, the following shall be the basis for the fact finder's determination of the fair market value of the Mortgaged Property as of the date of the foreclosure sale in proceedings governed by applicable law (as amended from time to time): (i) the Mortgaged Property shall be valued in an "as is" condition as of the date of the foreclosure sale, without any assumption or expectation that the Mortgaged Property will be repaired or improved in any manner before a resale of the Mortgaged Property after foreclosure; (ii) the valuation shall be based upon an assumption that the foreclosure purchaser desires a resale of the Mortgaged Property for cash, promptly (but no later than twelve (12) months) following the foreclosure sale; (iii) all reasonable closing costs customarily borne by the seller in commercial real estate transactions should be deducted from the gross fair market value, including, without limitation, brokerage commissions, title insurance, survey costs, tax prorations, attorneys' fees, and marketing costs; (iv) the gross fair market value of the Mortgaged Property shall be further discounted to account for any estimated holding costs associated with maintaining the Mortgaged Property pending sale, including, without limitation, utilities expenses, property management fees, taxes, and assessments (to the extent not accounted for in (iii) above), and other maintenance, operational, and ownership expenses; and (v) any expert opinion testimony regarding a determination of the fair market value must be given by a MAI appraiser having at least five (5) years experience in appraising property similar to the Mortgaged Property and who have conducted and prepared a complete written appraisal of the "as developed" Mortgaged Property which includes a specification of the appraiser's consideration of the factors set forth above.

## SECTION VIII SPECIAL PROVISIONS

**8.1 Condemnation Proceeds.** Mortgagee shall be entitled to receive all sums that may be awarded or become payable to Grantor for condemnation of all or any part of the Mortgaged Property, for public or quasi-public use, or by virtue of private sale in lieu thereof, and any sums which may be awarded or become payable to Grantor for damages caused by public works or construction on or near the Mortgaged Property. All such sums are hereby assigned to Mortgagee, and Grantor shall, upon request of Mortgagee, make, execute, acknowledge, and deliver any and all additional assignments and documents that may be necessary from time to time to enable Mortgagee to collect any such sums. Mortgagee shall not be liable or responsible for failing to collect, or to exercise diligence in the collection of, any such sums. Any sums received by Mortgagee as a result of condemnation shall be applied to the Indebtedness pursuant to **Section 7.4**. Notwithstanding the foregoing, Mortgagee shall make such sums available to Grantor to restore or rebuild the Mortgaged Property so taken or damaged *provided that* all of the following conditions are satisfied: (i) Mortgagee determines in good faith that it is economically,

# UNOFFICIAL COPY

financially, and practically feasible to repair and restore the Mortgaged Property to substantially its previous condition, with such repairs and restorations being completed prior to the Maturity Date (as defined in the Note); (ii) the total cost of repairing and restoring the Mortgaged Property to substantially its previous condition, as estimated by the Architect (as defined in the Loan Agreement) or another architect reasonably approved by Mortgagee, shall not be greater than the amount of such casualty condemnation awards together with any sums that Grantor deposits with Mortgagee in advance for the purpose of paying for the cost of such repairs and restoration including any soft costs relating thereto; (iii) such restoration and repair shall be accomplished in accordance with the requirements and conditions of **Section 8.2(c)** hereof; and (iv) no Event of Default has occurred and is continuing, other than as may be related to the condemnation itself. To the extent Mortgagee makes such proceeds available to restore or rebuild, the Improvements shall be repaired and restored so as to be of at least equal value as prior to such damage or destruction on or before the Maturity Date. If such proceeds are made available by Mortgagee to Grantor, any surplus which may remain out of said proceeds after payment of all costs and expenses of such repair and restoration. Grantor will give Mortgagee prompt notice of any instituted or threatened condemnation proceeding affecting all or a part of the Mortgaged Property.

## 8.2 Insurance Proceeds.

(a) Grantor will give Mortgagee prompt notice of any damage to or destruction of the Mortgaged Property.

(b) Except as expressly provided below, Mortgagee may collect the proceeds of any and all insurance required to be carried under this Mortgage that may become payable with respect to the Mortgaged Property or any portion thereof (and Grantor hereby authorizes and directs each insurance company to make payment of such proceeds directly to Mortgagee at Mortgagee's request) and, at Mortgagee's sole option exercised reasonably, may apply the same to the Indebtedness in the order and manner as Mortgagee may determine. Notwithstanding the foregoing, Mortgagee shall make such insurance proceeds available to Grantor to restore or rebuild the Mortgaged Property so damaged *provided that* all of the following conditions are satisfied: (i) Mortgagee determines in good faith that it is economically, financially, and practically feasible to repair and restore the Mortgaged Property to substantially its previous condition, with such repairs and restorations being completed prior to the Maturity Date (as defined in the Note); (ii) the total cost of repairing and restoring the Mortgaged Property to substantially its previous condition, as estimated by the Architect (as defined in the Loan Agreement) or another architect reasonably approved by Mortgagee, shall not be greater than the amount of such casualty insurance proceeds together with any sums that Grantor deposits with Mortgagee in advance for the purpose of paying for the cost of such repairs and restoration including any soft costs relating thereto; (iii) such restoration and repair shall be accomplished in accordance with the requirements and conditions of **Section 8.2(c)** hereof; and (iv) no Event of Default has occurred and is continuing, other than as may be related to the damage, destruction or casualty itself. To the extent Mortgagee makes such proceeds available to restore or rebuild, the Improvements shall be repaired and restored so as to be of at least equal value as prior to such damage or destruction on or before the Maturity Date. If such casualty proceeds are made available by Mortgagee to Grantor, any surplus which may remain out of said insurance proceeds after payment of all costs and expenses of such repair and restoration shall, at the option of Mortgagee, be applied as a payment or prepayment of the Indebtedness. Notwithstanding anything to the contrary contained in this **Section 8.2(b)** or the other Loan Documents: (i) if the cost of any repair or restoration work is \$1,000,000.00 or less, Mortgagee shall deliver any insurance proceeds it receives to Grantor without the necessity of any of the foregoing conditions being satisfied, except condition (iv); and (ii) so long as no Event of Default exists, rental loss insurance shall be paid directly to Grantor and may be used by Grantor to pay the Indebtedness or



# UNOFFICIAL COPY

other expenditures made in operating, maintaining, managing and owning the Mortgaged Property.

(c) Any restoration or repair shall be commenced with due diligence and in good faith by Grantor and all funds held by Mortgagee in accordance with the terms of this *Section 8.2* shall be paid out from time to time as such restoration and repair progresses upon the written approval of Mortgagee and the written request of Grantor, which requests shall be submitted in form and substance, and with supporting notices, documentation and waivers as required for an Advance (as defined in the Loan Agreement) under the Loan Agreement.

(d) Prior to application or disbursement of any casualty insurance proceeds under this *Section 8.2*, or condemnation proceeds under *Section 8.1*, Mortgagee may deduct therefrom any third party expenses reasonably incurred in connection with the collection or handling of such proceeds, it being understood and agreed that Mortgagee shall not, except with respect to gross negligence or intentional misconduct, be, under any circumstances, liable or responsible for failure to collect, or exercise diligence in the collection of, any such proceeds, and Mortgagee shall provide Grantor a written summary of all expenses deducted from such proceeds.

(e) In the event this Mortgage is foreclosed, or title to any of the Mortgaged Property is transferred in extinguishment, in whole or in part, of the indebtedness secured thereby, or by transfer or conveyance in lieu of foreclosure, and in connection therewith all right, title, and interest of Grantor in and to all insurance policies passes to (i.e., is purchased by) such transferee or purchaser, the Insurance policies shall inure to the benefit of and pass to such successor in interest of Grantor or the purchaser.

**8.3 Reserve for Impositions and Insurance Premiums.** Upon the occurrence and continuation of an Event of Default, Grantor shall fund a reserve for the payment of all insurance premiums and Impositions against or affecting the Mortgaged Property by paying to Mortgagee, on the first day of each calendar month prior to the maturity of the Note, an amount equal to the sum of (a) (i) premiums that will next become due and payable on the insurance policies covering Grantor, the Mortgaged Property or any part thereof, or such other insurance policies required hereby or by the Loan Documents, plus (ii) Impositions next due on the Mortgaged Property or any part thereof as estimated by Mortgagee, less (iii) all sums paid previously to Mortgagee therefor, divided by (b) the number of months to elapse until one month before the date when each of such premiums and Impositions will become due; such amount to be held by Mortgagee without interest to Grantor, unless interest is required by applicable law, to pay such premiums and Impositions. Mortgagee has the discretion to credit any excess reserve against subsequent reserve payments or subsequent payments on the Note, and to the extent Mortgagee reasonably determines a deficiency exists, Grantor shall pay any deficiency in the reserve amounts to Mortgagee on or before the date when Mortgagee demands in writing such payment to be made, but in no event after the date when such premiums and Impositions become delinquent. If there is a deficiency in such reserve at any time when Impositions or insurance premiums are due and payable, then Mortgagee may, but shall not be obligated to, advance the amount of such deficiency on behalf of Grantor and such amounts so advanced shall be added to the Indebtedness, shall be immediately due and payable, and shall bear interest at the Default Rate from the date of such advance through and including the date of repayment. Without implying Mortgagee's consent to a transfer, any transfer of legal title to the Mortgaged Property shall automatically include a transfer to the holder of legal title to the Mortgaged Property of Grantor's interest in all sums deposited with Mortgagee under the provisions hereof or otherwise.

**8.4 INDEMNITY. EXCEPT TO THE EXTENT RESULTING FROM MORTGAGEE'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT, GRANTOR SHALL**

# UNOFFICIAL COPY

INDEMNIFY, DEFEND, PROTECT, AND HOLD HARMLESS MORTGAGEE AND ITS PARENTS, SUBSIDIARIES, DIRECTORS, OFFICERS, EMPLOYEES, REPRESENTATIVES, AGENTS, SUCCESSORS, AND ASSIGNS FROM AND AGAINST ALL LIABILITY, DAMAGE, LOSS, COST, OR EXPENSE (INCLUDING WITHOUT LIMITATION REASONABLE ATTORNEYS' FEES AND EXPENSES), ACTION, PROCEEDING, CLAIM, OR DISPUTE INCURRED OR SUFFERED BY THE FOREGOING PARTIES SO INDEMNIFIED WHETHER OR NOT AS THE RESULT OF THE NEGLIGENCE OF ANY PARTY SO INDEMNIFIED AND EVEN IF ARISING IN STRICT LIABILITY, WHETHER VOLUNTARILY OR INVOLUNTARILY INCURRED OR SUFFERED, REGARDING THE FOLLOWING: (A) ANY LITIGATION CONCERNING THIS MORTGAGE, THE OTHER LOAN DOCUMENTS, OR THE MORTGAGED PROPERTY, OR ANY INTEREST OF GRANTOR OR MORTGAGEE THEREIN, OR THE RIGHT OF OCCUPANCY THEREOF BY GRANTOR OR MORTGAGEE, WHETHER OR NOT ANY SUCH LITIGATION IS PROSECUTED TO A FINAL, NON-APPEALABLE JUDGMENT; (B) ANY DISPUTE, INCLUDING DISPUTES AS TO THE DISBURSEMENT OF PROCEEDS OF THE NOTE NOT YET DISBURSED, AMONG OR BETWEEN ANY OF THE CONSTITUENT PARTIES OR OTHER PARTNERS OR VENTURERS OF GRANTOR IF GRANTOR IS A GENERAL OR LIMITED PARTNERSHIP, OR AMONG OR BETWEEN ANY EMPLOYEES, OFFICERS, DIRECTORS, SHAREHOLDERS, MEMBERS, OR MANAGERS OF GRANTOR IF GRANTOR IS A CORPORATION OR LIMITED LIABILITY COMPANY, OR AMONG OR BETWEEN ANY MEMBERS, TRUSTEES, OR OTHER RESPONSIBLE PARTIES IF GRANTOR IS AN ASSOCIATION, TRUST OR OTHER ENTITY; (C) ANY ACTION TAKEN OR NOT TAKEN BY MORTGAGEE THAT IS ALLOWED OR PERMITTED UNDER THIS MORTGAGE OR ANY OF THE OTHER LOAN DOCUMENTS RELATING TO GRANTOR, THE MORTGAGED PROPERTY, ANY CONSTITUENT PARTIES, OR OTHERWISE IN CONNECTION WITH THE LOAN DOCUMENTS, INCLUDING WITHOUT LIMITATION, THE PROTECTION OR ENFORCEMENT OF ANY LIEN, SECURITY INTEREST, OR OTHER RIGHT, REMEDY, OR RECOURSE CREATED OR AFFORDED BY THIS MORTGAGE OR THE OTHER LOAN DOCUMENTS; AND (D) ANY ACTION BROUGHT BY MORTGAGEE AGAINST GRANTOR UNDER THIS MORTGAGE OR THE OTHER LOAN DOCUMENTS, WHETHER OR NOT SUCH ACTION IS PROSECUTED TO A FINAL, NON-APPEALABLE JUDGMENT.

MORTGAGEE MAY EMPLOY AN ATTORNEY OR ATTORNEYS TO PROTEST OR ENFORCE ITS RIGHTS, REMEDIES, AND RECOURSES UNDER THIS MORTGAGE AND THE OTHER LOAN DOCUMENTS, AND TO ADVISE AND DEFEND MORTGAGEE WITH RESPECT TO ANY SUCH ACTIONS AND OTHER MATTERS. GRANTOR SHALL REIMBURSE MORTGAGEE FOR THEIR RESPECTIVE REASONABLE ATTORNEYS' FEES AND EXPENSES (INCLUDING EXPENSES AND COSTS FOR EXPERTS) IMMEDIATELY UPON RECEIPT OF A WRITTEN DEMAND THEREFOR, WHETHER ON A MONTHLY OR OTHER TIME INTERVAL, AND WHETHER OR NOT AN ACTION IS ACTUALLY COMMENCED OR CONCLUDED. ALL OTHER REIMBURSEMENT AND INDEMNITY OBLIGATIONS HEREUNDER SHALL BECOME DUE AND PAYABLE WHEN ACTUALLY INCURRED BY MORTGAGEE. ANY PAYMENTS NOT MADE WITHIN TEN (10) DAYS AFTER WRITTEN DEMAND THEREFOR SHALL BEAR INTEREST AT THE DEFAULT RATE FROM THE DATE OF SUCH DEMAND UNTIL FULLY PAID. THE PROVISIONS OF THIS SECTION 8.4 SHALL SURVIVE THE REPAYMENT OF THE INDEBTEDNESS AND PERFORMANCE OF THE OBLIGATIONS, THE RELEASE OF THE LIEN OF THIS MORTGAGE, ANY FORECLOSURE (OR ACTION IN LIEU OF FORECLOSURE), THE TRANSFER BY GRANTOR OF ANY OF ITS RIGHT, TITLE, AND INTEREST IN OR TO THE MORTGAGED PROPERTY, AND THE EXERCISE BY MORTGAGEE OF ALL REMEDIES SET FORTH HEREIN OR IN THE LOAN DOCUMENTS.

# UNOFFICIAL COPY

**8.5 Grantor's Waiver of Subrogation.** Grantor waives all right to claim, recover, or subrogation that arises or may arise in its favor against Mortgagee or its officers, directors, employees, agents, attorneys, or representatives for all loss or damage to Grantor, the Mortgaged Property, Grantor's property, or the property of others under Grantor's control from any cause insured against or required to be insured against by the Loan Documents. This waiver is in addition to, and not in limitation or derogation of, any other waiver or release contained in this Mortgage regarding any loss or damage to the parties' property. Because the above waivers preclude the assignment of any claim by way of subrogation (or otherwise) to an insurance company (or any other person), Grantor shall immediately give to each insurance company that has issued Grantor an insurance policy (whether or not such policy is required by the Loan Documents) written notice of the terms of the above waivers, and to have all insurance policies properly endorsed, if necessary, to prevent the invalidation of insurance coverage because of the above waivers.

**8.6 Grantor's Waiver of Setoff.** Grantor shall pay the Indebtedness, or any part thereof, without notice, demand, counterclaim, setoff, deduction, or defense and without abatement, suspension, deferment, diminution, or reduction by reason of: (a) any damage to, destruction of, or any condemnation or similar taking of the Mortgaged Property; (b) any interference with any use of the Mortgaged Property; (c) any title defect or encumbrance or any eviction from the Mortgaged Property by superior title or otherwise; (d) any bankruptcy, insolvency, reorganization, composition, adjustment, dissolution, liquidation, or other like proceeding relating to Mortgagee or Grantor, or any action taken under this Mortgage by any trustee or receiver of Mortgagee or Grantor, or by any court, in any such proceeding; (e) any claim that Grantor has or might have against Mortgagee; (f) any default or failure on the part of Mortgagee to perform or comply with this Mortgage, the Loan Documents, or any other agreement with Grantor; or (g) any other occurrence, whether similar or dissimilar to the foregoing, whether or not Grantor has notice or knowledge of any of the foregoing. Except as expressly provided herein, Grantor waives all rights now or hereafter conferred by statute or otherwise to any abatement, suspension, deferment, diminution, or reduction of the Indebtedness.

**8.7 Mortgagee's Setoff.** Mortgagee shall be entitled to exercise both the rights of setoff and banker's lien, if applicable, against the interest of Grantor in and to each and every account and other property of Grantor that are in the possession of Mortgagee to the full extent of the outstanding balance of the Indebtedness. Grantor hereby grants to Mortgagee a Lien on and security interest in, and assigns to Mortgagee, all deposits (general or special, time or demand, provisional or final) at any time held by Grantor and other indebtedness at any time owing by Mortgagee to or for the credit or for the account of Grantor, and any property of Grantor from time to time in the possession or control of Mortgagee.

**8.8 Consent to Disposition.** Mortgagee may base its decision to grant or withhold consent to a Disposition on such terms and conditions as Mortgagee may require, in its sole discretion, including, without limitation, (a) consideration of the creditworthiness of the proposed transferee and its management ability with respect to the Mortgaged Property; (b) consideration of whether the security for repayment of the Indebtedness and the performance and discharge of the Obligations, or Mortgagee's ability to enforce its rights, remedies, and recourses with respect to such security, will be impaired in any way by the proposed Disposition; (c) an increase in the rate of interest payable under the Note or any other change in the terms and provisions of the Note and other Loan Documents; (d) reimbursement of Mortgagee for all reasonable expenses incurred by Mortgagee in investigating the creditworthiness and management or consulting ability of the proposed transferee and in determining whether Mortgagee's security will be impaired by the proposed Disposition; (e) payment to Mortgagee of a transfer and assumption fee; (f) payment of Mortgagee's reasonable attorneys' fees in connection with such Disposition; (g) the express assumption of payment of the Indebtedness and performance and discharge of the Obligations by the transferee (with or without the release of Grantor from liability for such Obligations, such release, if any, to be in Mortgagee's sole discretion); (h) the execution of assumption

# UNOFFICIAL COPY

agreements, modification agreements, supplemental loan documents, and financing statements, satisfactory in form and substance to Mortgagee; (i) endorsements (to the extent available under applicable law) to any existing loan title insurance policies insuring Mortgagee's liens and security interests covering the Mortgaged Property; and (j) requiring additional security for the payment of the Indebtedness and performance and discharge of the Obligations.

**8.9 Consent to Subordinate Mortgage.** If Mortgagee consents to the granting of a Subordinate Mortgage, or if Mortgagee's right to declare the Indebtedness to be immediately due and payable upon the granting of a Subordinate Mortgage without the prior written consent of Mortgagee is determined by a court of competent jurisdiction to be unenforceable under the provisions of any applicable law, then Grantor shall not execute or deliver any Subordinate Mortgage unless (a) it shall contain express covenants to the effect that: (i) the Subordinate Mortgage is in all respects unconditionally subject and subordinate to the lien and security interest evidenced by this Mortgage and each term and provision hereof; (ii) if any judicial or non-judicial action or proceeding shall be instituted to foreclose the Subordinate Mortgage, then no tenant of any portion of the Mortgaged Property will be named as a party defendant, nor will any action be taken by Grantor with respect to the Mortgaged Property which would terminate any occupancy or tenancy of the Mortgaged Property without the prior written consent of Mortgagee; (iii) the rents and profits, if collected through a receiver or by the holder of the Subordinate Mortgage, shall be applied first to the Indebtedness, next to the payment of the Impositions, and then to the performance and discharge of the Obligations; and (iv) if any judicial or non-judicial action or proceeding shall be brought to foreclose the Subordinate Mortgage, then written notice of the commencement thereof (including, without limitation, contemporaneous delivery of copies of notices thereof) will be given to Mortgagee contemporaneously with the commencement of such action or proceeding; and (b) Grantor shall deliver a copy thereof to Mortgagee not less than ten (10) days prior to the date of the execution of such Subordinate Mortgage.

**8.10 Payment After Acceleration.** If, after the occurrence of an Event of Default, and after any or all of the Indebtedness is accelerated, but before a foreclosure sale of the Mortgaged Property, and Grantor tenders to Mortgagee the payment of an amount sufficient to satisfy the accelerated Indebtedness, then such tender shall be deemed a voluntary prepayment of the Indebtedness and accordingly, Grantor, to the extent permitted by applicable law, shall also pay to Mortgagee the applicable Funding Loss (as defined in the Note), if any, then required under the Note or other Loan Documents to exercise the prepayment privilege contained therein.

**8.11 Contest of Certain Claims.** Notwithstanding the provisions of *Sections 4.5, 4.12, or 6.6*, Grantor shall not be in default for failure to pay or discharge any Imposition or mechanic's or materialman's lien asserted against the Mortgaged Property if, and so long as, (a) Grantor shall have notified Mortgagee of same within five (5) days of obtaining written notice thereof; (b) Grantor shall diligently and in good faith contest the same by appropriate legal proceedings which shall operate to prevent the enforcement or collection of the same and the sale of the Mortgaged Property or any part thereof, to satisfy the same; (c) Grantor shall have furnished to Mortgagee a cash deposit, or an indemnity bond satisfactory to Mortgagee with a surety satisfactory to Mortgagee, in the amount of the Imposition or mechanic's or materialman's lien claim, plus a reasonable additional sum to pay all costs, interest and penalties that may be imposed or incurred in connection therewith, to assure payment of the matters under contest and to prevent any sale or forfeiture of the Mortgaged Property or any part thereof; (d) Grantor shall promptly upon final determination thereof pay the amount of any such Imposition or claim so determined, together with all costs, interest and penalties which may be payable in connection therewith; (e) the failure to pay the Imposition or mechanic's or materialman's lien claim does not constitute a default under any other Mortgage, mortgage or security interest covering or affecting any part of the Mortgaged Property; and (f) notwithstanding the foregoing, Grantor shall immediately upon request of Mortgagee pay (and if Grantor shall fail so to do, Mortgagee may, but shall not be required to, pay or

# UNOFFICIAL COPY

cause to be discharged or bonded against) any such Imposition or claim notwithstanding such contest, if in the reasonable opinion of Mortgagee the Mortgaged Property shall be in jeopardy or in danger of being forfeited or foreclosed. Mortgagee may pay over any such cash deposit or part thereof to the claimant entitled thereto at any time when, in the judgment of Mortgagee, the entitlement of such claimant is established.

**8.12 Maximum Interest.** It is the intent of Grantor and Mortgagee at all times to comply strictly with the applicable Texas law governing the maximum non-usurious rate or non-usurious amount of interest payable on the Note or the Related Indebtedness (or applicable United States federal law to the extent that it permits Mortgagee to contract for, charge, take, reserve, or receive a greater amount of interest than under Texas law). If the applicable law is ever judicially interpreted so as to render usurious any amount (a) contracted for, charged, taken, reserved or received pursuant to the Note, any other Loan Documents, or any other communication or writing by or between Grantor and Mortgagee related to the Indebtedness or to the transaction or transactions that are the subject matter of the Loan Documents; (b) contracted for, charged, taken, reserved, or received by reason of Mortgagee's exercise of the option to accelerate the maturity of the Note and/or the Related Indebtedness; or (c) Grantor has paid or Mortgagee has received by reason of any voluntary prepayment by Grantor of the Note and/or the Related Indebtedness, then it is Grantor's and Mortgagee's intent that all amounts charged in excess of the Maximum Rate shall be automatically canceled, *ab initio*, and all amounts in excess of the Maximum Rate that have been collected by Mortgagee shall be credited on the principal balance of the Note and/or the Related Indebtedness (or, if the Note and all Related Indebtedness have been or would thereby be paid in full, refunded to Grantor), and that the provisions of the Note and the other Loan Documents immediately be deemed reformed to reduce the amounts thereafter collectible under the Note and other Loan Documents, without the necessity of the execution of any new document, to comply with the applicable law, but to permit the recovery of the fullest amount otherwise called for; *provided, however*, if the Note has been paid in full before the end of the stated term of the Note, then Mortgagee shall, with reasonable promptness after Mortgagee discovers or is advised by Grantor that interest was received in an amount in excess of the Maximum Rate, either refund such excess interest to Grantor and/or credit such excess interest against any Related Indebtedness then owing by Grantor to Mortgagee. As a condition precedent to any claim seeking usury penalties against Mortgagee, Grantor agrees that it shall provide written notice to Mortgagee, advising Mortgagee in reasonable detail of the nature and amount of the violation, and Mortgagee shall have sixty (60) days after receipt of such notice in which to correct such usury violation, if any, by either refunding such excess interest to Grantor or crediting such excess interest against the Note and/or the Related Indebtedness then owing by Grantor to Mortgagee. All sums contracted for, charged, taken, reserved, or received by Mortgagee for the use, forbearance, or detention of any debt evidenced by the Note and/or the Related Indebtedness shall, to the extent permitted by applicable law, be amortized or spread, using the actuarial method, throughout the stated term of the Note and/or the Related Indebtedness (including all renewal and extension periods) until payment in full so that the rate or amount of interest on account of the Note and/or the Related Indebtedness does not exceed the Maximum Rate from time to time in effect and applicable to the Note and/or the Related Indebtedness for so long as debt is outstanding. The provisions of Chapter 346 of the Texas Finance Code (which regulates certain revolving credit loan accounts and revolving triparty accounts) shall not apply to the Note and/or the Related Indebtedness. Notwithstanding anything to the contrary contained herein or in any of the other Loan Documents, it is not the intention of Mortgagee to accelerate the maturity of any interest that has not accrued at the time of such acceleration or to collect unearned interest at the time of such acceleration.

# UNOFFICIAL COPY

## SECTION IX ASSIGNMENT OF RENTS

**9.1 Assignment.** Grantor hereby absolutely and unconditionally GRANTS, BARGAINS, SELLS, and CONVEYS, the Rents unto Mortgagee to provide a source of future payment of the Indebtedness, subject only to the License and any applicable Permitted Exceptions, it being the intention of Grantor and Mortgagee that this conveyance be absolute, unconditional, presently, and immediately effective, and not a security for the repayment of the Indebtedness; TO HAVE AND TO HOLD the Rents unto Mortgagee forever and Grantor does hereby bind itself, its successors, and assigns to WARRANT AND FOREVER DEFEND the title to the Rents unto Mortgagee against every Person whomsoever lawfully claiming or to claim the same or any part thereof; *provided, however*, that upon the delivery and recording of a release, satisfaction, or discharge of this Mortgage duly executed by Mortgagee, this assignment shall terminate.

**9.2 Grantor's License.** Mortgagee hereby grants to Grantor a limited license (the "*License*"), subject to termination of the License and to the other terms and provisions of *Section 7.1(h)*, to exercise and enjoy all incidences of the status of a lessor with respect to 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. Under the License, Grantor shall receive all Rents and hold the same on behalf of Mortgagee as Mortgagee's Agent, and will apply the Rents so collected first to the payment of the Indebtedness then due, next to the performance and discharge of the Obligations then due, and next to the payment of the Operating Expenses. Thereafter, Grantor may use the balance of the Rents collected in any manner consistent with the Loan Documents. Neither this assignment nor the receipt of Rents by Mortgagee (except to the extent, if any, that Mortgagee actually receives and applies such Rents to the Indebtedness) shall effect a *pro tanto* payment of the Indebtedness. Rents actually received by Mortgagee shall be applied by Mortgagee as provided in *Section 9.3*. Mortgagee shall not be deemed to have received Rents or to have applied Rents to the Indebtedness until the money is actually received by Mortgagee at its principal office in Dallas, Texas, or at such other place as Mortgagee shall designate in writing. Mortgagee shall not apply Rents to the Indebtedness after foreclosure or any other transfer of all or any part of the Mortgaged Property to Mortgagee or any third party.

**9.3 Reliance Upon Lease Rent Notice.** Upon receipt from Mortgagee of a Lease Rent Notice, each Lessee is authorized and directed to pay directly to Mortgagee all Rents thereafter accruing, and the receipt of Rents by Mortgagee shall be a release of such Lessee to the extent of all amounts so paid. The receipt by a Lessee of a Lease Rent Notice shall be sufficient authorization for such Lessee to make all future payments of Rents directly to Mortgagee and each such Lessee shall be entitled to rely on the Lease Rent Notice and shall have no liability to Grantor for any Rents paid to Mortgagee after receipt of the Lease Rent Notice. Rents so received by Mortgagee for any period prior to foreclosure under this Mortgage or acceptance of a deed in lieu of such foreclosure shall be applied by Mortgagee to the payment of the following (in such order and priority as Mortgagee shall determine): (a) all Operating Expenses; (b) all expenses incident to taking and retaining possession of the Mortgaged Property and/or collecting Rent as it becomes due and payable; and (c) the Indebtedness. The Indebtedness will not be reduced under this *Section 9.3* except to the extent, if any, that Mortgagee actually receives and applies any Rents to the Indebtedness in accordance with the preceding sentence. Without impairing its rights hereunder, Mortgagee may, at its option, at any time and from time to time, release to Grantor any Rents so received by Mortgagee. As between Grantor and Mortgagee, and any Person claiming through or under Grantor, other than any Lessee who has not received a Lease Rent Notice, this assignment is intended to be absolute, unconditional, presently, and immediately effective, and not a security for the repayment of the Indebtedness and the Obligations. Unless otherwise required by applicable Legal Requirements, the Lease Rent Notice is intended solely for the benefit of the Lessees and shall never

# UNOFFICIAL COPY

inure to the benefit of Grantor or any Person claiming through or under Grantor, other than a Lessee who has not received such Lease Rent Notice. It shall never be necessary for Mortgagee to institute legal proceedings of any kind whatsoever to enforce the provisions of this Mortgage with respect to Rents. **GRANTOR SHALL HAVE NO RIGHT OR CLAIM AGAINST ANY LESSEE FOR THE PAYMENT OF ANY RENTS TO MORTGAGEE HEREUNDER AND GRANTOR SHALL INDEMNIFY, DEFEND, AND HOLD FREE AND HARMLESS EACH LESSEE FROM AND AGAINST ALL LIABILITY, LOSS, COST, DAMAGE, OR EXPENSE SUFFERED OR INCURRED BY SUCH LESSEE BY REASON OF SUCH LESSEE'S COMPLIANCE WITH ANY LEASE RENT NOTICE.**

## SECTION X SECURITY AGREEMENT

**10.1 Security Interest.** This Mortgage (a) shall be construed as a Mortgage on real property, and (b) shall also constitute and serve as a "Security Agreement" on personal property within the meaning of the UCC, and (c) until terminated pursuant to *Section 2*, shall constitute a first and prior security interest under the UCC as to property within the scope thereof. To this end, Grantor GRANTS, BARGAINS, CONVEYS, ASSIGNS, TRANSFERS, and SETS OVER, unto Mortgagee, a first and prior security interest in all of Grantor's right, title, and interest in, to, under, and with respect to the Personalty, Fixtures, Contracts, Leases, and Rents to secure the full and timely payment of the Indebtedness and the full and timely performance and discharge of the Obligations. It is the intent of Grantor and Mortgagee that this Mortgage encumber all Leases and that all items contained in the definition of "Leases" that are governed by the UCC be covered by the security interest granted in this *Section 10*; and all items contained in the definition of "Leases" that are not governed by the UCC be covered by the provisions of *Section 2*. Grantor shall cooperate with Mortgagee in obtaining control with respect to portions of the Personalty that are either or both deposit accounts or letter of credit rights.

**10.2 Financing Statements.** Grantor shall execute and deliver to Mortgagee, in form and substance satisfactory to Mortgagee, such "Financing Statements" and such further assurances as Mortgagee may, from time to time, reasonably consider necessary to create, perfect, and preserve Mortgagee's security interest herein granted, and Mortgagee may cause such statements and assurances to be recorded and filed, at such times and places as may be required or permitted by law to create, perfect, and preserve such security interest. Grantor authorizes Mortgagee to prepare and file new financing statements, financing statement amendments, and financing statement continuations that describe all or any portion of the Mortgaged Property as collateral thereunder, and Mortgagee may file such statements without any signature of Grantor or of a representative of Grantor appearing thereon, where such filings are permitted by applicable law.

**10.3 No Changes.** Grantor shall not change its state of organization or registration, or change its name, without the prior written consent of Mortgagee, which consent shall not be unreasonably withheld or delayed. Mortgagee's consent will, however, be conditioned upon, among other things, the execution and delivery of additional financing statements, security agreements, and other instruments that may be necessary to effectively evidence or perfect Mortgagee's security interest in the Mortgaged Property as a result of such changes.

**10.4 Fixture Filing and Construction Mortgage.** This Mortgage secures future advances to be used for construction of improvements on the Land. Accordingly, this Mortgage constitutes a "construction mortgage" under the UCC. This Mortgage shall also constitute a "fixture filing" under the UCC. All or part of the Mortgaged Property may be or become fixtures; information concerning the security interest herein granted may be obtained from the debtor (Grantor) at the address set forth in the

# UNOFFICIAL COPY

first paragraph of this Mortgage and from the secured party (Mortgagee) at the address set forth in *Section 1*.

## SECTION XI RESERVED

## SECTION XII MISCELLANEOUS

**12.1 Release.** If the Indebtedness is paid in full pursuant to this Mortgage, the Note, and the other Loan Documents, and if Grantor shall perform all of the Obligations (other than Obligations that expressly survive the full payment of the Indebtedness) to be performed and discharged pursuant to this Mortgage, the Note and the other Loan Documents, then this conveyance shall become void and be released at Grantor's request and expense. Upon release of this Mortgage, all obligations, if any, of Mortgagee to make advances under this Mortgage or the other Loan Documents shall terminate.

**12.2 Performance at Grantor's Expense.** Subject to the maximum interest provisions of *Section 8.12*, Grantor shall (a) pay all reasonable legal fees incurred by Mortgagee in connection with the preparation of the Loan Documents (including any amendments thereto or consents, releases, or waivers granted thereunder); (b) reimburse Mortgagee, promptly upon demand, for all amounts expended, advanced, or incurred by Mortgagee to satisfy any obligation of Grantor under the Loan Documents, including, without limitation, all court costs, reasonable attorneys' fees (including, without limitation, fees for trial, appeal, or other proceedings), fees of auditors and accountants and other investigation expenses reasonably incurred by Mortgagee in connection with any such matters; and (c) all other actual expenses of performing or complying with the Obligations. Except for the expenses that are included within the definition of "Indebtedness," the payment of any expenses, including, without limitation, those set forth above, shall not be credited against any installment on or portion of the Indebtedness.

**12.3 Survival of Obligations.** The Obligations shall survive the execution and delivery of the Loan Documents and the consummation of the loan called for therein and shall continue in full force and effect until the Indebtedness has been paid in full; *provided, however*, that any Obligations that expressly survive the full payment of the Indebtedness shall continue in full force and effect until otherwise terminated.

**12.4 Recording and Filing.** Grantor shall cause the Loan Documents requested by Mortgagee and any amendments, supplements, and restatements thereof to be recorded, filed, rerecorded, and refiled in such manner and in such places that Mortgagee shall reasonably request, and Grantor shall pay all recording, filing, re-recording and refiling taxes, documentary stamp taxes, fees, and other charges.

**12.5 Notices.** Whenever any notice is required or permitted to be given under the terms of this Mortgage, the same shall, except as otherwise expressly provided for in this Mortgage, be given in writing, and sent by: (a) certified mail, return receipt requested, postage pre-paid; (b) a national overnight delivery service; (c) hand delivery with written receipt acknowledged; or (d) facsimile, followed by a copy sent in accordance with *clause (b)* or *(c)* of this *Section 12.5* sent the same day as the facsimile, in each case to the address or facsimile number (together with a contemporaneous copy to each copied addressee), as applicable, set forth in the opening paragraph of this Mortgage and, the definition of "Mortgagee" set forth in *Section 1.1*. Mortgagee and Grantor shall not conduct communications contemplated by this Mortgage by electronic mail or other electronic means, except by facsimile transmission as expressly provided in this *Section 12.5*, and the use of the phrase "in writing" or the word "written" shall not be construed to include electronic communications except by facsimile transmissions



# UNOFFICIAL COPY

as expressly provided in this *Section 12.5*. Any notice required or given hereunder shall be deemed received the same Business Day if sent by hand delivery or facsimile, the next Business Day if sent by overnight courier, or three (3) Business Days after posting if sent by certified mail, return receipt requested; *provided that* any notice received after 5:00 p.m. local time at the location of delivery on any Business Day or received on any day that is not a Business Day shall be deemed to have been received on the following Business Day. Notwithstanding the foregoing, notices in connection with posting for foreclosure delivered pursuant to *Section 7.1(d)* shall be effective when given in accordance with the requirements of applicable law.

**12.6 Covenants Running with the Land.** All Obligations contained in this Mortgage and the other Loan Documents are intended by Grantor and Mortgagee to be, and shall be construed as, covenants running with the Mortgaged Property until the lien of this Mortgage has been fully released by Mortgagee.

**12.7 Successors and Assigns.** Subject to the provisions of *Sections 6.7* and *6.8* hereof, all of the terms of the Loan Documents shall apply to, be binding upon, and inure to the benefit of the parties thereto, their successors, assigns, and all other persons claiming by, through, or under them.

**12.8 No Waiver; Severability.** Any failure by Mortgagee to insist, or any election by Mortgagee not to insist, upon strict performance by Grantor or others of any of the terms, provisions, or conditions of the Loan Documents shall not be deemed to be a waiver of same or of any other terms, provisions, or conditions thereof, and Mortgagee shall have the right at any time or times thereafter to insist upon strict performance by Grantor or others of all such terms, provisions, and conditions. No Default or Event of Default shall be waived by Mortgagee except by written instrument specifying the scope and terms of that waiver, signed by an authorized officer of Mortgagee. Any written waiver shall be effective only for the purpose(s) and time(s) given. No waiver shall extend to any other or further event or circumstance. Grantor expressly agrees that this *Section 12.8* may not be waived or modified by Mortgagee by course of performance, estoppel or otherwise. The Loan Documents are intended to be performed in accordance with, and only to the extent permitted by, all applicable Legal Requirements. If any provision of any of the Loan Documents or the application thereof to any person or circumstance shall, for any reason and to any extent, be invalid or unenforceable, then neither the remainder of the instrument in which such provision is contained, nor the application of such provision to other persons or circumstances, nor the other instruments referred to herein shall be affected thereby, but rather shall be enforced to the greatest extent permitted by law.

**12.9 Counterparts.** To facilitate execution, this Mortgage may be executed in as many counterparts as may be convenient or required. It shall not be necessary that the signature and acknowledgment of, or on behalf of, each party, or that the signature and acknowledgment of all persons required to bind any party, appear on each counterpart. All counterparts shall collectively constitute a single instrument. It shall not be necessary in making proof of this Mortgage to produce or account for more than a single counterpart containing the respective signatures and acknowledgment of, or on behalf of, each of the parties hereto. Any signature and acknowledgment page to any counterpart may be detached from such counterpart without impairing the legal effect of the signatures and acknowledgments thereon and thereafter attached to another counterpart identical thereto except having attached to it additional signature and acknowledgment pages.

**12.10 Waiver of Fraudulent Inducement.** Except as may otherwise specifically be provided in the Loan Documents, neither Mortgagee nor any Affiliate of Mortgagee has made any representation, warranty, or statement to Grantor to induce Grantor to execute this Mortgage. Grantor expressly waives any claim of fraudulent inducement to execute this Mortgage and further disclaims any reliance on statements or representations of Mortgagee in waiving such claim.

# UNOFFICIAL COPY

**12.11 Governing Law; Venue; Service of Process.** THIS MORTGAGE SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS; *PROVIDED THAT* MORTGAGEE SHALL RETAIN ALL RIGHTS UNDER FEDERAL LAW AND THAT, WITH RESPECT TO THE CREATION, PERFECTION, PRIORITY AND ENFORCEMENT OF THE LIENS AND SECURITY INTERESTS CREATED BY THIS MORTGAGE, THE OTHER SECURITY DOCUMENTS AND THE OTHER LOAN DOCUMENTS, THE LAWS OF THE STATE WHERE THE MORTGAGED PROPERTY IS LOCATED SHALL APPLY. THIS MORTGAGE HAS BEEN ENTERED INTO IN DALLAS COUNTY, TEXAS, AND IS PERFORMABLE FOR ALL PURPOSES IN DALLAS COUNTY, TEXAS. THE PARTIES HEREBY AGREE THAT ANY LAWSUIT, ACTION, OR PROCEEDING THAT IS BROUGHT (WHETHER IN CONTRACT, TORT, OR OTHERWISE) ARISING OUT OF OR RELATING TO ANY OF THE LOAN DOCUMENTS, THE TRANSACTIONS CONTEMPLATED THEREBY, OR THE ACTIONS OF MORTGAGEE IN THE NEGOTIATION, ADMINISTRATION, OR ENFORCEMENT OF ANY OF THE LOAN DOCUMENTS SHALL BE BROUGHT IN A STATE OR FEDERAL COURT OF COMPETENT JURISDICTION LOCATED IN DALLAS COUNTY, TEXAS OR, IF REQUESTED BY MORTGAGEE, IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, OR THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS. GRANTOR HEREBY IRREVOCABLY AND UNCONDITIONALLY (A) SUBMITS TO THE EXCLUSIVE JURISDICTION OF SUCH COURTS, (B) WAIVES ANY OBJECTION IT MAY NOW OR HEREAFTER HAVE AS TO THE VENUE OF ANY SUCH LAWSUIT, ACTION, OR PROCEEDING BROUGHT IN ANY SUCH COURT, AND (C) FURTHER WAIVES ANY CLAIM THAT IT MAY NOW OR HEREAFTER HAVE THAT ANY SUCH COURT IS AN INCONVENIENT FORUM.

**12.12 Waiver of Exemplary, Consequential, Punitive and Speculative Damages.** In connection with any action, suit, or proceeding relating to or arising out of this Mortgage or any other Loan Documents, Grantor and Mortgagee each mutually waive to the fullest extent permitted by applicable law any claim for exemplary, consequential, punitive, or speculative damages.

**12.13 Controlling Agreement.** The terms of the Loan Agreement shall control over any conflicting provision of this Mortgage. The parties acknowledge that they were represented by competent counsel in connection with the negotiation, drafting, and execution of the Loan Documents and that the Loan Documents shall not be subject to the principle of construing their meaning against the drafting party.

**12.14 Subrogation.** If any of the proceeds of the Note are used to extinguish, extend, or renew any previous indebtedness against the Mortgaged Property, then Mortgagee, to the extent of such funds so used, shall be subrogated to all of the rights, claims, liens, titles, and interests existing against the Mortgaged Property previously held by, or in favor of, the holder of such indebtedness and such former rights, claims, liens, titles, and interests, if any, are not waived but rather continue in full force and effect in favor of Mortgagee and shall merge with the lien and security interest created herein as cumulative security for the performance and discharge of the Obligations.

**12.15 Payments.** Payment of any part of the Indebtedness other than of the required amount in immediately available funds at the place where the Note is payable shall not, regardless of any receipt or credit issued therefor, constitute payment until the required amount is actually received by Mortgagee in immediately available funds at the place where the Note is payable (or such other place that Mortgagee, in Mortgagee's sole discretion, has established by delivery of written notice thereof to Grantor) and shall be made and accepted subject to the condition that any check or draft may be handled for collection in accordance with the practice of the collecting bank or banks. Acceptance by Mortgagee of any payment in an amount less than the amount then due shall be deemed an acceptance on account only, and the failure to pay the entire amount then due shall be and continue to be an Event of Default.

# UNOFFICIAL COPY

**12.16 Exceptions to Covenants.** Grantor shall not be permitted to take any action or to fail to take any action with regard to any particular covenant or condition contained herein or in any of the Loan Documents if the action or omission would result in the breach of any other covenant or condition contained herein or in any of the Loan Documents which has not been specifically waived or consented to by Mortgagee, nor shall Mortgagee be deemed to have consented to any such act or omission if the same would provide cause for acceleration of the Indebtedness as a result of the breach of any other covenant or condition contained herein or in any of the Loan Documents which has not been specifically waived or consented to by Mortgagee.

**12.17 Reliance.** Grantor acknowledges (a) that Mortgagee, by entering into the loan transaction evidenced by the Loan Documents and by accepting this Mortgage, is expressly and primarily relying on the truth and accuracy of the foregoing warranties and representations set forth in **Section 3**, without any obligation to investigate the Mortgaged Property and notwithstanding any investigation of the Mortgaged Property that may have been conducted by Mortgagee; (b) that Mortgagee has relied on such warranties and representations before entering into this Mortgage; (c) that such warranties and representations are a material inducement to Mortgagee in making the loan evidenced by the Loan Documents and accepting this Mortgage; and (d) that Mortgagee would not be willing to make the loan evidenced by the Loan Documents and accept this Mortgage in the absence of any of such warranties and representations.

**12.18 Headings.** The Section and Subsection headings in this Mortgage 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 Sections or Subsections.

**12.19 Entire Agreement.** THIS MORTGAGE AND THE OTHER LOAN DOCUMENTS REPRESENT THE FINAL AGREEMENT BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES. THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES.

**12.20 Amendment.** The provisions hereof and of the other Loan Documents may be amended or waived only by an instrument in writing signed by Grantor and Mortgagee.

**12.21 WAIVER OF JURY TRIAL.** TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, GRANTOR HEREBY IRREVOCABLY AND EXPRESSLY WAIVES ALL RIGHT TO A TRIAL BY JURY IN ANY ACTION, PROCEEDING, OR COUNTERCLAIM (WHETHER BASED UPON CONTRACT, TORT, OR OTHERWISE) ARISING OUT OF OR RELATING TO ANY OF THE LOAN DOCUMENTS OR THE TRANSACTIONS CONTEMPLATED THEREBY OR THE ACTIONS OF MORTGAGEE IN THE NEGOTIATION, ADMINISTRATION, OR ENFORCEMENT THEREOF. EACH PARTY HERETO (A) CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PERSON HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PERSON WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER AND (B) ACKNOWLEDGES THAT IT AND THE OTHER PARTIES HERETO HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT AND THE OTHER LOAN DOCUMENTS BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS **SECTION 12.21**.

**12.22 Counting of Days.** The term “*days*” when used herein shall mean calendar days. If any time period ends on a Saturday, Sunday or other day not a business day, the period shall be deemed to end on the next succeeding business day. The term “*business day*” or “*Business Day*” when used herein shall

# UNOFFICIAL COPY

mean a weekday, Monday through Friday, except a legal holiday or a day on which banking institutions in Dallas, Texas are authorized by law to be closed.

**12.23 No Merger of Estates.** So long as any part of the Indebtedness and the Obligations secured hereby remain unpaid and unperformed or undischarged, the fee 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 Grantor, Mortgagee, any lessee, or any third party purchaser or otherwise.

**12.24 USA Patriot Act Notice.** Mortgagee hereby notifies Grantor that pursuant to the requirements of the USA Patriot Act (Title III of Pub. L. 107-56 (signed into law October 26, 2001)) (the "Act"), Mortgagee is required to obtain, verify and record information that identifies Grantor, which information includes the name and address of Grantor and other information that will allow Mortgagee to identify Grantor in accordance with the Act.

## 12.25 STATE SPECIFIC PROVISIONS.

(a) Principles of Construction. In the event of any inconsistencies between the terms and conditions of this **Section 12.25** and the other terms and conditions of this Mortgage, the terms and conditions of this **Section 12.25** shall control and be binding.

(b) Waiver of Redemption and Reinstatement. Grantor further agrees, to the full extent permitted by law, that in case of an Event of Default, neither Grantor nor anyone claiming through or under it will set up, claim or seek to take advantage of any appraisement, valuation, stay or extension laws now or hereafter in force, or take any other action that would prevent or hinder the enforcement or foreclosure of this Mortgage or the absolute sale of the Mortgaged Property, or the final and absolute delivery of possession thereof, immediately after such foreclosure sale, of the purchaser thereat. Grantor, for itself and all who may, at any time, claim through or under it, hereby waives, to the full extent that it may lawfully so do, the benefit of all such laws, and any and all right to have the assets comprising the Mortgaged Property marshaled upon any foreclosure of the lien hereof, and agrees that Mortgagee or any court having jurisdiction to foreclose such lien may sell the Mortgaged Property in part or as an entirety. Grantor acknowledges that the transaction of which this Mortgage is a part is a transaction that does not include either agricultural real estate (as defined in Section 15-1201 of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1101 et seq.; the "Act")) or residential real estate (as defined in Section 15-1219 of the Act). On behalf of Grantor, and each and every person acquiring any interest in, or title to, the Mortgaged Property subsequent to the date of this Mortgage, and on behalf of all other persons, to the maximum extent permitted by applicable law, Grantor hereby waives any and all rights: (x) of redemption from any foreclosure, or other disposition of any kind or nature, of the Mortgaged Property, or any part thereof, or interest therein, under or pursuant to rights herein granted to Mortgagee; and (y) to reinstatement of the indebtedness secured hereby, including, without limitation, any right to reverse any acceleration of such indebtedness pursuant to 735 ILCS 5/15-1602. All waivers by Grantor in this Mortgage have been made voluntarily, intelligently and knowingly by Grantor, after Grantor has been afforded an opportunity to be informed by counsel of Grantor's choice as to possible alternative rights. Grantor's execution of this Mortgage shall be conclusive evidence of the making of such waivers and that such waivers have been voluntarily, intelligently and knowingly made.

(c) Receiver. If an Event of Default shall have occurred and be continuing, Mortgagee, upon application to a court of competent jurisdiction, shall be entitled, as a matter of strict right, without notice and without regard to the occupancy or value of any security for the Indebtedness, or the insolvency of any party bound for its payment, to the appointment of a

# UNOFFICIAL COPY

receiver to take possession of, and to operate, the Mortgaged Property, and to collect and apply the Rents and other benefits thereof. The receiver shall have all rights and powers to the fullest extent permitted by law. Grantor shall pay to Mortgagee, upon demand, all of Mortgagee's costs and expenses, including, without limitation, receiver's fees and expenses and reasonable attorneys' fees and expenses, incurred pursuant to this Section, plus interest thereon at the lesser of the Maximum Rate or the Past Due Rate, and all such amounts shall be additional Indebtedness secured hereby.

(d) Business Loan Recital/Statutory Exemption/Usury.

(i) Grantor acknowledges and agrees that (i) the proceeds of the Loan will be used in conformance with subparagraph (1) of Section 4 of "An Act in relation to the rate of interest and other charges in connection with sales on credit and the lending of money," approved May 24, 1879, as amended (815 ILCS 205/4(1)); (ii) the indebtedness secured hereby has been incurred by Grantor solely for business purposes of Grantor and for Grantor's investment or profit, as contemplated by said Section 4; (iii) the indebtedness secured hereby constitutes a loan secured by real estate within the purview of and as contemplated by said Section 4; and (iv) the Indebtedness is an exempted transaction under the Truth-In-Lending Act, 15 U.S.C. Sec. 1601 *et. seq.* and has been entered into solely for business purposes of Grantor and for Grantor's investment or profit, as contemplated by said section.

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

(e) Illinois Collateral Protection Act. Grantor is hereby notified pursuant to the Illinois Collateral Protection Act (815 ILCS 180/1 *et. seq.*) that, unless Grantor provides Mortgagee with evidence of the insurance coverage required by this Mortgage or the Loan Agreement, if any, Mortgagee may purchase insurance at Grantor's expense to protect Mortgagee's interests in the Mortgaged Property. This insurance may, but need not, protect Grantor's interest. The coverage that Mortgagee purchases may not pay any claim that Grantor may make or any claim that is made against Grantor in connection with the Mortgaged Property. Grantor may later cancel any insurance purchased by Mortgagee, but only after providing Mortgagee with evidence that Grantor has obtained insurance as required by this Mortgage. If Mortgagee purchases insurance for the Mortgaged Property, Grantor will be responsible for the costs of such insurance, including interest and any other charges that may be imposed in connection with the placement of such insurance, until the effective date of the cancellation or expiration of such insurance. Without limitation of any other provision of this Mortgage or any other Loan Document, the cost of such insurance shall be added to the indebtedness secured hereby. The cost of the insurance may be more than the cost of insurance Grantor may be able to obtain on its own.

(f) Purchase by Mortgagee. Upon any foreclosure sale, Mortgagee may bid for and purchase the Mortgaged Property and shall be entitled to apply all or any part of any Obligation secured hereby as a credit to the purchase price.

(g) Compliance with Illinois Mortgage Foreclosure Law. In the event that any provision in this Mortgage shall be inconsistent with any provision of the Act, the provisions of the Act shall take precedence over the provisions of this Mortgage, but shall not invalidate or

# UNOFFICIAL COPY

render unenforceable any other provision of this Mortgage that can be construed in a manner consistent with the Act. Furthermore, if any provision of this Mortgage grants to Mortgagee any rights or remedies, upon default of Grantor, that are more limited than the rights that would otherwise be vested in Mortgagee under the Act, in the absence of said provision, Mortgagee shall be vested with the rights granted in the Act, to the full extent permitted by law. Without limiting the generality of the foregoing, all expenses incurred by Mortgagee, to the extent reimbursable under Sections 15-1510 and 15-1512 of the Act, whether incurred before or after any decree or judgment of foreclosure, and whether enumerated in this Mortgage, shall be added to the indebtedness secured hereby or by the judgment of foreclosure.

(h) Future Advances. At all times, regardless of whether any loan proceeds have been disbursed, this Mortgage secures as part of the Indebtedness the payment of all loan commissions, service charges, liquidated damages, reasonable attorneys' fees, expenses and advances due to or incurred by Mortgagee in connection with the Indebtedness and the Obligations, all in accordance with the Note, this Mortgage and the Loan Agreement; provided, however, that in no event shall the total amount of the Indebtedness, including loan proceeds disbursed plus any additional charges, exceed two hundred percent (200%) of the face amount of the Note. Grantor acknowledges that Mortgagee has bound itself to make advances pursuant to the Loan Agreement and that all such future advances shall be a lien from the time this Mortgage is recorded, as provided in the Act.

(i) Protective Advances. Without limitation on anything contained in this Mortgage, all advances, disbursements and expenditures made by the Mortgagee before and during a foreclosure, and before and after a judgment of foreclosure, and at any time prior to sale, and, where applicable, after sale and during the pendency of any related proceedings, for the following purposes, in addition to those otherwise authorized by this Mortgage or by the Act, shall have the benefit of all applicable provisions of the Act, including those provisions of the Act referred to below (collectively, "*Protective Advances*"):

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

(ii) payments by the Mortgagee of: (A) when due installments of principal, interest or other obligations in accordance with the terms of any senior mortgage or other prior lien or encumbrance on the Mortgaged Property; (B) when due installments of real estate taxes and assessments, general and special and all other taxes and assessments of any kind or nature whatsoever which are assessed or imposed upon the Mortgaged Property or any part thereof; (C) other Indebtedness and Obligations authorized by this Mortgage; or (D) with court approval, any other amounts in connection with other liens, encumbrances or interests reasonably necessary to preserve the status of title, as referred to in Section 15-1505 of the Act;

(iii) advances by the Mortgagee in settlement or compromise of any claims asserted by claimants under senior mortgages or any Prior Liens;

(iv) reasonable attorneys' fees and other expenses incurred: (A) in connection with the foreclosure of this Mortgage as referred to in Section 15-1504(d)(2) and 15-1510 of the Act; (B) in connection with any action, suit or proceeding brought by or against the

# UNOFFICIAL COPY

Mortgagee for the enforcement of this Mortgage or arising from the interest of the Mortgagee hereunder; or (C) in the preparation for the commencement or defense of any such foreclosure or other action;

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

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

(vii) expenses incurred and expenditures made by the Mortgagee for any one or more of the following: (A) if all or any portion thereof constitutes one or more units under a condominium declaration, assessments imposed upon the unit owner thereof; (B) if any interest in the Mortgaged Property is a leasehold estate under a lease or sublease, rents or other payments required to be made by the lessee under the terms of the lease or sublease; (C) premiums for casualty and liability insurance paid by the Mortgagee whether or not the Mortgagee or a receiver is in possession, if reasonably required, in reasonable amounts, and all renewals thereof, without regard to the limitation to maintaining existing insurance in effect at the time any receiver or mortgagee takes possession of the Mortgaged Property as imposed by subsection (c)(1) of Section 15-1704 of the Act; (D) repair or restoration of damage or destruction in excess of available insurance proceeds or condemnation awards; (E) payments required or deemed by the Mortgagee to be 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; (F) shared or common expense assessments payable to any association or corporation in which the owner of the Mortgaged Property is a member if in any way affecting the Mortgaged Property; (G) costs incurred by the Mortgagee for demolition, preparation for and completion of construction; and (H) pursuant to any lease or other agreement, for occupancy of the Mortgaged Property.

All Protective Advances shall be additional Indebtedness secured hereby, and shall become immediately due and payable without notice and with interest thereon from the date of the advance until paid at the Default Rate. This Mortgage shall be a lien for all Protective Advances as to subsequent purchasers and judgment creditors from the time this Mortgage is recorded pursuant to subsection (b)(1) of Section 15-1302 of the Act. All Protective Advances shall, except to the extent, if any, that any of the same are clearly contrary to or inconsistent with the provisions of the Act, apply to and be included in: (A) determination of the amount of indebtedness secured hereby at any time; (B) the amount of the Indebtedness found due and owing to the Mortgagee in a judgment of foreclosure and any subsequent, supplemental judgments, orders, adjudications or findings by any 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); (C) if right of redemption is deemed not to be waived by this Mortgage, computation of any amounts required to redeem, pursuant to Subsections (d)(2) and (e) of Section 5-1603 of the Act; (D) determination of amounts deductible from sale proceeds pursuant to Section 15-1512 of the Act; (E) application of income in the hands of any receiver or the Mortgagee in possession; and (F) computation of any

# UNOFFICIAL COPY

deficiency judgment pursuant to subsections (b)(2) and (e) of sections 15-1508 and Section 15-1511 of the Act.

(j) Maturity Date. The maturity date of the Indebtedness secured hereby is no later than December [ ], 2019, subject to extension to December [ ], 2020 as set forth in the Loan Agreement.

(k) Maximum Principal Amount. This Mortgage shall secure the payment of any amounts advanced from time to time under the Loan Documents, or under other documents stating that such advances are secured hereby. The maximum amount of unpaid principal of the Indebtedness and Obligations arising under or in connection with this Mortgage, exclusive of interest thereon, which may be outstanding at any time and secured hereby shall be 200% of the face amount of the Note. This Mortgage also secures any and all Indebtedness and Obligations arising under or in connection with this Mortgage, which future Indebtedness and Obligations shall have the same priority as if all such Indebtedness and Obligations were made on the date of execution hereof. Nothing in this Section or in any other provision of this Mortgage shall be deemed an obligation on the part of Mortgagee to make any future advances of any sort. At all times, regardless of whether any loan proceeds have been disbursed, this Mortgage shall secure (in addition to any Loan proceeds disbursed from time to time) the payment of any and all expenses and advances due to or incurred by Mortgagee in connection with the Indebtedness to be secured hereby and which are to be reimbursed by Grantor under the terms of this Mortgage and the Loan Agreement; provided, however, that in no event shall the total amount of Loan proceeds disbursed plus such additional amounts plus all the portions of the Indebtedness and the other Obligations arising under or in connection with this Mortgage exceed two hundred percent (200%) of the aggregate, original principal amounts of the Note.

(l) Mortgagee's Right to Possession. Upon an Event of Default, and subject to the requirements of 735 ILCS 5/15-1701(b)(2), Mortgagee shall be entitled to be placed in possession of the Mortgaged Property and to exercise the rights and powers of a mortgagee in possession under the Act.

(m) Priority of Leases. Subject to the provisions of agreements between the Mortgagee and the tenants at the Mortgaged Property, at the option of Mortgagee, this Mortgage shall become subject and subordinate, in whole or in part (but not with respect to priority of entitlement to insurance proceeds or any award arising out of any condemnation), to any and all leases of all or any part of the Mortgaged Property upon the execution by Mortgagee and recording thereof, at any time hereafter in the appropriate official records of the County wherein the Mortgaged Property is situated, of a unilateral declaration to that effect.

**REMAINDER OF PAGE INTENTIONALLY LEFT BLANK.**

**SIGNATURE PAGE FOLLOWS.**



# UNOFFICIAL COPY

EXECUTED as of the date first above written.

**NOTICE OF INDEMNIFICATION:**

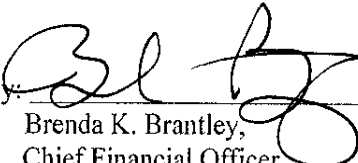
GRANTOR HEREBY ACKNOWLEDGES AND AGREES THAT THIS MORTGAGE CONTAINS CERTAIN INDEMNIFICATION PROVISIONS (INCLUDING, WITHOUT LIMITATION, THOSE CONTAINED IN SECTIONS 7.1(b) AND 8.4 HEREOF) WHICH, IN CERTAIN CIRCUMSTANCES, COULD INCLUDE AN INDEMNIFICATION BY GRANTOR OF MORTGAGEE FROM CLAIMS OR LOSSES ARISING IN STRICT LIABILITY OR AS A RESULT OF MORTGAGEE'S OWN NEGLIGENCE.

**GRANTOR:**

WHEELING MEMORY CARE, LLC,  
a Delaware limited liability company

By: LaSalle Wheeling Management, LLC,  
an Illinois limited liability company,  
its Managing Member

By: The LaSalle Group, Inc.,  
a Texas corporation,  
its Sole Member

By:   
Brenda K. Brantley,  
Chief Financial Officer

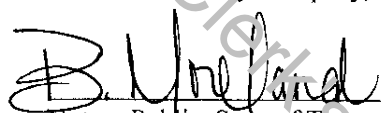
STATE OF TEXAS           §  
  §  
COUNTY OF Dallas       §

The foregoing instrument was ACKNOWLEDGED before me this 9 day of December, 2014, by Brenda K. Brantley, the Chief Financial Officer of The LaSalle Group, Inc., a Texas corporation and sole member of LaSalle Wheeling Management, LLC, an Illinois limited liability company and the managing member of Wheeling Memory Care, LLC, a Delaware limited liability company, on behalf of said entities.

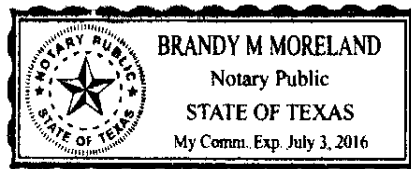
[S E A L]

My Commission Expires:

July 3, 2016

  
Notary Public, State of Texas

Brandy Moreland  
Printed Name of Notary Public



# UNOFFICIAL COPY

## EXHIBIT A

### LAND DESCRIPTION

Order No.: 5257-1400895

For APN/Parcel ID(s): 03-02-316-034, 03-02-316-033 and 03-02-316-020

#### PARCEL 1:

THAT PART OF LOT 2 IN CHRYSLER REALTY CORPORATION'S RESUBDIVISION OF LOT 4 IN WHEELING HEIGHTS, BEING A SUBDIVISION OF THE EAST 50.01 ACRES OF THE SKINNER FARM, IN THE SOUTHWEST QUARTER OF SECTION 2 TOWNSHIP 42 NORTH, RANGE 11 EAST OF THE THIRD PRINCIPAL MERIDIAN, ACCORDING TO THE PLAT THEREOF RECORDED OCTOBER 2, 1972 AS DOCUMENT NUMBER 22070178, AND THAT PART OF LOT 79 IN HOLLAND'S RESUBDIVISION, RECORDED SEPTEMBER 16, 1955 AS DOCUMENT T1621040, IN THE EAST HALF OF THE SOUTHWEST QUARTER OF SECTION 2, TOWNSHIP 42 NORTH, RANGE 11 EAST OF THE THIRD PRINCIPAL MERIDIAN DESCRIBED AS FOLLOWS:

BEGINNING AT THE SOUTHWEST CORNER OF SAID LOT 2; THENCE NORTH 00 DEGREES 29 MINUTES 33 SECONDS EAST ALONG THE WEST LINE OF SAID LOT 2 A DISTANCE OF 224.44 FEET; THENCE NORTH 61 DEGREES 53 MINUTES 23 SECONDS EAST 214.02 FEET; THENCE NORTH 88 DEGREES 16 MINUTES 36 SECONDS EAST 259.05 FEET TO A POINT ON THE EAST LINE OF SAID LOT 79; THENCE SOUTH 48 DEGREES 15 MINUTES 12 SECONDS EAST ALONG THE EAST LINE OF SAID LOT 79 A DISTANCE OF 268.18 FEET TO A POINT OF CURVATURE; THENCE SOUTHEASTERLY 68.41 FEET ALONG THE ARC OF A TANGENT CIRCLE TO THE RIGHT (ALSO BEING THE EAST LINE OF SAID LOT 79) HAVING A RADIUS OF 254.94 FEET AND WHOSE CHORD BEARS SOUTH 40 DEGREES 33 MINUTES 59 SECONDS EAST 68.20 FEET TO A POINT ON THE WEST LINE OF THE PARCEL DEEDED TO THE STATE OF ILLINOIS DECEMBER 06, 2010 AS DOCUMENT NUMBER 1034046041; THENCE SOUTH 01 DEGREES 43 MINUTES 31 SECONDS EAST ALONG THE WEST LINE OF LAST DESCRIBED PARCEL 61.77 FEET TO A POINT ON THE NORTH OF LAST DESCRIBED PARCEL; THENCE SOUTH 88 DEGREES 16 MINUTES 36 SECONDS WEST ALONG THE NORTH LINE OF SAID PARCEL 45.00 FEET TO A POINT ON THE WEST LINE OF SAID PARCEL; THENCE SOUTH 01 DEGREES 43 MINUTES 33 SECONDS EAST ALONG THE WEST LINE OF SAID PARCEL 20.00 FEET TO THE NORTH LINE OF DUNDEE ROAD; THENCE SOUTH 88 DEGREES 16 MINUTES 36 SECONDS WEST 651.86 FEET, TO THE POINT OF BEGINNING, IN COOK COUNTY, ILLINOIS.

#### PARCEL 2:

NON-EXCLUSIVE EASEMENT FOR THE BENEFIT OF PARCEL 1 AS CREATED BY ACCESS EASEMENT AND CONSTRUCTION AND MAINTENANCE AGREEMENT FOR THE COMMUNITY GARDEN FROM SHIR HADASH RECONSTRUCTIONIST SYNAGOGUE-CONGREGATION SHIR HADASH TO WHEELING MEMORY CARE, LLC DATED DECEMBER 11, 2014 AND RECORDED JANUARY 9, 2015 AS DOCUMENT NO. 1500922025 FOR USE AND ENJOYMENT OF THE COMMUNITY GARDEN, TOGETHER WITH INGRESS AND EGRESS OVER THE LAND CONTAINED IN EXHIBIT F OF SAID AGREEMENT.

#### PARCEL 3:

NON-EXCLUSIVE EASEMENT FOR THE BENEFIT OF PARCEL 1 AS CREATED BY CROSS ACCESS AND ENTRY DRIVEWAY EASEMENT AND MAINTENANCE AND SHARED PARKING AGREEMENT DATED DECEMBER 11, 2014 AND RECORDED JANUARY 9, 2015 AS DOCUMENT NO. 1500922024

# UNOFFICIAL COPY

## EXHIBIT A

### LAND DESCRIPTION

(continued)

FROM SHIR HADASH RECONSTRUCTIONIST SYNAGOGUE-CONGREGATION SHIR HADASH TO WHEELING MEMORY CARE, LLC FOR ACCESS AND ENTRY FOR VEHICULAR AND PEDESTRIAN USE ON, OVER AND ACROSS THAT PORTION OF THE SHARED ACCESS AND ENTRY DRIVEWAY CONTAINED IN EXHIBIT C-1 OF SAID AGREEMENT.

Property of Cook County Clerk's Office

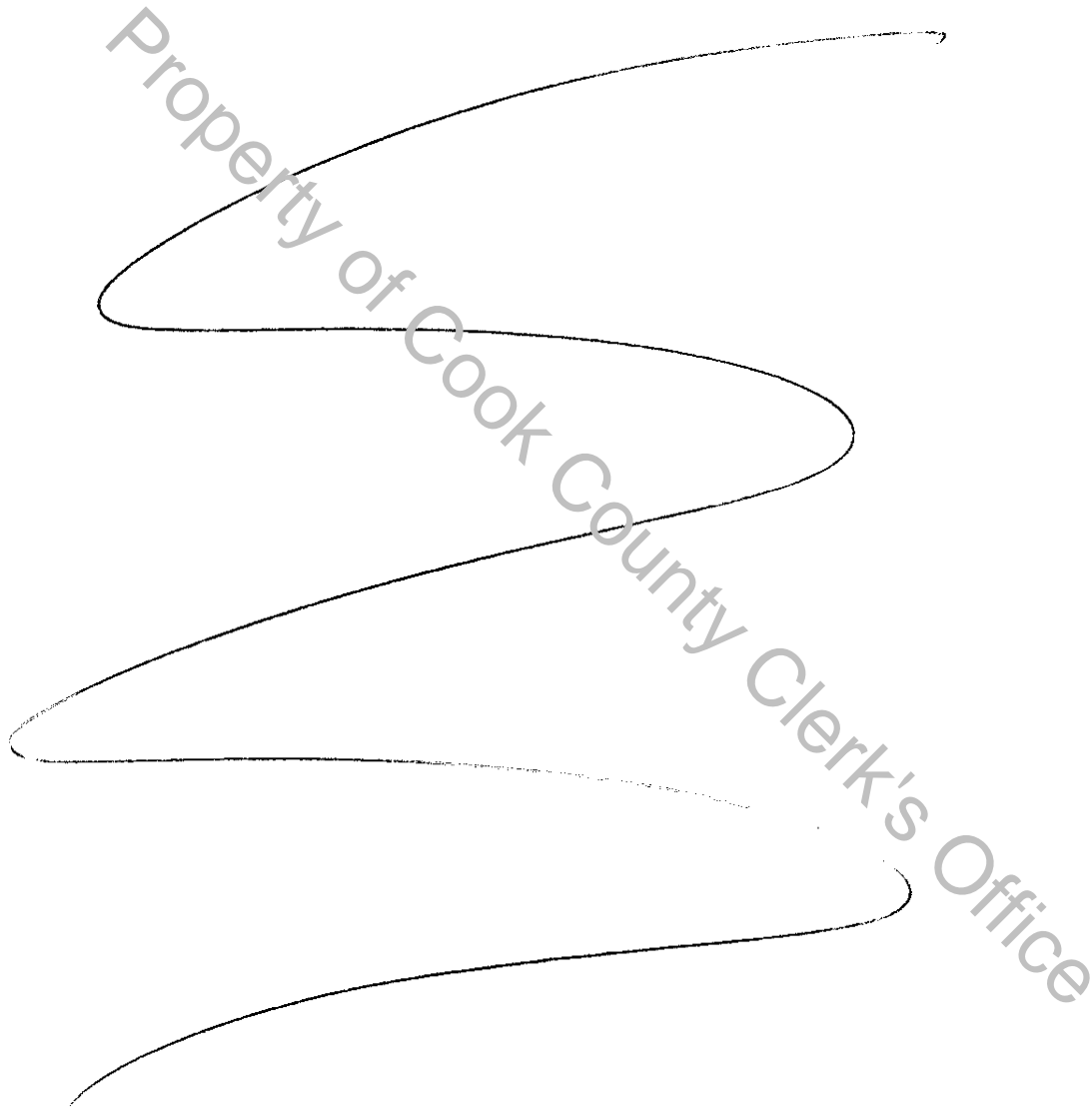
# UNOFFICIAL COPY

## EXHIBIT B

### PERMITTED EXCEPTIONS

The following items are Permitted Exceptions to the extent they are valid and subsisting and affect the Mortgaged Property:

Property of Cook County Clerk's Office



# UNOFFICIAL COPY

1. Taxes for the years 2014, not yet due or payable. Permanent Tax No.: 03-02-316-033 (Affects Lot 2, except the West 188 feet) (Land and Other Property)
2. Taxes for the year 2014 are not yet due and payable. Permanent Tax No.: 03-02-316-033 (Affects Lot 2, except the West 188 feet) (Land and Other Property)
3. Taxes for the year 2014 are not yet due and payable. Permanent Tax No.: 03-02-316-020 (Affects Lot 79) (Land and Other Property)
4. Annual Maintenance Assessment of Wheeling Draining District No. 1 under Law Docket No. 26637CO.
5. Declaration of Restrictive Covenants recorded October 20, 1970 as Document No. 21294494 made by First Lake County National Bank at Libertyville, as Trustee under Trust Agreement dated June 26, 1969 and known as Trust No. 472 declaring that the land will not be developed or improved with an automobile service station as presently defined in the Zoning Code of the Village of Wheeling, and that no request shall be made by the declarant, its grantees, assigns or successors requesting that the said Village of Wheeling issue a building permit for the erection of an automobile service station.
6. Wheeling Drainage Ditch over the North 40 feet as shown on the Plat of Subdivision recorded as Document No. 2207017; as noted or shown on Survey of the land prepared by Jerry P. Christoph (IPLS No. 035-3540), of Spaceco, Inc. (Job No. 8018) dated October 29, 2014, last updated December \_\_\_\_, 2014.
7. Rights of Wheeling Drainage District in and to the South 7 feet of the North 40 feet recorded on Plat of Chrysler Realty Corporation Subdivision to Wheeling Drainage District; As noted or shown on Survey of the land prepared by Jerry P. Christoph (IPLS No. 035-3540), of Spaceco, Inc. (Job No. 8018) dated October 29, 2014, last updated December \_\_\_\_, 2014.
8. Appended to Plat of Chrysler Realty Corporation's Resubdivision recorded October 2, 1972 as Document No. 22070178 is a letter dated September 22, 1972 from Department of Transportation of State of Illinois that portions of Lot 2 lying and adjacent to the Wheeling Drainage Ditch will be subject to flood risks.
9. Terms, provisions and conditions contained in Access Easement and Construction and Maintenance Agreement for the Community Garden dated December \_\_\_\_, 2014 by and between Shir Hadash Reconstructinist Synagogue – Congregation Shir Hadash and Wheeling Memory Care, LLC.
10. Terms, provisions and conditions contained in Cross Access and Entry Driveway Easement and Maintenance and Shared Parking Agreement dated December \_\_\_\_, 2014 by and between Shir Hadash Reconstructinist Synagogue – Congregation Shir Hadash and Wheeling Memory Care, LLC.
11. Covenants, conditions and restrictions contained in Declaration of Use Restrictions by Wheeling Memory Care, LLC dated December \_\_\_\_, 2014.
12. Terms, provisions and conditions contained in Temporary Monument Easement Agreement dated December \_\_\_\_, 2014, by and between Shir Hadash Reconstructinist Synagogue – Congregation Shir Hadash and Wheeling Memory Care, LLC.
13. Easement in favor of the Village of Wheeling, and its/their respective successors and assigns, to install, operate and maintain all equipment necessary for the purpose of serving the land and other property, together with the right of access to said equipment, and the provisions relating thereto contained in the Grant recorded/filed as Document No. 0916918004, affecting the land.
14. Terms, provisions and conditions contained in Memorandum of Reconveyance Option dated December \_\_\_\_, 2014 made by and between Shir Hadash Reconstructinist Synagogue – Congregation Shir Hadash and Wheeling Memory Care, LLC.