

UNOFFICIAL COPY

Illinois Anti-Predatory Lending Database Program

Certificate of Exemption

CT 17SAB168124LFE



Report Mortgage Fraud
844-768-1713



1800334052

Doc# 1800334052 Fee \$118.00

RHSP FEE:\$9.00 RPRF FEE: \$1.00

KAREN A. YARBROUGH

COOK COUNTY RECORDER OF DEEDS

DATE: 01/03/2018 01:23 PM PG: 1 OF 41

The property identified as: PIN: 17-05-309-046-0000

Address:

Street: 1431 West Cortez Street

Street line 2:

City: Chicago

State: IL

ZIP Code: 60642

Lender: BOFI Federal Bank

Borrower: Miki Oku

Loan / Mortgage Amount: \$1,037,500.00

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

S _____
P _____
S _____
SC _____
INT _____

Certificate number: B60E88C6-EF55-4302-9203-9725C81AAC56

Execution date: 12/25/2017

Handwritten initials: R, VL

UNOFFICIAL COPY



Prepared By and
RECORDING REQUESTED BY AND
WHEN RECORDED MAIL TO:

BOFI FEDERAL BANK
4350 La Jolla Village Dr., Suite 140 Mail
Stop 860
San Diego, CA 92122
Attn: Loan Servicing
Loan No. 900025024

Tax Parcel / APN: 17-05-309-046-0000

(Space Above For Recorder's Use)

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

MIKI OKU
(Borrower)

in favor of

BOFI FEDERAL BANK
(Lender)

DATED: December 13, 2017

Property of Cook County Clerk's Office

UNOFFICIAL COPY

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

(MULTIFAMILY)

The parties to this MORTGAGE, ASSIGNMENT OF LEASES AND RENTS, SECURITY AGREEMENT AND FIXTURE FILING (this "**Mortgage**"), dated as of **December 13, 2017**, are **MIKI OKU** ("**Borrower**" or "**Mortgagor**"), having its principal place of business at **c/o Saratoga Property Advisors, LLC 222 South Morgan Street, Unit 4D, Chicago, IL 60607**, and **BOFI FEDERAL BANK**, a federally chartered savings bank ("**Lender**" or "**Mortgagee**"), having its principal place of business at 4350 La Jolla Village Drive, Suite 140, San Diego, California, 92122.

RECITALS

A. Lender is making a loan to Borrower (the "**Loan**"), which is evidenced by a Promissory Note Secured By Mortgage (the "**Note**") in the amount of **ONE MILLION THIRTY SEVEN THOUSAND FIVE HUNDRED AND 00/100 DOLLARS (\$1,037,500.00)**, executed by Borrower in favor of Lender, dated the same date as this Mortgage, payable to the order of Lender.

B. The loan documents include this Mortgage, the Note and the other documents described in the Note as Loan Documents (the "**Loan Documents**").

ARTICLE 1

MORTGAGE

1.1 **Grant.** For the purposes of and upon the terms and conditions of this Mortgage, Borrower irrevocably grants, conveys and assigns to Lender, with power of sale and right of entry and possession, all estate, right, title and interest which Borrower now has or may hereafter acquire in, to, under or derived from any or all of the following:

- (a) That real property (the "**Land**") located in the **County of Cook, State of Illinois**, and more particularly described on **Exhibit A** attached hereto;
- (b) All appurtenances, easements, rights of way, water and water rights, pumps, pipes, flumes and ditches and ditch rights, water stock, ditch and/or reservoir stock or interests, royalties, development rights and credits, air rights, minerals, oil rights, and gas rights, now or later used or useful in connection with, appurtenant to or related to the Land;
- (c) All buildings, structures, facilities, other improvements and fixtures now or hereafter located on the Land;
- (d) All apparatus, equipment, machinery and appliances and all accessions thereto and renewals and replacements thereof and substitutions therefor used in the operation or occupancy of the Land, it being intended by the parties that all such items shall be conclusively considered to be a part of the Land, whether or not attached or affixed to the Land;
- (e) All land lying in the right-of-way of any street, road, avenue, alley or right-of-way opened, proposed or vacated, and all sidewalks, strips and gores of land adjacent to or used in connection with the Land;
- (f) All additions and accretions to the property described above;

UNOFFICIAL COPY

- (g) All licenses, authorizations, certificates, variances, consents, approvals and other permits now or hereafter pertaining to the Land and all estate, right, title and interest of Borrower in, to, under or derived from all trade names or business names relating to the Land or the present or future development, construction, operation or use of the Land;
- (h) The Collateral (as defined herein); and
- (i) All proceeds, royalties, payments, net profit interests and other interests of any of the foregoing.

All of the property described above is hereinafter collectively defined as the "**Property**". The listing of specific rights or property shall not be interpreted as a limitation of general terms.

ARTICLE 2

OBLIGATIONS SECURED

2.1 Obligations Secured. Borrower makes the foregoing grant and assignment for the purpose of securing the following obligations (the "**Secured Obligations**"):

- (a) Full and punctual payment to Lender of all sums at any time owing under the Note;
- (b) Payment and performance of all covenants and obligations of Borrower under this Mortgage including, without limitation, indemnification obligations and advances made to protect the Property;
- (c) Payment and performance of all additional covenants and obligations of Borrower under the Loan Documents except for the Borrower's covenants and obligations under any "Environmental Indemnity Agreement," executed in favor of Lender, as of the date hereof (including any riders thereto). For the avoidance of doubt, the Secured Obligations, notwithstanding anything to the contrary contained herein, shall not include, obligations or covenants, in each case, pursuant to: (i) any guarantee of the Loan (it being understood that the guarantor(s) under such Guarantee shall not be the Borrower); (ii) any environmental indemnity regarding the Property executed by, in each case, the Borrower and/or any guarantor/additional indemnitor; and (iii) any similar Guarantee or indemnity, including any rider(s) thereto, by which a person guarantees or otherwise acts as a surety regarding the Borrower's obligations under the Loan Documents. Without limiting the generality of the foregoing provisions of this Section 2.1(c) and for the further avoidance of doubt, the Secured Obligations do not include, in each case, (x) any "Guarantee" of the Loan executed as of the date hereof, in favor of Lender, and any successor thereto and (y) any "Environmental Indemnity Agreement" (including any rider(s) thereto) executed as of the date hereof, in favor of Lender, and any successor thereto (it being understood that such Guarantee/Guaranties and the Environmental Indemnity Agreement, notwithstanding anything to the contrary contained herein, are not secured by this Mortgage);
- (d) Payment and performance of all covenants and obligations, if any, which any rider attached as an exhibit to this Mortgage recites are secured hereby;
- (e) Payment and performance of all future advances and other obligations that the then record owner of all or part of the Property may agree to pay and/or perform (whether as principal, surety or guarantor) for the benefit of Lender, when the obligation is evidenced by a writing that recites that it is secured by this Mortgage; however, any obligation secured by this Mortgage shall not be construed to be part of any "Guarantee" or "Environmental Indemnity Agreement" (as such terms are used in Section 2.1(c) hereof, including any rider(s) or successor documents thereto);

UNOFFICIAL COPY

(f) All interest and charges on all obligations secured hereby including, without limitation, prepayment charges, late charges and loan fees; and

(g) All modifications, extensions and renewals of any of the obligations secured hereby, however evidenced, including, without limitation: (i) modifications of the required principal payment dates or interest payment dates or both, as the case may be, deferring or accelerating payment dates wholly or partly; and (ii) modifications, extensions or renewals at a different rate of interest whether or not any such modification, extension or renewal is evidenced by a new or additional promissory note or notes.

2.2 Obligations. The term "**obligations**" is used herein in its broadest and most comprehensive sense and shall be deemed to include, without limitation, all interest and charges, prepayment charges, late charges, reimbursements for expenses, and loan fees at any time accruing or assessed on any of the Secured Obligations.

2.3 Incorporation. All terms and conditions of the documents that evidence any of the Secured Obligations are incorporated herein by this reference. All persons who may have or acquire an interest in the Property shall be deemed to have notice of the terms of the Secured Obligations and to have notice that the rate of interest on one or more Secured Obligations may vary from time to time. As used in this Mortgage, "person" or "persons" shall refer to both a natural person and a legal person.

ARTICLE 3

ASSIGNMENT OF RENTS AND LEASES

3.1 Assignment. Borrower absolutely, irrevocably, and unconditionally grants, transfers and assigns to Lender all of Borrower's right, title and interest in, to and under: (a) all present and future leases of the Property or any portion thereof, all licenses and agreements relating to the management, leasing or operation of the Property or any portion thereof, and all other agreements of any kind relating to the use or occupancy of the Property or any portion thereof, whether such leases, licenses and agreements are now existing or entered into after the date hereof (the "**Leases**"); and (b) the rents, issues, deposits and profits of the Property, including, without limitation, all amounts payable and all rights and benefits accruing to Borrower under the Leases (the "**Payments**"). The term "**Leases**" shall also include all guaranties of and security for the tenants' performance thereunder, and all amendments, extensions, renewals or modifications thereto which are permitted hereunder. This is a present and absolute assignment, not an assignment for security purposes only, and Lender's right to the Leases and Payments is not contingent upon, and may be exercised without possession of, the Property.

3.2 Grant of License. Lender confers upon Borrower a revocable license (the "**License**") to collect and retain the Payments as they become due and payable, until the occurrence of an Event of Default (as hereinafter defined). Upon an Event of Default, the License shall be automatically revoked and Lender may collect and apply the Payments pursuant to the terms hereof without notice and without taking possession of the Property. All Payments thereafter collected by Borrower shall be held by Borrower as trustee under a constructive trust for the benefit of Lender. Borrower hereby irrevocably authorizes and directs the tenants under the Leases to rely upon and comply with any notice or demand by Lender for the payment to Lender of any rental or other sums which may at any time become due under the Leases, or for the performance of any of the tenants' undertakings under the Leases, and the tenants shall have no right or duty to inquire as to whether any Event of Default has actually occurred or is then existing. Borrower hereby relieves the tenants from any liability to Borrower by reason of relying upon and complying with any such notice or demand by Lender. Lender may apply, in its sole discretion, any Payments so collected by Lender against any Secured Obligation or any other obligation of Borrower, Borrower or any other person or entity, under any document or instrument related to or executed in connection with the Loan Documents, whether existing on the date hereof or hereafter arising. Collection

UNOFFICIAL COPY

of any Payments by Lender shall not cure or waive any Event of Default or notice of an Event of Default or invalidate any acts done pursuant to such notice.

3.3 Effect of Assignment. The foregoing irrevocable assignment shall not cause Lender to be: (a) a mortgagee in possession; (b) responsible or liable for the control, care, management or repair of the Property or for performing any of the terms, agreements, undertakings, obligations, representations, warranties, covenants and conditions of the Leases; (c) responsible or liable for any waste committed on the Property by the tenants under any of the Leases or by any other parties for any dangerous or defective condition of the Property, or for any negligence in the management, upkeep, repair or control of the Property resulting in loss or injury or death to any tenant, licensee, employee, invitee or other person; or (d) responsible for or impose upon Lender any duty to produce rents or profits. Lender shall not directly or indirectly be liable to Borrower or any other person as a consequence of: (e) the exercise or failure to exercise any of the rights, remedies or powers granted to Lender hereunder; or (f) the failure or refusal of Lender to perform or discharge any obligation, duty or liability of Borrower arising under the Leases.

3.4 Covenants.

- (a) All Leases. Borrower shall, at Borrower's sole cost and expense:
- (i) perform all obligations of the landlord under the Leases and use reasonable efforts to enforce performance by the tenants of all obligations of the tenants under the Leases;
 - (ii) use reasonable efforts to keep the Property leased at all times to tenants which Borrower in good faith believes are creditworthy, at rents not less than the fair market rental value (including, but not limited to, free or discounted rents to the extent the market so requires);
 - (iii) promptly upon Lender's request, deliver to Lender a copy of each requested Lease and all amendments thereto and waivers thereof;
 - (iv) promptly upon Lender's request, execute and record any additional assignments of landlord's interest under any Lease to Lender and specific subordinations of any Lease to this Mortgage, in form and substance satisfactory to Lender; and
 - (v) promptly upon Lender's request, but in any event by June 30th of each year, provide Lender a current rent roll, certified by Borrower as being true and correct, containing the names of all tenants with respect to the Property, the terms of their respective Leases, the spaces occupied and the rents or fees payable thereunder and the amount of each tenant's security deposit.

Unless consented to in writing by Lender or otherwise permitted under any other provision of the Loan Documents, Borrower shall not:

- (vi) grant any tenant under any Lease any option, right of first refusal or other right to purchase all or any portion of the Property under any circumstances;
- (vii) grant any tenant under any Lease any right to prepay rent more than one (1) month in advance;
- (viii) except upon Lender's request, execute any assignment of landlord's interest in any Lease;

UNOFFICIAL COPY

- (ix) except as set forth in Section 3.4(a)(vii), collect rent or other sums due under any Lease in advance, other than to collect rent one (1) month in advance of the time when it becomes due; or
- (x) execute any lease for a term of greater than five (5) years, which deviates materially from the standard form Lease approved by Lender in writing.

Any such attempted action in violation of the provisions of this Section shall be null and void.

(b) **Major Leases.** Borrower shall, at Borrower's sole cost and expense, give Lender prompt written notice of any material default by landlord or tenant under any Major Lease (as defined below). Unless consented to in writing by Lender or otherwise permitted under any other provision of the Loan Documents, Borrower shall not:

- (i) enter into any Major Lease which (aa) is not on fair market terms (which terms may include free or discounted rent to the extent the market so requires); (bb) does not contain a provision requiring the tenant to execute and deliver to the landlord an estoppel certificate in form and substance satisfactory to the landlord promptly upon the landlord's request; or (cc) allows the tenant to assign or sublet the premises without the landlord's consent;
- (ii) reduce any rent or other sums due from the tenant under any Major Lease;
- (iii) terminate or materially modify or amend any Major Lease; or
- (iv) release or discharge the tenant or any guarantor under any Major Lease from any material obligation thereunder.

Any such attempted action in violation of the provisions of this Section shall be null and void.

Without in any way limiting the requirement of Lender's consent hereunder, any sums received by Borrower in consideration of any termination or material modification or amendment of any Major Lease or any release or discharge of any tenant under any Major Lease from any material obligation thereunder shall be applied to reduce the outstanding Secured Obligations (without payment of a prepayment charge) and any such sums received by Borrower shall be held in trust by Borrower for such purpose; provided, however, so long as no Event of Default shall exist at the time, any sums received by Borrower in consideration of any termination (or the release or discharge of any tenant), modification or amendment of any Major Lease which: (A) total less than \$50,000 shall be payable to Borrower; and (B) total \$50,000 or more shall be placed into an impound account and shall be released to Borrower from time to time upon delivery of an executed replacement tenant lease and satisfactory evidence as to the completion of re-tenanting work. Following the completion of such re-tenanting work, and provided no Default shall exist at such time, Lender shall release any excess funds received by Borrower with respect to the termination of any Major Lease to Borrower. "Major Lease", as used herein, shall mean (x) a Lease of more than twenty percent (20%) of the total rentable area of all buildings forming a part of the Property, as reasonably determined by Lender, (y) cell tower Leases, and (z) Leases of oil, gas and mineral rights. Borrower's obligations with respect to Major Leases shall be governed by the provisions of Section 3.4(a) applicable to all Leases as well as by the provisions of this Section. Lender's failure to deny any written request by Borrower for consent under this Section within five (5) Business Days (as defined in the Note) after Lender's receipt of such request (and all documents and information reasonably related thereto) shall be deemed to constitute Lender's consent to such request.

UNOFFICIAL COPY

3.5 Estoppel Certificates. Within thirty (30) days after request by Lender, Borrower shall deliver to Lender and to any party designated by Lender, estoppel certificates relating to the Leases (excluding Leases of storage units) executed by Borrower and by each of the tenants, in form and substance acceptable to Lender; provided, however, if any tenant shall fail or refuse to so execute and deliver any such estoppel certificate upon request, Borrower shall use reasonable efforts to cause such tenant to execute and deliver such estoppel certificate but such tenant's continued failure or refusal to do so, despite Borrower's reasonable efforts, shall not constitute a default by Borrower under this Section.

3.6 Right of Subordination. Lender may at any time and from time to time by specific written instrument intended for the purpose unilaterally subordinate the lien of this Mortgage to any Lease, without joinder or consent of, or notice to, Borrower, any tenant or any other person. Notice is hereby given to each tenant under a Lease of such right to subordinate. No subordination referred to in this Section shall constitute a subordination to any lien or other encumbrance, whenever arising, or improve the right of any junior lienholder. Nothing herein shall be construed as subordinating this Mortgage to any Lease.

ARTICLE 4

SECURITY AGREEMENT AND FIXTURE FILING

4.1 Security Interest. Borrower grants and assigns to Lender a security interest to secure payment and performance of all of the Secured Obligations, in Borrower's interest in all of the following described personal property in which Borrower now or at any time hereafter has any interest (the "**Collateral**"):

All goods, building and other materials, supplies, work in process, equipment, machinery, fixtures, furniture, furnishings (including consumer goods, inventory, equipment and farm products), signs and other personal property, wherever situated, which are or are to be incorporated into, used in connection with or appropriated for use on the Property; all rents, issues, deposits and profits of the Property (to the extent, if any, they are not subject to the assignment of leases and rents set forth in Article 3 of this Mortgage); all inventory, accounts, cash receipts, impounds, accounts receivable, contract rights, general intangibles (including payment intangibles and software), chattel paper (including electronic chattel paper and tangible chattel paper), instruments, documents, notes, drafts, letter of credit rights and deposit accounts (as those terms are defined in the UCC (as defined below)), insurance policies, insurance and condemnation awards and proceeds (including without limitation all Claims and Proceeds of Claims as such terms are defined below), any other rights to the payment of money, trade names, trademarks and service marks arising from or related to the Property or any business now or hereafter conducted thereon by Borrower; all permits, consents, approvals, licenses, authorizations and other rights granted by, given by or obtained from, any governmental entity with respect to the Property, including but not limited for the Intended Use; all interest in any assignments of leases to adjoining real property and options to purchase such property; all deposits or other security now or hereafter made with or given to utility companies by Borrower with respect to the Property; all advance payments of insurance premiums made by Borrower with respect to the Property; all plans, drawings and specifications relating to the Property; all loan funds held by Lender, whether or not disbursed, all funds deposited with Lender pursuant to any Loan Document, including, without limitation, all "**Restoration Funds**" as defined herein; all reserves, deferred payments, deposits, accounts, refunds, cost savings and payments of any kind related to the Property or any portion thereof, including, without limitation, all "**Impounds**" as defined herein together with all replacements and proceeds of, and additions and accessions to, any of the foregoing, and all books, records and files relating to any of the foregoing.

As to all of the above-described personal property which is or which hereafter becomes a "fixture" under applicable law, this Mortgage constitutes a fixture filing under the Illinois Uniform Commercial Code ("**UCC**").

UNOFFICIAL COPY

4.2 Rights of Lender. In addition to Lender's rights as a "**Secured Party**" under the UCC, Lender may, but shall not be obligated to, at any time without notice and at the expense of Borrower as a "**Debtor**": (a) give notice to any person of Lender's rights hereunder and enforce such rights at law or in equity; (b) insure, protect, defend and preserve the Collateral or any rights or interests of Lender therein; (c) inspect the Collateral; and (d) endorse, collect and receive any right to payment of money owing to Borrower under or from the Collateral. Notwithstanding the above, in no event shall Lender be deemed to have accepted any property other than cash in satisfaction of any obligation of Borrower to Lender unless Lender shall make an express written election of said remedy under the UCC or other applicable law.

4.3 Additional Rights of Lender Upon an Event of Default. Upon the occurrence of an Event of Default hereunder, then in addition to all of Lender's rights as a Secured Party under the UCC or otherwise at law:

(a) Sale of Collateral. Lender may: (i) upon written notice, require Borrower to assemble any or all of the Collateral and make it available to Lender at a place designated by Lender; (ii) without prior notice, enter upon the Property or other place where any of the Collateral may be located and take possession of, collect, sell and dispose of any or all of the Collateral, and store the same at a location acceptable to Lender at Borrower's expense; or (iii) sell, assign and deliver at any place or in any lawful manner all or any part of the Collateral and bid and become purchaser at any such sale; and

(b) Other Rights. Lender may, for the account of Borrower and at Borrower's expense: (i) operate, use, consume, sell or dispose of the Collateral as Lender deems appropriate for the purpose of performing any or all of the Secured Obligations; (ii) enter into any agreement, compromise or settlement including insurance claims, which Lender may deem desirable or proper with respect to any of the Collateral; and (iii) endorse and deliver evidences of title for, and receive, enforce and collect by legal action or otherwise, all indebtedness and obligations now or hereafter owing to Borrower in connection with or on account of any or all of the Collateral.

Borrower acknowledges and agrees that a disposition of the Collateral in accordance with Lender's rights and remedies as heretofore provided is a disposition thereof in a commercially reasonable manner and that five (5) days prior notice of such disposition is commercially reasonable notice. Borrower further agrees that any sale or other disposition of all or any portion of the Collateral may be applied by Lender first to the reasonable expenses in connection therewith, including reasonable attorneys' fees and disbursements, and then to the payment of the Secured Obligations.

4.4 Additional Covenants of Borrower. Borrower, at its sole cost and expense, (a) shall give Lender at least thirty (30) days prior written notice of any change in Borrower's principal place of business and the acquisition or use of a trade name or style by Borrower; (b) shall promptly notify Lender in writing of any claim, lien, security interest, right, encumbrance or any other occurrence which may be adverse to Lender's security interest in the Collateral; (c) shall defend the Collateral from all claims, liens, security interests, rights, encumbrances and other matters which are adverse to Lender's security interest in the Collateral; (d) shall promptly pay all costs and expenses relating to the purchase, ownership, or use of the Collateral, including all liens, taxes, assessments and charges of Governmental Authorities levied, assessed or imposed on all or part of the Collateral; (e) shall not sell, transfer, pledge, hypothecate, lease or otherwise dispose of or abandon all or part of the Collateral without Lender's prior written consent, except for the sale of inventory in the ordinary course of Borrower's business or the disposition of any Collateral which is replaced with new Collateral of substantially comparable value and utility; (f) shall not remove any material part of the Collateral which consists of tangible personal property from its location on the Property without Lender's prior written consent; (g) shall, upon Lender's request, give notice, in form and substance acceptable to Lender, to any or all account debtors designated by Lender of Borrower's

UNOFFICIAL COPY

grant of a security interest in any Collateral which consists of accounts, contract rights, instruments, documents, or general intangibles (referred to collectively as the "**Accounts**" and individually as an "**Account**"); (h) following the occurrence of any Event of Default, shall not compromise, settle, adjust, or grant any discount, credit, or allowance to any Account debtor without Lender's prior written consent; (i) shall undertake any and all other acts necessary or appropriate to maintain, preserve and protect the Collateral and Lender's security interest therein, including any actions requested by Lender; and (j) shall execute and deliver to Lender such other documents as Lender may request in order to evidence, effectuate, perfect, maintain, preserve or protect Lender's security interest in the Collateral, including financing statements, continuation financing statements, financing statement amendments, security agreements, and assignments. If Borrower fails to execute and deliver to Lender any document requested by Lender pursuant Section 4.4 within ten (10) days after such request, then Borrower irrevocably appoints Lender, with full power of substitution, as Borrower's attorney-in-fact, coupled with an interest, with full power, in its own name or in the name of Borrower, to execute such document on behalf of Borrower. Borrower has set forth above its full and correct name, and Borrower does not presently use any other names or tradenames, except for those tradenames specifically disclosed in writing by Borrower to Lender prior to the recordation of this Mortgage. Nothing contained in this Article 4 shall be construed to obligate Lender to act on behalf of Borrower as attorney-in-fact.

4.5 FOR PURPOSES OF THE UCC THE FOLLOWING INFORMATION IS FURNISHED:

Name, address of Debtor(s):	MIKI OKU c/o Saratoga Property Advisors, LLC 222 South Morgan Street, Unit 4D Chicago, IL 60607
-----------------------------	--

Name and address of Secured Party	Bofl Federal Bank 4350 La Jolla Village Dr., Ste. 140 San Diego, CA 92122
--------------------------------------	---

See Section 4.1.

Description of the type
(or items) of property (constituting the
Collateral):

Description of real property to which the Collateral is attached or upon which it is or will be located:	See <u>Exhibit A</u> hereto.
---	------------------------------

ARTICLE 5

REPRESENTATIONS AND WARRANTIES

5.1 Representations and Warranties. Borrower represents and warrants to Lender that, to Borrower's current actual knowledge after reasonable investigation and inquiry, the following statements are true and correct as of the Closing Date (as defined in the Note):

- (a) Legal Status. Borrower is qualified or licensed to do business in all jurisdictions in which such qualification or licensing is required.

UNOFFICIAL COPY

- (b) Permits. Borrower possesses all permits, franchises and licenses and all rights to all trademarks, trade names, patents and fictitious names, if any, necessary to enable Borrower to conduct the business(es) in which Borrower is now engaged in compliance with applicable law.
- (c) Authorization and Validity. The execution and delivery of the Loan Documents have been duly authorized and the Loan Documents constitute valid and binding obligations of Borrower, in accordance with their respective terms, except as such enforcement may be limited by bankruptcy, insolvency, moratorium or other laws affecting the enforcement of creditors' rights, or by the application of rules of equity.
- (d) Violations. The execution, delivery and performance by Borrower of each of the Loan Documents do not violate any provision of any law or regulation, or result in any breach or default under any contract, obligation, indenture or other instrument to which Borrower is a party or by which Borrower is bound.
- (e) Litigation. There are no pending or threatened actions, claims, investigations, suits or proceedings before any governmental authority, court or administrative agency which may adversely affect the financial condition or operations of Borrower other than those previously disclosed in writing by Borrower to Lender.
- (f) Financial Statements. The financial statements of Borrower, of each general partner (if Borrower or Borrower is a partnership), of each member (if Borrower is a limited liability company) and of each guarantor, if any, previously delivered by Borrower to Lender: (i) are materially complete and correct; (ii) present fairly the financial condition of such party; and (iii) have been prepared in accordance with the same accounting standard used by Borrower to prepare the financial statements delivered to and approved by Lender in connection with the making of the Loan, or other accounting standards approved by Lender. Since the date of such financial statements, there has been no material adverse change in such financial condition, nor have any assets or properties reflected on such financial statements been sold, transferred, assigned, mortgaged, pledged or encumbered except as previously disclosed in writing by Borrower to Lender and approved in writing by Lender.
- (g) Reports. All reports, documents, instruments and information delivered to Lender in connection with the Loan: (i) are correct and sufficiently complete to give Lender accurate knowledge of their subject matter; and (ii) do not contain any misrepresentation of a material fact or omission of a material fact which omission makes the provided information misleading.
- (h) Income Taxes. There are no pending assessments or adjustments of Borrower's or guarantor's, if any, income tax payable with respect to any year.
- (i) Subordination. There is no agreement or instrument to which Borrower is a party or by which Borrower is bound that would require the subordination in right of payment of any of Borrower's obligations under the Note to an obligation owed to another party.
- (j) Title. Borrower lawfully holds and possesses fee simple title to the Property, without limitation on the right to encumber same. This Mortgage is a first lien on the Property prior and superior to all other liens and encumbrances on the Property except: (i) liens for real estate taxes and assessments not yet due and payable; (ii) senior exceptions previously approved by Lender and shown in the title insurance policy insuring the lien of this Mortgage; and (iii) other matters, if any, previously disclosed to Lender by Borrower in a writing specifically referring to this representation and warranty.
- (k) Mechanics' Liens. There are no mechanics' or similar liens or claims which have been filed for work, labor or material (and no rights are outstanding that under law could give rise to

UNOFFICIAL COPY

any such liens) affecting the Property which are or may be prior to or equal to the lien of this Mortgage.

(l) Encroachments. To the best of Borrower's knowledge, except as shown in the survey, if any, previously delivered to Lender, none of the buildings or other improvements which were included for the purpose of determining the appraised value of the Property lies outside of the boundaries or building restriction lines of the Property and no buildings or other improvements located on adjoining properties encroach upon the Property.

(m) Leases. All existing Leases are in full force and effect and are enforceable in accordance with their respective terms. No material breach or default by any party, or event which would constitute a material breach or default by any party after notice or the passage of time, or both, exists under any existing Lease. None of the landlord's interests under any of the Leases, including, but not limited to, rents, additional rents, charges, issues or profits, has been transferred or assigned. No rent or other payment under any existing Lease has been paid by any tenant for more than one (1) month in advance.

(n) Collateral. Borrower has good title to the existing Collateral. Borrower has not previously assigned or encumbered Borrower's interest in any of the Collateral, and no financing statement covering any of the Collateral has been delivered to any other person or entity. Borrower's principal place of business is located at the address shown in this Mortgage.

(o) Condition and Use of Property. Except as shown in the property condition survey or other engineering reports, if any, previously delivered to or obtained by Lender, the Property is in good condition and repair and is free from any damage, waste or defect that would materially and adversely affect the value of the Property as security for the Loan or the intended use of the Property. The Property is and shall remain for the term of Loan exclusively used for the commercial purpose of a multifamily housing complex of more than four (4) units, with units leased to residents.

(p) Wetlands. No part of the Property consists of or is classified as wetlands, tidelands or swamp and overflow lands.

(q) Compliance With Laws; ERISA.

(i) All federal, state and local laws, rules and regulations applicable to the Property, including, without limitation, all zoning and building requirements and all requirements of the Americans With Disabilities Act of 1990, as amended from time to time (42 U.S.C. Section 12101 et seq.) have been satisfied or complied with. Borrower is in possession of all certificates of occupancy and all other licenses, permits and other authorizations required by applicable law for the existing use of the Property. All such certificates of occupancy and other licenses, permits and authorizations are valid and in full force and effect.

(ii) Borrower shall not engage in any transaction which would cause any obligation, or action taken or to be taken, hereunder (or the exercise by Lender of any of its rights under the Note, this Mortgage and the other Loan Documents) to be a non-exempt (under a statutory or administrative class exemption) prohibited transaction under the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

(iii) Borrower is not or will not be an "employee benefit plan" as defined in Section 3(32) of ERISA, which is subject to Title I of ERISA, and the assets of Borrower do not and will not constitute "plan assets" of one or more such plans for purposes of Title I of ERISA. Borrower is not or will not be a "governmental plan" within the meaning

UNOFFICIAL COPY

of Section 3(32) of ERISA, and transactions by or with Borrower are not and will not be subject to state statutes applicable to Borrower regulating investments of and fiduciary obligations with respect to governmental plans.

(r) Property Taxes and Other Liabilities. All taxes, governmental assessments, insurance premiums, water, sewer and municipal charges, and ground rents, if any, which previously became due and owing in respect of the Property have been paid.

(s) Condemnation. There is no proceeding pending or threatened for the total or partial condemnation of the Property.

(t) Homestead. There is no homestead or other exemption available to Borrower which would materially interfere with the right to sell the Property at a trustee's sale or the right to foreclose this Mortgage.

ARTICLE 6

RIGHTS AND DUTIES OF THE PARTIES

6.1 Maintenance and Preservation of the Property. Borrower shall: (a) keep the Property in good condition and repair; (b) complete or restore promptly and in workmanlike manner the Property or any part thereof which may be damaged or destroyed (unless, if and to the extent permitted under Section 6.10, Lender elects to require that insurance proceeds be used to reduce the Secured Obligations and after such repayment the ratio of Secured Obligations to the value of the Property, as reasonably determined by Lender is the same as or lower than it was immediately before the loss or taking occurred); (c) comply and cause the Property to comply with (i) all laws, ordinances, regulations and standards, (ii) all covenants, conditions, restrictions and equitable servitudes, whether public or private, of every kind and character and (iii) all requirements of insurance companies and any bureau or agency which establishes standards of insurability, which laws, covenants or requirements affect the Property and pertain to acts committed or conditions existing thereon, including, without limitation, any work of alteration, improvement or demolition as such laws, covenants or requirements mandate; (d) operate and manage the Property at all times in a professional manner and do all other acts which from the character or use of the Property may be reasonably necessary to maintain and preserve its value; (e) promptly after execution, deliver to Lender a copy of any management agreement concerning the Property and all amendments thereto and waivers thereof; and (f) execute and acknowledge all further documents, instruments and other papers as Lender deems necessary or appropriate to preserve, continue, perfect and enjoy the benefits of this Mortgage and perform Borrower's obligations, including, without limitation, statements of the amount secured hereby then owing and statements of no offset. Borrower shall not: (g) remove or demolish all or any material part of the Property; (h) alter either (i) the exterior of the Property in a manner which materially and adversely affects the value of the Property; or (ii) the roof or other structural elements of the Property in a manner which requires a building permit; (i) initiate or acquiesce in any change in any zoning or other land classification which affects the Property; (j) materially alter the type of occupancy or use of all or any part of the Property; or (k) commit or permit waste of the Property.

6.2 Compliance with Laws. Borrower shall comply with all federal, state and local laws, rules and regulations applicable to the Property, including, without limitation, all zoning and building requirements and all requirements of the Americans With Disabilities Act of 1990 (42 U.S.C. Section 12101 et seq.), as amended from time to time. Borrower shall possess and maintain or cause Borrower to possess and maintain in full force and effect at all times (a) all certificates of occupancy and other licenses, permits and authorizations required by applicable law for the existing use of the Property and (b) all permits, franchises and licenses and all rights to all trademarks, trade names, patents and fictitious names, if any, required by applicable law for Borrower to conduct the business(es) in which Borrower is now engaged.

UNOFFICIAL COPY

6.3 Litigation. Borrower shall promptly notify Lender in writing of any litigation pending or threatened against either Borrower Party claiming damages in excess of \$50,000 and of all pending or threatened litigation against either Borrower Party if the aggregate damage claims against Borrower exceed \$100,000.00.

6.4 Merger, Consolidation, Transfer of Assets. Borrower shall not: (a) merge or consolidate with any other entity or permit Borrower to merge or consolidate with any other entity; (b) make any substantial change in the nature of Borrower's business or structure or permit Borrower to make any substantial change in the nature of Borrower's business or structure; (c) acquire all or substantially all of the assets of any other entity or permit Borrower to acquire all or substantially all of the assets of any other entity; or (d) sell, lease, assign, transfer or otherwise dispose of a material part of Borrower's assets except in the ordinary course of Borrower's business or permit Borrower to sell, lease, assign, transfer or otherwise dispose of a material part of Borrower's assets except in the ordinary course of Borrower's business.

6.5 Accounting Records. Borrower shall maintain adequate books and records in accordance with the same accounting standard used by Borrower to prepare the financial statements delivered to and approved by Lender in connection with the making of the Loan or other accounting standards approved by Lender. Borrower shall permit and shall cause Borrower to permit any representative of Lender, at any reasonable time and from time to time, to inspect, audit and examine such books and records and make copies of same.

6.6 Financial Statements and Accounts.

6.6.1 Statements Required. During the term of the Loan or while any liabilities of Borrower to Lender under any of the Loan Documents remain outstanding and unless Lender otherwise consents in writing, Borrower shall provide to Lender or cause to be provided to Lender, each in a form acceptable to Lender, the following:

(a) Leasing Schedule. Not later than thirty (30) days after written request by Lender, a schedule, signed and dated by Borrower, showing the following lease information with regard to each tenant: the name of the tenant, a description of the premises, monthly or other periodic rental amount, dates of commencement and expiration of the lease, and payment status;

(b) Balance Sheet and Annual Financial Statements. With respect to Both Borrower and any guarantor or indemnitor, in each case, not later than ninety (90) days after the close of the respective fiscal years of Borrower, any guarantor, and any indemnitor, balance sheet and financial statements, including, as applicable and without limitation: (i) balance sheet for the Property, signed and dated by Borrower; (ii) a schedule, signed and dated by Borrower, showing all revenues and expenses during such fiscal year, relating to the Property; (iii) financial statements showing all assets and liabilities of Borrower, which shall be certified by a principal, managing member or general partner of Borrower as being true, correct and complete or, upon the reasonable request of Lender, audited by an independent certified public accountant; and (iv) financial statements showing all assets and liabilities of each indemnitor and guarantor under any indemnity or guarantee, which shall be certified by such guarantor or indemnitor or the principal, managing member or general partner of such indemnitor or guarantor, as being true, correct and complete or, upon the reasonable request of Lender, audited by an independent certified public accountant;

(c) Tax Returns. Not later than June 30th of each year, copies of all tax returns (with all schedules) or extensions filed by Borrower and any indemnitor or guarantor under any

UNOFFICIAL COPY

indemnity or guarantee, unless an extension has been obtained, but no event later than the earlier of (i) September 1st of each year or (ii) within twenty (20) days after filing;

(d) Other Information. From time to time, such other information with regard to Borrower, principals of Borrower, guarantors or the Property as Lender may reasonably request in writing.

6.6.2 Form; Warranty. Borrower agrees that all financial statements to be delivered to Lender, pursuant to the immediately preceding Section, irrespective of whether they pertain to Borrower or any guarantor or indemnitor, in each case, shall: (a) be complete and correct; (b) present fairly the financial condition of the party; (c) disclose all liabilities that are required to be reflected or reserved against; and (d) be prepared in accordance with the same accounting standard used by Borrower, or as applicable, such guarantor or indemnitor, to prepare the financial statements delivered to and approved by Lender in connection with the making of the Loan or other accounting standards acceptable to Lender. By delivering any such financial statement, Borrower shall be deemed to warrant and represent that, as of the date of delivery of any such financial statement, there has been no material adverse change in financial condition, nor have any assets or properties been sold, transferred, assigned, mortgaged, pledged or encumbered since the date of such financial statement except as disclosed by Borrower in a writing delivered to Lender.

Borrower agrees that all leasing schedules and other information to be delivered to Lender pursuant to Section 6.6.1 hereof and this Section 6.6.2, in each case, shall not contain any misrepresentation or omission of a material fact.

6.6.3 Accounts and Primary Banking Relationships. Borrower shall establish its primary deposit and operating accounts with Lender. Borrower shall cause any guarantor of the Loan to establish its primary deposit and operating accounts with Lender.

6.7 Costs, Expenses and Fees. Borrower shall pay to Lender the full amount of all costs and expenses, including, without limitation, attorneys' fees (i.e., outside counsel), incurred by Lender in connection with: (a) Appraisals and inspections of the Property or Collateral required by Lender as a result of (i) a Transfer (as hereinafter defined) or proposed Transfer, or (ii) an Event of Default, and (b) any acts performed or proposed to be performed by Lender at Borrower's request or wholly or partially for the benefit of Borrower (including, without limitation, the preparation or review of amendments, assumptions, waivers, releases, reconveyances, estoppel certificates or statements of amounts owing under any Secured Obligation). Borrower shall pay all costs and expenses arising under this Section immediately upon demand by Lender together with interest thereon following notice of such indebtedness at the rate of interest then applicable to the principal balance of the Note as specified therein. Any administrative fees owed to Lender pursuant to the Loan Documents, including, without limitation, those owed pursuant to Section 6.15 hereof (but excluding 6.15.4(a)) shall be due and payable immediately upon Borrower requesting the action from Lender and shall be non-refundable, irrespective of the disposition of the request by Lender. Borrower shall have no expectation that Lender commence review of any matter or request prior to Borrower paying the required fee pursuant to the Loan Documents. In addition and without limitation to Lender's right to recover all its out-of-pocket expenses from Borrower on demand as provided in this Section 6.7, Lender shall have the right to require Borrower to provide a legal deposit (i.e., payment in advance) before engaging outside counsel to do any legal work and to refresh that deposit, at Lender's request, over the pendency of the matter. Borrower shall have no expectation that Lender commence any legal work with outside counsel prior to Borrower paying any legal deposit requested by Lender.

6.8 No Other Liens, Encumbrances and Charges. Without obtaining Lender's prior written consent (which consent shall be granted or withheld in Lender's sole and absolute discretion and at Borrower's sole cost and expense), Borrower shall not incur any debt, secured or unsecured, direct or indirect,

UNOFFICIAL COPY

absolute or contingent (including guaranteeing any obligation), other than the Loan and trade debt incurred in the ordinary course of Borrower's business (with any such trade debt to be paid within sixty (60) days of the date such debt was incurred and, in any event, prior to delinquency). Borrower shall immediately discharge by bonding or otherwise any lien, charge or other encumbrance which attaches to the Property in violation of Section 6.15. Subject to Borrower's right to contest such matters under this Mortgage or as expressly permitted in the Loan Documents, Borrower shall pay when due all obligations secured by or reducible to liens and encumbrances which shall now or hereafter encumber or appear to encumber all or any part of the Property or any interest therein, whether senior or subordinate hereto, including, without limitation, all claims for work or labor performed, or materials or supplies furnished, in connection with any work of demolition, alteration, repair, improvement or construction of or upon the Property, except such as Borrower may in good faith contest or as to which a bona fide dispute may arise (provided provision is made to the satisfaction of Lender for eventual payment thereof in the event that Borrower is obligated to make such payment and that any recorded claim of lien, charge or other encumbrance against the Property is immediately discharged by bonding or otherwise).

6.9 Taxes and Other Liabilities. Borrower shall pay and discharge when due any and all indebtedness, obligations, assessments and taxes, both real and personal and including federal and state income taxes and state and local property taxes and assessments. Borrower shall promptly provide to Lender copies of all tax and assessment notices pertaining to the Property. Borrower hereby authorizes Lender to obtain, at Borrower's expense, a tax service contract which shall provide tax information on the Property to Lender for the term of the Loan and any extensions or renewals of the Loan.

6.10 Insurance Coverage. Borrower shall insure the Property against loss or damage by fire and such other hazards as Lender shall from time to time require, however, not to exceed full replacement cost; provided, however, (a) Lender, at Lender's election, may only require flood insurance if all or any portion of the improvements located on the Property is or becomes located in a special flood hazard area; and (b) Lender, at Lender's election, may only require earthquake insurance if all or any portion of the Property is or becomes located in an earthquake fault zone. Borrower shall also carry public liability insurance and such other insurance as Lender may require, including, without limitation, business interruption insurance or loss of rents insurance. Such policies shall contain a standard mortgage clause naming Lender and its successors and assigns as a loss payee or additional insured, as appropriate, and requiring at least thirty (30) days prior notice to the holder at termination or cancellation. Borrower shall maintain all required insurance at Borrower's expense, in companies, and in substance and form satisfactory to Lender, including, without limitation, an agreed amount endorsement. Lender shall not, by reason of accepting, rejecting, approving or obtaining insurance shall incur any liability for: (c) the existence, nonexistence, form or legal sufficiency of any insurances; (d) the solvency of any insurer; or (e) the payment of claims.

If Borrower fails to maintain and deliver to Lender the original policies or certificates of insurance required by this Mortgage, upon ten (10) days prior notice to Borrower, Lender may procure such insurance at Borrower's sole cost and expense. Borrower agrees to deliver to Lender promptly upon receipt, but in any event no later than thirty (30) days prior to the termination of any of such insurance policies, a renewal policy (or certificate of insurance evidencing the same) satisfying the requirements of this Mortgage.

6.11 Insurance and Condemnation Proceeds.

(a) **Assignment of Claims.** Borrower absolutely and irrevocably assigns to Lender all of the following rights, claims and amounts (collectively, the "**Claims**"), all of which shall be paid to Lender: (i) all awards of damages and all other compensation payable directly or indirectly by reason of a condemnation or proposed condemnation for public or private use affecting all or any part of, or any interest in, the Property; (ii) all other claims and awards for damages to or decrease in value of all or any part of, or any interest in, the Property; (iii) all proceeds of any

UNOFFICIAL COPY

insurance policies payable by reason of loss sustained to all or any part of the Property; and (iv) all interest which may accrue on any of the foregoing. Borrower shall give Lender prompt written notice of the occurrence of any casualty affecting, or the institution of any proceedings for eminent domain or for the condemnation of, the Property or any portion thereof. So long as no Event of Default has occurred and is continuing at the time, Borrower shall have the right to adjust, compromise and settle any Claim of \$25,000 or less without the consent of Lender, provided, however, all awards, proceeds and other sums described herein shall continue to be payable to Lender. Lender may commence, appear in, defend or prosecute any Claim exceeding \$25,000, and may adjust, compromise and settle all Claims (except for Claims which Borrower may settle as provided herein), but shall not be responsible for any failure to commence, appear in, defend, prosecute or collect any such Claim regardless of the cause of the failure. All awards, proceeds and other sums described herein shall be payable to Lender.

(b) Application of Proceeds; No Event of Default. So long as no Event of Default has occurred and is continuing at the time of Lender's receipt of the proceeds of the Claims (the "**Proceeds**") and no Event of Default occurs thereafter, Lender shall apply the Proceeds in the following order of priority: First, to Lender's expenses in settling, prosecuting or defending the Claims; Second, to the repair or restoration of the Property; and Third, to Borrower if the repair or restoration of the Property has been completed, but to the Secured Obligations in any order without suspending, extending or reducing any obligation of Borrower to make installment payments if the repair or restoration of the Property has not been completed. Notwithstanding the foregoing, Lender shall have no obligation to make any Proceeds available for the repair or restoration of the Property unless and until all the following conditions have been satisfied in Lender's sole and absolute discretion: (i) delivery to Lender of the Proceeds plus any additional amount which is needed to pay all costs of the repair or restoration (including, without limitation, taxes, financing charges, insurance and rent during the repair period); (ii) establishment of an arrangement for lien releases and disbursement of funds acceptable to Lender; and (iii) delivery to Lender in form and content acceptable to Lender of all of the following: (aa) plans and specifications for the work; (bb) a contract for the work, signed by a contractor acceptable to Lender; (cc) a cost breakdown for the work; (dd) if required by Lender, a payment and performance bond for the work; (ee) evidence of the continuation of all Leases unless consented to in writing by Lender; (ff) evidence that, upon completion of the work, the size, capacity, value, and income coverage ratios for the Property will be at least as great as those which existed immediately before the damage or condemnation occurred; and (gg) evidence of the satisfaction of any additional conditions that Lender may reasonably establish to protect Lender's security. Borrower acknowledges that the specific conditions described above are reasonable.

(c) Application of Proceeds; Event of Default. If an Event of Default has occurred and is continuing at the time of Lender's receipt of the Proceeds or if an Event of Default occurs at any time thereafter, Lender may, at Lender's absolute discretion and regardless of any impairment of security or lack of impairment of security, but subject to applicable law governing use of the Proceeds, if any, apply all or any of the Proceeds to Lender's expenses in settling, prosecuting or defending the Claims and then apply the balance to the Secured Obligations in any order without suspending, extending or reducing any obligation of Borrower to make installment payments, and may release all or any part of the Proceeds to Borrower upon any conditions Lender chooses.

6.12 Impounds.

(a) Taxes and Insurance. If required by Lender at any time, on each Payment Date (as defined in the Note) on which both principal and interest under the Loan are payable, Lender, at its sole option, may require that Borrower pay, an amount estimated from time to time by Lender in its sole discretion to pay one-twelfth (1/12th) of an amount which would be sufficient to pay all "**Costs**". The term "Cost" shall mean (i) all taxes and other liabilities payable by Borrower under

UNOFFICIAL COPY

Section 6.9; (ii) all insurance premiums payable by Borrower under Section 6.10; (iii) all other Costs and expenses required for impounds; and/or (iv) all other amounts that in Lender's sole and independent determination will be required to preserve the value of the Property. Borrower shall deliver to Lender, promptly upon receipt, all bills for Costs for which Lender has required Impounds. So long as there has been no Event of Default, Lender waives the requirement of Costs to be paid on each Payment Date.

(b) Post-Default Impounds. In the event Lender at any time waives the requirement that Borrower pays Costs, and if required by Lender at any time after an Event of Default occurs (and regardless of whether such an Event of Default is thereafter cured), Borrower shall deposit with Lender such amounts Post-Default Impounds on such dates (determined by Lender as provided below), as will be sufficient to pay any or all Costs specified by Lender. Lender in its sole discretion shall estimate the amount of such Costs that will be payable or required during any period selected by Lender not exceeding one year and shall determine the fractional portion thereof that Borrower shall deposit with Lender on each date specified by Lender during such period. If the Post-Default Impounds paid by Borrower are not sufficient to pay the related Costs, Borrower shall deposit with Lender upon demand an amount equal to the deficiency. All Post-Default Impounds shall be payable by Borrower in addition to (but without duplication of) any other Impounds.

(c) All Impounds. Post-Default Impounds and any other impounds that may be payable by Borrower under the Note are collectively called "**Impounds**". All Impounds shall be deposited into an account maintained by Lender or its servicing agent, which may be a commingled account, and Lender shall not be entitled to interest thereon. Lender shall not be a trustee, special depository or other fiduciary for Borrower with respect to such account, and the existence of such account shall not limit Lender's rights under this Mortgage, any other agreement or any provision of law. If no Event of Default exists, Lender shall apply all Impounds to the payment of the related Costs, or in Lender's sole discretion may release any or all Impounds to Borrower for application to and payment of such Costs. If an Event of Default exists, Lender may apply any or all Impounds to any Secured Obligation and/or to cure such Event of Default, whereupon Borrower shall restore all Impounds so applied and cure all Events of Default not cured by such application. The obligations of Borrower hereunder shall not be diminished by deposits of Impounds made by Borrower, except to the extent that such obligations have actually been met by application of such Impounds. Upon any assignment of this Mortgage, Lender may assign all Impounds in its possession to Lender's assignee, whereupon Lender shall be released from all liability with respect to such Impounds. Within sixty (60) days following full repayment of the Secured Obligations (other than as a consequence of foreclosure or conveyance in lieu of foreclosure) or at such earlier time as Lender may elect, Lender shall pay to Borrower all Impounds in its possession, and no other party shall have any right or claim thereto.

6.13 Defense and Notice of Losses, Claims and Actions. Borrower shall protect, preserve and defend the Property and title to and right of possession of the Property, the security of this Mortgage and the rights and powers of Lender hereunder at Borrower's sole expense against all adverse claims, whether the claim: (a) is against a possessory or non-possessory interest; (b) arose prior or subsequent to the Closing Date; or (c) is senior or junior to Borrower's or Lender's rights. Borrower shall give Lender prompt notice in writing of the assertion of any claim, of the filing of any action or proceeding, of the occurrence of any damage to the Property and of any condemnation offer or action.

6.14 Right of Inspection. Lender and its independent contractors, agents and employees may enter the Property from time to time at any reasonable time for the purpose of inspecting the Property and ascertaining Borrower's compliance with the terms of this Mortgage. Lender shall use reasonable efforts to assure that Lender's entry upon and inspection of the Property shall not materially and unreasonably interfere with the business or operations of Borrower's tenants on the Property.

UNOFFICIAL COPY

6.15 Transfer of Property or Interests in Borrower.

6.15.1 Prohibition. Borrower acknowledges that Lender has relied upon the principal(s) of Borrower and their experience in owning and operating properties similar to the Property in connection with the closing of the Loan. Accordingly, except pursuant to the prior written consent of Lender, which Lender may withhold, delay, or condition in Lender's sole discretion (including, without limitation, pursuant to the terms of Section 6.15.4 hereof), Borrower shall not cause or permit any Transfer (as defined herein) of, in each case, itself (i.e., the Borrower), the Property, the Collateral (except for equipment and inventory in the ordinary course of its business, with respect to the Collateral only), the Loan, the Note, or this Mortgage. "Transfer" means any: (a) sale or exchange; (b) mortgage, pledge, hypothecation or encumbrance; (c) assignment including, without limitation, assignment by operation of law or for the benefit of creditors or the delegation of duties; (d) direct or indirect conveyance, transfer, or disposition, including, without limitation, any direct transfer, grant, or release of title or legal ownership and any indirect transfer through the use of a nominee, trustee, or receiver (other than a receiver appointed at Lender's request); (e) direct or indirect change of control of the Borrower through any means, including without limitation, serial transactions, contracts, or a change in the ultimate control or beneficial ownership of Borrower (including, without limitation, any transfer of or by, in each case, (i) a general or limited partnership interest; (ii) stock, shares, or other equity; (iii) issuance of new or treasury stock, shares, or other equity or changes in voting rights or the creation of a new class of stock, shares, or other equity interests, in each case, that, whether through one action or a series of actions, effects a direct or indirect change of control in an entity; (iv) a limited liability company or membership interest; (v) direct or indirect control of a trust; (vi) interest in a joint venture contract; or (vii) any other interest analogous or otherwise similar to items (i)-(vi) of this list), as well as changing of a key control person, whether legal or natural, relied upon by Lender as provided in this Section, such as, without limitation, the naming a new general partner of a partnership or manager or managing member of a limited liability company); and (f) any action, transfer, or event of similar effect to the preceding list of items (a)-(e), and the meaning of the meaning of Transfer shall include any of the foregoing circumstances listed in (a)-(f) whether occurring, in each case, voluntarily, involuntarily, by operation of law, through one action or event, or through a series of transactions, legal transfers, or other actions or events even if each individually would not constitute a change in control in or beneficial ownership of Borrower but as a series would constitute a Transfer. If a Transfer is made without the prior written consent of Lender (including, without limitation, any Transfer requiring Lender's prior written consent under Section 6.15.2 hereof), Lender shall have the absolute right at its option, without prior demand or notice, to declare all of the Secured Obligations immediately due and payable, except to the extent prohibited by law, and pursue its rights and remedies under Section 7.3 herein. Borrower agrees to pay any prepayment fee as set forth in the Note in the event the Secured Obligations are accelerated pursuant to the terms of this Section. Lender's consent to one such Transfer shall apply only to the Transfer consented to in that instance and shall not be deemed to be a waiver of the right to require prior written consent to future or successive Transfers. Without limiting the generality of the foregoing provisions of this Section, the capitalized term "Assignment" refers to the subset of Transfers encompassing: (i) any assignment of Borrower's interest in the Note or the Mortgage, in each case, including, without limitation, an assignment by operation of law, and (ii) any delegation of duties by Borrower under, in each case, the Note or the Mortgage. Unless Lender, in writing, subsequently ratifies an Assignment made contrary to this Section, any Assignment by Borrower, whether voluntarily or involuntarily, made contrary to this Section (including, without limitation, any Assignment requiring Lender's prior written consent under Section 6.15.2 hereof) shall be null and void *ab initio*. Lender's consent to or ratification of, in each case, one such Assignment shall apply only to the Assignment consented to or ratified in that instance and shall not be deemed to be a waiver of the right to require prior written consent to future or successive Assignments.

6.15.2 Other Permitted Transfers. Notwithstanding and without limiting the generality of the foregoing Section 6.15.1, the following actions shall be permitted subject to the terms of (i) this Section 6.15.2 and (ii) the terms of Section 6.15.1 with respect to any action that requiring Lender's prior written consent that is taken without such consent (i.e., regarding Lender's rights and remedies, including, without limitation,

UNOFFICIAL COPY

acceleration, payment of the prepayment fee). In the case of the actions described in clauses (a) and (c) of this Section 6.15.2, the actions described therein shall be permitted only with the prior written consent of Lender, which consent shall not be unreasonably withheld, conditioned, or delayed.

(a) the direct one-time transfer (i.e., of the interest itself, and not by a higher-level change in control) of up to forty-nine (49%) of: the (i) limited partnership interests in any Borrower that is a limited partnership; (ii) membership interests in any Borrower that is a limited liability company (other than the membership interests (x) of a member that is the manager or managing member of such Borrower or (y) that otherwise constitute control of such Borrower, which, in each case, shall not be transferable without the prior written consent of Lender, which may be withheld, conditioned or delayed by Lender in its sole and absolute discretion); or (iii) voting stock in any Borrower that is a corporation (other than preferred, special, or similar stock that, despite holding less than 50% of the corporation's total stock allows for direct or indirect control of, in each case, the corporation or its board of directors or other governing body, which shall not be transferable without the prior written consent of Lender, which may be withheld, conditioned or delayed by Lender in its sole and absolute discretion).

(b) any involuntary transfer caused by the death or court-adjudicated incapacity of any natural person that is (i) a general partner, shareholder, joint venturer or member of Borrower; (ii) any manager or managing member of Borrower if Borrower is a limited liability company; and (iii) a beneficial owner of a or other natural person that controls a trust.

(c) gifts for estate planning purposes of any natural person's interests in Borrower or in any of Borrower's general partners, members or joint venturers to the spouse or any lineal descendant of such individual, or to a properly constituted trust for the benefit of any one or more of such individual, spouse or lineal descendant, provided, however, that in each case described in clauses (a), (b) or (c) above, such transfer shall be permitted only so long as Borrower remains as a legal person or, if required, e.g., in the case of a joint venture or general partnership, is reconstituted, following such transfer and so long as those persons responsible for the management of the Property and Borrower remain unchanged following such gift or any replacement management is approved by Lender. Notwithstanding the foregoing provisions of this Section 6.15.2(c), nothing in this Section 6.15.2(c) authorizes title to the Property to be transferred without Lender's prior written consent that would be otherwise required, in each case, under Section 6.15.1 hereof or any other provision this Mortgage.

6.15.3 Lender's Written Consent or Ratification: As used in this Section 6.15, any reference to Lender's written consent, approval, or ratification of a Transfer, in each case, requires a writing made by Lender executed by an officer of Lender holding the title Executive Vice President or higher.

6.15.4 Transfer Costs: In connection with any Transfer requiring Lender's consent:

(a) Borrower shall pay an assumption fee in the amount of one percent (1%) of the then unpaid principal balance of the Loan.

(b) Borrower shall pay to Lender both (i) an administrative fee of one thousand five hundred dollars (\$1,500.00) for Lender processing the Transfer and (ii) all Lender's out-of-pocket costs (including, without limitation, any out-of-pocket legal expenses paid to outside counsel and the cost of any appraisal); and

(c) The cost of either (i) a "date down" endorsed to Lender's title insurance policy, including any additional endorsements required by Lender, or (ii) a new title insurance policy, satisfactory to Lender in its discretion, if a "date down" is not available.

UNOFFICIAL COPY

In addition to the above-stated, Borrower shall comply with all Lender's then policies and procedures in connection with providing its consent to a Transfer, including but not limited to Borrower and its transferee entering an assumption agreement acceptable to Lender and provide a substitute guarantor (acceptable to Lender in Lender's sole and absolute discretion) who shall sign a Guarantee agreement acceptable to Lender (in Lender's sole and absolute discretion).

Nothing in this Section 6.15.4 limits Lender's discretion to withhold, delay, or condition, in each case, its consent pursuant to the provisions of Sections 16.15.1 and 16.15.2 hereof, including, without limitation, Lender's right to: (i) require other conditions not provided for in this Section 16.15.4; (ii) make decisions regarding Lender's assessment of the creditworthiness of any prospective substitute guarantor or party assuming the obligations hereunder as a result of a proposed Transfer; (iii) require additional conditions related to its credit evaluation of any Transfer or party thereto; (iv) require execution of additional documentation; or (v) refer matters to outside counsel at Borrower's expense to assist with reviewing or consummating any proposed Transfer.

6.16 Intentionally omitted.

6.17 Intentionally omitted.

6.18 Exculpation. Lender shall not directly or indirectly, be liable to Borrower or any other person as a consequence of: (a) the exercise of the rights, remedies or powers granted to Lender in this Mortgage; (b) the failure or refusal of Lender to perform or discharge any obligation or liability of Borrower under any agreement related to the Property or under this Mortgage; or (c) any loss sustained by Borrower or any third party resulting from Lender's failure to lease the Property after an "Event of Default" or from any other act or omission of Lender in managing the Property after an Event of Default unless the loss is caused by the willful misconduct and bad faith of Lender and no such liability shall be asserted or enforced against Lender, all such liability being expressly waived and released by Borrower.

6.19 Indemnity. Without in any way limiting any other indemnity contained in this Mortgage, Borrower agrees to defend, indemnify and hold harmless the Lender Group (hereinafter defined) from and against any claim, loss, damage, cost, expense or liability directly or indirectly arising out of: (a) the making of the Loan, except for violations of banking laws or regulations by the Lender Group; (b) this Mortgage; (c) the execution of this Mortgage or the performance of any act required or permitted hereunder or by law; (d) any failure of Borrower to perform Borrower's obligations under this Mortgage or the other Loan Documents; (e) any alleged obligation or undertaking on the Lender Group's part to perform or discharge any of the representations, warranties, conditions, covenants or other obligations contained in any other document related to the Property; (f) any act or omission by Borrower or any contractor, agent, employee or representative of Borrower with respect to the Property; or (g) any prohibited transaction or in the sale of a prohibited loan, and in obtaining any individual prohibited transaction exemption under ERISA that may be required, in Lender's sole discretion, that Lender may incur, directly or indirectly, as a result of an Event of Default under Sections 5.1(q) or 6.2. The foregoing notwithstanding, this indemnity shall not include any claim, loss, damage, cost, expense or liability directly or indirectly arising out of the gross negligence or willful misconduct of any member of the Lender Group, or any claim, loss, damage, cost, expense or liability incurred by the Lender Group arising from any act or incident on the Property occurring after the full reconveyance and release of the lien of this Mortgage on the Property. This indemnity shall include, without limitation: (aa) all consequential damages (including, without limitation, any third party tort claims or governmental claims, fines or penalties against the Lender Group); and (bb) all court costs and reasonable attorneys' fees (including, without limitation, expert witness fees) paid or incurred by the Lender Group. "Lender Group", as used herein, shall mean (1) Lender (including, without limitation, any participant in the Loan); (2) any entity controlling, controlled by or under common control with Lender; (3) the directors, officers, employees and agents of Lender and such other entities; and (4) the successors, heirs and assigns of the entities and persons described in foregoing clauses (1) through (3). Borrower shall pay immediately upon Lender's demand any amounts owing under this

UNOFFICIAL COPY

indemnity together with interest from the date the indebtedness arises until paid at the rate of interest applicable to the principal balance of the Note as specified therein. Borrower agrees to use legal counsel reasonably acceptable to the Lender Group in any action or proceeding arising under this indemnity. THE PROVISIONS OF THIS SECTION SHALL SURVIVE THE TERMINATION AND RELEASE OF THIS MORTGAGE, BUT BORROWER'S LIABILITY UNDER THIS INDEMNITY SHALL BE SUBJECT TO THE PROVISIONS OF THE SECTION, IF ANY, IN THE NOTE ENTITLED "**BORROWER'S LIABILITY**".

6.20 Intentionally omitted.

6.21 Releases, Extensions, Modifications and Additional Security. Without notice to or the consent, approval or agreement of any persons or entities having any interest at any time in the Property or in any manner obligated under the Secured Obligations (the "**Interested Parties**"), Lender may, from time to time: (a) fully or partially release any person or entity from liability for the payment or performance of any Secured Obligation; (b) extend the maturity of any Secured Obligation; (c) make any agreement with Borrower increasing the amount or otherwise altering the terms of any Secured Obligation; (d) accept additional security for any Secured Obligation; or (e) release all or any portion of the Property, Collateral and other security for any Secured Obligation. None of the foregoing actions shall release or reduce the personal liability of any of the Interested Parties, or release or impair the priority of the lien of this Mortgage upon the Property.

6.22 Sale or Participation of Loan. Borrower agrees that Lender may at any time sell, assign, participate or securitize all or any portion of Lender's rights and obligations under the Loan Documents, and that any such sale, assignment, participation or securitization may be to one or more financial institutions or other entities, to private investors, and/or into the public securities market, in Lender's sole discretion. Borrower further agrees that Lender may disseminate to any such actual or potential purchaser(s), assignee(s) or participant(s) all documents and financial and other information heretofore or hereafter provided to or known to Lender with respect to: (a) the Property and its operation; and/or (b) any party connected with the Loan (including, without limitation, Borrower, any partner or member of Borrower, any constituent partner or member of Borrower, any guarantor and any nonborrower party). In the event of any such sale, assignment, participation or securitization, Lender and the other parties to the same shall share in the rights and obligations of Lender set forth in the Loan Documents as and to the extent they shall agree among themselves. In connection with any such sale, assignment, participation or securitization, Borrower further agrees that the Loan Documents shall be sufficient evidence of the obligations of Borrower to each purchaser, assignee or participant, and Borrower shall, within fifteen (15) days after request by Lender, deliver an estoppel certificate verifying for the benefit of Lender and any other party designated by Lender the status and the terms and provisions of the Loan in form and substance acceptable to Lender, and enter into such amendments or modifications to the Loan Documents as may be reasonably required in order to facilitate any such sale, assignment, participation or securitization without impairing Borrower's rights or increasing Borrower's obligations. The indemnity obligations of Borrower under the Loan Documents shall also apply with respect to any purchaser, assignee or participant.

6.23 Release. Lender shall release this Mortgage and the lien hereof by proper instrument upon payment and discharge of all Indebtedness secured hereby (including any interest and late charges provided for herein or in the Note). The recitals of any matters of fact or facts in any instrument of release executed hereunder ("**Release**") shall be conclusive proof of the truthfulness thereof. To the extent permitted by law, the Release may describe the grantee as "**the person or persons legally entitled thereto**". Lender shall not have any duty to determine the rights of persons claiming to be rightful grantees of any Release. When the Property has been fully released and reconveyed, the last such release and reconveyance shall operate as a reassignment of all future rents, issues and profits of the Property to the person or persons legally entitled thereto.

UNOFFICIAL COPY

6.24 Subrogation. Lender shall be subrogated to the lien of all encumbrances, whether released of record or not, paid in whole or in part by Lender pursuant to this Mortgage or by the proceeds of any loan secured by this Mortgage.

ARTICLE 7

DEFAULT

7.1 Event of Default. An "Event of Default" shall occur automatically upon the occurrence of any one or more of the following events:

(a) Monetary. Borrower shall fail to: (i) pay when due any sums which by their express terms require immediate payment without any grace period or sums which are payable on the Maturity Date; or (ii) pay within five (5) days when due any other sums payable under the Note, this Mortgage or any of the other Loan Documents, including, without limitation, any monthly payment due under the Note.

(b) Failure to Perform. Borrower shall fail to observe, perform or discharge any of Borrower's or Borrower's obligations, covenants, conditions or agreements, other than Borrower's or Borrower's payment obligations, under the Note, this Mortgage or any of the other Loan Documents, and (i) such failure shall remain uncured for thirty (30) days after written notice thereof shall have been given to Borrower, as the case may be, by Lender; or (ii) if such failure is of such a nature that it cannot be cured within such thirty (30) day period, Borrower shall fail to commence to cure such failure within such thirty (30) day period or shall fail to diligently prosecute such curative action thereafter or shall fail to cure such default within ninety (90) days after written notice thereof was first given to Borrower.

(c) Representations and Warranties. Any representation, warranty, certificate or other statement (financial or otherwise) made or furnished by or on behalf of Borrower, or a guarantor, if any, to Lender or in connection with any of the Loan Documents, or as an inducement to Lender to make the Loan, shall be false, incorrect, incomplete or misleading in any material respect when made or furnished.

(d) Condemnation, Attachment. The condemnation, seizure or appropriation of any material portion (as reasonably determined by Lender) of the Property, or the sequestration or attachment of, or levy or execution upon any of the Property, the Collateral or any other collateral provided by Borrower under any of the Loan Documents, or any material portion of the other assets of Borrower, which sequestration, attachment, levy or execution is not released or dismissed within forty-five (45) days after its occurrence; or the sale of any assets affected by any of the foregoing.

(e) Uninsured Casualty. The occurrence of an uninsured casualty with respect to any material portion (as reasonably determined by Lender) of the Property unless: (i) no other Event of Default has occurred and is continuing at the time of such casualty or occurs thereafter; (ii) Borrower promptly notifies Lender of the occurrence of such casualty; and (iii) not more than forty-five (45) days after the occurrence of such casualty, Borrower delivers to Lender immediately available funds ("Restoration Funds") in an amount sufficient, in Lender's reasonable opinion, to pay all costs of the repair or restoration (including, without limitation, taxes, financing charges, insurance and rent during the repair period). So long as no Event of Default has occurred and is continuing at the time of Lender's receipt of the Restoration Funds and no Event of Default occurs thereafter, Lender shall make the Restoration Funds available for the repair or restoration of the Property. Notwithstanding the foregoing, Lender shall have no obligation to make any Restoration Funds available for repair or restoration of the Property unless and until all the conditions set forth in clauses (ii) and (iii) of the second sentence of Section

UNOFFICIAL COPY

6.11(b) of this Mortgage have been satisfied. Borrower acknowledges that the specific conditions described above are reasonable.

(f) Adverse Financial Change. Any adverse change in the financial condition of Borrower or any general partner of Borrower, any guarantor, or any other person or entity from the condition shown on the financial statements submitted to Lender and relied upon by Lender in making the Loan, and which change Lender reasonably determines will have a material adverse effect on (i) the business, operations or condition of the Property; or (ii) the ability of Borrower to pay or perform Borrower's or Borrower's obligations in accordance with the terms of the Note, this Mortgage, and the other Loan Documents.

(g) Voluntary Bankruptcy, Insolvency, Dissolution. (i) Borrower's filing a petition for relief under the Bankruptcy Reform Act of 1978, as amended or recodified ("**Bankruptcy Code**"), or under any other present or future state or federal law regarding bankruptcy, reorganization or other relief to debtors (collectively, "**Debtor Relief Law**"); or (ii) Borrower's filing any pleading in any involuntary proceeding under the Bankruptcy Code or other Debtor Relief Law which admits the jurisdiction of a court to regulate Borrower or the Property or the petition's material allegations regarding Borrower's insolvency; or (iii) Borrower's making a general assignment for the benefit of creditors; or (iv) Borrower's applying for, or the appointment of, a receiver, trustee, custodian or liquidator of Borrower or any of its property; or (v) the filing by or against Borrower of a petition seeking the liquidation or dissolution of Borrower or the commencement of any other procedure to liquidate or dissolve Borrower.

(h) Involuntary Bankruptcy. Borrower's failure to effect a full dismissal of any involuntary petition under the Bankruptcy Code or other Debtor Relief Law that is filed against Borrower or in any way restrains or limits Borrower or Lender regarding the Loan or the Property, prior to the earlier of the entry of any order granting relief sought in the involuntary petition or forty-five (45) days after the date of filing of the petition.

(i) Partners, Guarantors. The occurrence of an event specified in Sections 7(g) or 7(h) as to Borrower, any general partner of Borrower, or any guarantor or other person or entity in any manner obligated to Lender under the Loan Documents.

(j) Attachment. If all or any material part of the assets of Borrower, any of the guarantors, or any general partner or manager of Borrower are attached, seized, subjected to a writ or levied upon by any court process and Borrower fails to cause such attachment, seizure, writ or levy to be fully released or removed within sixty (60) days after the occurrence of such event. The cure provision contained in this Section shall be in lieu of, and not in addition to, any and all other cure periods contained in the Loan Documents;

(k) Injunctions. If a court order is entered against Borrower, any of the guarantors, or any General Partner or Manager of Borrower enjoining the conduct of all or part of such Person's business and Borrower fails to cause such injunction to be fully stayed, dissolved or removed within sixty (60) days after such order is entered. The cure provision contained in this Section shall be in lieu of, and not in addition to, any and all other cure periods contained in the Loan Documents;

(l) Dissolution. If Borrower, any of the guarantors, or any General Partner or Manager of Borrower is a corporation, partnership, limited liability company or trust, the dissolution, liquidation, or termination of existence of such Person;

(m) Transfers of Partnership Interests. Any Transfer contrary to Section 6.15 hereof, including, without limitation, if Borrower is a partnership (x) the admission, withdrawal, death, retirement, or removal of any general partner of Borrower or (y) the direct or indirect sale or

UNOFFICIAL COPY

transfer of an aggregate of more than forty-nine percent (49%) of the beneficial interests in Borrower or, in addition to the foregoing, Lender's receipt of any conflicting written instructions or written demands relating to the Loan from any partners of Borrower which Lender reasonably determines have a material adverse effect on Lender's ability to service or administer the Loan;

(n) Transfers of Corporate Ownership. Any Transfer contrary to Section 6.15 hereof, including, without limitation, if Borrower is a corporation, the direct or indirect sale or transfer of an aggregate of more than forty-nine percent (49%) of any class of stock in such corporation or the issuance by such corporation of additional stock to any Person who is not a shareholder in such corporation as of the date of this Mortgage;

(o) Transfer of Manager's Interests. Any Transfer contrary to Section 6.15 hereof, including, without limitation, if Borrower is a limited liability company, (x) the appointment, withdrawal, death, retirement or removal of any manager of Borrower or (y) the direct or indirect sale or transfer of an aggregate of more than forty-nine percent (49%) of the beneficial interests of Borrower, or, in addition to the foregoing, Lender's receipt of any conflicting written instructions or written demands relating to the Loan from any members of Borrower which Lender reasonably determines have a material adverse effect on Lender's ability to service or administer the Loan;

(p) Death; Incompetency. If Borrower, any of the guarantors, or any General Partner or Manager of Borrower is an individual, the death or incompetency of such Person, except where applicable law limits or prohibits Lender's declaration of a default based on such occurrences; provided, however, that Lender shall not declare an Event of Default to exist based solely on the death or mental incompetence of any individual guarantor, General Partner, or Manager if, within ninety (90) days after the occurrence of such event, (i) in the case of the death or mental incompetence of a guarantor, Borrower causes a substitute guarantor to execute and deliver to Lender a continuing Guarantee in the form previously executed by the affected guarantor, and Lender in good faith determines that such substitute guarantor's financial condition is comparable to that of the affected guarantor and that such substitute guarantor is otherwise reasonably acceptable to Lender; and (ii) in the case of the death or mental incompetence of a General Partner or Manager, Borrower causes a substitute general partner or manager, as applicable, to be admitted to Borrower or appointed, and Lender in good faith determines that the financial condition, credit history, character, experience, ability and expertise of such substitute general partner or manager are comparable to the affected General Partner or Manager and that such substitute general partner or manager is otherwise acceptable to Lender;

(q) Impairment of Priority. If (i) the priority of this Mortgage or Lender's security interest under any of the other agreements securing any or all of the Obligations is impaired for any reason; or (ii) the value of the Property has deteriorated, declined or depreciated as a result of any intentional tortious act or omission by Borrower;

(r) Condemnation. If all or any material part of the Property is transferred to any Governmental Authority as a result of any condemnation proceeding or action with respect to all or any material part of the Property;

(s) Failure to Repair Casualty. If there is an uninsured casualty with respect to the Property, and Borrower (i) fails to commence repairs and reconstruction of the Property within ninety (90) days after such damage; or (ii) thereafter fails to diligently prosecute such repairs and reconstruction to completion;

(t) Transfers of Property. If any of the events described in Section 2.15 above occurs without Lender's prior written consent;

UNOFFICIAL COPY

(u) Default by Guarantors. If any guarantor fails to pay any of its indebtedness or perform any of its obligations under any of the Guaranties when due or the revocation, limitation or termination or attempted revocation, limitation or termination of any of the obligations of any guarantor under any of the Guaranties, except in accordance with the express written terms of the Guaranties; or

(v) Misrepresentation by Guarantors. If any request, statement, information, certification, or representation, whether written or oral, submitted or made by any guarantor to Lender in connection with the Loan or any other extension of credit by Lender to Borrower or such guarantor is false or misleading in any material respect.

(w) Licenses. Borrower fails to do any act or execute any document at any time requested by Lender to provide it an assignment of all licenses necessary to operate the business for its Intended Use.

7.2 Acceleration. Upon the occurrence of an Event of Default, Lender may, at its option, declare all sums owing to Lender under the Note and the other Loan Documents immediately due and payable.

7.3 Rights and Remedies. In addition to the rights and remedies in Section 7.2 above, at any time after an Event of Default, Lender shall have all of the following rights and remedies:

(a) Right of Possession in Case of Default. With or without notice, and without releasing Borrower from any Secured Obligation, and without becoming a mortgagee in possession, to enter upon the Property from time to time and to do such acts and things as Lender deems necessary or desirable in order to inspect, investigate, assess and protect the security hereof or to cure any Event of Default, including, without limitation: (i) to take and possess all documents, books, records, papers and accounts of Borrower or the then owner of the Property which relate to the Property; (ii) to make, terminate, enforce or modify leases of the Property upon such terms and conditions as Lender deems proper or elect to disaffirm any lease or sublease which is then subordinate to the lien hereof; (iii) to make repairs, alterations and improvements to the Property necessary, in Lender's sole judgment, to protect or enhance the security hereof; (iv) to appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Lender hereunder; (v) to pay, purchase, contest or compromise any encumbrance, charge, lien or claim of lien which, in the sole judgment of either Lender, is or may be senior in priority hereto, the judgment of Lender being conclusive, as between the parties hereto; (vi) to insure and reinsure the Property and all risks incidental to Mortgagee's possession, operation and management thereof; (vii) to pay any premiums or charges with respect to insurance required to be carried hereunder; and/or (viii) to employ legal counsel, accountants, engineers, consultants, contractors and other appropriate persons to assist them;

(b) Application of Income Received by Lender. Lender, in the exercise of the rights and powers hereinabove conferred upon it, shall have full power to use and apply the avails, rents, issues and profits of the Property to the payment of or on account of the following, in such order as Mortgagee may determine: (i) to the payment of the operating expenses of the Property, including cost of management and leasing thereof (which shall include compensation to Mortgagee and its agent or agents, if management be delegated to an agent or agents, and shall also include lease commissions and other compensation and expenses of seeking and procuring tenants and entering into leases), established claims for damages, if any, and premiums on insurance hereinabove authorized; (ii) to the payment of taxes and special assessments now due or which may hereafter become due on the Property; and (iii) to the payment of any Secured Obligations, including any deficiency which may result from any foreclosure sale;

UNOFFICIAL COPY

(c) Appointment of Receiver. To apply to a court of competent jurisdiction for and obtain appointment of a receiver of the Property as a matter of strict right and without regard to: (i) the adequacy of the security for the repayment of the Secured Obligations; (ii) the existence of a declaration that the Secured Obligations are immediately due and payable; or (iii) the filing of a notice of default; and Borrower consents to such appointment;

(d) Judicial Foreclosure, Injunction. To commence and maintain an action or actions in any court of competent jurisdiction to foreclose this instrument as a mortgage or to obtain specific enforcement of the covenants of Borrower hereunder, and Borrower agrees that such covenants shall be specifically enforceable by injunction or any other appropriate equitable remedy and that for the purposes of any suit brought under this subparagraph, Borrower waives the defense of laches and any applicable statute of limitations;

(e) Foreclosure; Expense of Litigation. When all or any part of the Secured Obligations shall become due, whether by acceleration or otherwise, Mortgagee shall have the right to foreclose the lien hereof for such Secured Obligations or part thereof and/or exercise any right, power or remedy provided in this Mortgage or any of the other Loan Documents in accordance with the Illinois Mortgage Foreclosure Act (Chapter 735, Sections 5/15 1101 et seq., Illinois Compiled Statutes) (as may be amended from time to time, the "Act"). In the event of a foreclosure sale, Mortgagee is hereby authorized, without the consent of Mortgagor, to assign any and all insurance policies to the purchaser at such sale or to take such other steps as Mortgagee may deem advisable to cause the interest of such purchaser to be protected by any of such insurance policies. In any suit to foreclose the lien hereof, there shall be allowed and included as additional Secured Obligations in the decree for sale all expenditures and expenses which may be paid or incurred by or on behalf of Mortgagee for reasonable attorneys' fees, appraisers' fees, outlays for documentary and expert evidence, stenographers' charges, publication costs, and costs (which may be estimated as to items to be expended after entry of the decree) of procuring all such abstracts of title, title searches and examinations, title insurance policies, and similar data and assurances with respect to the title as Mortgagee may deem reasonably necessary either to prosecute such suit or to evidence to bidders at any sale which may be had pursuant to such decree the true condition of the title to or the value of the Property. All expenditures and expenses of the nature mentioned in this paragraph and such other expenses and fees as may be incurred in the enforcement of Mortgagor's Secured Obligations hereunder, the protection of said Property and the maintenance of the lien of this Mortgage, including the reasonable fees of any attorney employed by Mortgagee in any litigation or proceeding affecting this Mortgage, the Note, or the Property, including probate and bankruptcy proceedings, or in preparations for the commencement or defense of any proceeding or threatened suit or proceeding shall be immediately due and payable by Mortgagor, with interest thereon until paid at the Default Rate and shall be secured by this Mortgage;

(f) Application of Proceeds of Foreclosure Sale. The proceeds of any foreclosure sale of the Property shall be distributed and applied in accordance with the Act and, unless otherwise specified therein, in such order as Mortgagee may determine in its sole and absolute discretion;

(g) Compliance with Illinois Mortgage Foreclosure Law. If any provision in this Mortgage shall be inconsistent with any provision of the Act, provisions of the Act shall take precedence over the provisions of this Mortgage, but shall not invalidate or render unenforceable any other provision of this Mortgage that can be construed in a manner consistent with the Act. Any provision of this Mortgage shall grant to Mortgagee (including Mortgagee acting as a mortgagee in possession) or a receiver appointed pursuant to the provisions of Section 12.3(c) of this Mortgage any powers, rights or remedies prior to, upon or following the occurrence of an Event of Default which are more limited than the powers, rights or remedies that would otherwise be vested in Mortgagee or in such receiver under the Act in the absence of said provision,

UNOFFICIAL COPY

Mortgagee and such receiver shall be vested with the powers, rights and remedies granted in the Act to the full extent permitted by law. Without limiting the generality of the foregoing, all expenses incurred by Mortgagee which are of the type referred to in Section 5/15 1510 or 5/15 1512 of the Act, whether incurred before or after any decree or judgment of foreclosure, and whether or not enumerated in this Mortgage, shall be added to the Secured Obligations and/or by the judgment of foreclosure;

(h) Rights Cumulative. Each right, power and remedy herein conferred upon Mortgagee is cumulative and in addition to every other right, power or remedy, express or implied, given now or hereafter existing under any of the Loan Documents or at law or in equity, and each and every right, power and remedy herein set forth or otherwise so existing may be exercised from time to time as often and in such order as may be deemed expedient by Mortgagee, and the exercise or the beginning of the exercise of one right, power or remedy shall not be a waiver of the right to exercise at the same time or thereafter any other right, power or remedy, and no delay or omission of Mortgagee in the exercise of any right, power or remedy accruing hereunder or arising otherwise shall impair any such right, power or remedy, or be construed to be a waiver of any Event of Default or acquiescence therein.

(i) Mortgagee's Right of Inspection. Mortgagee and its representatives shall have the right to inspect the Property and the books and records with respect thereto at all reasonable times upon not less than twenty four (24) hours prior notice to Mortgagor, and access thereto, subject to the rights of tenants in possession, shall be permitted for that purpose.

(j) Indemnification of Mortgagee. Except for gross negligence or willful misconduct, Mortgagee shall not be liable for any act or omission or error of judgment. Mortgagee may rely on any document believed by Mortgagee in good faith to be genuine. All money received by Mortgagee shall, until used or applied as herein provided, be held in trust, but need not be segregated (except to the extent required by law), and Mortgagee shall not be liable for interest thereon except as may be provided herein. Mortgagor shall indemnify Mortgagee against all liability and expenses which Mortgagee may incur in the performance of Mortgagee's duties hereunder other than as a result of Mortgagee's willful misconduct or gross negligence;

(k) Defense. At all times the Mortgagee shall appear in and defend any suit, action or proceeding that might in any way in the sole judgment of Mortgagee affect the value of the Property, the priority of this Mortgage or the rights and powers of Mortgagee hereunder or under any document given at any time to secure the Indebtedness. Mortgagor shall, at all times, indemnify, hold harmless and reimburse Mortgagee on demand for any and all loss, damage, expense or cost, including cost of evidence of title and reasonable attorneys' fees, arising out of or incurred in connection with any such suit, action or proceeding, and the sum of such expenditures shall be secured by this Mortgage and shall bear interest after demand at the rate specified in the Note applicable to a period when an Event of Default has occurred thereunder, and such interest shall be secured hereby and shall be due and payable on demand;

(l) UCC Remedies. With respect to all or any part of the Property that is personal or intangible, Mortgagee shall have all the rights and remedies of a secured party under the Uniform Commercial Code. Upon request, Mortgagor shall assemble and make such collateral available to Mortgagee at a place to be designated by Mortgagee which is reasonably convenient to both parties. Upon repossession, Mortgagee may propose to retain the collateral in partial satisfaction of the Note or sell the collateral at public or private sale in accordance with the Uniform Commercial Code as adopted in the state where the Property is situated or any other applicable statute. Such sale may be held as a part of, distinctive from or without a trustee's sale or foreclosure of the real property secured by this Mortgage. If any notification of disposition of all or any portion of the collateral is required by law, such notification shall be deemed reasonably and

UNOFFICIAL COPY

properly given if mailed at least ten (10) days prior to such disposition. If Mortgagee disposes of all or any part of the collateral after default, the proceeds of disposition shall be applied in the following order: (i) to the reasonable expenses of retaking, holding, preparing for sale, selling the collateral, and the like; (ii) to the reasonable attorneys' fees and legal expenses incurred by Mortgagee; and (iii) to the satisfaction of the indebtedness secured by this Mortgage;

(m) Remedial Advances. Mortgagee, without obligation to do so and without demand upon Mortgagor and without releasing Mortgagor from any obligation hereof, may (i) cure such Event of Default and to such extent as either may deem necessary to protect the security hereof, Mortgagee being authorized to enter upon the Property for such purposes; (ii) commence, appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Mortgagee, (iii) pay, purchase, contest, or compromise any encumbrance, charge, lien, tax or assessment, or the premium for any policy of insurance required herein; and in exercising any such power, incur any liability, expend whatever amounts in its absolute discretion it may deem necessary therefor, including cost of evidence of title, employ counsel and pay such counsel's fees. Mortgagee shall be subrogated to the rights and lien interests of any person who is paid by Mortgagee pursuant to the terms of this paragraph. Mortgagor shall repay immediately on written notice to Mortgagee all sums expended or advanced hereunder by or on behalf of Mortgagee, with interest from the date of such advance or expenditure at the Default Rate provided for in the Note, and the repayment thereof shall be secured hereby;

(n) Collection of Rents. Mortgagee may require any Mortgagor to make payments of rent or fees directly to Mortgagee regardless of whether Mortgagee has taken possession of the Property. If any rents are collected by Mortgagee, then Mortgagor irrevocably designates Mortgagee as Mortgagor's attorney-in-fact to endorse instruments received in payment thereof in the name of Mortgagor and to negotiate the same and collect the proceeds. Payments by Tenants to Mortgagee in response to Mortgagee's demand shall satisfy the obligation for which the payments are made, whether or not any proper grounds for the demand existed. Mortgagee may exercise Mortgagee's rights under this paragraph either in person, by agent or through a receiver;

(o) Mortgagee's Enforcement of Leases. Mortgagee is hereby vested with full power to use all measures, legal and equitable, deemed by Mortgagee necessary or proper to collect the rents assigned in this Mortgage, including the right, in person or by agent, employee or court-appointed receiver, to enter upon the Property, or any part thereof, and take possession thereof forthwith to the extent necessary to effect the cure of any default on the part of Mortgagor as lessor in any of the Leases. Mortgagor hereby grants to Mortgagee full power and authority to exercise all rights, privileges and powers herein granted at any and all times after an Event of Default, without notice to Mortgagor, including the right to operate and manage the Property, make and amend Leases, enforce guaranties of any lease and perform any other acts which are reasonably necessary to protect the value, priority or enforceability of any security for the Note and use and apply all of the rents and other income herein assigned to the payment of the costs of exercising such remedies, of managing and operating the Property, and of any indebtedness or liability of Mortgagor to Mortgagee, including, but not limited to, the payment of taxes, special assessments, insurance premiums, damage claims, the costs of maintaining, repairing, rebuilding and restoring the improvements on the Property or of making the same rentable, reasonable attorneys' fees incurred in connection with the enforcement of this Mortgage, and any principal and interest payments due from Mortgagor to Mortgagee on the Note and this Mortgage, all in such order as Mortgagee may determine. Mortgagee shall be under no obligation to enforce any of the rights or claims assigned to Mortgagee hereunder or to perform or carry out any of the obligations of the lessor under any leases and does not assume any of the liabilities in any way related to the covenants and agreements of Mortgagor in any leases. It is further understood that this Mortgage shall not operate to place responsibility for the control, care, management or repair of

UNOFFICIAL COPY

the Property, or parts thereof, upon Mortgagee nor shall it operate to make Mortgagee liable for the carrying out of any of the terms and conditions of any leases, or for any waste of the Property by the lessee under any leases or by any other party, or for any dangerous or defective condition of the Property or for any negligence in the management, upkeep, repair or control of the Property resulting in loss or injury or death to any lessee, invitee, licensee, employee or stranger, except as may result from the gross negligence or willful misconduct of Mortgagee or its agents or employees after taking possession of the Property hereunder;

(p) Summary Possession. Mortgagee may, at Mortgagee's option, and in person or by agent, employee or court-appointed receiver, enter upon and take possession of the Property and continue any improvement, repair or renovation thereof at Mortgagor's expense and to lease the same or any part thereof, making, such alterations as Mortgagee determines necessary, and may terminate in any lawful manner any lease of the Property, exercising, with respect thereto any right of option available to Mortgagor. The entering upon and taking, possession of the Property, the collection of rents, issues and profits, or the proceeds of fire and other insurance policies or compensation or awards for any taking or damage of the Property, and the application or release thereof shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

(q) Mortgagee's Enforcement of Contracts. Mortgagee shall have the right to enforce Mortgagor's rights under all architect contracts and construction contracts and to bring, an action for the breach thereof in the name of Mortgagee or, at Mortgagee's option, in the name of Mortgagor, in the event any architect or contractor breaches their respective contracts, regardless of whether Mortgagee has acquired or retained any interest in the Property. Mortgagor hereby irrevocably appoints Mortgagee as Mortgagor's attorney-in-fact for the purposes of the foregoing, which power shall be durable and coupled with an interest. Mortgagee does not assume and shall not be obligated to perform any of Mortgagor's obligations under any contract nor shall Mortgagee be required to enforce such contracts or bring action for the breach thereof; provided, however, any performance of the respective contracts specifically required in writing by the Mortgagee, following any Event of Default by Mortgagor under the Note, and which is properly and timely undertaken by the contractor or architect shall be paid for by the Mortgagee in accordance with the terms and conditions of the contracts. Such payments shall be deemed additions to the Note principal and shall bear interest at the rate provided in the Note from the date of advance to and including the date of full payment, and shall be secured as a part of the Note principal and interest by any mortgage, collateral assignment of leases and rents, security agreement, guaranty and other documents granted to secure the Note.

(r) Other Rights. To exercise such other rights as Lender may have at law or in equity or pursuant to the terms and conditions of this Mortgage or any of the other Loan Documents.

In connection with any sale or sales hereunder, Lender may elect to treat any of the Property which consists of a right in action or which is property that can be severed from the Property (including, without limitation, any improvements forming a part thereof) without causing structural damage thereto as if the same were personal property or a fixture, as the case may be, and dispose of the same in accordance with applicable law, separate and apart from the sale of the Property. Any sale of Collateral hereunder shall be conducted in any manner permitted by the UCC.

7.4 Application of Foreclosure Sale Proceeds. If any foreclosure sale is effected, Lender shall apply the proceeds of such sale in the following order of priority: First, to the costs, fees and expenses of exercising the power of sale and of the sale, including, without limitation, the payment of the Lender's attorneys' fees permitted pursuant to the Act; Second to the payment of the Secured Obligations which are secured by this Mortgage, in such order as Lender shall determine in its sole discretion; Third, to satisfy the

UNOFFICIAL COPY

outstanding balance of obligations secured by any junior liens or encumbrances in the order of their priority; and Fourth, to the Borrower or the Borrower's successor in interest, or in the event the Property has been sold or transferred to another, to the vested owner of record at the time of the foreclosure sale.

7.5 Waiver of Marshaling Rights. Borrower, for itself and for all parties claiming through or under Borrower, and for all parties who may acquire a lien on or interest in the Property, hereby waives all rights to have the Property and/or any other property, including, without limitation, the Collateral, which is now or later may be security for any Secured Obligation, marshaled upon any foreclosure of this Mortgage or on a foreclosure of any other security for any of the Secured Obligations.

7.6 No Cure or Waiver. Neither Lender's nor any receiver's entry upon and taking possession of all or any part of the Property, nor any collection of rents, issues, profits, insurance proceeds, condemnation proceeds or damages, other security or proceeds of other security, or other sums, nor the application of any collected sum to any Secured Obligation, nor the exercise of any other right or remedy by Lender or any receiver shall cure or waive any Event of Default or notice of default under this Mortgage, or nullify the effect of any notice of default or sale (unless all Secured Obligations then due have been paid or performed and Borrower has cured all other Events of Default hereunder), or impair the status of the security, or prejudice Lender in the exercise of any right or remedy, or be construed as an affirmation by Lender of any tenancy, lease or option or a subordination of the lien of this Mortgage.

7.7 Payment of Costs, Expenses and Attorneys' Fees. Borrower agrees to pay to Lender immediately and upon demand all costs and expenses incurred by Lender in the enforcement of the terms and conditions of this Mortgage (including, without limitation, statutory trustee's fees, court costs and attorneys' fees, whether incurred in litigation or not) with interest from the date of expenditure until said sums have been paid at the rate of interest applicable to the principal balance of the Note as specified therein.

7.8 Power to File Notices and Cure Events of Default. Borrower hereby irrevocably appoints Lender and its successors and assigns, as its attorney-in-fact, which power of attorney is coupled with an interest, to perform any obligation of Borrower hereunder upon the occurrence of an event, act or omission which, with notice or passage of time or both, would constitute an Event of Default; provided, however, that: (a) Lender as such attorney-in-fact shall only be accountable for such funds as are actually received by Lender; and (b) Lender shall not be liable to Borrower or any other person or entity for any failure to act under this Section.

7.9 Remedies Cumulative. All rights and remedies of Lender provided hereunder are cumulative and are in addition to all rights and remedies provided by applicable law (including specifically that of foreclosure of this instrument as though it were a mortgage) or in any other agreements between Borrower and Lender. Lender may enforce any one or more remedies or rights hereunder successively or concurrently.

ARTICLE 8

ENVIRONMENTAL HAZARDS

8.1 Compliance. Borrower shall comply with all covenants, conditions, provisions, and obligations of Borrower under the Environmental Indemnity Agreement, and Borrower shall comply with all "**Hazard Substance Laws**" (as defined in the Environmental Indemnity Agreement).

8.2 Covenants. Borrower further agrees as follows:

- (a) With or without notice, and without releasing Borrower from any obligation hereunder, to cure any default of Borrower and, in connection therewith, Lender or its agents, acting by

UNOFFICIAL COPY

themselves or through a court appointed receiver, may enter upon the Property or any part thereof and perform such acts and things as Lender deems necessary or desirable to inspect, investigate, assess, and protect the security hereof, including without limitation of any of its other rights: (i) to obtain a court order to enforce Lender's right to enter and inspect the Property under the Act, to which the decision of Lender as to whether there exists a release or threatened release of "Hazardous Substances" (as defined in the Environmental Indemnity Agreement) in or onto the Property shall be deemed reasonable and conclusive as between the parties hereto; and (ii) to have a receiver appointed under the Act to enforce Lender's right to enter and inspect the Property for Hazardous Substances. All costs and expenses reasonably incurred by Lender with respect to the audits, tests, inspections, and examinations which Lender or its agents or employees may conduct, including the fees of the engineers, laboratories, contractor, consultants, and attorneys, shall be paid by Borrower. All reimbursement costs and expenses incurred by Lender pursuant to this subparagraph (including, without limitation, court costs, consultant fees and attorneys' fees, whether incurred in litigation or not and whether before or after judgment) shall be added to the Indebtedness and shall bear interest at the Default Rate from the date they are incurred until said sums have been paid.

(b) Lender may seek a judgment that Borrower has breached its covenants, representations and/or warranties with respect to the environmental matters set forth herein, by commencing and maintaining an action or actions in any court of competent jurisdiction for breach of contract pursuant to the Act, whether commenced prior to foreclosure of the Property, and to seek the recovery of any and all costs, damages, expenses, fees, penalties, fines, judgments, indemnification payments to third parties, and other out-of-pocket costs or expenses actually incurred by Lender (collectively, the "Environmental Costs") incurred or advanced by Lender relating to the cleanup, remediation or other response action, required by applicable law or to which Lender believes necessary to protect the Property, it being conclusively presumed between Lender and Borrower that all such Environmental Costs incurred or advanced by Lender relating to the cleanup, remediation, or other response action of or to the Property were made by Lender in good faith. All Environmental Costs incurred by Lender under this subparagraph (including, without limitation, court costs, consultant fees and attorneys' fees, whether incurred in litigation or not and whether before or after judgment) shall bear interest at the Default Rate (as defined in the Note) from the date of expenditure until said sums have been paid. Lender shall be entitled to bid, at the sale of the Property, the amount of said costs, expenses and interest in addition to the amount of the other obligations hereby secured as a credit bid, the equivalent of cash.

Borrower acknowledges and agrees that notwithstanding any term or provision contained herein or elsewhere, the Environmental Costs shall be exceptions to any limited recourse or exculpatory provision, if applicable, and Borrower shall be fully and personally liable for the Environmental Costs hereunder, and such liability shall not be limited to the original principal amount of the obligations secured by this Mortgage, and the Property or this Mortgage. For the purposes of any action brought under this subparagraph, Borrower hereby waives the defense of laches and any applicable statute of limitations.

(c) Lender may waive its lien against the Property or any portion thereof, whether fixtures or personal property, to the extent such property is found to be environmentally impaired in accordance with the Act and to exercise any and all rights and remedies of an unsecured creditor against Borrower and all of Borrower's assets and property for the recovery of any deficiency and Environmental Costs, including, but not limited to, seeking an attachment order under the Act. As between Lender and Borrower, for purposes of the Act, Borrower shall have the burden of proving that Borrower or any related party (or any affiliate or agent of Borrower or any related party) was not in any way negligent in permitting the release or threatened release of Hazardous Substances. Borrower acknowledges and agrees that notwithstanding any term or provision contained herein or elsewhere, all judgments and awards entered against Borrower shall be

UNOFFICIAL COPY

exceptions to any nonrecourse or exculpatory provision, and Borrower shall be fully and personally liable for all judgments and awards entered against Borrower hereunder and such liability shall not be limited to the original principal amount of the obligations secured by this Mortgage and Borrower's obligations shall survive the foreclosure, deed in lieu of foreclosure, release, reconveyance, or any other transfer of the Property or this Mortgage. For the purposes of any action brought under this subparagraph, Borrower hereby waives the defense of laches and any applicable statute of limitations.

8.3 Distinct Covenants. Notwithstanding anything to the contrary in this Article 8: (i) Borrower's obligations pursuant to this Article 8 are specific to this Mortgage; (ii) the Environmental Indemnity Agreement remains separate herefrom and shall survive, in each case, release, reconveyance, or other termination or satisfaction of this Mortgage; and (iii) consistent with Section 2.1 hereof, this Mortgage does not secure the Environmental Indemnity Agreement.

ARTICLE 9

GENERAL PROVISIONS

9.1 Additional Provisions. The Loan Documents contain or incorporate by reference the entire agreement of the parties with respect to matters contemplated herein and supersede all prior negotiations. The Loan Documents grant further rights to Lender and contain further agreements and affirmative and negative covenants by Borrower which apply to this Mortgage and to the Property and such further rights and agreements are incorporated herein by this reference. **THE OBLIGATIONS AND LIABILITIES OF BORROWER UNDER THIS MORTGAGE AND THE OTHER LOAN DOCUMENTS ARE SUBJECT TO THE PROVISIONS OF THIS SECTION, IF ANY, IN THE NOTE ENTITLED "BORROWER'S LIABILITY."**

9.2 Non-Waiver. By accepting payment of any amount secured hereby after its due date or late performance of any other Secured Obligation, Lender shall not waive its right against any person obligated directly or indirectly hereunder or on any Secured Obligation, either to require prompt payment or performance when due of all other sums and obligations so secured or to declare default for failure to make such prompt payment or performance. No exercise of any right or remedy by Lender hereunder shall constitute a waiver of any other right or remedy herein contained or provided by law. No failure by Lender to exercise any right or remedy hereunder arising upon any Event of Default shall be construed to prejudice Lender's rights or remedies upon the occurrence of any other or subsequent Event Default. No delay by Lender in exercising any such right or remedy shall be construed to preclude Lender from the exercise thereof at any time while that Event of Default is continuing. No notice to nor demand on Borrower shall of itself entitle Borrower to any other or further notice or demand in similar or other circumstances.

9.3 Consents and Approvals. Wherever Lender's consent, approval, acceptance or satisfaction is required under any provision of this Mortgage or any of the other Loan Documents, such consent, approval, acceptance or satisfaction shall be exercised in accordance with Section 15.9 of the Note.

9.4 Permitted Contests. After prior written notice to Lender, may contest, by appropriate legal or other proceedings conducted in good faith and with due diligence, the amount, validity or application, in whole or in part, of any lien, levy, tax or assessment, or any lien of any laborer, mechanic, materialman, supplier or vendor, or the application to Borrower or the Property of any law or the validity thereof, the assertion or imposition of which, or the failure to pay when due, would constitute an Event of Default; subject to the requirements that: (a) Borrower pursues the contest diligently, in a manner which Lender determines is not prejudicial to Lender, and does not impair the lien of this Mortgage; (b) the Property, or any part hereof or estate or interest therein, shall not be in any danger of being sold, forfeited or lost by

UNOFFICIAL COPY

reason of such proceedings; (c) in the case of the contest of any law or other legal requirement, Lender shall not be in any danger of any civil or criminal liability; and (d) if required by Lender, Borrower deposits with Lender any funds or other forms of assurance (including a bond or letter of credit) satisfactory to Lender to protect Lender from the consequences of the contest being unsuccessful. Borrower's right to contest pursuant to the terms of this provision shall in no way relieve Borrower of its obligations under the Loan or to make payments to Lender as and when due.

9.5 Further Assurances. Borrower shall, upon demand by Lender, execute, acknowledge (if appropriate) and deliver any and all documents and instruments and do or cause to be done all further acts reasonably necessary or appropriate to effectuate the provisions hereof.

9.6 Attorneys' Fees. In the event it is necessary for Lender to retain the services of an attorney or any other party to enforce or to commence any legal action to enforce the terms of the Note, this Mortgage, or any of the other Loan Documents, or any portion hereof or thereof, Borrower agrees to pay to Lender, in addition to damages or other relief, any and all costs and expenses, including, without limitation, expert witness fees and reasonable attorney's fees incurred by Lender as a result thereof.

9.7 Borrower and Lender Defined. The term "**Borrower**" includes both the original Borrower and any subsequent owner or owners of any of the Property, and the term "**Lender**" includes the original Lender and any future owner or holder, including assignees, pledges and participants, of the Note or any interest therein.

9.8 Disclaimers.

(a) Relationship. The relationship of Borrower and Lender under this Mortgage and the other Loan Documents is, and shall at all times remain, solely that of borrower and Lender; and Lender neither undertakes nor assumes any responsibility or duty to Borrower or to any third party with respect to the Property. Notwithstanding any other provisions of this Mortgage and the other Loan Documents: (i) Lender is not, and shall not be construed to be, a partner, joint venturer, member, alter ego, manager, controlling person or other business associate or participant of any kind of Borrower, and Lender does not intend to ever assume such status; (ii) Lender's activities in connection with this Mortgage and the other Loan Documents shall not be "outside the scope of activities of a Lender of money", and Lender does not intend to ever assume any responsibility to any person for the quality, suitability, safety or condition of the Property; and (iii) Lender shall not be deemed responsible for or a participant in any acts, omissions or decisions of Borrower; and

(b) No Liability. Lender shall not be directly or indirectly liable or responsible for any loss, claim, cause of action, liability, indebtedness, damage or injury of any kind or character to any person or property arising from any construction on, or occupancy or use of, the Property, whether caused by or arising from: (i) any defect in any building, structure, grading, fill, landscaping or other improvements thereon or in any on-site or off-site improvement or other facility therein or thereon; (ii) any act or omission of Borrower or any of Borrower's agents, employees, independent contractors, licensees or invitees; (iii) any accident in or on the Property or any fire, flood or other casualty or hazard thereon; (iv) the failure of Borrower or any of Borrower's licensees, employees, invitees, agents, independent contractors or other representatives to maintain the Property in a safe condition; or (v) any nuisance made or suffered on any part of the Property.

9.9 Severability. If any term of this Mortgage, or the application thereof to any person or circumstances, shall, to any extent, be invalid or unenforceable, the remainder of this Mortgage, or the application of such term to persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each term of this Mortgage shall be valid and enforceable to the fullest extent permitted by law.

UNOFFICIAL COPY

9.10 Relationship of Articles. The rights, remedies and interests of Lender under this Mortgage established by Article 1 and the security agreement established by Article 4 are independent and cumulative, and there shall be no merger of any lien created by this Mortgage with any security interest created by the security agreement. Lender may elect to exercise or enforce any of its rights, remedies or interests under either or both this Mortgage or the security agreement as Lender may from time to time deem appropriate. The Assignment of Rents and Leases established by Article 3 is similarly independent of and separate from this Mortgage and the Security Agreement.

9.11 Merger. No merger shall occur as a result of Lender's acquiring any other estate in, or any other lien on, the Property unless Lender consents to a merger in writing.

9.12 Obligations of Borrower, Joint and Several. If more than one person has executed this Mortgage as "Borrower", the obligations of all such persons hereunder shall be joint and several.

9.13 Separate and Community Property. Any married person who executes this Mortgage as a Borrower agrees that any money judgment which Lender obtains pursuant to the terms of this Mortgage or any other obligation of that married person secured by this Mortgage may be collected by execution upon any separate property or community property of that person.

9.14 Integration; Interpretation. The Loan Documents contain or expressly incorporate by reference the entire agreement of the parties with respect to the matters contemplated therein and supersede all prior negotiations or agreements, written or oral. The Loan Documents shall not be modified except by written instrument executed by all parties. Any reference in any of the Loan Documents to the Property or Collateral shall include all or any part of the Property or Collateral. Any reference to the Loan Documents includes any amendments, renewals or extensions now or hereafter approved by Lender in writing (it being understood that no amendment or modification of the Loan Documents shall be valid and binding against Lender unless signed by an officer of Lender holding the title of Executive Vice President or higher). When the identity of the parties or other circumstances make it appropriate, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

9.15 Capitalized Terms. Capitalized terms not otherwise defined herein shall have the meanings set forth in the Note.

9.16 Successors in Interest. The terms, covenants, and conditions herein contained shall be binding upon and inure to the benefit of the heirs, successors and assigns of the parties hereto. The foregoing sentence shall not be construed to permit Borrower to assign the Loan except as otherwise permitted under the Note or the other Loan Documents.

9.17 Governing Law. This Mortgage, the Note and the other Loan Documents and the obligations arising hereunder and thereunder shall be governed by, and construed in accordance with, the laws of the State of Illinois applicable to contracts made and performed in Illinois and any applicable federal law, including, to the extent, with respect to Lender's rights and obligations, that federal law preempts the laws of the State of Illinois. Except as provided in the immediately preceding sentence, Borrower hereby unconditionally and irrevocably waives, to the fullest extent permitted by law, any claim to assert that the law of any jurisdiction other than Illinois governs the Note, and other Loan Documents.

9.18 Consent to Jurisdiction. Borrower irrevocably submits to the Jurisdiction of: (a) any state or federal court sitting in the State of Illinois over any suit, action, or proceeding, brought by Borrower against Lender, arising out of or relating to this Mortgage, the Note or the Loan; (b) any state or federal court sitting in the state where the Property is located or the state in which Borrower's principal place of business is located over any suit, action or proceeding, brought by Lender against Borrower, arising out of or relating to this Mortgage, the Note or the Loan; and (c) any state court sitting in the county of the state where the Property is located over any suit, action, or proceeding, brought by Lender to exercise its STATUTORY POWER OF SALE under this Mortgage or any action brought by Lender to enforce its

UNOFFICIAL COPY

rights with respect to the Collateral. Borrower irrevocably waives, to the fullest extent permitted by law, any objection that Borrower may now or hereafter have to the laying of venue of any such suit, action, or proceeding brought in any such court and any claim that any such suit, action, or proceeding brought in any such court has been brought in an inconvenient forum.

9.19 Exhibits. Any and all Exhibits are incorporated into this Mortgage by this reference.

9.20 Addresses; Request for Notice. All notices and other communications that are required or permitted to be given to a party under this Mortgage shall be in writing, refer to the Loan number, and shall be sent to such party, either by personal delivery, by overnight delivery service, or by certified first-class mail, return receipt requested to the addressee below. All such notices and communications shall be effective upon receipt of such delivery. The addresses of the parties are set forth on page 1 of this Mortgage. Borrower's principal place of business is at the address set forth on page 1 of this Mortgage.

Any Borrower whose address is set forth on page 1 of this Mortgage hereby requests that a copy of notice of default and notice of sale be delivered to it at that address. Failure to insert an address shall constitute a designation of Borrower's last known address as the address for such notice. Any party shall have the right to change its address for notice hereunder to any other location within the continental United States by giving thirty (30) days' notice to the other parties in the manner set forth above.

9.21 Counterparts. This Mortgage may be executed in any number of counterparts, each of which, when executed and delivered, will be deemed an original and all of which taken together, will be deemed to be one and the same instrument.

9.22 Time is of the Essence. Time is of the essence with respect to all of Borrower's obligations and agreements hereunder with respect to, in each case, (i) the payment of money; (ii) where any deadline or period for performance is provided; and (iii) where notice, reports, or other information is required to be delivered to Lender.

9.23 Customer Identification - USA Patriot Act Notice. Lender hereby notifies Borrower that pursuant to the requirements of the USA Patriot Act (Title III of Pub. L. 107-56, signed into law October 26, 2001), as amended (the "Act"), and Lender's policies and practices, Lender is required to obtain, verify and record certain information and documentation that identifies Borrower, which information includes the name and address of Borrower and such other information that will allow Lender to identify Borrower in accordance with the Act.

9.24 Waiver of Jury Trial. TO THE FULLEST EXTENT PERMITTED BY LAW, BORROWER HEREBY AGREES NOT TO ELECT A TRIAL BY JURY OF ANY ISSUE TRIABLE OF RIGHT BY JURY, AND WAIVES ANY RIGHT TO TRIAL BY JURY WITH REGARD TO THIS MORTGAGE OR ANY OTHER LOAN DOCUMENT, OR ANY CLAIM, COUNTERCLAIM OR OTHER ACTION ARISING IN CONNECTION THEREWITH. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS GIVEN KNOWINGLY AND VOLUNTARILY BY BORROWER, AND IS INTENDED TO ENCOMPASS INDIVIDUALLY EACH INSTANCE AND EACH ISSUE AS TO WHICH THE RIGHT TO A TRIAL BY JURY WOULD OTHERWISE ACCRUE. BENEFICIARY IS HEREBY AUTHORIZED TO FILE A COPY OF THIS PARAGRAPH IN ANY PROCEEDING AS CONCLUSIVE EVIDENCE OF THIS WAIVER BY BORROWER.

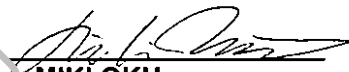
[Signature page follows]

UNOFFICIAL COPY

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

(BORROWER:)

(MIKI OKU)

By: 
MIKI OKU

COOK COUNTY
RECORDER OF DEEDS

COOK COUNTY
RECORDER OF DEEDS

COOK COUNTY
RECORDER OF DEEDS

Property of Cook County Clerk's Office

UNOFFICIAL COPY

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of _____
County of _____

On _____, before me,
_____ personally appeared
_____ who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of _____ that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____

Property of Cook County Clerk's Office

UNOFFICIAL COPY

EXHIBIT A

LEGAL DESCRIPTION

The Land is described as follows:

LOT 13 IN BLOCK 2 IN MCCAGG'S SUBDIVISION OF OUT-LOT 19 IN CANAL TRUSTEES' SUBDIVISION OF THE WEST 1/2 OF SECTION 5, TOWNSHIP 39 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS.

APN: 17-05-309-046-0000

Street Address: 1431 West Cortez Street, Chicago, Illinois 60642

COOK COUNTY
RECORDER OF DEEDS

COOK COUNTY
RECORDER OF DEEDS

Property of Cook County Clerk's Office

UNOFFICIAL COPY

Registered No. 2207

NOTARIAL CERTIFICATE

This is to certify that Ms. MIKI OKU has signed in my very presence the attached document.

Dated this 25th day of DEC., 2017

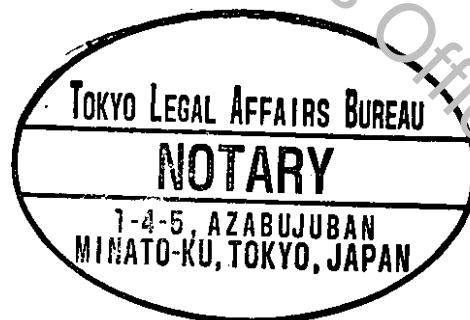
Kaoru Tokuda



KAORU TOKUDA

Notary

Tokyo Legal Affairs Bureau



UNOFFICIAL COPY

嘱託人 奥水樹 は、本公証人の面前において別添文書に署名した。

よって、これを認証する。

平成29年 12 月 25 日、本公証人役場において

東京都港区麻布十番1-4-5
東京法務局所属

公証人
Notary

徳日 薫
Kaoru TOKUDA



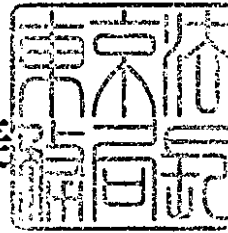
証 明

上記署名は、東京法務局所属公証人の署名に相違ないものであり、かつ、その押印は、真実のものであることを証明する。

平成29年 12 月 25 日

東京法務局長

秋山仁美



APOSTILLE

(Convention de La Haye du 5 octobre 1961)

1. Country: JAPAN
This public document
2. has been signed by **Kaoru TOKUDA**
3. acting in the capacity of Notary of the Tokyo Legal Affairs Bureau
4. bears the seal/stamp of **Kaoru TOKUDA, Notary**
5. at Tokyo
6. Certified **DEC. 25. 2017**
7. by the Ministry of Foreign Affairs
8. 17-N^o 060516
9. Seal/stamp:
10. Signature



T. TANAKA

Toshie TANAKA

For the Minister for Foreign Affairs