

# UNOFFICIAL COPY

Doc#: 2006347078 Fee: \$98.00  
Edward M. Moody  
Cook County Recorder of Deeds  
Date: 03/03/2020 10:51 AM Pg: 1 of 79

Prepared by and  
when recorded mail to:

Katten Muchin Rosenman LLP  
2029 Century Park East, Suite 2600  
Los Angeles, California 90067-3012  
Attention: Adam J. Engel, Esq.

**AMENDED AND RESTATED MORTGAGE, SECURITY AGREEMENT,  
FIXTURE FILING, FINANCING STATEMENT  
AND ASSIGNMENT OF LEASES AND RENTS**

MORTGAGOR: WASHINGTON PARK PLAZA LLC,  
a Delaware limited liability company  
1449 37<sup>th</sup> Street, Suite 216  
Brooklyn, New York 11218  
Attention: Binyamin Beitel

MORTGAGEE: CONTINENTAL CASUALTY COMPANY,  
an Illinois insurance company  
151 N. Franklin Street, 10th Floor  
Chicago, Illinois 60606  
Attention: David B. Lehman, Mortgage Servicing

AMOUNT SECURED: \$24,200,000.00

GOVERNING LAW: See Section 9.19

LOCATION: 17928, 17932, and 17960 South Halsted Street  
17750, 17800, 17830, and 17852 Halsted Street  
Homewood, Illinois 60430

COUNTY: Cook

# UNOFFICIAL COPY

## TABLE OF CONTENTS

	<u>Page</u>
ARTICLE 1A. AMENDMENT AND RESTATEMENT.....	1
ARTICLE 1 PARTIES, PROPERTY, AND DEFINITIONS .....	2
ARTICLE 2 GRANTING CLAUSE .....	14
2.1 Grant to Mortgagee.....	14
2.2 Security Interest to Mortgagee .....	14
ARTICLE 3 MORTGAGOR'S REPRESENTATIONS AND WARRANTIES .....	15
3.1 Warranty of Title .....	15
3.2 Due Authorization .....	16
3.3 Other Representations and Warranties.....	16
3.4 Continuing Effect .....	20
ARTICLE 4 MORTGAGOR'S AFFIRMATIVE COVENANTS .....	20
4.1 Payment of Note.....	20
4.2 Performance of Other Obligations.....	20
4.3 Other Encumbrances.....	20
4.4 Payment of Taxes .....	20
4.5 Maintenance of Insurance .....	22
4.6 Maintenance and Repair of Property, Chattels and the Other Collateral; Contracts .....	25
4.7 Leases.....	26
4.8 Eminent Domain; Private Damage.....	26
4.9 Mechanics' Liens.....	28
4.10 Defense of Actions .....	29
4.11 Expenses of Enforcement.....	29
4.12 Financial Reports.....	29
4.13 Priority of Leases.....	29
4.14 Inventories; Assembly of Chattels.....	30
4.15 Compliance with Laws, Existence, Etc.....	30
4.16 Records and Books of Account .....	31
4.17 Inspection Rights .....	31
4.18 Change of Executive Offices.....	31
4.19 Further Assurances; Estoppel Certificates .....	31
4.20 Costs of Closing.....	32
4.21 Fund for Electronic Transfer .....	32
4.22 Use .....	32
4.23 Management .....	32
4.24 Reserve Agreement .....	33
4.25 Single Purpose Entity.....	33
4.26 Cash Management .....	33
4.27 Patriot Act, Anti Terrorism .....	33

# UNOFFICIAL COPY

4.28	Anti-Money Laundering .....	34
4.29	General Indemnity .....	35
4.30	Duty to Defend, Costs and Expenses.....	35
4.31	Guarantor.....	35
4.32	Title to the Property .....	36
4.33	Intentionally Omitted .....	36
4.34	O&M Plan Compliance.....	36
<b>ARTICLE 5 MORTGAGOR'S NEGATIVE COVENANTS.....</b>		<b>36</b>
5.1	Waste and Alterations .....	36
5.2	Zoning and Private Covenants .....	36
5.3	Certain Covenants Regarding Leases .....	37
5.4	Transfer or Further Encumbrance of Property .....	40
5.5	Further Encumbrance of Chattels or other Collateral.....	44
5.6	Assessments Against Property .....	45
5.7	Transfer or Removal of Chattels, Intangible Personalty or other Collateral.....	45
5.8	Change of Name or Jurisdiction.....	45
5.9	Improper Use of Property, Chattels, Intangible Personalty or other Collateral .....	45
5.10	ERISA .....	45
5.11	Use of Proceeds .....	46
5.12	Single-Purpose Entity .....	46
5.13	Indebtedness .....	46
5.14	Access Agreements.....	46
5.15	No Cannabis or Cannabis-Related Businesses.....	46
5.16	Labor Agreements .....	46
<b>ARTICLE 6 EVENTS OF DEFAULT .....</b>		<b>46</b>
6.1	Failure to Pay Note or Other Amounts .....	46
6.2	Violation of Certain Covenants .....	47
6.3	Other Obligations .....	47
6.4	Levy Against Property .....	47
6.5	Liquidation .....	47
6.6	Appointment of Receiver .....	47
6.7	Assignments .....	47
6.8	Order for Relief .....	47
6.9	Bankruptcy .....	47
6.10	Misrepresentation .....	48
6.11	Judgments.....	48
6.12	Admissions Regarding Debts.....	48
6.13	Assertion of Priority.....	48
6.14	Other Loan Documents .....	48
6.15	Other Liens .....	48
6.16	Other Indebtedness .....	48
<b>ARTICLE 7 MORTGAGEE'S REMEDIES.....</b>		<b>48</b>
7.1	Performance of Defaulted Obligations .....	48
7.2	Specific Performance and Injunctive Relief.....	49

# UNOFFICIAL COPY

7.3	Acceleration of Secured Obligations .....	49
7.4	Suit for Monetary Relief .....	49
7.5	Possession of Property .....	49
7.6	Enforcement of Security Interests .....	49
7.7	Foreclosure Against Property .....	49
7.8	Appointment of Receiver .....	53
7.9	Right to Make Repairs, Improvements .....	53
7.10	Surrender of Insurance .....	54
7.11	Application of Letter of Credit, Escrow and Reserve Funds .....	54
7.12	Remedies Under Other Loan Documents .....	54
7.13	Prima Facie Evidence .....	54
7.14	Replacement of Property Manager .....	54
7.15	Waiver of Right of Redemption .....	54
ARTICLE 8 ASSIGNMENT OF LEASES AND RENTS .....		54
8.1	Assignment of Leases and Rents .....	55
8.2	Further Assignments .....	55
8.3	Application of Rents .....	55
8.4	Collection of Rents .....	55
8.5	Authority of Mortgagee .....	56
8.6	Indemnification of Mortgagee .....	56
ARTICLE 9 MISCELLANEOUS PROVISIONS .....		56
9.1	Time of the Essence .....	56
9.2	Joint and Several Obligations .....	56
9.3	Waiver of Homestead and Other Exemptions .....	57
9.4	Non-Recourse; Exceptions to Non-Recourse .....	57
9.5	Rights and Remedies Cumulative .....	57
9.6	Modification; No Implied Waivers .....	57
9.7	No Third Party Rights .....	58
9.8	Preservation of Liability and Priority .....	58
9.9	Subrogation of Mortgagee .....	58
9.10	Notices .....	58
9.11	Release or Assignment by Mortgagee .....	59
9.12	Illegality .....	59
9.13	Usury Savings Clause .....	60
9.14	Obligations Binding Upon Mortgagor's Successors .....	60
9.15	Construction .....	60
9.16	Attorneys' Fees .....	60
9.17	Waiver and Agreement Regarding Prepayment .....	61
9.18	Waiver of Jury Trial .....	61
9.19	Governing Laws; Forum .....	61
9.20	Entire Agreement .....	62
9.21	Limitation on Liability .....	62
9.22	Acceptance of Cures for Events of Default .....	62
9.23	Binding Action .....	62
9.24	Claims Against Mortgagee .....	62

# UNOFFICIAL COPY

ARTICLE 10 ILLINOIS PROVISIONS.....63

10.1 Principles of Construction.....63

10.2 Compliance with Illinois Mortgage Foreclosure Law.....63

10.3 Advances.....63

10.4 Insurance.....64

10.5 Marshalling and Other Matters.....64

10.6 Expenses.....65

10.7 Business Loan.....65

10.8 Waiver.....65

10.9 No Property Manager Lien.....66

10.10 Transfer Tax Obligation and Indemnification.....66

Property of Cook County Clerk's Office

# UNOFFICIAL COPY

**THIS AMENDED AND RESTATED MORTGAGE, SECURITY AGREEMENT, FIXTURE FILING, FINANCING STATEMENT AND ASSIGNMENT OF LEASES AND RENTS** (this “Mortgage”) is executed as of February 27, 2020, by **WASHINGTON PARK PLAZA LLC**, a Delaware limited liability company (“Mortgagor”), having an address at 1449 37<sup>th</sup> Street, Suite 216, Brooklyn, New York 11218, in favor of, and for the use and benefit of **CONTINENTAL CASUALTY COMPANY**, an Illinois insurance company (“Mortgagee”), having an address at 151 N. Franklin Street, 10th Floor, Chicago, Illinois 60606.

## RECITALS

WHEREAS On July 1, 2016 (the “Original Closing Date”), Mortgagee made a loan to Mortgagor in the original principal amount of \$23,200,000.00 (the “Original Loan”);

WHEREAS The Original Loan was (i) evidenced by that certain Promissory Note, dated as of the Original Closing Date made by Mortgagor in favor of Mortgagee, as amended by that certain Omnibus Amendment dated as of June 28, 2019, by and among Mortgagor, Guarantor and Mortgagee (collectively, the “Prior Note”) and (ii) secured by, among other things, that certain Mortgage, Security Agreement, Fixture Filing, Financing Statement and Assignment of Leases and Rents, dated as of the Original Closing Date, granted by Mortgagor to and for the benefit of Mortgagee, and recorded with the Cook County Register of Deeds, Cook County, Illinois as Document No. 168316067 on July 1, 2016, as amended by that certain First Amendment of Mortgage, Security Agreement, Fixture Filing, Financing Statement and Assignment of Leases and Rents, dated as of June 28, 2019 and recorded with the Cook County Register of Deeds, Cook County, Illinois as Document No. 1918945036 on July 8, 2019 (collectively, the “Prior Mortgage”), covering the Property;

WHEREAS Mortgagor has requested and Mortgagee has agreed to increase the principal amount of the Original Loan by an amount equal to \$1,000,000.00

NOW THEREFORE, in consideration of the premises and other good and valuable consideration, the receipt of which is hereby acknowledged, Mortgagor hereby represents and warrants to and covenants and agrees with Mortgagee as follows:

## ARTICLE 1A.

### AMENDMENT AND RESTATEMENT

**1A.1. Spread Provisions.** The Prior Mortgage and lien thereof is hereby spread to cover those parts of the Property, if any, not already covered by the lien of each of the Prior Mortgage so that the Prior Mortgage and its lien covers the entire Property.

**1A.2. Consolidation.** The Prior Mortgage and its lien thereof is hereby combined, consolidated and spread so that together it shall hereafter constitute in law but one mortgage, a single lien covering the Property and securing the principal sum of TWENTY-FOUR MILLION TWO HUNDRED THOUSAND AND NO/100 DOLLARS (\$24,200,000.00), together with interest thereon and other sums as hereinafter provided (the Prior Mortgage, continued, spread, combined and consolidated and as modified, amended, restated, ratified and confirmed pursuant

# UNOFFICIAL COPY

to the provisions of this agreement hereinafter set forth, are hereinafter collectively included in the definition of "Mortgage" as set forth above).

**1A.3. Prior Note.** Concurrently with the execution of this Mortgage, (i) Mortgagor is consolidating, amending and restating the Prior Note, pursuant to that certain Amended and Restated Promissory Note of even date herewith made by Mortgagor in favor of Mortgagee (the "Amended and Restated Note"), in the principal sum of \$24,200,000.00. Such consolidation, amendment and restatement of the Prior Note shall not be deemed, under any circumstances, an extinguishment, novation or cancellation of the indebtedness evidenced by the Prior Note or the Amended and Restated Note or the creation or substitution of new indebtedness, it being agreed that the Note shall merely be evidence of the indebtedness theretofore evidenced by the Prior Note as consolidated by the Amended and Restated Note. All debts evidenced by the Prior Note are combined and consolidated by the Note to constitute one joint indebtedness in the principal sum of \$24,200,000.00 together with interest thereon. The manner and time for payment and the other terms and provisions of the Prior Note are modified, amended, restated and supplanted in their entirety by the Note.

**1A.4. Amendment of Prior Mortgage.** The terms, covenants and provisions of the Prior Mortgage are hereby modified, amended and restated in their entirety so that henceforth the terms, conditions and provisions of the Prior Mortgage shall read the same as set forth in this Mortgage, and the Prior Mortgage, as so modified, amended and restated in its entirety, is hereby ratified and confirmed in all respects by Mortgagor. The Secured Obligations (as hereinafter defined) shall be secured by this Mortgage.

**1A.5. Recording and Taxes.** Mortgagor shall promptly cause this Mortgage to be filed, registered or recorded in such manner and in such places as may be required by any present or future Legal Requirements in order to publish notice of and to fully protect the lien of this Mortgage upon, and the interest of Mortgagee in, the Property. Mortgagor shall pay all filing, registrations and recording fees, and all expenses incident to the preparation, execution and acknowledgment of this Mortgage, and all federal, state, county and municipal taxes, duties, imposts, assessments and charges arising out of or in connection with the filing, registration, recording, execution and delivery of this Mortgage and Mortgagor shall hold harmless and indemnify Mortgagee against any liability incurred by reason of the imposition of any tax on the issuances, making, filing, registration or recording of this Mortgage.

**1A.6. No Offsets, Counterclaims, etc.** Mortgagor represents, warrants and covenants that there are no offsets, counterclaims or defenses against the Secured Obligations, this Mortgage or the Note, that the Secured Obligations constitute the valid and binding obligations of Mortgagor and that Mortgagor (and the undersigned representative of Mortgagor, if any) has full power, authority and legal right to execute this Mortgage and to keep and observe all of the terms of this Mortgage on Mortgagor's part to be observed or performed. Mortgagor hereby waives any and all claims in respect of the Prior Mortgage.

## ARTICLE 1

### PARTIES, PROPERTY, AND DEFINITIONS

# UNOFFICIAL COPY

The following terms and references shall have the meanings indicated:

**1.1 Access Agreement:** Any reciprocal easement agreement, unilateral easement agreement, access agreement, right of way agreement or similar agreement affecting the Land or the Improvements.

**1.2 Affiliate:** With respect to a specified Person, (a) any Person that, directly or indirectly through one or more intermediaries, Controls, is Controlled by or is under common Control with, the specified Person, (b) any Person that is an officer, director, partner, manager, employee, or trustee of, or serves in a similar capacity with respect to, the specified Person or of which the specified Person is an officer, partner, manager or trustee, or with respect to which the specified Person serves in a similar capacity, (c) any Person that, directly or indirectly, has an ownership interest in the specified Person (except to the extent that the ownership interest of such person consists solely of publicly traded stock), (d) any Person (excluding any entities whose stock is publicly traded) in which the specified Person has an ownership interest, (e) the spouse, issue, sibling, parent or grandparent of the specified Person, (f) Guarantor, if the specified Person is Mortgagor or any Mortgagor Owner Person, (g) Mortgagor, if the specified Person is Guarantor or any Mortgagor Owner Person, (h) any Mortgagor Owner Person, if the specified Person is Mortgagor, Guarantor or any other Mortgagor Owner Person, and (i) any Person that would constitute an Affiliate of any such Person described in clauses (a) through (h) above.

**1.3 Alto Fund II:** Alto Fund II, LLC, a Delaware limited liability company.

**1.4 Anti-Money Laundering Laws:** Has the meaning set forth in Section 4.28 hereof.

**1.5 Anti-Money Laundering Measures:** Has the meaning set forth in Section 4.28 hereof.

**1.6 Appraisal:** An appraisal performed by a Member of the Appraisal Institute and obtained by Mortgagee at the sole cost and expense of Mortgagor, that is prepared by an appraiser selected and engaged by Mortgagee, certified in the state where the Property is located and otherwise satisfactory in form and substance to Mortgagee.

**1.7 Assignment of Leases:** The Amended and Restated Assignment of Leases and Rents of even date herewith executed by Mortgagor for the benefit of Mortgagee, as the same may be modified, amended and/or supplemented from time to time.

**1.8 BSA:** Has the meaning set forth in Section 4.28 hereof.

**1.9 Business Day:** As defined in the Note.

**1.10 Cash Collateral Account:** As defined in the Pledge Agreement.

**1.11 Change in Control Event:** Any event that results in Binyamin Beitel, an individual, no longer Controlling Mortgagor.



# UNOFFICIAL COPY

**1.12 Chattels:** All goods (including, without limitation, all “Goods” as defined in the UCC), fixtures (including, without limitation, all “Fixtures” as defined in the UCC), inventory (including, without limitation, all “Inventory” as defined in the UCC), equipment (including, without limitation, all “Equipment” as defined in the UCC), building and other materials, supplies, and other tangible personal property of every nature (but excluding all chattels, “trade fixtures” and personal property of the tenants under Leases that is not and does not become the property of Mortgagor under the Leases and all personal property leased or licensed by Mortgagor pursuant to equipment leases, license agreements or other agreements with third parties), whether now owned or hereafter acquired by Mortgagor, used, intended for use, or reasonably required in the construction, development, operation or maintenance of the Property, together with all accessions thereto, replacements and substitutions therefor, and proceeds thereof.

**1.13 Collateral:** As defined in Section 2.2 hereof.

**1.14 Contracts:** Any and all agreements entered into by or on behalf of Mortgagor in connection with the use, maintenance, furnishing, equipping, ownership and operation of the Property, including, but not limited to, any and all contracts, licenses, permits, warranties and approvals for and in respect of the Property.

**1.15 Control:** With respect to any Person, either (i) ownership, directly or indirectly, of greater than fifty percent (50%) of the ownership interests in such person or (ii) the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities, by contract or otherwise. This definition is to be construed to apply equally to variations of the word “Control” including, without limitation, “Controlled”, “Controlling” or “Controlled by”.

**1.16 Debt Service Coverage Ratio:** The ratio, as determined by Mortgagee, of (i) Net Operating Income for the Property for the preceding twelve (12) calendar months, to (ii) annual debt service equal to the greater of (a) the actual debt service for the Loan due under the Loan Documents and on all other Indebtedness secured, or to be secured, by a lien on all or any part of the Property and (b) a seven percent (7%) constant over the term of the Loan, where “Net Operating Income” shall mean all gross revenues generated by the Property (excluding loans or contributions to capital), less operating expenses (other than debt service payments due under the Loan Documents), as determined on a cash accounting basis, as of the date of such calculation for the period in question, adjusted, however, so that (A) operating expenses shall be deemed to include (1) a management fee equal to the greater of the actual management fee for the Property or four percent (4%) of gross revenues, and (2) a tenant improvement, leasing commission, and capital improvement reserve equal to \$1.00 per rentable square foot in the case of retail properties, (B) payments of operating expenses, including property taxes and assessments and insurance expenses, are to be spread over the period during which they are payable and shall be adjusted for any known future changes to any such expenses, (C) prepaid rents and other prepaid payments received are to be spread over the periods during which such rents or payments are earned or applicable, (D) security deposits shall not be included as items of income until duly applied or earned, (E) gross revenues shall be based on a lease-in-place analysis that reflects then current Leases in place, as determined by Mortgagee, in its reasonable discretion, in accordance with its standard underwriting criteria, consistently applied, and excluding extraordinary, or one-

# UNOFFICIAL COPY

time items, and (F) any refunds or rebates to operating expenses are to be applied and credited against the applicable operating expenses for the period that such operating expenses were incurred. Debt Service Coverage Ratio shall be calculated on a cash flow basis. As of the date hereof, the Debt Service Coverage Ratio is 1.30 to 1.0.

**1.17 Default:** Any matter that, with the giving of notice, passage of time, or both, would constitute an Event of Default.

**1.18 Default Rate:** The "Default Rate" specified in the Note.

**1.19 Deposit Account:** As defined in the Pledge Agreement.

**1.20 Deposit Account Control Agreement:** The Deposit Account Control Agreement dated as of the Original Closing Date, made by Mortgagor, Depository Bank, and Mortgagee, as the same may be modified, amended and/or supplemented from time to time.

**1.21 Depository Bank:** means Wells Fargo Bank, National Association.

**1.22 Environmental Indemnity Agreement:** The Environmental Indemnity Agreement dated as of the Original Closing Date, made by Mortgagor and Guarantor for the benefit of Mortgagee, as the same may be modified, amended and/or supplemented from time to time.

**1.23 ERISA:** The Employee Retirement Income Security Act of 1974, as amended, together with all rules and regulations issued thereunder.

**1.24 Event of Default:** As defined in Article 6.

**1.25 Excess Termination Fee:** As defined in Section 5.3(h)(ii).

**1.26 First Omnibus Amendment:** The Omnibus Amendment dated as of June 28, 2019, by and among Mortgagor, Guarantor and Mortgagee.

**1.27 Governmental Authority:** (a) the government of (i) the United States of America or any state, county, city or political subdivision thereof, or (ii) any other jurisdiction that Mortgagor, Guarantor or any Mortgagor Control Person (as applicable) conducts all or any portion of its business, or that asserts jurisdiction over any properties of any of the foregoing, or (b) any entity exercising executive, legislative, judicial, regulatory or administrative functions of, or pertaining to, any such government.

**1.28 Gross Revenue:** All payments and other revenues (exclusive, however, of any payments attributable to sales taxes) received by or on behalf of (or paid at the direction of) Mortgagor from all sources related to the ownership or operation of the Property, including, but not limited to, rents, fees, income, receipts, revenues, issues, profits, advances, prepaid rents, lease termination payments, parking fees, interest, security deposits (to the extent that such security deposits are applied to tenant obligations or are no longer subject to being returned to the applicable tenant), business or rental interruption insurance proceeds, operating expense pass-through revenues, direct expense reimbursements, common area maintenance charges,

# UNOFFICIAL COPY

refunds, rebates and reimbursements (other than by Mortgagee) of any Operating Expenses (as defined in the Pledge Agreement), taxes or Capital Improvement Costs (as defined in the Pledge Agreement) related to the Property previously paid (excluding amounts required to be returned to the tenants), payments received by or on behalf of Mortgagor as compensation or as settlement of claims or litigation, and payments under an indemnity or other similar matters with respect to Mortgagor or the Property, in each case, for the relevant period for which the calculation of Gross Revenue is being made.

**1.29 Guarantor:** Binyamin Beitel, an individual, or any replacement Guarantor approved by Mortgagee in accordance with Section 4.32 or Section 5.4(b) hereof.

**1.30 Guaranty Agreement:** The Guaranty Agreement, dated as of the Original Closing Date,, executed by Guarantor for the benefit of Mortgagee as the same may be modified, amended, supplemented or replaced from time to time.

**1.31 Improvements:** Collectively, all buildings, structures and other improvements now or hereafter located on the Land.

**1.32 Indebtedness:** As of the date of any determination thereof, (i) all indebtedness for borrowed money or purchase money financing, (ii) all indebtedness evidenced by a note, bond, debenture or similar instrument, (iii) the face amount of all letters of credit and, without duplication, all unreimbursed amounts drawn thereunder, (iv) all payment obligations under any interest rate protection agreements and currency swaps and similar agreements (if any), and (v) all other indebtedness.

**1.33 Indemnified Parties:** As defined in Section 4.30 hereof.

**1.34 Insurance Agreement:** The Agreement Concerning Insurance Requirements of even date herewith executed by Mortgagor for the benefit of Mortgagee, as the same may be modified, amended and/or supplemented from time to time.

**1.35 Intangible Personalty:** The trademarks and trade names and symbols or logos, or any modifications or variations thereof, used in connection with the operation of the Improvements, together with all accounts, deposit accounts, letter of credit rights, investment property, monies in the possession of Mortgagee (including without limitation proceeds from insurance, retainages and deposits for taxes and insurance), Permits, contract rights (including, without limitation, rights to receive insurance proceeds) and general intangibles (whether now owned or hereafter acquired, and including proceeds thereof) relating to or arising from Mortgagor's ownership, use, operation, leasing, or sale of all or any part of the Property, specifically including, but in no way limited to, any air rights or development rights that Mortgagor may have or that Mortgagor may hereafter acquire (excluding, however, any intangible property owned by any tenant under any Lease that is not and does not become the property of Mortgagor under such Lease).

**1.36 Land:** Collectively, the property described on Exhibit A and any land lying between the boundaries of such tract or tracts and the center line of any adjacent street, road, avenue or alley, whether opened or proposed, and any tidelands or filled lands within the

# UNOFFICIAL COPY

boundaries described on Exhibit A, as well as any rights-of-way, easements, Access Agreements and other appurtenances thereto.

**1.37 Late Charges:** As defined in the Note.

**1.38 Lease Certificate:** The Certificate Concerning Leases and Financial Condition of even date herewith made by Mortgagor and Guarantor to Mortgagee concerning, among other things, the Leases and financial condition of Mortgagor and Guarantor.

**1.39 Leases:** Any and all present and future leases, subleases, licenses and other use and occupancy agreements under the terms of which any Person other than Mortgagor has or acquires any right to occupy or use the Property, or any part thereof, excluding utility and other easements that are Permitted Exceptions.

**1.40 Legal Requirements:** All present or future statutes, laws, rules, orders, regulations, ordinances, judgments, decrees and injunctions imposed by any Governmental Authority (including all building, zoning and other land use regulations, all environmental and ecological laws and any requirements regarding access for persons with disabilities) affecting Mortgagor, Guarantor, any Mortgagor Control Person or the Property, and all Permits relating thereto, and all public or private covenants, agreements, restrictions and encumbrances contained in any Property Record Agreements or other instruments affecting the Property or any part thereof or otherwise relating to the ownership, construction, maintenance, use, or operation of the Property.

**1.41 Listing Agent:** As defined in Section 4.23.

**1.42 Listing Agreement:** As defined in Section 4.23.

**1.43 Loan:** The loan evidenced by the Note and secured by this Mortgage.

**1.44 Loan Application:** The "Mortgage Loan Application" between Mortgagee and Mortgagor dated as of December 19, 2019.

**1.45 Loan Documents:** The Note and all of the deeds of trust, mortgages and other instruments, certificates and documents securing the Note or executed and delivered by Mortgagor and/or Guarantor and/or any of their respective Affiliates in connection with the Note, including, without limitation, this Mortgage, the Environmental Indemnity Agreement, the Assignment of Leases, the Lease Certificate, the Guaranty Agreement, the Deposit Account Control Agreement, the Pledge Agreement, the Insurance Agreement, the Partial Release Agreement, the Organizational Certificate, the Subordination of Management Agreement, the Subordination of Listing Agreement, the Reserve Agreement, the First Omnibus Amendment, the Second Omnibus Amendment and each other document (other than the organizational documents of Mortgagor or any of its Affiliates) executed or delivered by Mortgagor and/or Guarantor and/or any of their respective Affiliates in connection with the transaction pursuant to which the Note has been executed and delivered each dated of even date herewith. The term "Loan Documents" also includes all amendments, modifications, supplements, extensions, renewals, and replacements of each document referred to above.

# UNOFFICIAL COPY

**1.46 Loan-to-Value Ratio:** The ratio, as determined by Mortgagee, of the aggregate outstanding principal balance of the Note and all other Indebtedness secured by liens or encumbrances against all or any part of the Property, or against any of the direct or indirect ownership interests in Mortgagor as of the time of determination, to the fair market value of the Property, as such fair market value is determined by Mortgagee, or if required by Mortgagee, by an Appraisal. As of the date hereof, the Loan-to-Value Ratio is seventy-one percent (71%).

**1.47 Management Agreement:** As defined in Section 4.23 hereof.

**1.48 Managing Member:** Washington Park Plaza Manager LLC, a Delaware limited liability company.

**1.49 Maturity Date:** March 1, 2023.

**1.50 Melamud:** Yaniv Melamud, an individual.

**1.51 Minimum Available Liquidity:** The excess, if any, of (A) the market value of assets in the form of cash and other assets that are readily convertible to cash (including, without limitation, cash equivalents, obligations of the United States or any agency or instrumentality thereof that are supported by the full faith and credit of the United States, securities listed and traded on a recognized stock exchange or traded over the counter and listed in the National Association of Securities Dealers Automatic Quotations, certificates of deposit issued by a commercial bank that has net assets greater than \$1,000,000,000.00 and other liquid debt instruments that have a readily ascertainable cash value and are regularly traded in a recognized financial market), over (B) total liens and encumbrances affecting such cash and other assets (including, without limitation, contingent liabilities).

**1.52 Minimum Guarantor Net Worth Requirement:** Guarantor has an aggregate (i) Net Worth of not less than \$30,000,000 and (ii) Minimum Available Liquidity of not less than \$3,000,000.

**1.53 Mortgagee:** The Mortgagee named in the introductory paragraph of this Mortgage, whose legal address is 151 N. Franklin Street, 10th Floor, Chicago, Illinois 60606, together with any future holder of the Note.

**1.54 Mortgagor:** The Mortgagor named in the introductory paragraph of this Mortgage (Taxpayer Identification No. 81-2335100), whose legal address is 1449 37<sup>th</sup> Street, Suite 216, Brooklyn, New York 11218, together with any future owner of the Property or any part thereof or interest therein.

**1.55 Mortgagor Control Persons:** Means (i) Mortgagor; (ii) Guarantor; (iii) Managing Member; (iv) Alto Fund II; (v) following a Change in Control Event that results in Melamud having Control of Mortgagor, (a) Alto Fund II LP, a Delaware limited partnership, (b) Alto Fund II Founders LLC, a Delaware limited liability company, (c) Melamud, (d) intentionally omitted, (e) IRA Fund II, LLC, a Delaware limited liability company, (f) IRA Fund II LP, a Delaware limited partnership, and (g) Alto Fund II GP LLC, a Delaware limited liability company; and (vi) any other Person that Controls, directly or through one or more intermediaries, any of the Persons set forth in the preceding clause (i), (ii), (iii), (iv) or (v) and

# UNOFFICIAL COPY

any Person that is a managing member, manager, general partner or other Person that Controls such Controlling Person or intermediary.

**1.56 Mortgagor Owner Persons:** Means (i) Mortgagor, (ii) Guarantor, (iii) the Other Owner Persons, (iv) any Person that is a Mortgagor Control Person; and (v) any other Person that owns, directly or indirectly, any interest in any Person described in the preceding clauses (i), (ii), (iii) or (iv).

**1.57 Net Operating Income:** All Gross Revenue generated by the Property (excluding loans or contributions to capital), less operating expenses (other than debt service payments due under the Loan Documents), as determined on a cash accounting basis, as of the date of such calculation for the period in question, adjusted, however, so that (A) operating expenses shall be deemed to include (1) a management fee equal to the greater of the actual management fee for the Property or four percent (4%) of Gross Revenue, and (2) a tenant improvement, leasing commission, and capital improvement reserve equal to \$1.00 per rentable square foot, (B) payments of operating expenses, including property taxes and assessments and insurance expenses, are to be spread over the period during which they are payable and shall be adjusted for any known future changes to any such expenses, (C) prepaid rents and other prepaid payments received are to be spread over the periods during which such rents or payments are earned or applicable, (D) security deposits shall not be included as items of income until duly applied or earned, (E) Gross Revenue shall be based on a lease-in-place analysis that reflects then current Leases in place, as determined by Mortgagee, in its sole discretion, in accordance with its standard underwriting criteria, consistently applied, and excluding extraordinary, or one-time items, and (F) any refunds or rebates to operating expenses are to be applied and credited against the applicable operating expenses for the period that such operating expenses were incurred.

**1.58 Net Worth:** The excess, if any, of (A) total assets (excluding the Property or any direct or indirect interest in the property) over (B) total liabilities (including, without limitation, contingent liabilities), in each case as determined in accordance with United States generally accepted accounting principles.

**1.59 Note:** Mortgagor's Amended and Restated Promissory Note of even date herewith from Mortgagor, payable to the order of Mortgagee in the original principal amount of \$24,200,000.00, the last payment under which is due on the Maturity Date, or, if extended by Mortgagee pursuant to its terms, on such extended maturity date unless such due date is accelerated, together with all renewals, extensions and modifications of such promissory note. All terms and provisions of the Note are incorporated by this reference in this Mortgage.

**1.60 OFAC:** As defined in Section 4.27(b) hereof.

**1.61 Organizational Certificate:** The Certificate Concerning Governing Documents of even date herewith made by Mortgagor and Guarantor for the benefit of Mortgagee.

**1.62 Other Owner Persons:** Those parties identified as "Other Owner Persons" in the Organizational Certificate.

# UNOFFICIAL COPY

**1.63 Partial Release Agreement:** The Partial Release of Property Agreement dated as of the Original Closing Date, by and between Mortgagor and Mortgagee, as the same may be amended, modified or supplemented from time to time.

**1.64 Permits:** All permits, licenses, certificates, franchises and authorizations necessary or desirable for the development, ownership, use, occupancy, operation and maintenance of the Property and the conduct of the business of Mortgagor.

**1.65 Permitted Exceptions:** The matters set forth in Exhibit B attached hereto.

**1.66 Permitted Indebtedness:** As defined in Section 5.4(d) hereof.

**1.67 Person:** Any individual, corporation, association, joint stock company, a trust, business trust, partnership, joint venture, limited liability company, real estate investment trust, unincorporated organization, or government or any agency or political subdivision thereof or any other entity (whether incorporated or unincorporated).

**1.68 Pledge Agreement:** The Pledge and Cash Collateral Agreement dated as of the Original Closing Date, by and between Mortgagor, Mortgagee and Servicer, as the same may be amended, modified or supplemented from time to time.

**1.69 Property:** The following, whether now owned or hereafter acquired by Mortgagor:

- (a) the Land;
- (b) all Improvements;
- (c) all Leases and all guaranties thereof and security deposits or other security provided in connection therewith;
- (d) all of the Gross Revenue;
- (e) all (i) water and water rights (whether decreed or undecreed, tributary, nontributary or not nontributary, surface or underground, or appropriated or unappropriated), (ii) ditches and ditch rights, (iii) spring and spring rights, (iv) reservoir and reservoir rights and (v) shares of stock or other interests in, to or under any water, ditch and canal companies and all other evidence of such rights, that are appurtenant to or that have been used in connection with the Land or the Improvements;
- (f) all minerals, crops, timber, trees, shrubs, flowers, and landscaping features now or hereafter located on, under or above the Land;
- (g) all machinery, apparatus, equipment, fittings, fixtures (whether actually or constructively attached, and including, without limitation, all trade, domestic and ornamental fixtures) now or hereafter located in, upon, or under the Land or the Improvements and used or usable in connection with any present or future ownership, operation or maintenance thereof, including, without limitation, all heating, air-conditioning, freezing, lighting, laundry,

# UNOFFICIAL COPY

incinerating and power equipment, engines, pipes, pumps, tanks, motors, conduits, switchboards, plumbing, lifting, cleaning, fire prevention, fire extinguishing, refrigerating, ventilating, cooking, and communications apparatus, boilers, water heaters, ranges, furnaces, and burners, appliances, vacuum cleaning systems, elevators, escalators, shades, awnings, screens, storm doors and windows, stoves, refrigerators, attached cabinets, partitions, ducts and compressors, rugs and carpets, draperies, and all additions thereto and replacements therefor (excluding, however, any of the foregoing to the extent owned by a tenant under a Lease for so long as the same do not become property of Mortgagor under such Lease);

(h) all development rights associated with the Land or the Improvements, whether previously or subsequently transferred to the Land or the Improvements from other real property or now or hereafter susceptible of transfer from the Land or the Improvements to other real property, including, without limitation, all development rights appurtenant to the Land or the Improvements under any applicable zoning and other laws and regulations;

(i) all Permits

(j) all awards and payments, including interest thereon, resulting from the exercise of any right of eminent domain or any other public or private taking of, injury to, or decrease in the value of, any of such Property;

(k) all other and greater rights and interests of every nature in the Land and the Improvements and in the possession or use thereof and income therefrom, whether now owned or subsequently acquired by Mortgagor,

(l) all contract rights with respect to, or that may in any way pertain to the foregoing and all refunds, rebates, security deposits or other expectancy under or from any such account or contract right;

(m) any Access Agreement;

(n) all insurance proceeds in respect of the foregoing Property;

(o) the balance of the property interests associated with the Land and the Improvements to the extent not already included in this definition of "Property"; and

(p) all proceeds of each and every of the foregoing.

**1.70 Property Manager:** As defined in Section 4.23 hereof.

**1.71 Qualified Replacement Guarantor:** Means a Person that (a) owns a direct or indirect ownership interest in Mortgagor, (b) (i) if such Person is an entity, satisfies the Minimum Guarantor Net Worth Requirement, either by itself or together with any other Qualified Replacement Guarantor, and, in either case, the assets that satisfy the Minimum Guarantor Net Worth Requirement are located at all times in the United States of America or (ii) if such Person is an individual, such individual's Net Worth and financial condition is, in Mortgagor's discretion, equivalent to or better than the Guarantor immediately prior to such replacement and based upon the financial statements and other financial information delivered to



# UNOFFICIAL COPY

Mortgagee in respect of the individual that is the Guarantor immediately prior to such replacement, and the assets that satisfy the Net Worth and financial condition are located at all times in the United States of America, (c) has delivered to Lender bankruptcy, judgment, litigation, UCC, tax lien and Patriot Act searches, acceptable to Lender in its sole discretion, (d) complies with the requirements of Section 4.27 of this Mortgage, (e) is not a Prohibited Person, (f) is either (x) an individual that is a citizen of the United States of America, (y) a newly formed entity domiciled in the United States of America, or (z) an entity domiciled in the United States of America, in each case that is acceptable to Lender in its reasonable discretion, and (g) in respect of a Qualified Replacement Guarantor that is an entity, is owned entirely by Persons permitted under all applicable securities laws to acquire and hold their respective interests in such entity.

**1.72 Recording Office:** Means the Cook County Recorder of Deeds, Cook County, Illinois.

**1.73 Rent Roll:** A list of all Leases of space at the Property, whether or not evidenced by written instruments, that includes, without limitation, the following terms for all Leases: (a) name of tenant, (b) rentable square footage, (c) space or unit number, (d) commencement and expiration dates, (e) commencement date of rental payments, (f) monthly base rent, (g) any rent abatements, (h) any rent escalations, (i) all other rent items (including reimbursable expenses), (j) any percentage rent breakpoint, (k) any expense stop, (l) any deposits, (m) any options to purchase, extend, expand, renew and/or terminate, (n) any operating covenant "Go Dark" rights, (o) any co-tenancy clause and (p) any unextinguished tenant concessions. Items listed above that are not contained in Mortgagor's standard form of rent roll may be provided on a separate schedule(s).

**1.74 Reserve Agreement:** The Reserve Agreement (TI/LC) of even date herewith by and among Mortgagor, Mortgagee and Servicer, as the same may be modified, amended and/or supplemented from time to time.

**1.75 Second Omnibus Amendment:** The Second Omnibus Amendment of even date herewith, by and among Mortgagor, Guarantor and Mortgagee.

**1.76 Secured Obligations:** All present and future obligations of Mortgagor to Mortgagee evidenced by or contained in the Note, the Assignment of Leases, the Insurance Agreement, the Guaranty Agreement, the Environmental Indemnity Agreement, this Mortgage, the Subordination of Management Agreement, the Subordination of Listing Agreement, the Lease Certificate, the Pledge Agreement, the Reserve Agreement, the Deposit Account Control Agreement, the Partial Release Agreement, the Organizational Certificate, the First Omnibus Amendment, the Second Omnibus Amendment and all of the other Loan Documents, whether stated in the form of promises, covenants, representations, warranties, conditions, or prohibitions or in any other form whether absolute or contingent, direct or indirect, joint, several or independent, now outstanding or owing or that may hereafter be existing or incurred, arising by operation of law or otherwise, due or to become due under the Loan Documents, or are in any way secured by the Property or any other collateral now or hereafter provided to Mortgagee as collateral for the Loan.

# UNOFFICIAL COPY

**1.77 Servicer:** Means the servicer under the Pledge Agreement and/or a servicing agreement between Servicer and Mortgagee to which Mortgagee may delegate all or any portion of Mortgagee's responsibilities under the Note, this Mortgage and the other Loan Documents.

**1.78 Single-Purpose Entity:** Means a Person, other than an individual, that (a) is formed or organized solely for the purpose of holding, directly, an ownership interest in the Property, or any portion thereof, or an ownership interest in another Person that holds, directly or indirectly, an ownership interest in the Property, or any portion thereof, (b) does not engage in any business other than the ownership, management and operation of the Property or any portion thereof or of any such other Person described in clause (a) above, (c) does not have any (i) assets other than those related to its interest in the Property or any portion thereof or of any such other Person described in clause (a) above or (ii) Indebtedness other than the Loan and any Permitted Indebtedness, (d) does not guarantee or otherwise become liable on or in connection with any obligation of any other Person, (e) does not enter into any contract or agreement with any stockholder, partner, principal, member or Affiliate of such Person or any Affiliate of any such stockholder, partner, principal, member or Affiliate except upon terms and conditions that are intrinsically fair and substantially similar to those that would be available on an arm's length basis with third parties other than an Affiliate, (f) does not incur, create or assume any Indebtedness (except for the Loan and any Permitted Indebtedness), (g) does not make any loans or advances to any other Person (including, without limitation, any Affiliate), (h) does not become insolvent or fail to pay its debts from its assets as the same shall become due, (i) does not fail to conduct and operate its business in all material respects as presently conducted and operated, (j) does not fail to maintain its books and records and bank accounts separately from those of its Affiliates, including, without limitation, its general partners or members, as may be applicable, (k) does not fail at all times to hold itself out to the public as a legal entity separate and apart from any other Person (including, without limitation, any Affiliate (including, without limitation, any stockholder, partner, member, trustee, beneficiary, or other owner of Mortgagor or any Affiliate of any such stockholder, partner, member, trustee, beneficiary, or other owner)), (l) does not fail to file its own tax returns, (m) does not fail to maintain adequate capital for its normal obligations, reasonably foreseeable in a business of its size and character and in light of its contemplated business operations, (n) does not fail to maintain its assets in such a manner that it is not costly or difficult to segregate, ascertain or identify its individual assets from those of any Affiliate or any other Person, (o) does not hold itself out to be responsible for the Indebtedness of any other Person, (p) is subject to and complies with all of the limitations on powers set forth in the organizational documentation (and if a partnership, that of each general partner, and if a limited liability company, that of the managing member (or if there is no managing member, the members)) as in effect on the date hereof, (q) holds all of its assets in its own name, (r) utilizes its own letterhead, invoices and checks, (s) holds title to its interest in the Property in its own name, (t) allocates fairly and reasonably any overhead expenses that are shared with any Affiliate including, without limitation, paying for office space and services performed by any employee of any Affiliate, (u) does not pledge its assets for the benefit of any other Person, and (v) corrects any known misunderstandings regarding its separate identity.

**1.79 SNDA:** Any Subordination, Non-Disturbance and Attornment Agreement entered into in accordance with this Mortgage or any of the other Loan Documents.

# UNOFFICIAL COPY

**1.80 Subordination of Listing Agreement:** Any Subordination of Listing Agreement entered into in accordance with Section 4.23 hereof, as the same may be modified, amended and/or supplemented from time to time.

**1.81 Subordination of Management Agreement:** Any Subordination of Management Agreement entered into in accordance with Section 4.23 hereof, as the same may be modified, amended and/or supplemented from time to time.

**1.82 Termination Fees:** As defined in Section 5.3(h)(i).

**1.83 Threshold Amount:** As defined in Section 4.5(d).

**1.84 Title Company:** means Chicago Title Insurance Company.

**1.85 Triggering Event:** As defined in the Pledge Agreement.

**1.86 UCC:** The Uniform Commercial Code in effect from time to time in the State of Illinois.

## ARTICLE 2

### GRANTING CLAUSE

**2.1 Grant to Mortgagee.** As security for the Secured Obligations, Mortgagor hereby grants, bargains, sells, conveys, mortgages, and warrants unto Mortgagee, the entire right, title, interest and estate of Mortgagor in and to the Property, whether now owned or hereafter acquired; TO HAVE AND TO HOLD the same, together with all and singular the rights, hereditaments, and appurtenances in anywise appertaining or belonging thereto, unto Mortgagee and Mortgagee's successors, substitutes and assigns forever.

**2.2 Security Interest to Mortgagee.** As additional security for the Secured Obligations, Mortgagor hereby grants to Mortgagee a security interest in the Property, the Chattels and the Intangible Personalty. To the extent the Property, the Chattels or the Intangible Personalty may be or have been acquired with funds advanced by Mortgagee under the Loan Documents, this security interest is a purchase money security interest. This Mortgage constitutes a Security Agreement under the UCC with respect to any part of the Property, the Chattels and the Intangible Personalty that may or might now or hereafter be or be deemed to be personal property, fixtures or property other than real estate (all collectively hereinafter called "Collateral"); all of the terms, provisions, conditions and agreements contained in this Mortgage pertain and apply to the Collateral as fully and to the same extent as to any other property comprising the Property, and the following provisions of this Section shall not limit the generality or applicability of any other provisions of this Mortgage but shall be in addition thereto:

(a) The Collateral shall be used by Mortgagor solely for business purposes, and all Collateral (other than the Intangible Personalty) shall be installed upon the real estate comprising part of the Property for Mortgagor's own use or as the fixtures, equipment and furnishings furnished by Mortgagor, as landlord, to tenants of the Property;

# UNOFFICIAL COPY

(b) The Collateral (other than the Intangible Personalty) shall be kept at the real estate comprising a part of the Property, and shall not be removed therefrom without the written consent of Mortgagee (being the Secured Party as that term is used in the UCC); and the Collateral (other than the Intangible Personalty) may be affixed to such real estate, but shall not be affixed to any other real estate;

(c) No financing statement covering any of the Collateral or any proceeds thereof is on file in any public office, and Mortgagor shall, at its cost and expense, upon demand, furnish to Mortgagee such further information and shall execute (if required) and deliver to Mortgagee such financing statements and execute and deliver such other documents in form satisfactory to Mortgagee and shall do all such acts and things as Mortgagee may at any time or from time to time request or as may be necessary or appropriate to establish and maintain a perfected first priority security interest in the Collateral as security for the Secured Obligations, subject to no adverse liens or encumbrances other than the Permitted Exceptions. Mortgagor shall pay the cost of filing the same or filing or recording such financing statements or other documents and this instrument in all public offices wherever filing or recording is deemed by Mortgagee to be necessary or desirable;

(d) The terms and provisions contained in this Section and in Section 7.6 of this Mortgage shall, unless the context otherwise requires, have the meanings and be construed as provided in the UCC; and

(e) This Mortgage constitutes a financing statement under the UCC with respect to the Collateral. As such, this Mortgage covers all items of the Collateral that are or are to become fixtures and the proceeds thereof. Mortgagor covenants and agrees that the filing of this Mortgage in the real estate records of the city or county wherein such fixtures are situated shall also operate from the date of such filing as a fixture filing in accordance with Section 9-501 and 9-502(c) of the UCC. Mortgagor hereby authorizes, within the meaning of section 9-509 of the Uniform Commercial Code, Mortgagee to file such financing statements in such jurisdictions as it deems necessary or desirable to perfect the security interest granted hereunder. Information concerning the security interests created hereby may be obtained at the addresses set forth in Article 1 of this Mortgage. Mortgagor is the "Debtor" and Mortgagee is the "Secured Party" (as those terms are defined and used in the UCC) insofar as this Mortgage constitutes a financing statement.

## ARTICLE 3

### MORTGAGOR'S REPRESENTATIONS AND WARRANTIES

**3.1 Warranty of Title.** Mortgagor represents and warrants to Mortgagee that:

(a) Mortgagor owns and holds good, marketable and indefeasible fee simple title to the Property, and such fee simple title is free and clear of all liens, encumbrances, security interests and other claims whatsoever, subject only to the Permitted Exceptions.

# UNOFFICIAL COPY

(b) Mortgagor is the sole and absolute owner of the Chattels, the Intangible Personalty and the other Collateral, free and clear of all liens, encumbrances, security interests and other claims whatsoever, subject only to the Permitted Exceptions.

(c) This Mortgage is a valid and enforceable first-priority lien and security interest on the Property, the Chattels, the Intangible Personalty and the other Collateral, subject only to the Permitted Exceptions.

(d) Mortgagor, for itself and its successors and assigns, hereby agrees to warrant and forever defend, all and singular of the Property and all liens, security interests and other property interests granted and conveyed pursuant to this Mortgage and the other Loan Documents, against every Person whomsoever lawfully claiming, or to claim, the same or any part thereof.

(e) The representations, warranties and covenants contained in this Section shall survive foreclosure of this Mortgage, and shall inure to the benefit of and be enforceable by any Person that may acquire title to the Property, the Chattels, the Intangible Personalty or the other Collateral (or any portion thereof) pursuant to any such foreclosure.

**3.2 Due Authorization.** If Mortgagor is other than a natural person, then Mortgagor represents and warrants to Mortgagee that each individual who executes this document on behalf of Mortgagor has been duly authorized by all necessary corporate, partnership, limited liability company or other action on the part of Mortgagor. Mortgagor represents and warrants to Mortgagee that Mortgagor has obtained all consents and approvals required in connection with the execution, delivery and performance by Mortgagor of this Mortgage and all other Loan Documents.

**3.3 Other Representations and Warranties.** Mortgagor represents and warrants to Mortgagee as follows:

(a) Mortgagor is (i) a limited liability company, duly formed, validly existing and in good standing under the laws of the State of Delaware, (ii) authorized to transact business and in good standing under the laws of the State of Illinois, (iii) the sole owner of the Property, (iv) a Single Purpose Entity, (v) owned by the Mortgagor Control Persons, as set forth in the Organizational Certificate, and (vi) solely managed and Controlled by Managing Member.

(b) Mortgagor does not receive more than five percent (5%) of its revenue from business conducted in or with countries sanctioned by the U.S. Treasury Department of Foreign Assets Control, except in connection with "Country Sanction Programs" promulgated thereby.

(c) The execution, delivery and performance by each Mortgagor Control Person of the Loan Documents to which such Mortgagor Control Person is a party are within the power and authority of each such Mortgagor Control Person and have been duly authorized by all necessary action and will not violate any provision of the certificate of incorporation, by-laws, certificate of partnership, partnership agreement, certificate of formation, operating agreement, trust agreement or other organizational documents of any such Mortgagor Control Person, all such documents (as applicable), in form and substance satisfactory to Mortgagee.

# UNOFFICIAL COPY

(d) This Mortgage and the other Loan Documents to which any of the Mortgagor Control Persons are a party will, when delivered hereunder, be valid and binding obligations of each such Mortgagor Control Person enforceable against each such Mortgagor Control Person in accordance with their respective terms, except as limited by equitable principles and bankruptcy, insolvency and similar laws affecting creditors' rights.

(e) The execution, delivery and performance by the Mortgagor Control Persons of the Loan Documents to which any of the Mortgagor Control Persons are a party will not contravene any contractual or other restriction binding on or affecting such Mortgagor Control Persons and will not result in or require the creation of any lien, security interest, other charge or encumbrance (other than pursuant hereto) upon or with respect to any of its or their respective properties.

(f) The execution, delivery and performance by the Mortgagor Control Persons of the Loan Documents to which any of the Mortgagor Control Persons are a party do not contravene any applicable law or regulation.

(g) No authorization, approval, consent or other action by, and no notice to or filing with, any court, Governmental Authority or regulatory body is required for the due execution, delivery and performance by the Mortgagor Control Persons of any of the Loan Documents or the effectiveness of any assignment of any of the Mortgagor Control Persons rights and interests of any kind to Mortgagee.

(h) No part of the Property, the Chattels, the Intangible Personalty or other Collateral is in the hands of a receiver, no application for a receiver is pending with respect to any portion of the Property, the Chattels, the Intangible Personalty or other Collateral, and no part of the Property, the Chattels, the Intangible Personalty or other Collateral is subject to any foreclosure or similar proceeding.

(i) None of the Mortgagor Control Persons has made any assignment for the benefit of creditors, nor has any of the Mortgagor Control Persons filed or had filed against it, any petition in bankruptcy.

(j) There is no pending or threatened, litigation, action, proceeding or investigation, including, without limitation, any condemnation proceeding, against any of the Mortgagor Control Persons or the Property before any court, governmental or quasi-governmental, arbitrator or other authority.

(k) Each of the Mortgagor Control Persons is a "non-foreign person" within the meaning of Sections 1445 and 7701 of the United States Internal Revenue Code of 1986, as amended, and the regulations issued thereunder.

(l) Access to and egress from the Property to a public street are available and are provided by public streets, and Mortgagor has no actual knowledge of any federal, state, county, municipal or other governmental plans to change the highway or road system in the vicinity of the Property or to restrict or change access from any such public street, highway or road to the Property.

# UNOFFICIAL COPY

(m) All public utility services necessary for the operation of the Property and the Improvements for their intended purposes are available at the boundaries of the Land, including, but not limited to, water supply, storm and sanitary sewer facilities, natural gas, electric and telephone facilities, cable television facilities and high speed internet access facilities.

(n) The Property is located in zoning districts designated B-4 PUD – Shopping Center District – Planned Unit Development by Homewood Village, Illinois. Such designation permits the development, use, operation and maintenance of the Property as it is currently operated as a permitted, and not as a non-conforming use. The Property complies in all material respects with all Legal Requirements.

(o) There are no special or other assessments for public improvements or otherwise now affecting the Property, nor does Mortgagor know of any pending or threatened special assessments affecting the Property or any contemplated improvements affecting the Property that may result in special assessments. There are no tax abatements or exceptions affecting the Property. There are no license fees or similar charges required in respect to any filled land or in respect of any tideland, wetland or other bodies of water.

(p) Each of the Mortgagor Control Persons has filed or has obtained extensions to file all tax returns that are required to be filed by it, and has paid all taxes as shown on such returns or on any assessment received pertaining to the Property.

(q) Mortgagor has not received (i) any written notice from any governmental body having jurisdiction over the Property as to any violation of any Legal Requirements, except as disclosed in Title Commitment No. RAIL-36017A issued by the Title Company, or (ii) any written notice from any insurance company or inspection or rating bureau setting forth any requirements as a condition to the continuation of any insurance coverage on or with respect to the Property or the continuation thereof at premium rates existing at present, that, in either case, has not been remedied or satisfied.

(r) None of the Mortgagor Control Persons is in default, in any manner that would adversely affect such Mortgagor Control Person's properties, assets, operations or condition (financial or otherwise), in the performance, observance or fulfillment of any of the obligations, covenants or conditions set forth in any agreement or instrument to which such Mortgagor Control Person is a party or by which such Mortgagor Control Person or such Mortgagor Control Person's properties, assets or revenues are bound.

(s) Except to the extent disclosed to Mortgagee in the Lease Certificate, there are no occupancy rights (written or oral), Leases or tenancies presently affecting any part of the Property. The Lease Certificate, including the Rent Roll attached thereto, contains a true, correct and complete description in all material respects of all Leases presently affecting the Property. No written or oral agreements or understandings, actually known to Mortgagor after due inquiry, exist between Mortgagor and the tenants under the Leases described in the Lease Certificate that grant such tenants any rights other than those described in the Lease Certificate or that are in any way inconsistent with the rights described in the Lease Certificate.

# UNOFFICIAL COPY

(t) There are no purchase options, purchase contracts or other similar purchase or sale agreements of any type (written or oral) presently affecting any part of the Property, except to the extent disclosed in the Lease Certificate.

(u) There exists no brokerage agreement with respect to any part of the Property, except to the extent disclosed in the Lease Certificate.

(v) Except to the extent disclosed to Mortgagee in the Lease Certificate, (i) there are no Contracts presently affecting the Property having a term in excess of one hundred eighty (180) days or not terminable by Mortgagor (without penalty) on thirty (30) days' notice, (ii) Mortgagor has heretofore delivered to Mortgagee true, correct and complete copies of each of the Contracts together with all amendments thereto, (iii) Mortgagor is not in default beyond any applicable notice and/or cure period of any obligations under any of the Contracts and (iv) the Contracts represent the complete agreement between Mortgagor and such other parties as to the services to be performed or materials to be provided thereunder and the compensation to be paid for such services or materials, as applicable, and except as otherwise disclosed herein, such other parties possess no unsatisfied claims against Mortgagor.

(w) Mortgagor has obtained all Permits necessary for the operation, use, ownership, development, occupancy and maintenance of the Property for its current use and occupancy and the use and occupancy as set forth under the Leases. None of the Permits has been suspended or revoked, and all of the Permits are in full force and effect, all amounts due and payable by Mortgagor in respect of such Permits have been paid and Mortgagor has made or will make application for renewals of any of the Permits prior to the expiration thereof. Mortgagor has not received any written notice of default or notice terminating, or threatening to terminate, any such Permit.

(x) All insurance policies held by Mortgagor relating to or affecting the Property are in full force and effect and shall remain in full force and effect until all Secured Obligations are satisfied. All premiums due and payable by Mortgagor in respect of such insurance policies have been paid. Mortgagor has not received any written notice of default or notice terminating or threatening to terminate any such insurance policies prior to the expiration thereof. Mortgagor has made or will make application for renewals of any of such insurance policies prior to the expiration thereof.

(y) Mortgagor currently complies with, or is not subject to, ERISA. Neither the making of the loan evidenced by the Note and secured by this Mortgage nor the exercise by Mortgagee of any of its rights under the Loan Documents constitutes or will constitute a non-exempt, prohibited transaction under ERISA.

(z) The Access Agreements, if any, are in full force and effect and there are no defaults thereunder by Mortgagor or any other party and no conditions which with the passage of time and/or notice would constitute defaults thereunder. All amounts due and payable by Mortgagor under any Access Agreement have been paid.

(aa) Mortgagor is not insolvent and the obligations of Mortgagor set forth in this Mortgage and the other Loan Documents will not render Mortgagor insolvent. Mortgagor



# UNOFFICIAL COPY

has no indebtedness other than Permitted Indebtedness and any liabilities created pursuant to this Mortgage and the other Loan Documents.

(bb) As of the date hereof, none of the Mortgagor Control Persons has any offsets, claims, counterclaims or defenses against Mortgagee or any of the Secured Obligations, and any such offsets, claims, counterclaims or defenses are hereby waived.

(cc) Mortgagor is not a party to, and the Property is not subject to, any collective bargaining agreements or similar labor agreements.

(dd) No portion of any space located at the Property is subject to any Lease that permits, or is otherwise used or occupied for or in connection with, any marijuana or cannabis related use, dispensary or business, whether or not marijuana and/or cannabis is a dominant or incidental use or element of such business or space and whether or not such use is legal or permissible under any Governmental Authority.

**3.4 Continuing Effect.** Mortgagor shall be liable to Mortgagee for any damage suffered by Mortgagee if any of the foregoing representations and warranties are inaccurate as of the date hereof, regardless of when such inaccuracy may be discovered by, or result in harm to, Mortgagee. Mortgagor further represents and warrants that the foregoing representations and warranties, as well as all other representations and warranties of Mortgagor to Mortgagee relative to the Loan Documents, shall remain true and correct during the term of the Note and until the repayment of the Secured Obligations and shall survive termination of this Mortgage.

## ARTICLE 4

### MORTGAGOR'S AFFIRMATIVE COVENANTS

**4.1 Payment of Note.** Mortgagor shall pay all principal, interest, and other sums payable under the Note or the other Loan Documents on the date when such payments are due, without notice or demand.

**4.2 Performance of Other Obligations.** Mortgagor shall promptly and strictly perform and comply with all other covenants, conditions and prohibitions required of Mortgagor pursuant to and in accordance with the terms and provisions as set forth in the Loan Documents.

**4.3 Other Encumbrances.** Mortgagor shall promptly and strictly perform and comply with all covenants, conditions and prohibitions required of Mortgagor in connection with any Access Agreement and any other encumbrance affecting the Property, the Chattels, the Intangible Personalty or the other Collateral or any part thereof, or any interest therein, regardless of whether such other encumbrance is superior or subordinate to the lien hereof.

#### **4.4 Payment of Taxes.**

(a) Property Taxes. Unless Mortgagor is depositing money into escrow pursuant to Section 4.4(b) hereof, Mortgagor shall (i) pay, before delinquency and before the imposition of any penalty or interest, all taxes and assessments, general or special, that may be levied or imposed at any time against the Property, the Chattels, the Intangible Personalty or the

# UNOFFICIAL COPY

other Collateral, (ii) within ten (10) days after each payment of any such tax or assessment, Mortgagor shall deliver to Mortgagee, without notice or demand, an official receipt for such payment. At Mortgagee's option, Mortgagee may retain the services of a firm to monitor the payment of all taxes and assessments relating to the Property, the cost of which shall be borne by Mortgagor. Mortgagor shall provide Mortgagee with satisfactory evidence of the payment of all such taxes and assessments, general or special, that may be levied or imposed at any time against Mortgagor's interest and estate in the Property, the Chattels, the Intangible Personalty or the other Collateral not later than the date that is ten (10) days following the date of any such payment.

(b) Deposit for Taxes. Mortgagor shall deposit with Mortgagee an amount equal to 1/12th of the amount that Mortgagee estimates will be required to make the next annual payment of taxes, assessments and similar governmental charges referred to in this Section, multiplied by the number of whole or partial months that have elapsed since the date that is one month prior to the most recent due date for such taxes, assessments and similar governmental charges. Thereafter, with each monthly payment due and payable under the Note, Mortgagor shall deposit with Mortgagee an amount equal to 1/12th of the amount that Mortgagee estimates will be required to pay the next annual payment of taxes, assessments and similar governmental charges referred to in this Section. The purpose of these provisions is to provide Mortgagee with sufficient funds on hand for Mortgagee or Servicer to pay all such taxes, assessments and other governmental charges thirty (30) days prior to the date that any such taxes, assessments and other governmental charges become past due. If Mortgagee, in Mortgagee's sole discretion, determines that the funds deposited with Mortgagee hereunder are, or will be, insufficient to pay such taxes, assessments or any other governmental charges, Mortgagor shall, upon demand, pay such additional sums as Mortgagee shall determine necessary to pay such taxes, assessments and any other governmental charges and shall pay any increased monthly charges requested by Mortgagee. Provided no Event of Default exists, Mortgagee will apply the amounts so deposited with Mortgagee to the payment of such taxes, assessments, and other charges when due, but in no event will Mortgagee be liable for any interest on any amount so deposited, and any amount so deposited may be held and commingled with Mortgagee's own funds.

(c) Intangible Taxes. If any tax, assessment, or similar charge is imposed against the Note, Mortgagee or any interest of Mortgagee in any real or personal property encumbered hereby, Mortgagor shall pay such tax, assessment or other charge before delinquency (with interest and penalties, if any) and shall indemnify Mortgagee against all loss, expense or diminution of income in connection with any such tax, assessment or other charge. In the event Mortgagor is unable to do so, either for economic reasons or because the legal provisions or decisions creating such tax, assessment or charge forbid Mortgagor from doing so, then the Note will, at Mortgagee's option, become due and payable in full upon thirty (30) days' notice to Mortgagee.

(d) Right to Contest. Notwithstanding any other provision of this Section, Mortgagor shall not be deemed to be in Default solely by reason of Mortgagor's failure to pay any tax, assessment or similar governmental charge so long as, in Mortgagee's judgment, each of the following conditions is satisfied:

# UNOFFICIAL COPY

(i) Mortgagor is engaged in, and diligently pursuing in good faith, administrative or judicial proceedings appropriate to contest the validity or amount of such tax, assessment or similar governmental charge;

(ii) Mortgagor's payment of such tax, assessment or similar governmental charge would necessarily and materially prejudice Mortgagor's prospects for success in such proceedings;

(iii) Nonpayment of such tax, assessment or similar governmental charge will not result in the loss or forfeiture or encumbrance of any real or personal property encumbered hereby or any interest of Mortgagee therein; and

(iv) Mortgagor deposits with Mortgagee, as security for such payment that may ultimately be required, an amount equal to the amount of the disputed tax, assessment or similar governmental charge plus the interest, penalties, advertising charges, and other costs that Mortgagee estimates are likely to become payable if Mortgagor's contest is unsuccessful. For the avoidance of doubt, the funds required to be deposited with Mortgagee under this clause (iv) shall be in addition to all taxes, assessments and other similar governmental charges that are not being contested and that are subject to the provisions of Section 4.4(b) hereof.

If Mortgagee determines that any one or more of the foregoing conditions is not satisfied or is no longer satisfied, Mortgagor shall pay the tax, assessment or charge in question, together with any interest and penalties thereon, not later than the date that is ten (10) days following the date that Mortgagee provides written notice of such determination.

## 4.5 Maintenance of Insurance.

(a) Coverages Required. Mortgagor shall maintain or cause to be maintained, with financially sound and reputable insurance companies or associations satisfactory to Mortgagee and its counsel, all insurance required under the terms of the Insurance Agreement, and shall comply with each and every covenant and agreement contained in such Insurance Agreement pursuant to, and in accordance with, the terms and provisions thereof. Mortgagor shall provide Mortgagee with satisfactory evidence of the payment of the premiums of all such insurance no later than the date that is five (5) Business Days following the date that any such payment is made.

(b) Renewal Policies. Not less than thirty (30) days prior to the expiration date of each insurance policy required pursuant to the Insurance Agreement, Mortgagor shall deliver to Mortgagee either an appropriate renewal policy (or a certified copy thereof or a certificate of insurance and the other documents required to be delivered under the Insurance Agreement) that satisfies the requirements of the Insurance Agreement, together with evidence satisfactory to Mortgagee and its counsel that the applicable premium has been prepaid.

(c) Deposit for Premiums. Mortgagor shall deposit with Mortgagee an amount equal to 1/12th of the amount that Mortgagee estimates will be required to make the next annual payments of the premiums for the policies of insurance referred to in this Section 4.5, multiplied by the number of whole and partial months that have elapsed since the date that is two

# UNOFFICIAL COPY

(2) months prior to the most recent policy anniversary date for each such policy. With each monthly payment due and payable under the Note, Mortgagor shall deposit an amount equal to 1/12th of the amount that Mortgagee estimates will be required to pay the next required annual premium for each insurance policy referred to in this Section 4.5. The purpose of these provisions is to provide Mortgagee with sufficient funds on hand for Mortgagee or Servicer to pay such premiums thirty (30) days prior to the date that such premiums become past due. If Mortgagee, in Mortgagee's sole discretion, determines that the funds deposited with Mortgagee hereunder are, or will be, insufficient to pay such premiums, then, Mortgagor shall upon demand, pay such additional sums as Mortgagee shall determine as necessary to pay such premiums and shall pay any increased monthly charges requested by Mortgagee. Provided that no Event of Default exists, Mortgagee shall apply the amounts so deposited to the payment of such insurance premiums when due, but in no event will Mortgagee be liable for any interest on any amounts so deposited, and the money so deposited may be held and commingled with Mortgagee's own funds.

(d) Application of Hazard Insurance Proceeds. Mortgagor shall after learning thereof promptly notify Mortgagee of any damage or casualty to all or any portion of the Property, Chattels or other Collateral. Mortgagee may participate in all negotiations and appear and participate in all judicial or arbitration proceedings concerning any insurance proceeds that may be payable as a result of such casualty or damage, and may, in Mortgagee's sole discretion, compromise or settle, in the names of both Mortgagor and Mortgagee, any claim for any such insurance proceeds. Whether or not Mortgagee is involved in any such negotiation or settlement, any such compromise or settlement shall be subject to the prior written consent of Mortgagee, which consent shall not be unreasonably withheld, conditioned or delayed so long as no Default or Event of Default then exists. Any such insurance proceeds shall be paid directly to Mortgagee and shall be applied first to reimburse Mortgagee for all costs and expenses, including, without limitation, attorneys' fees, incurred by Mortgagee in connection with the ascertainment and collection of such insurance proceeds. The balance, if any, of any insurance proceeds received by Mortgagee with respect to an insured damage or casualty shall, in Mortgagee's sole but reasonable discretion, either (i) be retained and applied by Mortgagee toward payment of the Secured Obligations, in such order and manner as Mortgagee deems appropriate, or (ii) be paid over, in whole or in part and subject to such conditions as Mortgagee may reasonably impose, to Mortgagor to pay for repairs or replacements necessitated by the damage or casualty. In the event that all of the Secured Obligations have been performed or are discharged by the application of less than all of such insurance proceeds, then, any remaining proceeds shall be paid over to Mortgagor. Notwithstanding the foregoing provisions of this Section 4.5(d), Mortgagee shall pay over to Mortgagor any such insurance proceeds as provided in clause (ii) of the immediately preceding sentence, provided that, and on the following conditions: (A) there does not exist any Default or Event of Default, (B) Mortgagor demonstrates to the satisfaction of Mortgagee that Mortgagor has the financial ability to pay all principal and interest and any other amounts required to be paid under the Note, and perform all of the other Secured Obligations, during the restoration of the Property from Gross Revenue (including, without limitation, proceeds of rent loss or business interruption insurance) or otherwise, (C) the damage or casualty occurs prior to the date that is six (6) months prior to the Maturity Date and the restoration is capable of being completed prior to the Maturity Date, (D) all insurance proceeds and other funds provided by Mortgagor for such restoration are released under reserve and construction funding arrangements reasonably satisfactory to Mortgagee and its counsel, (E) the repair or restoration will return the

# UNOFFICIAL COPY

Property to substantially the same size, design and utility as existed immediately prior to the damage or casualty, (F) in the event the proceeds of insurance are by themselves insufficient to pay for the restoration (as determined by Mortgagee), Mortgagor shall, prior to the commencement of any restoration work, deposit with Mortgagee not later than the date that is fifteen (15) days following the date that the proceeds of insurance are received by Mortgagee, such additional funds as are necessary to complete the restoration as reasonably determined by Mortgagee; (G) Mortgagor undertakes and covenants and agrees (in writing) with Mortgagee to fund any and all deficiencies, and in fact funds any and all such deficiencies, not later than the date that is fifteen (15) days following the date that Mortgagor is notified of such deficiency and prior to the distribution of any further insurance proceeds, such that at all times the funds held by Mortgagee and remaining to be disbursed for purposes of the restoration shall be sufficient to complete the restoration, (H) the annual income from the Leases that are in existence as of the date hereof or executed in accordance with the provisions of this Mortgage that will survive the restoration or repair of the Property produce a Debt Service Coverage Ratio of not less than 1.20 to 1.0, and Mortgagor demonstrates to Mortgagee's satisfaction that Mortgagor will be able to attain a Debt Service Coverage Ratio of at least 1.30 to 1.0 from Leases that are in existence as of the date hereof or that are executed following the date hereof in accordance with the provisions of this Mortgage within six (6) months following completion of the restoration and (I) if any site plan amendment, variance, special use permit or other similar special approval or consent is required from any government authority or any other Person for such repair or restoration, Mortgagor shall obtain and deliver to Mortgagee such site plan amendment, variance, special use permit or other similar special approval or consent not later than the date that is one hundred eighty (180) days following the date of such casualty or damage (provided, however, that such one hundred eighty (180) day time period shall in all respects be subject to the foregoing provisions of this Section 4.5(d) and shall not extend or otherwise modify any time periods in such foregoing provisions). Mortgagee may, prior to the application of insurance proceeds, commingle such insurance proceeds with Mortgagee's own funds and otherwise act with regard to such proceeds as Mortgagee may determine in Mortgagee's sole discretion. Notwithstanding the foregoing provisions of this Section 4.5, in the event the insurance proceeds from any such casualty are less than the lesser of (a) five percent (5%) of the then-current principal balance of the Loan and (b) \$1,000,000 (the "Threshold Amount"), then such insurance proceeds received by Mortgagee with respect to the applicable damage or casualty shall be paid over, in whole or in part and subject to such conditions as Mortgagee may impose, to Mortgagor to pay for repairs or replacements necessitated by the damage or casualty (provided, however, that if all of the Secured Obligations have been performed or are discharged by the application of less than all of such insurance proceeds, then any remaining proceeds will be paid over to Mortgagor) if (i) no Default or Event of Default then exists (ii) the proceeds received by Mortgagee (together with any other funds delivered by Mortgagor to Mortgagee for such purpose) shall be sufficient, in Mortgagee's reasonable judgment, to pay for any restoration necessitated by the casualty, (iii) the cost of such restoration shall not exceed the Threshold Amount, (iv) the damage or casualty occurs prior to the date that is six (6) months prior to the Maturity Date and the restoration is capable of being completed, in Mortgagee's reasonable judgment, at least ninety (90) days prior to the Maturity Date and (v) Mortgagor shall undertake and complete the repair or restoration of the Property so as to return the Property to substantially the same size, design and utility as existed immediately prior to the damage or casualty and shall

# UNOFFICIAL COPY

fund any deficiency in the event such proceeds are insufficient to complete such repair or restoration.

Mortgagee will have no obligation to see to the proper application of any insurance proceeds paid over to Mortgagor, nor will any such proceeds received by Mortgagee bear interest or be subject to any other charge for the benefit of Mortgagor. If such proceeds are deposited with Mortgagee, Mortgagee may, prior to the application of such proceeds, commingle such insurance proceeds with Mortgagee's own funds and otherwise act with regard to such insurance proceeds as Mortgagee may determine in Mortgagee's sole discretion.

(e) Successor's Rights. Any Person that acquires title to the Property or the Chattels upon foreclosure or deed in lieu of foreclosure hereunder will succeed to all of Mortgagor's rights under all policies of insurance maintained pursuant to this Section.

**4.6 Maintenance and Repair of Property, Chattels and the Other Collateral; Contracts.** Mortgagor shall at all times maintain the Property, the Chattels and the other Collateral in good condition and repair, shall diligently prosecute the completion of any building or other improvement that is at any time in the process of construction on the Property, and shall promptly repair, restore, replace, or rebuild any part of the Property, the Chattels or the other Collateral that may be affected by any casualty or any public or private taking or injury to the Property, the Chattels or the other Collateral. All costs and expenses arising out of the foregoing shall be paid by Mortgagor whether or not the proceeds of any insurance or eminent domain shall be sufficient therefor. Mortgagor shall maintain access to and egress from the Property by public streets. Subject to the provisions of Section 4.12(b), Mortgagor shall comply with (or cause compliance with) all statutes, ordinances, and other governmental or quasi-governmental requirements and private covenants relating to the ownership, construction, maintenance, use, or operation of the Property, including but not limited to, any zoning requirements, any environmental or ecological requirements, any requirements pursuant to, and in accordance with, any Access Agreements and any requirements regarding access for persons with disabilities. Mortgagee and any Person authorized by Mortgagee may, upon prior notice to Mortgagor but without unreasonable disruption to the business of Mortgagor or tenants under Leases, enter and inspect the Property at all reasonable times, and may inspect the Chattels and/or the other Collateral, wherever located, at all reasonable times. Mortgagor shall take all actions necessary or required under the Leases to effect the provisions of the immediately preceding sentence. Mortgagor shall maintain all public utility services (including, without limitation, water supply, storm and sanitary sewer facilities, and natural gas, electric, telephone, cable television and high speed Internet access facilities) necessary for the operation and maintenance of the Property (including, without limitation, improvements constituting part of the Property) for its intended purposes, and, without limiting such maintenance requirement, shall maintain such services at the boundaries of the Land. Mortgagor shall comply with (or cause compliance with) all requirements of any insurance company or inspection or rating bureau in respect of the Property, including, without limitation, any requirements for the continuation of any insurance coverage or the continuation thereof at premium rates. Mortgagor shall timely pay and perform each of Mortgagor's obligations under or in connection with the Contracts. Mortgagor shall not, without Mortgagee's prior written consent, (i) enter into any Contract with an affiliate of Mortgagor, Guarantor or any other Mortgagor Owner Person and/or (ii) enter into any Contract that has a term in excess of one hundred eighty (180) days unless such Contract is terminable by

# UNOFFICIAL COPY

Mortgagor (without penalty) on thirty (30) days' notice. Neither Mortgagor nor any Mortgagor Control Person shall enter into any contract or agreement that contravenes any of the Loan Documents or that provides or has the effect that the performance of the Loan Documents constitutes a default under such contract or agreement or results in the creation of any lien, security interest, other charge or encumbrance upon or with respect to the Property, the Chattels, the Intangible Personalty or other Collateral. Mortgagor shall perform, observe and fulfill, in all material respects, and shall cause Guarantor to perform, observe and fulfill, in all material respects, all of the obligations, covenants and conditions set forth in any agreement or instrument to which Mortgagor or Guarantor, as the case may be, or any of the properties, assets or revenues of Mortgagor or Guarantor, as the case may be, are bound, if the failure to perform, observe or fulfill any such obligation, covenant or condition would materially and adversely affect the properties, assets, operations or condition (financial or otherwise) of Mortgagor or Guarantor, as the case may be, or the ability of any party to the Loan Documents to perform such party's obligations under the Loan Documents.

**4.7 Leases.** Mortgagor shall timely pay and perform each of the obligations of Mortgagor under or in connection with the Leases, and shall otherwise pay such sums and take such action as shall be necessary or required in order to maintain each of the Leases in full force and effect in accordance with its terms. Mortgagor shall within five (5) Business Days following receipt thereof, furnish to Mortgagee copies of (a) any notices given to Mortgagor by the lessee under any Lease, (i) alleging the default by Mortgagor in the timely payment or performance of its obligations under such Lease, (ii) purporting to terminate or cancel any Lease or inform Mortgagee that such tenant intends to vacate or otherwise abandon all or any portion of the Property covered by such Lease prior to its stated expiration date, or (iii) (A) requiring or demanding the expenditure of any sum by Mortgagor, (B) demanding the taking of any action by Mortgagor, or (C) requesting any consent or approval of Mortgagor, in each case unless such expenditure, action, or consent is expressly provided for pursuant to the terms and conditions of such Lease and (b) any subsequent communications related thereto relevant to the provisions of Section 4.7(a). Mortgagor agrees that Mortgagee, in Mortgagee's sole discretion during the continuance of a Default or Event of Default, may advance any sum or take any action that Mortgagee believes is necessary or required to maintain the Leases in full force and effect, and all such sums advanced by Mortgagee, together with all costs and expenses incurred by Mortgagee in connection with action taken by Mortgagee pursuant to this Section 4.7, shall be due and payable by Mortgagor to Mortgagee not later than the date that is ten (10) days following the date of demand thereof, shall bear interest from the date such sums are advanced by Mortgagee until paid at the Default Rate, and shall be secured by this Mortgage.

**4.8 Eminent Domain; Private Damage.** If all or any part of the Property is threatened to be taken or damaged by eminent domain or any other public or private action, Mortgagor shall promptly, following actual notice thereof, provide Mortgagee written notice of the time and place of all meetings, hearings, trials, and other proceedings relating to such action. Mortgagee may participate in all negotiations and appear and participate in all judicial or arbitration proceedings concerning any award or payment that may be due as a result of such taking or damage, and may, in Mortgagee's sole discretion, compromise or settle, in the names of both Mortgagor and Mortgagee, any claim for any such award or payment. Whether or not Mortgagee is involved in any such negotiation or settlement, any such compromise or settlement shall be subject to the prior written consent of Mortgagee, which consent shall not be

# UNOFFICIAL COPY

unreasonably withheld, conditioned or delayed so long as no Default or Event of Default then exists. Any such award or payment shall be paid directly to Mortgagee and shall be applied first to reimburse Mortgagee for all costs and expenses, including, without limitation, attorneys' fees, incurred by Mortgagee in connection with the ascertainment and collection of such award or payment. The balance, if any, of such award or payment received by Mortgagee with respect to a condemnation shall, in Mortgagee's sole discretion, either be (i) retained and applied by Mortgagee toward payment of the Secured Obligations, in such order and manner as Mortgagee deems appropriate, or (ii) paid over, in whole or in part and subject to such conditions as Mortgagee may impose, to Mortgagor for the purpose of restoring, repairing, or rebuilding any part of the Property affected by the taking or damage. Notwithstanding the foregoing provisions of this Section 4.8, Mortgagee shall pay over to Mortgagor any such award or payment as provided in clause (ii) of the immediately preceding sentence, provided that, and on the following conditions: (A) no Default or Event of Default shall have occurred and be continuing, (B) Mortgagor demonstrates to the satisfaction of Mortgagee that Mortgagor has the financial ability to pay all principal and interest required under the Note, and perform all of the other Secured Obligations, during the restoration of the Property from Gross Revenue (including, without limitation, the proceeds of rent loss or business interruption insurance) or otherwise, (C) the damage occurs prior to the date that is six (6) months prior to the Maturity Date and the restoration is capable of being completed prior to the stated Maturity Date, (D) any condemnation award and other funds provided by Mortgagor for such restoration are released under reserve and construction funding arrangements reasonably satisfactory to Mortgagee and its counsel, (E) the repair or restoration will return the Property to substantially the same size, design and utility as existed immediately prior to the damage, (F) in the event the condemnation award is by itself insufficient to pay for the restoration (as reasonably determined by Mortgagee), Mortgagor shall, prior to the commencement of any restoration work, deposit with Mortgagee not later than the date that is fifteen (15) days following the date that the condemnation award is received by Mortgagee such additional funds as are necessary to complete the restoration as reasonably determined by Mortgagee; (G) Mortgagor undertakes and covenants and agrees (in writing) with Mortgagee to fund any and all deficiencies, and in fact actually funds any and all such deficiencies, not later than the date that is fifteen (15) days following the date that Mortgagor is notified of such deficiency and prior to the distribution of any further portion of the condemnation award, so that at all times the funds held by Mortgagee and remaining to be disbursed for purposes of the restoration shall be sufficient to complete the restoration; (H) the annual income from the Leases that are in existence as of the date hereof or executed in accordance with the provisions of this Mortgage that will survive the restoration or repair of the Property will produce a Debt Service Coverage Ratio of not less than 1.20 to 1.0, and mortgagor demonstrates to Mortgagee's satisfaction that Mortgagor shall be able to attain a Debt Service Coverage Ratio of at least 1.30 to 1.0 from income from the Leases that are in existence as of the date hereof or executed in accordance with the provisions of this Mortgage within six (6) months after completion of the restoration; and (I) if any site plan amendment, variance, special use permit or other similar special approval or consent is required from any government authority or any other Person for such repair or restoration, Mortgagor shall obtain and deliver to Mortgagee such site plan amendment, variance, special use permit or other similar special approval or consent not later than the date that is one hundred eighty (180) days following the date of such taking or condemnation (provided, however, that such one hundred eighty (180) day time period shall in all respects be subject to the foregoing provisions of this Section 4.8 and shall not extend



# UNOFFICIAL COPY

or otherwise modify any time periods in such foregoing provisions). Mortgagee may, prior to the application of any condemnation award, commingle such condemnation award with Mortgagee's own funds and otherwise act with regard to such award as Mortgagee may determine in Mortgagee's sole discretion. If this Mortgage has been foreclosed prior to Mortgagee's receipt of such award or payment, Mortgagee may nonetheless retain such award or payment to the extent required to reimburse Mortgagee for all costs and expenses, including attorneys' fees, incurred in connection therewith, and to discharge any deficiency remaining with respect to the Secured Obligations. Notwithstanding the foregoing provisions of this Section 4.8, in the event that the award or payment does not exceed the Threshold Amount, then such award or payment received by Mortgagor with respect to the applicable condemnation shall be paid over, in whole or in part and subject to such conditions as Mortgagee may impose, to Mortgagor for the purpose of restoring, repairing or rebuilding any part of the applicable Property affected by the taking or damage if (i) no Default or Event of Default then exists, and (ii) the award or payment received by Mortgagee (together with any other funds delivered by Mortgagor to Mortgagee for such purpose) shall be sufficient, in Mortgagee's reasonable judgment, to pay for any restoration, repair or rebuilding necessitated by the condemnation, and (iii) the cost of such restoration, repair or rebuilding shall not exceed the Threshold Amount, and (iv) the condemnation occurs prior to the last six (6) months of the term of the Loan and the restoration, repair or rebuilding is capable of being completed, in Mortgagee's reasonable judgment, at least ninety (90) days prior to the stated maturity date of the Loan and (v) Mortgagor shall undertake and complete the restoration, repair or rebuilding of the Property so as to return the Property to substantially the same size, design and utility as existed immediately prior to the condemnation and shall fund any deficiency in the event such award is insufficient to complete such repair or restoration.

Mortgagee will have no obligation to see to the proper application of any proceeds paid over to Mortgagor, nor will any such proceeds received by Mortgagee bear interest or be subject to any other charge for the benefit of Mortgagor. If such proceeds are deposited with Mortgagee, Mortgagee may, prior to the application of such proceeds, commingle such condemnation award with Mortgagee's own funds and otherwise act with regard to such condemnation award as Mortgagee may determine in Mortgagee's sole discretion.

**4.9 Mechanics' Liens.** Mortgagor shall keep the Property and the Chattels free and clear of all liens and claims of liens by contractors, subcontractors, mechanics, laborers, materialmen, and other such Persons, and Mortgagor shall cause any recorded statement of any such lien to be released of record or bonded off not later than the date that is thirty (30) days following the date of the recording thereof. Notwithstanding the preceding sentence, however, Mortgagor shall not be deemed to be in Default under this Section if and so long as Mortgagor (a) contests in good faith the validity or amount of any asserted lien and diligently prosecutes or defends an action appropriate to obtain a binding determination of the disputed matter and (b) provides Mortgagee with such security as Mortgagee may require to protect Mortgagee against all loss, damage, and expense, including, without limitation, attorneys' fees, that Mortgagee might incur if the asserted lien is determined to be valid (which security may, at the option of Mortgagor, be in the form of a bond over such lien, provided that such bond either removes any such lien of record or prevents the filing or enforcement of any such lien of record).

# UNOFFICIAL COPY

**4.10 Defense of Actions.** Mortgagor shall defend, at Mortgagor's expense, any action, proceeding or claim that affects any property, including, without limitation, the Property, encumbered hereby or any interest of Mortgagee in such property including, without limitation, the Property, or in the Secured Obligations, and Mortgagor shall indemnify and hold Mortgagee harmless from and against all loss, damage, cost, or expense, including attorneys' fees, that Mortgagee may incur in connection therewith.

**4.11 Expenses of Enforcement.** Mortgagor shall pay all costs and expenses, that Mortgagee may incur in connection with any effort or action (whether or not litigation or foreclosure is involved) to enforce or defend Mortgagee's rights and remedies under any of the Loan Documents, including but not limited to all attorneys' fees, appraisal fees, consultants' fees, and other expenses incurred by Mortgagee in securing title to or possession of, and realizing upon, any security for the Secured Obligations. All such costs and expenses (together with interest thereon at the Default Rate from the date incurred) shall constitute part of the Secured Obligations, and may be included in the computation of the amount owed to Mortgagee for purposes of foreclosing or otherwise enforcing this Mortgage.

**4.12 Financial Reports.** Mortgagor shall furnish to Mortgagee (a) within forty-five (45) days following the end of each fiscal quarter of Mortgagor and within ninety (90) days following the end of each fiscal year, Mortgagor's operating statements for the Property as of the end of and for such fiscal year and quarter, in each case prepared against the budget for such fiscal year and quarter, as may be applicable; (b) contemporaneously with the delivery of each of such operating statements of the Property, a Rent Roll certified, signed and dated by Mortgagor; (c) contemporaneously, with the delivery of the annual operating statements of the Property, the annual balance sheet and profit and loss statement of Mortgagor and Guarantor; and (d) quarterly financial statements, financial calculations and other reports and documentation demonstrating, as of the last day of the applicable calendar quarter, that the Debt Service Coverage Ratio was not less than 1.20 to 1.00. The financial statements and reports described in (a), (c) and (d) above shall be in such form and in such detail as Mortgagee may reasonably require, shall be prepared in accordance with generally acceptable accounting principles or on a tax basis, in either case consistently applied, and shall be certified as true and correct by Mortgagor or Guarantor, as may be applicable (or if required by Mortgagee, while a Default or Event of Default exists, by an independent certified public accountant reasonably acceptable to Mortgagee). Mortgagor shall file and pay its annual tax returns and taxes in a timely manner. Following a Default or Event of Default, Mortgagor shall furnish or cause to be furnished to Mortgagee within thirty (30) days after Mortgagee's request, any other financial reports or statements of Mortgagor, including, without limitation, audited financial statements, balance sheets, profit and loss statements, tax returns, other financial statements, and certified rent rolls, required under any of the Loan Documents, requested by any regulatory or Governmental Authority exercising jurisdiction over Mortgagee, or requested by Mortgagee from time to time, certified as true and correct by Mortgagor. Following the occurrence and during the existence of any Event of Default, or if Mortgagee securitizes the Loan, Mortgagor shall deliver to Mortgagee the items required in (a) and (b) above on a monthly basis.

**4.13 Priority of Leases.** To the extent Mortgagor has the right, under the terms of any Lease, to make such Lease subordinate to the lien hereof, Mortgagor shall, at Mortgagee's request and Mortgagor's expense, take such action as may be required to effect such

# UNOFFICIAL COPY

subordination. Conversely, Mortgagor shall, at Mortgagee's request and Mortgagor's expense, take such action as may be necessary to subordinate the lien hereof to any future Lease designated by Mortgagee. The standard form of Lease used by Mortgagor shall provide that the Lease is subject and subordinate to this Mortgage and all future mortgages and/or deeds of trust affecting the Property. Mortgagee shall provide an SNDA, in Mortgagee's standard form, for each Lease executed and delivered by Mortgagor following the date of this Mortgage, if requested by the tenant under the Lease or the Mortgagor or if required by Mortgagee. If any tenant under any such Lease requests a different form of SNDA or modifications to Mortgagee's standard form of SNDA, then Mortgagee shall use commercially reasonable efforts to negotiate a form of SNDA that is mutually acceptable to Mortgagee and such tenant, provided, however, that in no event shall Mortgagee be required to enter into any SNDA that is not acceptable to Mortgagee.

**4.14 Inventories; Assembly of Chattels.** Mortgagor shall, from time to time at the request of Mortgagee, deliver to Mortgagee a current inventory of the Chattels, the Intangible Personalty and the other Collateral, in such detail as Mortgagee may reasonably require. During the existence of any Event of Default, Mortgagor shall at Mortgagee's request assemble the Chattels and the other Collateral and make them available to Mortgagee at any place designated by Mortgagee that is reasonably convenient to both parties.

**4.15 Compliance with Laws, Existence, Etc.**

(a) Mortgagor shall comply with all applicable laws, rules, regulations and orders and other governmental or quasi-governmental requirements and private covenants, such compliance to include, without limitation, maintaining all Permits and paying before the same become delinquent all taxes, assessments and governmental charges imposed upon Mortgagor or the Property. Mortgagor shall maintain all Permits necessary or desirable for the operation, ownership, use, development, occupancy and maintenance of the Property for its current use, and without limiting this covenant of Mortgagor, Mortgagor shall make application for renewals of any of the Permits prior to the expiration thereof. Mortgagor shall promptly after receiving notice thereof, notify Mortgagee in writing of any litigation, action, proceeding or investigation against Mortgagor or any Mortgagor Control Person or the Property before any court, governmental or quasi-governmental arbitrator or other authority and, upon request of Mortgagee, from time to time provide Mortgagee with status or other information in respect thereof. Mortgagor and each Mortgagor Control Person shall do or cause to be done all things necessary to preserve, renew and keep in full force and effect its existence as a limited liability company, corporation or other entity, as may be applicable, and to maintain its authorization to perform the obligations under the Loan Documents. Neither Mortgagor nor any Mortgagor Control Person shall amend or modify its organizational documents so as to contravene any of the Loan Documents or to prevent the observance of the obligations under the Loan Documents. Mortgagor and each Mortgagor Control Person shall comply with all applicable laws, rules, regulations and orders and other governmental or quasi-governmental requirements, and shall obtain all authorizations, approvals and consents from, and shall make all notices and filings with, any court, governmental, authority or regulatory body, in respect of its right and ability to perform, or cause the performance of, the obligations under the Loan Documents. Each Mortgagor Control Person shall maintain its status as "non-foreign person" within the meaning

# UNOFFICIAL COPY

of Sections 1445 and 7701 of the United States Internal Revenue Code of 1986, as amended, and the regulations issued thereunder.

(b) **Right to Contest.** Notwithstanding any other provision of this Mortgage, Mortgagor shall not be deemed to be in Default solely by reason of Mortgagor's failure to comply with any applicable law, rule, regulation or order so long as, in Mortgagee's judgment, each of the following conditions is satisfied:

(i) Mortgagor is engaged in and diligently pursuing in good faith administrative or judicial proceedings appropriate to contest the validity or applicability of such law, rule, regulation or order; and

(ii) Noncompliance with any such law, rule, regulation or order will not result in the loss, forfeiture or encumbrance of any property encumbered hereby or any interest of Mortgagee therein or result in any fines or other punitive actions or any loss or impairment of insurance coverage; and

(iii) Mortgagor deposits with Mortgagee, as security for any payment or performance that may ultimately be required, an amount equal to the amount of any fine, assessment or charge plus the interest, penalties, and other costs that Mortgagee estimates are likely to become payable if Mortgagor's contest is unsuccessful.

If Mortgagee determines that any one or more of such conditions is not satisfied or is no longer satisfied, then Mortgagor shall comply with the law, rule, regulation or order in question, not later than the date that is ten (10) days following the date that Mortgagee provides written notice to Mortgagor of such determination.

**4.16 Records and Books of Account.** Mortgagor shall keep accurate and complete records and books of account, in which complete entries shall be made, reflecting all financial transactions of Mortgagor relating to the Property.

**4.17 Inspection Rights.** At any reasonable time, and from time to time, upon at least two (2) Business Days' prior notice from Mortgagee, Mortgagor shall permit Mortgagee, or any agents or representatives thereof, to examine and make copies of and abstracts from the records and books of account of, and, without unreasonably disturbing Mortgagor's business operations or those of any tenants under Leases, visit and inspect the Property and the Chateaus and to discuss with Mortgagor the affairs, finances and accounts of Mortgagor. Without limiting the obligations of Mortgagor under this Section 4.17, Mortgagor shall take all actions necessary or required under the Leases to effect such right of Mortgagee to inspect the Property.

**4.18 Change of Executive Offices.** Mortgagor shall promptly notify Mortgagee in writing if changes are made in the location of Mortgagor's primary executive offices.

**4.19 Further Assurances; Estoppel Certificates.** Mortgagor shall execute and deliver to Mortgagee no later than the date that is ten (10) days following the date of any request by Mortgagee, and pay the actual costs of preparation and recording thereof, any further documents that Mortgagee may request to confirm or perfect the liens and security interests created or intended to be created hereby, or to confirm or perfect any evidence of the Secured

# UNOFFICIAL COPY

Obligations. Mortgagor shall also, not later than the date that is ten (10) days following the date of any request by Mortgagee, deliver to Mortgagee a signed and acknowledged statement certifying to Mortgagee, or to any proposed transferee of the Secured Obligations, (a) the balance of principal, interest, and other sums then outstanding under the Note and the other Loan Documents, (b) whether or not Mortgagor claims that the Mortgagee is in default of any of the obligations of Mortgagee under this Mortgage or the other Loan Documents, and if so, the nature of any such default or defaults and (c) whether or not Mortgagor claims to have any offsets or defenses with respect to the Secured Obligations and, if so, the nature of such offsets or defenses.

**4.20 Costs of Closing.** Mortgagor shall, upon written demand by Mortgagee, pay directly or reimburse Mortgagee for any costs or expenses incurred by Mortgagee in connection with the closing of the Loan, including, but not limited to, reasonable fees of counsel for Mortgagee and costs and expenses for which invoices were not available at the closing of the Loan, or costs and expenses that are incurred by Mortgagee after the closing of the Loan. All such costs and expenses (together with interest thereon at the Default Rate from the date of demand by Mortgagee) shall constitute a part of the Secured Obligations, and may be included in the computation of the amount owed to Mortgagee for purposes of foreclosing or otherwise enforcing this Mortgage and/or any of the other Loan Documents.

**4.21 Fund for Electronic Transfer.** All monthly payments of principal and interest on the Note, reserve deposits and other amounts due under this Mortgage or the other Loan Documents shall be made by Mortgagor by electronic funds transfer from a bank account established and maintained by Mortgagor for such purpose. Mortgagor shall establish and maintain such account until the Secured Obligations are fully paid and shall direct the depository of such account in writing to so transmit such payments on or before the respective due dates to the account of Mortgagee as shall be designated by Mortgagee in writing.

**4.22 Use.** Mortgagor shall use the Property solely for the operation of a commercial business center and as otherwise provided in the Leases and any other use consistent therewith and not otherwise in violation of any Legal Requirements and for no other use or purpose.

**4.23 Management.** The Property shall be managed by the Mortgagor or any Property Manager (as defined below). The Property shall not be managed by any Person other than Mortgagor, except under a management agreement delivered to, and approved by, Mortgagee (the "Management Agreement") and with a property manager consented to by Mortgagee (the "Property Manager"). No Person shall act as listing agent or broker for the Property other than Mortgagor, except under a listing agreement or brokerage agreement delivered to, and approved by, Mortgagee (the "Listing Agreement") and with a listing agent or broker approved by Mortgagee (the "Listing Agent"). Mortgagee hereby approves (x) of Mid-America Asset Management, Inc. an Illinois corporation, as the initial Property Manager and (y) the Management Agreement, a true, correct and complete copy of which has been delivered to Mortgagee prior to the date hereof. Mortgagee hereby approves (x) ARC Leasing Group LLC, an Illinois limited liability company d/b/a ARC Real Estate, as the initial Listing Agent and (y) the Listing Agreement with such initial Listing Agent, and Mortgagor represents to Mortgagee that a true, correct and complete copy of such Listing Agreement has been delivered to Mortgagee prior to the date hereof. Any substitute or replacement Property Manager and/or Listing Agent or any other change in Property Manager and/or Listing Agent shall be subject to

# UNOFFICIAL COPY

the prior written consent of Mortgagee, which consent shall not be unreasonably withheld, conditioned, or delayed so long as no Default or Event of Default then exists. Mortgagor shall not permit any amendment to or modification of any Management Agreement and/or Listing Agreement, or management or listing of the Property by any Person other than Mortgagor or Property Manager and Listing Agent, as applicable, without the prior written consent of Mortgagee, which consent shall not be unreasonably withheld, conditioned, or delayed so long as no Default or Event of Default then exists. Any such Property Manager or Listing Agent shall execute a Subordination of Management Agreement or Subordination of Listing Agreement, as applicable, in respect of its Management Agreement or Listing Agreement, as applicable, in form and substance satisfactory to Mortgagee.

**4.24 Reserve Agreement.** Mortgagor covenants that it will fully comply with the terms of the Reserve Agreement.

**4.25 Single Purpose Entity.** Mortgagor shall at all times be a Single Purpose Entity.

**4.26 Cash Management.** At or prior to the closing of the Loan, Mortgagee and Mortgagor shall enter into the Pledge Agreement, pursuant to which Mortgagee shall (or shall cause Servicer to) establish the Deposit Account into which all proceeds in respect of the Property, including, without limitation, all Gross Revenue, shall be deposited, applied, retained and/or disbursed, pursuant to and in accordance with the terms and provisions of the Pledge Agreement. Mortgagor shall comply with all of the terms and conditions of the Pledge Agreement.

**4.27 Patriot Act, Anti Terrorism.** Mortgagor represents, warrants and covenants to Mortgagee that:

(a) Mortgagor, Guarantor and their respective Affiliates are not a "foreign person" within the meaning of Sections 1445 and 7701 of the Internal Revenue Code of 1986, as amended.

(b) Mortgagor, Guarantor and their respective Affiliates (A) are not, and shall not become, a person subject to, or with whom Mortgagee is restricted from doing business with, under regulations of the Office of Foreign Asset Control ("OFAC") of the Department of the Treasury (including, but not limited to, those named on OFAC's Specially Designated and Blocked Persons list) or under any statute (including, without limitation, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Public Law 107-56)), executive order (including, without limitation, the September 24, 2001 Executive Order Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism and the Annex thereto (collectively, the "Executive Order")), or other governmental action relating to terrorism financing, terrorism support and/or otherwise relating to terrorism and (B) are not and shall not engage in any dealings or transactions or otherwise become or be associated with persons named on OFAC's Specially Designated and Blocked Persons list or persons who commit terrorism or conspire to commit or support "terrorism" as defined in the Executive Order (any person described in the preceding clause (A) or clause (B) being referred to herein as a "Prohibited Person").

# UNOFFICIAL COPY

(c) None of the Mortgagor Control Persons, (i) has conducted or will conduct any business or has engaged or will engage in any transaction or dealing with any Prohibited Person, including making or receiving any contribution of funds, goods or services to or for the benefit of any Prohibited Person, (ii) has dealt or will deal in, or otherwise has engaged or will engage in any transaction relating to, any property or interest in property blocked pursuant to the Executive Order, or (iii) engage in or conspire to engage in any transaction that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in any Anti-Terrorism Law.

(d) (i) None of the funds or other assets of the Mortgagor Control Persons constitute property of, and are not beneficially owned, directly or indirectly, by any government or other person subject to trade restrictions under U.S. law, including, but not limited to, the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 et. seq., The Trading with the Enemy Act, 50 U.S.C. App. 1 et. seq., and any Executive Orders or regulations promulgated thereunder or any other laws, regulations or executive orders administered by OFAC with the result that an investment in Mortgagor (whether directly or indirectly) is prohibited by law or the Loan made by Mortgagee is in violation of law ("Embargoed Person"); (ii) no Embargoed Person has any interest of any nature whatsoever in any Mortgagor Control Persons with the result that the investment in any of the Mortgagor Control Person (whether directly or indirectly) is prohibited by law or the Loan is in violation of law; and (iii) none of the funds of the Mortgagor Control Persons, have been derived from any unlawful activity with the result that the investment in Mortgagor (whether directly or indirectly) is prohibited by law or the Loan is in violation of law.

(e) Mortgagor shall promptly deliver to Mortgagee any certification or other evidence requested from time to time by Mortgagee confirming the compliance by all of the Mortgagor Control Persons with this Section. The representations, warranties and covenants set forth in this Section shall be deemed repeated and reaffirmed by Mortgagor as of each date that Mortgagor makes a payment to Mortgagee under the Note, this Mortgage and the other Loan Documents or receives any payment from Mortgagee. Mortgagor shall promptly notify Mortgagee in writing should Mortgagor become aware of any change in the information set forth in these representations, warranties and covenants.

**4.28 Anti-Money Laundering.** Mortgagor represents and warrants that it has taken reasonable measures appropriate to the circumstances (and in any event as required by law), with respect to each holder of a direct or indirect interest in Mortgagor, to assure that funds invested by such holders in Mortgagor are derived from legal sources ("**Anti-Money Laundering Measures**"). Mortgagor represents that the Anti-Money Laundering Measures have been undertaken in accordance with the Bank Secrecy Act, 31 U.S.C. §§ 5311 et seq. ("**BSA**"), and all applicable laws, regulations and government guidance on BSA compliance and on the prevention and detection of money laundering violations under 18 U.S.C. §§ 1956 and 1957 (collectively with the BSA, "**Anti-Money Laundering Laws**"). Mortgagor covenants that it shall take Anti-Money Laundering Measures in accordance with Anti-Money Laundering Laws with respect to each holder of a direct or indirect interest in Mortgagor. Mortgagor covenants that it shall take reasonable measures appropriate to the circumstances (in any event as required by law), to ensure that Mortgagor is in compliance with all current and future Anti-Money Laundering Laws and laws, regulations and government guidance for the prevention of terrorism, terrorist

# UNOFFICIAL COPY

financing and drug trafficking. Without limiting the foregoing provisions of this Section 4.28, at all times throughout the term of the Loan, none of the funds of Mortgagor or Guarantor, as applicable, that are used to repay the Loan shall be derived from any unlawful activity, with the result that the investment in Mortgagor (whether directly or indirectly), is prohibited by law or the Loan is in violation of law.

**4.29 General Indemnity.** Mortgagor shall, at Mortgagor's sole cost and expense, protect, defend, release, indemnify and hold harmless the Indemnified Parties (defined below) from any Losses (defined below) imposed on, incurred by, or asserted against the Indemnified Parties, directly or indirectly, in each case arising out of or in connection with the Secured Obligations, the Property (or any portion thereof), the Loan, the Loan Documents (or any of them) or the Loan Application, any and all claims for brokerage, leasing, finders or similar fees that may be made relating to the Property and the Secured Obligations, or the exercise by Mortgagee of any rights or remedies granted to Mortgagee pursuant to this Mortgage, the other Loan Documents or applicable law; provided, however, that the foregoing shall not apply (a) to any Losses caused solely by the gross negligence or willful misconduct of the Indemnified Parties or (b) to any dispute among the Indemnified Parties not caused in whole or in part by a breach of Mortgagor's obligations under the Loan Documents. The term "Losses" shall mean any claims, suits, liabilities (including strict liabilities), actions, proceedings, obligations, debts, damages, losses (including, without limitation, unrealized loss of value of the Property), costs, expenses, fines, penalties, charges, fees, judgments, awards, and amounts paid in settlement of whatever kind including attorneys' fees and all other costs of defense. The term "Indemnified Parties" shall mean (a) Mortgagee, (b) any prior owner or holder of the Note, (c) the Servicer and any existing or prior servicer of the Loan, (d) the officers, directors, shareholders, partners, members, employees and trustees of any of the foregoing, and (e) the heirs, legal representatives, successors and assigns of each of the foregoing. THE FOREGOING INDEMNITIES SHALL APPLY TO EACH INDEMNIFIED PARTY WITH RESPECT TO LOSSES THAT IN WHOLE OR IN PART ARE CAUSED BY OR ARISE OUT OF THE ORDINARY NEGLIGENCE OF SUCH (AND/OR ANY OTHER) INDEMNIFIED PARTY.

**4.30 Duty to Defend, Costs and Expenses.** Upon request, whether Mortgagor's obligation to indemnify Mortgagee arises under Section 4.29 above or elsewhere in the Loan Documents, Mortgagor shall defend the Indemnified Parties (in Mortgagor's or the Indemnified Parties' names) by attorneys and other professionals reasonably approved by the Indemnified Parties. Notwithstanding the foregoing, the Indemnified Parties may, in their sole discretion, engage their own attorneys and professionals to defend or assist them and, at their option, their attorneys shall control the resolution of any claims or proceedings. Upon demand, Mortgagor shall pay or, in the sole discretion of the Indemnified Parties, reimburse the Indemnified Parties for all Losses imposed on, incurred by, or asserted against the Indemnified Parties by reason of any items set forth in Section 4.29 above and/or the enforcement or preservation of the Indemnified Parties' rights under the Loan Documents. Any amount payable to the Indemnified Parties under this Section 4.30 shall (a) be deemed a demand obligation, (b) be part of the Secured Obligations, (c) bear interest from the date of demand by Mortgagee at the Default Rate until paid, and (d) be secured by this Mortgage.

**4.31 Guarantor.** Within thirty (30) days after the death of any individual Guarantor, Mortgagor shall notify Mortgagee in writing of such death and provide to Mortgagee the names



# UNOFFICIAL COPY

and current financial statements of one or more substitute guarantors reasonably acceptable to Mortgagee: (A) whose Net Worth and financial condition is, in Mortgagee's discretion, equivalent to or better than the deceased Guarantor based upon the financial statements and other financial information delivered to Mortgagee in respect of the individual that is the Guarantor immediately prior to such replacement, or (B) who are the heirs, devisees and beneficiaries of substantially all of the deceased Guarantor's assets, provided, however, that, in each case, such replacement guarantor shall have an aggregate Net Worth equivalent to or better than the deceased Guarantor based upon the financial statements and other financial information delivered to Mortgagee in respect of the individual that is the Guarantor immediately prior to such replacement. Within sixty (60) days after the death of such individual Guarantor, each substitute guarantor(s) shall (i) deliver to Mortgagee the financial reports and statements required to be delivered by Guarantor in Section 4.12 hereof and Section 12 of the Guaranty Agreement and (ii) execute and deliver to Mortgagee a guaranty agreement and environmental indemnity agreement in substantially the same form as the Guaranty Agreement and Environmental Indemnity Agreement and such other instruments as Mortgagee may reasonably require in connection with such substitution.

**4.32 Title to the Property.** Mortgagor shall warrant and defend the validity of the lien of this Mortgage, subject only to the Permitted Exceptions, against the claims of any Person whomsoever.

**4.33 Intentionally Omitted.**

**4.34 O&M Plan Compliance.** Mortgagor shall develop, implement and comply with the Asbestos Operations and Maintenance Plan attached to the Lease Certificate.

## ARTICLE 5

### MORTGAGOR'S NEGATIVE COVENANTS

**5.1 Waste and Alterations.** Mortgagor shall not commit or permit any waste with respect to the Property, the Chattels or the other Collateral. Mortgagor shall not cause or permit any part of the Property, including but not limited to any building, structure, parking lot, driveway, landscape scheme, timber, or other ground improvement, to be removed, demolished, or materially altered without the prior written consent of Mortgagee, which may be granted or withheld in the sole but reasonable discretion of Mortgagee. Mortgagor shall not change or cause to be changed any access to or egress from the Property by public streets, easements or rights of way.

**5.2 Zoning and Private Covenants.** Mortgagor shall not initiate, join in, or consent to any change in any zoning ordinance or classification, any change in the "zoning lot" or "zoning lots" (or similar zoning unit or units) presently comprising the Property, any transfer of development rights, any private restrictive covenant, or any other public or private restriction limiting or defining the uses that may be made of the Property or any part thereof, without the express written consent of Mortgagee. If under applicable zoning provisions the use of all or any part of the Property is or becomes a nonconforming use, Mortgagor shall not cause such use to be discontinued or abandoned without the express written consent of Mortgagee, and Mortgagor

# UNOFFICIAL COPY

shall use commercially reasonable efforts to prevent the tenant under any Lease from discontinuing or abandoning such use.

## 5.3 Certain Covenants Regarding Leases.

(a) Mortgagor shall neither do, nor neglect to do, anything that may cause or permit the termination of any Lease of all or any part of the Property, or cause or permit the withholding or abatement of any rent payable under any such Lease.

(b) All existing Leases, and all other Leases entered into prior to or after the closing of the Loan (true, correct and complete copies of which fully executed leases and any guaranties therefor shall be promptly submitted by Mortgagor to Mortgagee) shall be subject to Mortgagee's prior written approval. Following the closing of the Loan, any submission by Mortgagor to Mortgagee for Mortgagee's approval of a Lease shall be accompanied by a copy of such Lease, a Lease abstract, a then-current Rent Roll for the Property, year-to-date and prior year operating statements for the Property, and a cover letter requesting Mortgagee's consent which contains a signature line on which Mortgagee may evidence its approval of such Lease, provided, however, that Mortgagee may provide such other form of consent satisfactory to Mortgagee and its counsel. All Leases entered into prior to or after the closing of the Loan shall be subordinate to the lien of this Mortgage; provided, however, that at Mortgagee's option, Mortgagee may require that any such Lease be superior to the lien of this Mortgage. Mortgagee agrees that for any proposed Lease for which Mortgagor is required to obtain Mortgagee's consent thereto, Mortgagee will attempt to respond within ten (10) Business Days following receipt of a written notice from Mortgagor requesting such consent. Each Lease, and each modification, amendment, supplement, termination or cancellation of any Lease, shall be in writing.

(c) Except with the prior written consent of Mortgagee, which may be granted or withheld in Mortgagee's sole discretion, Mortgagor shall not (i) collect any Gross Revenue from all or any part of the Property for more than one month in advance, (ii) assign any Gross Revenues from the Property or any part thereof, or (iii) consent to the cancellation or surrender of all or any part of any Lease, except that Mortgagor may in good faith terminate any Lease for nonpayment of rent or for any other material breach by the tenant thereunder.

Mortgagor shall provide Mortgagee with a Rent Roll, on an annual basis, certified by Mortgagor to Mortgagee as true, correct and complete. Without limiting the provisions of Section 5.3(b), the Rent Roll shall include all Leases, whether or not evidenced by written instruments.

(d) Notwithstanding the foregoing provisions of this Section 5.3, Mortgagor shall have the right to enter into "Safe-Harbor Leases" (as hereinafter defined) without Mortgagee's prior written consent. A "Safe-Harbor Lease" shall mean any proposed market Lease that meets the following criteria: (A) the rent payable under such proposed Lease is equal to or greater than the rent being or scheduled to be paid by the tenant occupying the space as of the date hereof for each lease year and, including space that is vacant as of the date hereof, in no case less than (i) \$20.00 per square foot on a triple net basis for space less than or equal to 5,000 square feet or (ii) \$15.00 per square foot on a triple net basis for space greater than 5,000 and equal to or less than 15,000 square feet; (B) such proposed Lease shall be for a term of no less

# UNOFFICIAL COPY

than three (3) years and no greater than ten (10) years (fifteen (15) years including any tenants extension options), (C) the tenant improvement allocation or allowance shall not exceed \$20.00 per rentable square foot, (D) such Lease does not contain any options to purchase, or other rights to acquire, any portion of the Property, (E) such Lease does not contain any restriction on Mortgagor's right to lease remaining portions of the Property, (F) such Lease does not contain any landlord obligations other than those obligations as set forth in the standard form of lease approved by Mortgagee, (G) such Lease is entered into on the standard form of Lease approved by Mortgagee, without material modification thereto and provided it conforms with the leasing guidelines hereunder and under the Loan Documents, (H) such Lease is entered into on arms-length terms with an unrelated third party, and (I) within five (5) Business Days following the execution of such Lease, Mortgagor shall deliver a copy of such Lease to Mortgagee, together with a certificate certifying that attached to such certificate is a true, complete and correct copy of the Lease and that such Lease satisfies all of the terms and conditions to be a "Safe Harbor Lease"

(e) For the avoidance of doubt, Mortgagor may (without the prior written consent of Mortgagee) enter into any modification or amendment of any Safe Harbor Leases so long as such Safe Harbor Lease shall remain a "Safe Harbor Lease" following such modification or amendment.

(f) Mortgagee will not be obligated to enter into an SNDA for any tenant that Mortgagor is requesting Mortgagee lease consent until such time as an executed Lease that complies with the provisions of this Mortgage is delivered to Mortgagee

(g) Whenever Mortgagee's consent is required pursuant to the provisions of this Section 5.3 with respect to any proposed Lease that does not qualify as a Safe-Harbor Lease, Mortgagee shall attempt to respond to such request not later than the date that is ten (10) Business Days following the date that Mortgagee receives Mortgagor's written request for such consent, which request includes all documents and information specified in Section 5.3(b) or this Section 5.3(g), and Mortgagee's consent shall not be unreasonably withheld based upon market conditions at the time of such written request. Mortgagor shall be permitted to submit to Mortgagee, for purposes of obtaining Mortgagee's consent to any proposed Lease under this Section 5.3(g), either (i) a "Lease Summary Term Sheet" that sets out all of the economic terms of the proposed Lease, as well as any deviations from the standard form of Lease approved by Mortgagee or (ii) a comparison of such Lease against the standard form of Lease approved in writing by Mortgagee showing all proposed modifications to the standard form of Lease approved in writing by Mortgagee. Notwithstanding the foregoing provisions of this Section 5.3(g), Mortgagee's consent under this Section 5.3(g) shall be contingent on the tenant under any proposed Lease executing the standard form of Lease approved by Mortgagee. If (a) Mortgagee fails to respond to such written request for consent of a proposed Lease on or prior to the date that is ten (10) Business Days following the date that Mortgagee receives (x) such request therefor, and (y) with any additional information that Mortgagee may reasonably require to evaluate such proposed Lease, and (b) Mortgagor has provided Mortgagee a second written request containing a legend clearly marked in not less than fourteen (14) point bold face type, underlined, in all caps letters "**LENDER SHALL BE DEEMED TO HAVE CONSENTED TO THE MATTER CONTAINED HEREIN IF LENDER FAILS TO RESPOND TO THIS REQUEST FOR CONSENT ON OR PRIOR TO THE DATE THAT IS FIVE (5)**

# UNOFFICIAL COPY

**BUSINESS DAYS FOLLOWING THE DATE HEREOF AND ALL REQUESTED INFORMATION HAS BEEN PROVIDED TO LENDER,** Mortgagee shall be deemed to have consented to such matter if Mortgagee fails to respond to such second written request before the expiration of such five (5) Business Day period.

(h) Termination Fees.

(i) Without limiting the generality of the foregoing, whether or not Mortgagee's consent to the cancellation, termination or surrender of any Lease is required hereunder, (a) Mortgagor shall notify Mortgagee in writing of any cancellation penalties, termination fees or other consideration payable to Mortgagor in connection with any cancellation, termination or surrender of any Lease (any such penalties or fees are referred to herein as "**Termination Fees**"), which written notice shall be delivered to Mortgagee not later than the date that is five (5) Business Days following the date that Mortgagor has received notice from the applicable tenant under such Lease of the intention of such tenant to cancel, terminate or surrender such Lease, but in any event prior to the payment by the applicable tenant under such Lease of any such Termination Fees to Mortgagor and (b) Mortgagee may, but shall not be required to, (i) require that Mortgagor deposit such Termination Fees into a reserve held by Mortgagee or Servicer pursuant to a tenant improvement and leasing commissions reserve agreement, which agreement shall be in form and substance reasonably satisfactory to Mortgagee, and (ii) impose such restrictions and conditions on the timing and amount of disbursements of the Termination Fees from such reserve account as Mortgagee may require, including, without limitation (x) requiring that (1) the space left vacant as a result of such cancellation, termination or surrender be relet to a tenant and under a Lease acceptable to Mortgagee (any such Lease an "**Approved Lease**"), (2) the tenant under such Approved Lease is in occupancy of the portion of the Property demised pursuant to such Approved Lease and is paying rent in accordance with such Approved Lease, (3) Mortgagor provides to Mortgagee a tenant estoppel certificate from the tenant under such Approved Lease in a form and in substance reasonably acceptable to Mortgagee, and (4) Mortgagor provides to Mortgagee written evidence acceptable to Mortgagee that all improvements to the Property required pursuant to such Approved Lease have been completed in accordance with such Approved Lease, and (y) limiting the amount of any such disbursement to the lesser of (1) the actual cost of re-tenanting such space and (2) the amount calculated by dividing the Termination Fees by the total square feet of space vacated, then multiplying that result by the number of square feet of newly leased space under such Approved Lease.

(ii) Subject to Section 5.3(i)(iii) below, (a) in the event that following the date that any such Termination Fees are paid, as of the date of determination, the Debt Service Coverage Ratio is less than 1.0 to 1.0, then Mortgagee may apply an amount equal to the excess of (x) any Termination Fees over (y) the amount of such Termination Fees disbursed to Mortgagor pursuant to Section 5.3(h)(i) above (any such excess amount the "**Excess Termination Fees**") to any regularly scheduled payment due and payable by Mortgagor under the Note, this Mortgage or the other Loan Documents (including, without limitation, any monthly payment of principal and/or interest and any regularly scheduled reserve deposits) in such order and in such

# UNOFFICIAL COPY

manner as determined by Mortgagee; or (b) following the date that any such Termination Fees are paid, as of the date of determination, (x) the Debt Service Coverage Ratio equals or exceeds 1.0 to 1.0 and (y) at least ninety percent (90%) of the rentable square feet of space available at the Property is occupied by Leases approved by Mortgagee pursuant to this Mortgage or a Safe-Harbor Lease, then Mortgagee shall disburse any Excess Termination Fees to Mortgagor.

(iii) If any Event of Default exists, Mortgagee may apply any Termination Fees to the Secured Obligations in such order and in such manner as determined by Mortgagee in Mortgagee's sole discretion.

## 5.4 Transfer or Further Encumbrance of Property.

(a) Except as provided in this Section 5.4, without Mortgagee's prior written consent, which consent may be granted or withheld in Mortgagee's sole and absolute discretion, Mortgagor shall not (i) directly or indirectly sell, assign, convey, transfer or otherwise dispose of the Property or any portion thereof or any direct or indirect legal, beneficial or equitable interest in all or any part of the Property, (ii) permit or suffer any owner directly or indirectly, voluntary or involuntary, of any direct or indirect ownership or beneficial or equitable interest in the Property or Mortgagor to transfer such interest, whether by transfer of partnership, membership, stock or other beneficial or equitable interest in any entity or otherwise, (iii) mortgage, pledge, hypothecate, suffer or otherwise permit to be encumbered or grant, suffer or otherwise permit to be granted a security interest in all or any part of the Property, or in any direct or indirect ownership interest in Mortgagor, or (iv) accept any subordinate or mezzanine financing secured by a security interest in all or any part of the Property or in any direct or indirect ownership interest in Mortgagor.

(b) Notwithstanding the provisions of Section 5.4(a), and in each case provided that the Transfer Conditions (as hereinafter defined) shall be simultaneously satisfied, the following transfers of direct or indirect interests in Mortgagor shall be permitted without Lender's prior written consent (each, a "Transfer"): (x) any transfer of direct or indirect interests in Mortgagor pursuant to any will or testament or applicable law of descent upon the death of a natural person that was the holder of the applicable interest in Mortgagor, (y) transfers of up to forty-nine percent (49%) of the direct or indirect interests in Mortgagor, and (z) the occurrence of a Change in Control Event. "Transfer Conditions" means, collectively, each of the following conditions:

(i) Immediately prior to and immediately following the consummation of any such Transfer, no Default or Event of Default shall then exist.

(ii) Other than in connection with a Change in Control Event, immediately prior to and immediately following the consummation of any such Transfer, Mortgagor remains Controlled by Binyamin Beitel, an individual.

(iii) Not less than thirty (30) days prior to the consummation of any such Transfer, Mortgagor shall deliver to Mortgagee written notice of the proposed transfer, together with an organizational chart illustrating the ownership structure both

# UNOFFICIAL COPY

before and after the consummation of the proposed transfer, which organizational chart shall set forth Mortgagor's direct and indirect upstream owners, the percentage interests held by each such owner and the type of entity of each such owner that is an entity (an "Organizational Chart").

(iv) Not more than ten (10) days following the date of such Transfer, Mortgagor delivers to Mortgagee a final Organizational Chart confirming the new ownership structure of Mortgagor.

(v) Mortgagor shall pay or reimburse Mortgagee for all of the out-of-pocket costs, fees and expenses incurred by Mortgagee in respect of any such Transfer, including, without limitation, attorneys' fees incurred by Mortgagee, whether or not such Transfer is consummated.

(vi) Any Person to whom or to which any such direct or indirect ownership interest is transferred shall comply with the requirements of Mortgagor and the Mortgagor Control Persons as set forth in Section 4.27 and Section 4.28 hereof, and if Mortgagee requests, the proposed transferees and its constituent members or other owners shall execute a certificate in form and substance reasonably satisfactory to Mortgagee conforming such compliance.

(vii) Each such Person to which any such direct or indirect ownership interest is transferred shall be a citizen of the United States of America or any State of the United States of America or the District of Columbia and have his/her principal residence in the United States of America, or, in the alternative, as applicable, an entity organized under the laws of the United States of America, any State of the United States of America or the District of Columbia.

(viii) Such transfer shall not impair or adversely affect Mortgagee's security under the Loan Documents, including, without limitation, the obligations of Mortgagor under this Mortgage and the obligations of Guarantor under the Guaranty Agreement and the Environmental Indemnity Agreement.

(ix) Such transfer could not subject Mortgagee or any of its Affiliates to any civil or criminal penalties in any jurisdiction or otherwise constitute an unlawful act, offence or crime by Mortgagee or any of its Affiliates, including, without limitation, under any of the laws, regulations and executive orders described in Section 4.27 of this Mortgage.

(x) Immediately following the consummation of such Transfer, all of the representations and warranties set forth in Section 3.3 as modified by the consummation of such transfer, shall remain true, complete and correct, except solely to reflect the changes resulting from such transfer.

(xi) Concurrently with the delivery of the notice required under clause (iii) above, Mortgagor pays Mortgagee an administrative review fee equal to \$5,000.

# UNOFFICIAL COPY

(xii) Not later than ten (10) days following any such Transfer, Mortgagor shall provide Mortgagee with (A) evidence reasonably satisfactory to Mortgagee that all of the applicable Transfer Conditions have been satisfied with respect to such Transfer and (B) a certificate signed by Mortgagor and Guarantor that (1) certifies to Mortgagee that all of the applicable Transfer Conditions have been satisfied with respect to such transfer, (2) attaches (x) a copy of the documents effectuating the transfer and a copy of the organizational documents of the entities affected by such transfer, as amended, and (3) certifies to Mortgagee that the Organizational Chart delivered to Mortgagee in respect of such transfer is true, complete and correct.

(xiii) In addition to the foregoing requirements, for any Transfer in respect of the occurrence of a Change in Control Event:

(1) Immediately following the consummation of a Transfer that results in a Change in Control Event, Mortgagor is Controlled, individually or collectively by Melamud.

(2) The Property is managed by a property manager and pursuant to a property management agreement, in each case reasonably approved by Lender, and subordinated in writing to the Loan Documents pursuant to Lender's standard form of subordination agreement for property management agreements, with modifications reasonably acceptable to Lender.

(3) Immediately following the consummation of a Transfer that results in a Change in Control Event, each Guarantor shall have been replaced with a Qualified Replacement Guarantor and each Qualified Replacement Guarantor shall (A) continue to own a direct or indirect interest in Mortgagor and (B) if an entity, collectively satisfy the Minimum Guarantor Net Worth Requirement. On or prior to the date of the consummation of the proposed Transfer, any such Qualified Replacement Guarantor shall execute and deliver to Lender a new guaranty agreement and environmental indemnity agreement, in favor of Lender in substantially the same form as the Guaranty Agreement and the Environmental Indemnity Agreement.

The violation of any provision of this Section 5.4(b), or the failure of any of the certifications and representations required pursuant to this Section 5.4(b) to be true, complete and correct, shall constitute an Event of Default under this Mortgage and the other Loan Documents, whether or not Mortgagor or Mortgagee has received notice thereof or has knowledge of the occurrence thereof.

(c) One-Time Transfer: Notwithstanding the "due on sale" provisions of the Loan Documents to the contrary, Mortgagee shall permit a one-time transfer of Mortgagor's entire interest in the Property provided that all of the following conditions are satisfied: (i) no Default or Event of Default then exists; (ii) Mortgagor has paid to Mortgagee an assumption fee of one percent (1%) of the outstanding principal balance of the Loan, calculated as of the date of such transfer; (iii) if the proposed transferee is a land trust, Mortgagee has received a first-lien collateral assignment of all beneficial interest therein; (iv) Mortgagee has received and has had a

# UNOFFICIAL COPY

reasonable opportunity to review and approve all organizational documents (including, without limitation, certificates and articles of formation, partnership and operating agreements, by-laws, certificates of good standing and authorizing resolutions) and all documents and agreements executed or to be executed in connection with the proposed transfer; (v) the non-economic terms (e.g., those terms other than interest rate, payment schedule, principal balance, and non-recourse nature (subject to exceptions thereto customarily included by Mortgagee in Loan Documents)) of the Loan Documents have been modified as Mortgagee may request in good faith; (vi) the proposed transferee has assumed all of Mortgagor's obligations under the Loan Documents pursuant to an assumption agreement in form and substance reasonably satisfactory to Mortgagee; (vii) Mortgagee has received at least thirty (30) days' prior written notice of the proposed transfer; (viii) the proposed transferee and, if applicable, its general partners or managing members have, in the sole judgment of Mortgagee, a net worth equal to the combined Net Worth of Mortgagor and Guarantor as of December 19, 2019, or otherwise satisfactory to Mortgagee in its sole discretion, and its general partners or managing members have a satisfactory history of owning, operating and managing property similar to the Property; (ix) the proposed transferee and, if applicable, its general partners or managing members have, in the sole judgment of Mortgagee, a satisfactory history of owning, operating and leasing property similar to the Property; (x) the proposed transferee and, if applicable, its general partners or managing members have, in the sole judgment of Mortgagee, a satisfactory credit history and professional reputation and character; (xi) the Debt Service Coverage Ratio is not less than the Debt Service Coverage Ratio for the Property as of the date of the closing of the Loan, as determined by Mortgagee, and Mortgagee receives satisfactory evidence that such ratio will be maintained for the succeeding twelve (12) months; (xii) the Loan-to-Value Ratio, taking into account all obligations secured by liens on the Property, does not exceed the Loan-to-Value Ratio of the Loan as of the date of the closing of the Loan, as determined by Mortgagee; (xiii) Mortgagor pays all costs and expenses actually incurred by Mortgagee in connection with such transfer, including, without limitation, all legal, processing, accounting, title insurance, and appraisal fees, whether or not such transfer is actually consummated; (xiv) at Mortgagee's option, Mortgagee has received an endorsement to Mortgagee's title insurance policy at Mortgagor's expense, which endorsement re-dates the date of such title insurance policy and states that the lien of the Mortgage remains a first and prior lien against the Property subject to no exceptions other than as approved by Mortgagee; (xv) if required by the applicable title insurance company, Mortgagor delivers to Mortgagee a new or updated survey confirming that there are no survey exceptions other than those set forth in the survey exceptions in Mortgagee's title insurance policy; (xvi) principals of the proposed transferee acceptable to Mortgagee in Mortgagee's sole discretion execute a guaranty agreement in the form of the Guaranty Agreement and an environmental indemnity agreement in the form of the Environmental Indemnity Agreement; (xvii) Mortgagor delivers to Mortgagee such opinions of counsel and certificates of organizational documents and corporate authority as Mortgagee may request in form and substance satisfactory to Mortgagee; and (xviii) the proposed transferee, any Person executing any Loan Documents in connection with the transfer, and their respective constituents comply with the requirements set forth in Section 4.27 and Section 4.28 hereof. Upon the satisfaction of the foregoing conditions and execution of assumption documents in form and substance satisfactory to Mortgagee, Mortgagee shall release Mortgagor and Guarantor from liability under the Loan Documents except to the extent of any liability or obligation under the Loan Documents that arises or is based upon any event that occurs or any state of affairs that



# UNOFFICIAL COPY

exists prior to or as of the date of consummation of the proposed transfer (including, without limitation, any liability arising under the Guaranty Agreement and any liability arising under the Environmental Indemnity Agreement). The foregoing right to transfer the Property shall terminate upon conveyance of the Property by the initial Mortgagor named herein.

(d) Trade Payables; Permitted Equipment Financing. Subject to the satisfaction of each of the following conditions and notwithstanding anything to the contrary contained in this Mortgage or any other Loan Document, Mortgagor may incur, without the consent of Mortgagee, (x) unsecured indebtedness in respect of trade payables incurred in the ordinary course of business relating to the ownership, maintenance and operation of the Property (“Trade Payable Financing”) and (y) equipment financing entered into in the ordinary course of Mortgagor’s business for non-fixture equipment related to the ownership, maintenance and operation of the Property (“Equipment Financing”):

(i) The maximum aggregate amount of Trade Payable Financing and Equipment Financing outstanding at any one time shall not exceed \$200,000.00.

(ii) Following the funding of any Trade Payable Financing or any Equipment Financing, all of the terms of the Loan Documents shall remain unchanged.

(iii) Mortgagor shall be responsible for all closing costs in connection with any Trade Payable Financing or Equipment Financing, including, but not limited to, the legal, appraisal, engineering and environmental, title and escrow costs of Mortgagee and the lender providing any Trade Payable Financing or Equipment Financing.

(iv) The interest rate payable under, and each of the other terms and provisions of, any Trade Payable Financing or any Equipment Financing shall be on arms'-length, market rate terms.

(v) The Equipment Financing shall be either (A) unsecured or (B) secured solely by security interests that encumber only equipment located at the Property that does not constitute or become a “fixture”, and whose removal would not be overly burdensome or damage or impair the operation or value of the Property.

(vi) Not less than ten (10) business days prior to the funding of any Trade Payable Financing or Equipment Financing, Mortgagor shall provide Mortgagee with a copy of the loan documents to be executed or delivered in connection therewith, and Mortgagor shall provide Mortgagee with written evidence satisfactory to Mortgagee that such Trade Payable Financing or Equipment Financing complies with the foregoing restrictions.

Any such Trade Payable Financing and/or Equipment Financing that satisfies each of the above conditions, as applicable, is referred to herein as “**Permitted Indebtedness**”.

**5.5 Further Encumbrance of Chattels or other Collateral.** Mortgagor shall neither create nor permit any lien, security interest or encumbrance against the Chattels, Intangible Personalty or other Collateral or any part thereof or interest therein, other than the liens and

# UNOFFICIAL COPY

security interests created by the Loan Documents, without the prior written consent of Mortgagee, which may be withheld for any reason.

**5.6 Assessments Against Property.** Mortgagor shall not, without the prior written consent of Mortgagee, consent to or allow the creation of any so-called special districts, special improvement districts, benefit assessment districts or similar districts, or any other body or entity of any type, or consent to or allow the occurrence of any other event, that would or might result in the imposition of any additional taxes, assessments or other monetary obligations or burdens on the Property, and this provision shall serve as RECORD NOTICE to any such district or districts or any governmental entity under whose authority such district or districts exist or are being formed that, should Mortgagor or any other Person include all or any portion of the Property in such district or districts, whether formed or in the process of formation, without first obtaining Mortgagee's express written consent, the rights of Mortgagee in the Property pursuant to this Mortgage or following any foreclosure of this Mortgage, and the rights of any Person to whom or to which Mortgagee might transfer the Property following a foreclosure of this Mortgage, shall be senior and superior to any taxes, charges, fees, assessments or other impositions of any kind or nature whatsoever, or liens (whether statutory, contractual or otherwise) levied or imposed, or to be levied or imposed, upon the Property or any portion thereof as a result of inclusion of the Property in such district or districts.

**5.7 Transfer or Removal of Chattels, Intangible Personalty or other Collateral.** Mortgagor shall not sell, transfer or remove from the Property all or any part of the Chattels, Intangible Personalty or other Collateral, unless the items sold, transferred, or removed are simultaneously replaced with similar items of equal or greater value.

**5.8 Change of Name or Jurisdiction.** Mortgagor shall not (a) change the name under which Mortgagor does business, or adopt or begin doing business under any other name or assumed or trade name, or (b) change its jurisdiction of organization, incorporation or formation without first notifying Mortgagee of Mortgagor's intention to do so and delivering to Mortgagee such executed modifications or supplements to this Mortgage (and to any financing statement that may be filed in connection herewith) as Mortgagee may require.

**5.9 Improper Use of Property, Chattels, Intangible Personalty or other Collateral.** Mortgagor shall not use the Property, the Chattels, the Intangible Personalty or the other Collateral for any purpose or in any manner that violates any Legal Requirement, the requirements or conditions of any insurance policy, or any private covenant.

**5.10 ERISA.** Mortgagor shall not engage in any transaction that would cause the Note (or the holding of the Note by the Mortgagee or the exercise by Mortgagee of any of its rights under the Loan Documents) to be a non-exempt, prohibited transaction under ERISA, (including for this purpose the parallel provisions of Section 4975 of the Internal Revenue Code of 1986, as amended), or otherwise result in liability for Mortgagee due to Mortgagor being deemed in violation of any applicable provisions of ERISA. Mortgagor shall indemnify, protect, defend, and hold Mortgagee harmless from and against any and all losses, liabilities, damages, claims, judgments, costs, and expenses (including, without limitation excise taxes, and attorneys' fees and costs incurred in the investigation, defense, and settlement of claims and in obtaining any individual ERISA exemption or state administrative exception that may be required, in

# UNOFFICIAL COPY

Mortgagee's sole and absolute discretion) that Mortgagee may incur, directly or indirectly, as the result of the breach by Mortgagor of any warranty or representation set forth in Section 3.3(y) hereof or the breach by Mortgagor of any covenant contained in this Section. This indemnity shall survive any termination, satisfaction or foreclosure of this Mortgage or deed in lieu of such foreclosure and shall not be subject to the limitation on personal liability described in the Note.

**5.11 Use of Proceeds.** Mortgagor shall not use any funds advanced by Mortgagee under the Loan Documents for household or agricultural purposes, to purchase margin stock, or for any purpose prohibited by Legal Requirements.

**5.12 Single-Purpose Entity.** Mortgagor shall not take any action or fail to take any action that would cause Mortgagor to no longer be a Single-Purpose Entity.

**5.13 Indebtedness.** Mortgagor shall not incur any Indebtedness other than the Loan and any Permitted Indebtedness.

**5.14 Access Agreements.** Without Mortgagee's prior written consent, Mortgagor shall not enter into, amend, supplement, cancel, modify or terminate any Access Agreements.

**5.15 No Cannabis or Cannabis-Related Businesses.** Mortgagor shall not cause or permit all or any portion of any space located at the Property to be subject to any Lease that permits, or is otherwise used or occupied for or in connection with, any marijuana or cannabis related use, dispensary or business, whether or not marijuana and/or cannabis is a dominant or incidental use or element of such business or space and whether or not such use is legal or permissible under any Governmental Authority.

**5.16 Labor Agreements.** Without the prior written consent of Mortgagee, Mortgagor shall not enter into collective bargaining agreements or other similar labor agreements.

## ARTICLE 6

### EVENTS OF DEFAULT

Each of the following events will constitute an event of default (an "Event of Default") under this Mortgage and under each of the other Loan Documents:

#### 6.1 Failure to Pay Note or Other Amounts.

(a) Any failure to pay when due any interest, principal or other amount in a sum certain under this Mortgage or under any of the other Loan Documents for which sum there is a scheduled date for payment or for which there is a date certain for payment; provided, however, that in any consecutive twelve (12) month period, there shall be a single grace period of not more than five (5) days for one (1) payment of principal and interest if such payment is not made on the due date therefor (and if such payment of principal and interest is received by Mortgagee within such five (5) day period, on the date of the receipt of such payment and the curing of such default, then (i) interest at the Default Rate shall not accrue or be charged in respect to such default and (ii) no Late Charges shall be payable in respect to such default); or

# UNOFFICIAL COPY

(b) Any failure to pay any amount, other than any amount set forth in Section 6.1(a) above, on or prior to the date that is ten (10) days following demand by Mortgagee.

**6.2 Violation of Certain Covenants.** The occurrence of any violation of any covenant contained in Section 4.9, 4.25, 4.27, 4.28, 4.29, 4.30, 4.31, 4.32, 4.33, 5.3, 5.4, 5.5, 5.7, 5.12, 5.13, 5.15 or 5.16.

**6.3 Other Obligations.** The failure of Mortgagor to properly perform any obligation contained herein or in any of the other Loan Documents (other than (i) the obligation to make payments under the Note or the other Loan Documents and (ii) other obligations under the Loan Documents covered by other provisions of this Article 6) and the continuance of such failure for a period of thirty (30) days following written notice thereof from Mortgagee to Mortgagor; provided, however, that if such failure is not curable within such thirty (30) day period, then, so long as Mortgagor commences to cure such failure within such thirty (30) day period and is continually and diligently attempting to cure to completion, such failure shall not be an Event of Default unless such failure remains uncured for ninety (90) days after such written notice to Mortgagor.

**6.4 Levy Against Property.** The levy against any of the Property, Chattels or Intangible Personalty, of any execution, attachment, sequestration or other writ that shall remain unvacated, or not set aside, or unstayed, for thirty (30) days.

**6.5 Liquidation.** The liquidation, termination or dissolution of any Mortgagor Control Person.

**6.6 Appointment of Receiver.** The appointment of a trustee, receiver or liquidator for the assets, or any part thereof, of any Mortgagor Control Person, other than by the request of Mortgagee.

**6.7 Assignments.** The making by any Mortgagor Control Person of a transfer in fraud of creditors or an assignment for the benefit of creditors.

**6.8 Order for Relief.** The entry in bankruptcy of an order for relief for or against any Mortgagor Control Person.

**6.9 Bankruptcy.** The filing of any petition (or answer admitting the material allegations of any petition), or other pleading, seeking entry of an order for relief for or against any Mortgagor Control Person as a debtor or bankrupt or seeking an adjustment of any of such parties' debts, or any other relief under any state or federal bankruptcy, reorganization, debtor's relief or insolvency laws now or hereafter existing, including, without limitation, a petition or answer seeking reorganization or admitting the material allegations of a petition filed against any such party in any bankruptcy or reorganization proceeding, or the act of any of such parties in instituting or voluntarily being or becoming a party to any other judicial proceedings intended to effect a discharge of the debts of any such parties, in whole or in part, or a postponement of the maturity or the collection thereof, or a suspension of any of the rights or powers of a trustee or of any of the rights or powers granted to Mortgagee herein, or in any other document executed in connection herewith, and any such petition, if involuntary, is not dismissed within ninety (90) days following the filing thereof.

# UNOFFICIAL COPY

**6.10 Misrepresentation.** If a representation, warranty or certification made by any Mortgagor Control Person, herein, or in any of the other Loan Documents, any certificate delivered to Mortgagee under or in connection with any of the Loan Documents, or any other instrument or document modifying, renewing, extending, evidencing, securing or pertaining to the Loan is false, misleading or erroneous in any material respect at the time when made.

**6.11 Judgments.** The failure of Mortgagor, Managing Member, Guarantor, or Alto Fund II to pay any money judgment in excess of \$25,000.00 against any such party before the expiration of thirty (30) days after such judgment becomes final and no longer appealable.

**6.12 Admissions Regarding Debts.** The admission of any Mortgagor Control Person, in writing, of any such party's inability to pay such party's debts as they become due.

**6.13 Assertion of Priority.** The assertion of any claim of priority over this Mortgage, by title, lien, or otherwise, unless Mortgagor within thirty (30) days after such assertion either causes the assertion to be withdrawn or provides Mortgagee with such security as Mortgagee may require to protect Mortgagee against all loss, damage, or expense, including attorneys' fees, that Mortgagee may incur in the event such assertion is upheld.

**6.14 Other Loan Documents.** The occurrence of any default by Mortgagor or Guarantor, after the lapse of any application notice, grace or cure period, or the occurrence of any event or circumstance defined as or deemed to be an "Event of Default", under this Mortgage or any of the other Loan Documents.

**6.15 Other Liens.** The occurrence of any default after the lapse of any applicable grace or cure period, or the occurrence of any event or circumstance defined as an "Event of Default", under any consensual lien encumbering the Property or any part thereof or interest therein, or any document or instrument evidencing obligations secured thereby; provided, however, that nothing in this Section 6.15 shall be deemed to permit any such consensual lien to be executed by Mortgagor or any other Person.

**6.16 Other Indebtedness.** The occurrence of any default after the lapse of any applicable grace or cure period, or the occurrence of any event or circumstance defined as an "Event of Default," under any Indebtedness incurred or owing by Mortgagor, or any document or instrument evidencing any obligation to pay such Indebtedness.

## ARTICLE 7

### MORTGAGEE'S REMEDIES

Immediately upon or any time during the existence of any Event of Default, Mortgagee may exercise any remedy available at law or in equity, including, but not limited to, those listed below and those listed in the other Loan Documents, in such sequence, combination and manner as Mortgagee may determine in Mortgagee's sole discretion:

**7.1 Performance of Defaulted Obligations.** Mortgagee may make any payment or perform any other obligation under the Loan Documents that either Mortgagor or Guarantor has failed to make or perform, and Mortgagor hereby irrevocably appoints Mortgagee as the true and

# UNOFFICIAL COPY

lawful attorney-in-fact for Mortgagor to make any such payment and perform any such obligation in the name of Mortgagor. All payments made and expenses (including attorneys' fees) incurred by Mortgagee in this connection, together with interest thereon at the Default Rate from the date paid or incurred by Mortgagee until repaid by Mortgagor, shall become part of the Secured Obligations and shall become immediately due and payable by Mortgagor to Mortgagee. In lieu of advancing Mortgagee's own funds for such purposes, Mortgagee may use any funds of Mortgagor that may be in Mortgagee's possession, including but not limited to, insurance proceeds or condemnation awards and amounts deposited for taxes, insurance premiums, required reserves or other purposes.

**7.2 Specific Performance and Injunctive Relief.** Notwithstanding the availability of legal remedies, Mortgagee shall be entitled to obtain specific performance, mandatory or prohibitory injunctive relief, or other equitable relief requiring Mortgagor or Guarantor to cure or refrain from repeating any Default or Event of Default.

**7.3 Acceleration of Secured Obligations.** Mortgagee may, without notice or demand, declare all of the Secured Obligations immediately due and payable in full.

**7.4 Suit for Monetary Relief.** Subject to the non-recourse provisions of the Note, with or without accelerating the maturity of the Secured Obligations, Mortgagee may sue from time to time for any payment due under any of the Loan Documents, or for money damages in respect of any Default or Event of Default under any of the Loan Documents.

**7.5 Possession of Property.** To the extent permitted by law, Mortgagee may enter and take possession of the Property without seeking or obtaining the appointment of a receiver, may manage the Property itself or may employ a managing agent for the Property, and may lease or rent all or any part of the Property, either in Mortgagee's name or in the name of Mortgagor, and may collect any Gross Revenue in respect of the Property. Any Gross Revenue collected by Mortgagee under this Section will be applied first toward payment of all expenses (including, without limitation, attorneys' fees) incurred by Mortgagee, together with interest thereon at the Default Rate from the date incurred by Mortgagee until repaid by Mortgagor, and the balance of any such Gross Revenue, if any, will be applied against the Secured Obligations in such order and manner as Mortgagee may elect in Mortgagee's sole discretion.

**7.6 Enforcement of Security Interests.** Mortgagee may exercise all rights of a secured party under the UCC with respect to the Chattels, the Intangible Personalty and the other Collateral, including but not limited to taking possession of, holding, and selling the Chattels or Intangible Personalty and enforcing or otherwise realizing upon the other Collateral, including, without limitation, any accounts and general intangibles. Any requirement for reasonable notice of the time and place of any public sale, or of the time after which any private sale or other disposition is to be made, will be satisfied by Mortgagee's giving of such notice to Mortgagor not later than the date that is five (5) days prior to the date of any public sale or the date after which any private sale or other intended disposition is to be made.

**7.7 Foreclosure Against Property.**

(a) Mortgagee may:

# UNOFFICIAL COPY

(i) institute proceedings for the complete foreclosure of this Mortgage, in which case the Property may be sold for cash or credit in one or more portions and/or parcels, and in such order and manner as Mortgagee shall determine;

(ii) with or without entry and, to the extent permitted, and pursuant to the procedures provided by, applicable law, institute proceedings for the partial foreclosure of this Mortgage for the portion of the Secured Obligations then due and payable, subject to the lien of this Mortgage continuing unimpaired and without loss of priority so as to secure the balance of the Secured Obligations not then due; and

(iii) sell the Property or any part thereof and all estate, claim, demand, right, title and interest of Mortgagor therein, pursuant to power of sale or otherwise, at one or more sales, in whole or in parcels, at such time and place, upon such terms and after such notice thereof as may be required or permitted by law, and in the event of a sale, by foreclosure or otherwise, of less than all of the Property, this Mortgage shall continue as a lien on the remaining portion of the Property.

Any real property sold pursuant to any writ of execution issued on a judgment obtained by virtue of the Note or this Mortgage, may be sold in one parcel, as an entirety, or in such parcels, and in such manner or order as Mortgagee, in Mortgagee's sole discretion may elect.

(b) All fees, costs and expenses of any kind actually incurred by Mortgagee in connection with the exercise of any remedies under this Mortgage or any of the other Loan Documents, including, without limitation, the acceleration of the Secured Obligations or foreclosure of this Mortgage, which fees, actual costs and expenses shall include, without limitation, the costs incurred in respect of any litigation, mediation, arbitration, bankruptcy proceeding and any appeals thereunder and all court costs incurred in connection therewith, the costs of any appraisals of the Property or any environmental reports obtained by Mortgagee, the cost of any title reports or abstracts, all costs of any receivership for the Property advanced by Mortgagee, and all attorneys' and consultants' fees and expenses incurred by Mortgagee, shall constitute a part of the Secured Obligations and may be included as part of the amount owing from Mortgagor to Mortgagee at any foreclosure sale.

(c) The proceeds of any sale under this Section shall be applied:

First: To the payment of the costs and expenses of any such sale, including, without limitation, compensation to Mortgagee, its agents and counsel, and of any judicial proceedings, including, without limitation, the costs and legal expenses of Mortgagee in foreclosing or otherwise enforcing this Mortgage, and of all actual expenses, liabilities and advances made or incurred by Mortgagee under this Mortgage, together with interest at the Default Rate, and all taxes or assessments, except any taxes, assessments or other charges subject to which the Property shall have been sold.

Second: To the payment of the whole amount of the Secured Obligations then due, owing or unpaid, with interest on the unpaid Secured Obligations at the Default Rate from and after the happening of any Event of Default until the same is paid.

# UNOFFICIAL COPY

Third: To the payment of any other sums required to be paid by Mortgagor pursuant to any provision of this Mortgage, the Note and all other Loan Documents.

Fourth: To the payment of the surplus, if any, to whosoever may be lawfully entitled to receive the same.

Mortgagee and any receiver or custodian of the Property or any part thereof shall be liable to account for only those rents, issues and profits actually received by Mortgagee or such receiver or custodian.

(d) Mortgagee may adjourn from time to time any sale to be made under or by virtue of this Mortgage by announcement at the time and place appointed for such sale or for such adjourned sale or sales; and, except as otherwise provided by any applicable provision of law, Mortgagee, without further notice or publication, may make such sale at the time and place to which the same shall be so adjourned.

(e) Upon the completion of any sale or sales made by Mortgagee under or by virtue of this Section 7.7, Mortgagee, or any officer of any court empowered to do so, shall execute and deliver to the accepted purchaser or purchasers a good and sufficient instrument, or good and sufficient instruments, granting, conveying, assigning and transferring all estate, right, title and interest in and to the property and rights sold. Mortgagee is hereby irrevocably appointed the true and lawful attorney-in-fact of Mortgagor (coupled with an interest), in its name and stead, to make all necessary conveyances, assignments, transfers and deliveries of the Property and rights so sold and for that purpose Mortgagee may execute all necessary instruments of conveyance, assignment, transfer and delivery, and may substitute one or more Persons with like power, Mortgagor hereby ratifying and confirming all that its said attorney or such substitute or substitutes shall lawfully do by virtue hereof. Nevertheless, Mortgagor, if so requested by Mortgagee, shall ratify and confirm any such sale or sales by executing and delivering to Mortgagee or to such purchaser or purchasers all such instruments as may be advisable, in the judgment of Mortgagee, for such purpose, and as may be designated in such request. Any such sale or sales made under or by virtue of this Section 7.7, whether made under the power of sale herein granted or under or by virtue of judicial proceedings or of a judgment or decree of foreclosure and sale, shall operate to divest all the estate, right, title, interest, claim and demand whatsoever, whether at law or in equity, of Mortgagor in and to the properties and rights so sold, and shall be a perpetual bar both at law and in equity against Mortgagor and against any and all Persons claiming or who may claim the same, or any part thereof, either from, through or under Mortgagor.

(f) Upon sale made under or by virtue of this Section 7.7 (whether made under the power of sale herein granted or under or by virtue of judicial proceedings or of a judgment or decree of foreclosure and sale), Mortgagee may bid for and acquire the Property or any part thereof and in lieu of paying cash therefor may take settlement for the purchase price by crediting upon the Secured Obligations the net sale price after deducting therefrom the expenses of the sale and the costs of the action and any other sums that Mortgagee is authorized to deduct under this Mortgage.



# UNOFFICIAL COPY

(g) Subject to the provisions of Section 18 of the Note and Section 9.21 of this Mortgage, the obligation of this Mortgage and of the Note shall continue until the Secured Obligations are paid in full notwithstanding any action or actions or partial foreclosure that may be brought to recover any amount or amounts for installments of principal, interest, taxes, assessments, water and sewer charges, rents and rates or insurance or other sums or charges due and payable under the provisions of this Mortgage.

(h) No recovery of any judgment by Mortgagee and no levy of an execution under any judgment upon the Property or upon any other property of Mortgagor shall affect in any manner or to any extent, the lien of this Mortgage upon the Property or any part thereof, or any liens, rights, powers or remedies of Mortgagee hereunder, but such liens, rights, powers and remedies of Mortgagee shall continue unimpaired as before, and notwithstanding any statutory rate of interest applicable with respect to judgments, after the entering of execution of any judgment, the Secured Obligations shall bear interest at the Default Rate until the Secured Obligations shall have been paid in full.

(i) In the event of a foreclosure of this Mortgage or the succession by Mortgagee to the interests of Mortgagor hereunder, the purchaser of the Property or such successor shall succeed to all rights of Mortgagor, including any right to proceeds of insurance and to unearned premiums, and in and to all policies or certificates of insurance assigned and delivered to Mortgagee pursuant to this Mortgage.

(j) Any assignee of this Mortgage and the Note shall take the same free and clear of all offsets, counterclaims and defenses of any nature (except for payments actually made) whatsoever that Mortgagor may have against any assignor of this Mortgage and the Note and no such offset, counterclaim or defense (except for payments actually made) shall be interposed or asserted by Mortgagor in any action or proceeding brought by any such assignee upon this Mortgage and/or the Note and any such right to interpose or assert any such offset, counterclaim or defense in any such action or proceeding is hereby expressly waived by Mortgagor.

(k) In any action or proceeding to foreclose this Mortgage, or to recover or collect the Secured Obligations, the provisions of law respecting the recovery of costs, disbursements and allowances shall also be applicable.

(l) Nothing in this Section dealing with foreclosure procedures or specifying particular actions to be taken by Mortgagee shall be deemed to contradict or add to the requirements and procedures now or hereafter specified by applicable law, and any such inconsistency shall be resolved in favor of the law applicable at the time of foreclosure.

(m) In the event that a referee is appointed during the pendency of a proceeding to foreclose this Mortgage, or to recover or collect the Secured Obligations, Mortgagor hereby waives any right to an in-person hearing, and Mortgagor agrees that the referee report will be prepared based on written submission by the parties.

(n) In the event that Mortgagor fails to repair or maintain the Property as required by the terms and conditions of this Mortgage and the other Loan Documents during the

# UNOFFICIAL COPY

pendency of a proceeding to foreclose this Mortgage, or to recover or collect the Secured Obligations, Mortgagor hereby agrees that Mortgagee may apply for court approval to make such repairs or cause such maintenance, and Mortgagor waives any right to contest such application. Any such maintenance or repair costs and expenses incurred by Mortgagee shall constitute a part of the Secured Obligations and may be included as part of the amount owing from Mortgagor to Mortgagee at any foreclosure sale

**7.8 Appointment of Receiver.** To the extent permitted by law, Mortgagee shall be entitled, as a matter of absolute right and without regard to the value of any security for the Secured Obligations or the solvency of any Person liable therefor, to the appointment of a receiver for the Property upon ex-parte application to any court of competent jurisdiction. Mortgagor waives (i) any right to any hearing or notice of hearing prior to the appointment of a receiver. Such receiver shall post a bond or other security for such receiver's actions as a receiver in an amount and in form and substance as may be required by applicable law and (ii) any right to contest the appointment of any receiver proposed by Mortgagee. Such receiver and its agents shall be empowered, but shall not be obligated, to (a) take possession of the Property and any businesses conducted by Mortgagor or any other Person thereon and any business assets used in connection therewith, (b) exclude Mortgagor and Mortgagor's agents, servants, and employees from the Property, (c) collect the rents, issues, profits, and income therefrom, (d) complete any construction that may be in progress, (e) do such maintenance and make such repairs and alterations as the receiver deems necessary, (f) use all stores of materials, supplies, and maintenance equipment on the Property and replace such items at the expense of the receivership estate, (g) pay all taxes and assessments against the Property and the Chattels, all premiums for insurance thereon, all utility and other operating expenses, and all sums due under any prior or subsequent encumbrance, and (h) generally do anything that Mortgagor could legally do if Mortgagor were in possession of the Property. All expenses incurred by the receiver or its agents shall constitute a part of the Secured Obligations. Any revenues collected by the receiver shall be applied first to the expenses of the receivership, including attorneys' fees incurred by the receiver and by Mortgagee, together with interest thereon at the Default Rate from the date incurred until repaid, and the balance shall be applied toward the Secured Obligations in such order or manner as Mortgagee may in Mortgagee's sole discretion elect or in such other manner as the court may direct. Unless sooner terminated with the express consent of Mortgagee, any such receivership will continue until the Secured Obligations have been discharged in full, or until title to the Property has passed after foreclosure sale and all applicable periods of redemption have expired (but only to the extent that any such periods of redemption are not waived pursuant to Section 7.15 hereof). Notwithstanding the foregoing provisions of this Section 7.8, prior to any receiver's engagement of counsel or any consultants, or incurring any expenses in excess of \$10,000.00, in connection with the Property, such receiver shall obtain Mortgagee's written consent to such counsel, consultant or expense, as applicable.

**7.9 Right to Make Repairs, Improvements.** Should any part of the Property come into the possession of Mortgagee, whether before or after an Event of Default, Mortgagee may, but shall not be obligated, to use, operate, and/or make repairs, alterations, additions and improvements to the Property for the purpose of preserving the Property or the value of the Property. Mortgagor covenants to promptly reimburse and pay to Mortgagee, at the place where the Note is payable, or at such other place as may be designated by Mortgagee in writing, the amount of all reasonable expenses (including the cost of any insurance, taxes, or other charges)

# UNOFFICIAL COPY

incurred by Mortgagee in connection with its custody, preservation, use or operation of the Property, together with interest thereon from the date incurred by Mortgagee at the Default Rate, and all such expenses, costs, taxes, interest, and other charges shall be a part of the Secured Obligations. It is agreed, however, that the risk of accidental loss or damage to the Property is undertaken by Mortgagor and Mortgagee shall have no liability whatsoever for decline in value of the Property, for failure to obtain or maintain insurance, or for failure to determine whether any insurance ever in force is adequate as to amount or as to the risks insured.

**7.10 Surrender of Insurance.** Mortgagee may surrender the insurance policies maintained pursuant to the terms hereof, or any part thereof, and receive and apply the unearned premiums as a credit on the Secured Obligations and, in connection therewith, Mortgagor hereby appoints Mortgagee (or any officer of Mortgagee), as the true and lawful agent and attorney-in-fact for Mortgagor (with full powers of substitution), which power of attorney shall be deemed to be a power coupled with an interest and therefore irrevocable, to collect such premiums.

**7.11 Application of Letter of Credit, Escrow and Reserve Funds.** Mortgagee may draw all amounts available under any letter of credit provided to Mortgagee and apply any or all of the funds that are so drawn or held in any escrow account or reserve account or maintained pursuant to any of the Loan Documents or otherwise in connection with the Loan to the payment of the Secured Obligations in such order and manner as Mortgagee may determine in Mortgagee's sole discretion.

**7.12 Remedies Under Other Loan Documents.** Mortgagee may exercise any right or remedy provided for in any of the other Loan Documents.

**7.13 Prima Facie Evidence.** Mortgagor agrees that, in any assignments, deeds, bills of sale, notices of sale, or postings, given by Mortgagee, any and all statements of fact or other recitals therein made as to the identity of Mortgagee, or as to the occurrence or existence of any Event of Default, or as to the acceleration of the maturity of the Secured Obligations, or as to the request to sell, posting of notice of sale, notice of sale, time, place, terms and manner of sale and receipt, distribution and application of the money realized therefrom, and without being limited by the foregoing, as to any other act or thing having been duly done by Mortgagee, shall be taken by all courts of law and equity as prima facie evidence that such statements or recitals state facts and are without further question to be so accepted, and Mortgagor does hereby ratify and confirm any and all acts that Mortgagee may lawfully do by virtue hereof.

**7.14 Replacement of Property Manager.** Following the occurrence of an Event of Default, Mortgagee shall have the right to replace the Property Manager with a property manager acceptable to Mortgagee in Mortgagee's sole discretion.

**7.15 Waiver of Right of Redemption.** Mortgagor hereby waives any right of redemption under any applicable federal, state or local law.

## ARTICLE 8

### ASSIGNMENT OF LEASES AND RENTS

# UNOFFICIAL COPY

**8.1 Assignment of Leases and Rents.** Mortgagor hereby unconditionally and absolutely grants, transfers and assigns unto Mortgagee all Gross Revenue now or hereafter due or payable for the occupancy or use of the Property, and all Leases, whether written or oral, with all security therefor, including all guaranties thereof, now or hereafter affecting the Property; reserving unto Mortgagor, however, a license to collect and retain such Gross Revenue and all security for the Leases prior to the occurrence of any Event of Default. Such license shall be revocable by Mortgagee without notice to Mortgagor at any time after the occurrence of an Event of Default. Mortgagor represents that the Gross Revenue and the Leases have not been heretofore sold, assigned, transferred or set over by any instrument now in force and will not at any time during the life of this assignment be sold, assigned, transferred or set over by Mortgagor or by any Person or Persons whomsoever; and Mortgagor has good right to sell, assign, transfer and set over the same and to grant to and confer upon Mortgagee the rights, interest, powers and authorities herein granted and conferred. Failure of Mortgagee at any time or from time to time to enforce the assignment of Gross Revenue and Leases under this Section shall not in any manner prevent its subsequent enforcement, and Mortgagee is not obligated to collect anything hereunder, but is accountable only for sums actually collected.

**8.2 Further Assignments.** Mortgagor shall give Mortgagee at any time upon demand any further or additional forms of assignment or transfer of such Gross Revenue, Leases and security as may be requested by Mortgagee, and shall deliver to Mortgagee executed copies of all such Leases and security.

**8.3 Application of Rents.** Mortgagee shall be entitled to deduct and retain a just and reasonable compensation from monies received hereunder for its services or that of its agents in collecting such monies. Any monies received by Mortgagee hereunder may be applied when received from time to time in payment of any taxes, assessments or other liens affecting the Property regardless of the delinquency, such application to be in such order as Mortgagee may determine. The acceptance of this Mortgage by Mortgagee or the exercise of any rights by it hereunder shall not be, or be construed to be, an affirmation by it of any Lease nor an assumption of any liability under any Lease.

**8.4 Collection of Rents.** Upon or at any time after an Event of Default shall have occurred and be continuing, Mortgagee may declare all sums secured hereby, immediately due and payable, and may, at its option, without notice, and whether or not the Secured Obligations shall have been declared due and payable, either in person or by agent, with or without bringing any action or proceeding, or by a receiver to be appointed by a court, (a) enter upon, take possession of, manage and operate the Property, or any part thereof (including without limitation making necessary repairs, alterations and improvements to the Property); (b) make, cancel, enforce or modify Leases (and any guaranties thereof); (c) obtain and evict tenants; (d) fix or modify Gross Revenue; (e) do any acts that Mortgagee deems proper to protect the security thereof and (f) either with or without taking possession of the Property, in Mortgagee's own name sue for or otherwise collect and receive such Gross Revenue, including any such Gross Revenue that is past due and unpaid. In connection with the foregoing, Mortgagee shall be entitled and empowered to employ attorneys, and management, rental and other agents in and about the Property and to effect the matters that Mortgagee is empowered to do, and in the event Mortgagee shall itself effect such matters, Mortgagee shall be entitled to charge and receive management, rental and other fees therefor as may be customary in the area in that the Property

# UNOFFICIAL COPY

is located; and the fees, charges, costs and expenses of Mortgagee or such Persons shall be additional Secured Obligations. Mortgagee may apply all funds collected as aforesaid, less costs and expenses of operation and collection, including attorneys' and agents' fees, charges, costs and expenses, as aforesaid, upon any Secured Obligations, and in such order as Mortgagee may determine. The entering upon and taking possession of the Property, the collection of such Gross Revenue and the application thereof as aforesaid shall not be deemed to (i) cure or waive any Default or Event of Default, (ii) waive, modify or affect notice of any Default or Event of Default under the Note or this Mortgage or (iii) invalidate any act done pursuant to such notice.

**8.5 Authority of Mortgagee.** Any tenants or occupants of any part of the Property are hereby authorized to recognize the claims of Mortgagee hereunder without investigating the reason for any action taken by Mortgagee, or the validity or the amount of Secured Obligations owing to Mortgagee, or the existence of any default in the Note or this Mortgage, or under or by reason of this assignment of Gross Revenue and Leases, or the application to be made by Mortgagee of any amounts to be paid to Mortgagee. The sole signature of Mortgagee shall be sufficient for the exercise of any rights under this assignment and the sole receipt of Mortgagee for any sums received shall be a full discharge and release therefor to any such tenant or occupant of the Property. Checks for all or any part of the rentals collected under this Assignment shall be drawn in such a manner as to be deposited in the Deposit Account or as otherwise directed by Mortgagee.

**8.6 Indemnification of Mortgagee.** Nothing herein contained shall be deemed to obligate Mortgagee to perform or discharge any obligation, duty or liability of any lessor under any Lease of the Property, and Mortgagor shall and does hereby indemnify and hold Mortgagee harmless from any and all liability, loss, costs or damage that Mortgagee may or might incur under any Lease or by reason of the assignment; and any and all such liability, loss or damage incurred by Mortgagee, together with the actual costs and expenses, including reasonable attorneys' fees, incurred by Mortgagee in defense of any claims or demands therefor (whether successful or not), shall be additional Secured Obligations, and Mortgagor shall reimburse Mortgagee therefor on demand.

## ARTICLE 9

### MISCELLANEOUS PROVISIONS

**9.1 Time of the Essence.** Time is of the essence with respect to all provisions of the Loan Documents.

**9.2 Joint and Several Obligations.** If Mortgagor is more than one Person, then: (a) all Persons comprising Mortgagor are jointly and severally liable for all of the Secured Obligations; (b) representations, warranties, and covenants made by any Person comprising Mortgagor shall be deemed representations, warranties, and covenants of each of the Persons comprising Mortgagor; (c) any breach, Default or Event of Default by any of the Persons comprising Mortgagor hereunder shall be deemed to be a breach, Default, or Event of Default of Mortgagor; and (d) any event creating personal liability of any of the Persons comprising Mortgagor shall create personal liability for all of the Persons comprising Mortgagor.

# UNOFFICIAL COPY

**9.3 Waiver of Homestead and Other Exemptions.** To the extent permitted by law, Mortgagor hereby waives all rights to any homestead or other exemption to which Mortgagor would otherwise be entitled under any Legal Requirements. Mortgagor hereby waives any right it may have to require Mortgagee to marshal all or any portion of the security for the Secured Obligations. Notwithstanding the existence of interests in the Property, Chattels, Intangible Personalty or other Collateral other than that created by this Mortgage, and notwithstanding any other provision of this Mortgage, upon an Event of Default, to the extent permitted by applicable law, Mortgagee shall have the right, in Mortgagee's sole discretion, to determine the order in which the Property, Chattels, Intangible Personalty or other Collateral shall be subjected to the remedies provided in this Mortgage and to determine the order and manner in which all or any part of the Indebtedness secured by this Mortgage is satisfied from the proceeds realized upon the exercise of the remedies provided in this Mortgage.

**9.4 Non-Recourse; Exceptions to Non-Recourse.** Except as expressly set forth in Section 18 of the Note and Section 9.21 of this Mortgage, the recourse of Mortgagee with respect to the obligations evidenced by the Note, this Mortgage and the other Loan Documents (except for the Guaranty Agreement and the Environmental Indemnity Agreement) shall be solely to the Property, the Chattels, the Intangible Personalty, the other Collateral, and any other collateral given as security for the Note.

**9.5 Rights and Remedies Cumulative.** Mortgagee's rights and remedies under each of the Loan Documents are cumulative of the rights and remedies available to Mortgagee under each of the other Loan Documents and those otherwise available to Mortgagee at law, in equity or otherwise. No act of Mortgagee shall be construed as an election to proceed under any particular provision of any Loan Document to the exclusion of any other provision in the same or any other Loan Document, or as an election of remedies to the exclusion of any other remedy that may then or thereafter be available to Mortgagee.

**9.6 Modification; No Implied Waivers.**

(a) Mortgagee shall not be deemed to have waived any provision of any Loan Document unless such waiver is in writing and is signed by Mortgagee. Without limiting the generality of the preceding sentence, neither Mortgagee's acceptance of any payment with knowledge of a Default or Event of Default by Mortgagor, nor any failure by Mortgagee to exercise any remedy following a Default or Event of Default by Mortgagor shall be deemed a waiver of such Default or Event of Default, and no waiver by Mortgagee of any particular Default or Event of Default on the part of Mortgagor shall be deemed a waiver of any other Default or Event of Default or of any similar Default or Event of Default in the future. No course of conduct or course of dealing or course of performance during the period of time that the Secured Obligations remain outstanding shall be deemed to constitute a waiver by Mortgagee of any rights under the Loan Documents.

(b) No modification, amendment, extension, discharge or termination of any provision of this Mortgage or any other Loan Document shall in any event be effective unless the same shall be in a writing signed by each of Mortgagee and each of the other parties to this Mortgage or such other Loan Document. Except as otherwise expressly provided herein, no

# UNOFFICIAL COPY

notice to or demand on Mortgagor shall entitle Mortgagor to any other or future notice or demand in the same, similar or other circumstances.

**9.7 No Third Party Rights.** No Person shall be a third party beneficiary of any provision of any of the Loan Documents. All provisions of the Loan Documents favoring Mortgagee are intended solely for the benefit of Mortgagee, and no third party shall be entitled to assume or expect that Mortgagee will not waive or consent to modification of any such provision in Mortgagee's sole discretion.

**9.8 Preservation of Liability and Priority.** Without affecting the liability of Mortgagor or of any other Person (except a Person expressly released in writing) for payment and performance of all of the Secured Obligations, and without affecting the rights of Mortgagee with respect to any security not expressly released in writing, and without impairing in any way the priority of this Mortgage over the interests of any Person acquired or first evidenced by recording subsequent to the recording hereof, Mortgagee may, either before or after the Maturity Date, and without notice or consent: (a) release any Person liable for payment or performance of all or any part of the Secured Obligations; (b) make any agreement altering the terms of payment or performance of all or any of the Secured Obligations; (c) exercise or refrain from exercising, or waive, any right or remedy that Mortgagee may have under any of the Loan Documents; (d) accept additional security of any kind for any of the Secured Obligations; or (e) release or otherwise deal with any real or personal property securing the Secured Obligations. Any Person acquiring or recording evidence of any interest of any nature in the Property, the Chattels, the Intangible Personalty or the other Collateral shall be deemed, by acquiring such interest or recording any evidence thereof, to have agreed and consented to any or all such actions by Mortgagee.

**9.9 Subrogation of Mortgagee.** Mortgagee shall be subrogated to the lien of any previous encumbrance discharged with funds advanced by Mortgagee under the Loan Documents, regardless of whether such previous encumbrance has been released of record.

**9.10 Notices.** Any notice, consent or approval required or permitted to be given by Mortgagor or Mortgagee under this Mortgage shall be in writing and will be deemed given (a) upon personal delivery, (b) on the first Business Day after receipted delivery to a courier service that guarantees next-business-day delivery, or (c) on the third Business Day after mailing, by registered or certified United States mail, postage prepaid, in any case to the appropriate party at its address set forth below:

If to Mortgagor:

Washington Park Plaza LLC  
1449 37th Street, Suite 216  
Brooklyn, New York 11218  
Attention: Binyamin Beitel

With a copy to:

Higier Allen & Lautin, P.C.  
2711 N. Haskell Avenue, Suite 2400

# UNOFFICIAL COPY

Dallas, Texas 75204  
Attention: Stuart A. Lautin, Esq.

If to Mortgagee:

Continental Casualty Company,  
an Illinois insurance company  
151 N. Franklin Street, 10th Floor  
Chicago, Illinois 60606  
Attention: Michael Coffey, Esq.

and

Continental Casualty Company  
A/L Loews Corporation  
667 Madison Avenue  
New York, New York 10065  
Attention: Michael Cotler

with a copy to:

Katten Muchin Rosenman LLP  
2029 Century Park East, Suite 2600  
Los Angeles, California 90067-3012  
Attention: Adam J. Engel, Esq.

Either party may change such party's address for notices or copies of notices by giving written notice to the other party in accordance with this Section.

**9.11 Release or Assignment by Mortgagee.** Upon payment and performance in full of all of the Secured Obligations, Mortgagee will, upon request of Mortgagor and at the sole cost and expense of Mortgagor, execute and deliver to Mortgagor such documents as may be required to release this Mortgage of record. Any such documents shall be satisfactory in form and substance to Mortgagee.

**9.12 Illegality.** If any provision of this Mortgage is held to be illegal, invalid, or unenforceable under present or future laws effective during the term of this Mortgage, the legality, validity, and enforceability of the remaining provisions of this Mortgage shall not be affected thereby, and in lieu of each such illegal, invalid or unenforceable provision there shall be added automatically as a part of this Mortgage a provision as similar in terms to such illegal, invalid, or unenforceable provision as may be possible and be legal, valid, and enforceable. If the rights and liens created by this Mortgage shall be invalid or unenforceable as to any part of the Secured Obligations, then the unsecured portion of the Secured Obligations shall be completely paid prior to the payment of the remaining and secured portion of the Secured Obligations, and all payments made on the Secured Obligations shall be considered to have been paid on and applied first to the complete payment of the unsecured portion of the Secured Obligations.



# UNOFFICIAL COPY

**9.13 Usury Savings Clause.** It is expressly stipulated and agreed to be the intent of Mortgagee and Mortgagor at all times to comply with the applicable law governing the highest lawful interest rate. If the applicable law is ever judicially interpreted so as to render usurious any amount called for under the Note or under any of the other Loan Documents, or contracted for, charged, taken, reserved or received with respect to the loan evidenced thereby, or if acceleration of the maturity of the Note, any prepayment by Mortgagor, or any other circumstance whatsoever, results in Mortgagor having paid any interest in excess of that permitted by applicable law, then it is the express intent of Mortgagor and Mortgagee that all excess amounts theretofore collected by Mortgagee be credited on the principal balance of the Note (or, at Mortgagee's option, paid over to Mortgagor), and the provisions of the Note and other Loan Documents immediately be deemed reformed and the amounts thereafter collectible hereunder and thereunder reduced, without the necessity of the execution of any new document, so as to comply with the applicable law, but so as to permit the recovery of the fullest amount otherwise called for hereunder and thereunder. The right to accelerate maturity of the Note does not include the right to accelerate any interest that has not otherwise accrued on the date of such acceleration, and Mortgagee does not intend to collect any unearned interest in the event of acceleration. All sums paid or agreed to be paid to Mortgagee for the use, forbearance or detention of the Secured Obligations evidenced hereby or by the Note shall, to the extent permitted by applicable law, be amortized, prorated, allocated and spread throughout the full term of such Secured Obligations until payment in full so that the rate or amount of interest on account of such Secured Obligations does not exceed the maximum rate or amount of interest permitted under applicable law. The term "applicable law" as used herein shall mean any federal or state law applicable to the loan made by Mortgagee to Mortgagor evidenced by the Note.

**9.14 Obligations Binding Upon Mortgagor's Successors.** This Mortgage is binding upon Mortgagor and Mortgagor's successors and assigns, and shall inure to the benefit of Mortgagee, and its successors and assigns, and the provisions hereof shall likewise be covenants running with the land. The duties, covenants, conditions, obligations, and warranties of Mortgagor in this Mortgage shall be joint and several obligations of Mortgagor and Mortgagor's successors and assigns.

**9.15 Construction.** All pronouns and any variations of pronouns herein shall be deemed to refer to the masculine, feminine, or neuter, singular or plural, as the identity of the parties may require. Whenever the terms herein are singular, the same shall be deemed to mean the plural, as the identity of the parties or the context requires. The term "including" shall mean "including, without limitation." Each party hereto acknowledges that each party hereto and its respective counsel reviewed and revised this Mortgage and the other Loan Documents, and each party hereto agrees that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in the interpretation of this Mortgage and the other Loan Documents.

**9.16 Attorneys' Fees.** Any reference in this Mortgage to attorneys' or counsel fees paid or incurred by Mortgagee shall be deemed to include paralegals' fees and legal assistants' fees. Moreover, wherever provision is made herein for payment of attorneys' or counsels' fees or expenses incurred by Mortgagee, such provision shall include but not be limited to, such actual fees or actual expenses incurred in any and all judicial, bankruptcy, reorganization, administrative, or other proceedings, including appellate proceedings, whether such fees or

# UNOFFICIAL COPY

expenses arise before proceedings are commenced, during such proceedings or after entry of a final judgment.

## 9.17 Waiver and Agreement Regarding Prepayment.

(A) EXCEPT AS OTHERWISE EXPRESSLY PERMITTED HEREUNDER OR UNDER THE NOTE, MORTGAGOR HEREBY EXPRESSLY WAIVES ANY RIGHT MORTGAGOR MAY HAVE UNDER APPLICABLE LAW TO PREPAY THE NOTE, IN WHOLE OR IN PART, WITHOUT PREPAYMENT CHARGE, UPON ACCELERATION OF THE MATURITY DATE OF THE NOTE, AND AGREES THAT, EXCEPT AS OTHERWISE EXPRESSLY PERMITTED HEREUNDER OR UNDER THE NOTE, IF FOR ANY REASON A PREPAYMENT OF ALL OR ANY PART OF THE NOTE IS MADE, WHETHER VOLUNTARILY OR FOLLOWING ANY ACCELERATION OF THE MATURITY DATE OF THE NOTE BY MORTGAGEE ON ACCOUNT OF THE OCCURRENCE OF ANY EVENT OF DEFAULT ARISING FOR ANY REASON, INCLUDING, WITHOUT LIMITATION, AS A RESULT OF ANY PROHIBITED OR RESTRICTED TRANSFER, FURTHER ENCUMBRANCE OR DISPOSITION OF THE PROPERTY OR ANY PART THEREOF SECURING THE NOTE, THEN MORTGAGOR SHALL BE OBLIGATED TO PAY, CONCURRENTLY WITH SUCH PREPAYMENT, THE PREPAYMENT PREMIUM PROVIDED FOR IN THE NOTE. MORTGAGOR HEREBY DECLARES THAT MORTGAGEE'S AGREEMENT TO MAKE THE LOAN EVIDENCED BY THE NOTE AT THE INTEREST RATE AND FOR THE TERM SET FORTH IN THE NOTE CONSTITUTES ADEQUATE CONSIDERATION, GIVEN INDIVIDUAL WEIGHT BY MORTGAGOR, FOR THIS WAIVER AND AGREEMENT.

(b) If the maturity of the Note secured by this Mortgage is accelerated, Mortgagor shall pay a prepayment premium in an amount equal to any prepayment premium that would be payable under the terms of the Note as if the Note were prepaid in full on the date of the acceleration..

**9.18 Waiver of Jury Trial.** MORTGAGEE AND MORTGAGOR KNOWINGLY, IRREVOCABLY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY RIGHT EITHER MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY ACTION, PROCEEDING OR COUNTERCLAIM BASED ON THIS MORTGAGE, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS MORTGAGE OR ANY LOAN DOCUMENT, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENT (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY HERETO OR TO ANY LOAN DOCUMENT. THIS PROVISION IS A MATERIAL INDUCEMENT FOR MORTGAGEE AND MORTGAGOR TO ENTER INTO THE LOAN TRANSACTION EVIDENCED BY THE NOTE.

## 9.19 Governing Laws; Forum.

(a) The substantive laws of the State of Illinois shall govern the validity, construction, enforcement and interpretation of this Mortgage without reference to any conflicts of law principles.

# UNOFFICIAL COPY

(b) Any legal suit, action or proceeding against Mortgagee or Mortgagor arising out of or relating to this Mortgage may at Mortgagee's option be instituted in any federal or state court located in or serving the County of Cook, State of Illinois and Mortgagor waives any objections that it may now or hereafter have based on venue and/or forum non conveniens of any such suit, action or proceeding, and Mortgagor hereby irrevocably submits to the jurisdiction of any such court in any suit, action or proceeding.

**9.20 Entire Agreement.** This Mortgage, together with the other Loan Documents, contains the entire understanding between the parties to the matters addressed herein, and may not be changed, amended, modified or waived except pursuant to a written agreement executed by the parties, and supersedes any other understandings or agreements with respect to the matters covered hereby.

**9.21 Limitation on Liability.** The provisions of Section 18(a) and Section 18(b) of the Note are incorporated herein by reference.

**9.22 Acceptance of Cures for Events of Default.** Notwithstanding anything to the contrary contained in this Mortgage or the other Loan Documents (including, without limitation, any reference to the "continuance" of an Event of Default), Mortgagee shall in no event or under any circumstance be obligated or required to accept a cure by Mortgagor, Guarantors or by any other Person of an Event of Default unless Mortgagee agrees to do so in the exercise of Mortgagee's sole and absolute discretion, it being agreed that once an Event of Default has occurred and so long as Mortgagee has not determined to accept a cure of such Event of Default in writing, Mortgagee shall be absolutely and unconditionally entitled to pursue all rights and remedies available to it under this Mortgage or the other Loan Documents or otherwise at law or in equity.

**9.23 Binding Action.** Mortgagor agrees that with respect to any consent, direction, approval or action that is required of Mortgagor under this Mortgage, any consent, direction, approval or action by Mortgagor shall be binding on Mortgagor and that Mortgagee shall have no obligation to confirm any such consent, direction, approval or action given to it and may act in reliance upon any such consent, direction, approval or action.

**9.24 Claims Against Mortgagee.**

(b) Mortgagee shall not be in default under this Mortgage, or under any of the other Loan Documents, unless a written notice specifically setting forth the claim of Mortgagor shall have been given to Mortgagee within five (5) months after Mortgagor first had knowledge of the occurrence of the event that Mortgagor alleges gave rise to such claim and Mortgagee does not remedy or cure the default, if any there be, promptly thereafter. Mortgagor waives any claim, set-off or defense against Mortgagee arising by reason of any alleged default by Mortgagee as to which Mortgagor does not give such notice timely as aforesaid. Mortgagor acknowledges that such waiver is or may be essential to Mortgagee's ability to enforce Mortgagee's remedies without delay and that such waiver therefore constitutes a substantial part of the bargain between Mortgagee and Mortgagor with respect to the Loan.

# UNOFFICIAL COPY

(c) Mortgagor hereby agrees that the sole remedy of Mortgagor based upon any claim that Mortgagor may have against any of the Indemnified Parties based upon any assertion that any such Indemnified Party has acted unreasonably or that any such Indemnified Party has unreasonably withheld or unreasonably delayed any action shall be an action for specific performance, injunctive relief or declaratory judgment. Mortgagor hereby further agrees that the Indemnified Parties shall not be liable for any monetary damages in respect of any such claim and that Mortgagor's sole remedy in respect of any such claim shall be limited to specific performance, injunctive relief or declaratory judgment.

## ARTICLE 10

### ILLINOIS PROVISIONS

**10.1 Principles of Construction.** In the event of any inconsistencies between the terms and conditions of this Article 10 and the other terms and conditions of this Mortgage, the terms and conditions of this Article 10 shall control and be binding.

**10.2 Compliance with Illinois Mortgage Foreclosure Law.** If any provision of this Mortgage shall be inconsistent with any provision of the statutes or common law of the State of Illinois governing the foreclosure of this Mortgage (collectively, "Foreclosure Laws"), the provisions of the Foreclosure Laws 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 Foreclosure Laws. If any provision of this Mortgage shall grant to Mortgagee any rights or remedies upon an Event of Default of Mortgagor which are more limited than the rights that would otherwise be vested in Mortgagee under the Foreclosure Laws in the absence of said provision, Mortgagee shall be vested with rights granted in the Foreclosure Laws to the full extent permitted by law.

**10.3 Advances.** Upon the occurrence of an Event of Default, Mortgagee may, but need not, make any payment or perform any act herein required of Mortgagor in any form and manner deemed expedient. By way of illustration and not in limitation of the foregoing, Mortgagee may (but need not) do all or any of the following: make payments of principal or interest or other amounts on any lien, encumbrance or charge on any part of the Property; complete construction; make repairs; collect rents; prosecute collection of any sums due with respect to the Property; purchase, discharge, compromise or settle any tax lien or any other lien, encumbrance, suit, proceeding, title or claim thereof; contest any tax or assessment; and redeem from any tax sale or forfeiture affecting the Property. All monies paid for any of the purposes herein authorized and all expenses paid or incurred in connection therewith, including reasonable attorneys' fees, and any other monies advanced by Mortgagee to protect the Property and the lien hereof, shall be so much additional indebtedness secured hereby, and shall become immediately due and payable without notice and with interest thereon at Default Rate. In making any payment or securing any performance relating to any obligation of Mortgagor hereunder, Mortgagee shall (as long as it acts in good faith) be the sole judge of the legality, validity and amount of any lien or encumbrance and of all other matters necessary to be determined in satisfaction thereof. No such action of Mortgagee, and no inaction of Mortgagee hereunder, shall ever be considered as a waiver of any right accruing to it on account of any default on the part of Mortgagor. All sums paid by Mortgagee for the purposes herein authorized, or

# UNOFFICIAL COPY

authorized by any Loan Document shall be considered additional advances made under the Note and pursuant to this Mortgage and shall be secured by this Mortgage, **WITH THE PROVISIO THAT THE AGGREGATE AMOUNT OF THE INDEBTEDNESS SECURED HEREBY TOGETHER WITH ALL SUCH ADDITIONAL SUMS ADVANCED SHALL NOT EXCEED TWO HUNDRED PERCENT (200%) OF THE AMOUNT OF THE ORIGINAL INDEBTEDNESS SECURED HEREBY.**

**10.4 Insurance.** In the event that Mortgagor does not fulfill its requirements to carry the required insurance hereunder or under the other Loan Documents and/or to provide Mortgagee with proof of such insurance, Mortgagee may, but is not obligated to, purchase such insurance at Mortgagor's expense to protect Mortgagee's interest in and to the Property. This insurance may, but need not protect Mortgagor's interest. The coverage obtained by Mortgagee may not pay any claim that is made by or against Mortgagor in connection with the Property. If Mortgagor complies with the requirements hereunder and under the other Loan Documents and substantially provides evidence of the required insurance, hereunder, Mortgagor may cancel any of such insurance purchased by Mortgagee. Mortgagor shall be responsible for any and all costs of any insurance purchased by Mortgagee hereunder, including interest thereon, and any other charges that Mortgagee may impose in connection with the placement of such insurance, until the effective date of the cancellation of the insurance or payment of such amounts due. These costs, including interest and other charges, may be added to the outstanding principal balance of the Note, at Mortgagee's option. The cost of such insurance may be more than the cost of insurance Mortgagor may be able to obtain on its own.

**ILLINOIS COLLATERAL PROTECTION ACT.** MORTGAGOR IS HEREBY NOTIFIED PURSUANT TO 815 ILCS 180/1 ET. SEQ. AS FOLLOWS:

UNLESS YOU MORTGAGOR PROVIDE US MORTGAGEE WITH EVIDENCE OF THE INSURANCE COVERAGE REQUIRED BY YOUR AGREEMENT WITH US, WE MAY PURCHASE INSURANCE AT YOUR EXPENSE TO PROTECT OUR INTERESTS IN YOUR COLLATERAL. THIS INSURANCE MAY, BUT NEED NOT, PROTECT YOUR INTERESTS. THE COVERAGE THAT WE PURCHASE MAY NOT PAY ANY CLAIM THAT YOU MAKE OR ANY CLAIM THAT IS MADE AGAINST YOU IN CONNECTION WITH THE COLLATERAL. YOU MAY LATER CANCEL ANY INSURANCE PURCHASED BY US, BUT ONLY AFTER PROVIDING US WITH EVIDENCE THAT YOU HAVE OBTAINED INSURANCE AS REQUIRED BY OUR AGREEMENT. IF WE PURCHASE INSURANCE FOR THE COLLATERAL, YOU WILL BE RESPONSIBLE FOR THE COSTS OF THAT INSURANCE, INCLUDING INTEREST AND ANY OTHER CHARGES WE MAY IMPOSE IN CONNECTION WITH THE PLACEMENT OF THE INSURANCE, UNTIL THE EFFECTIVE DATE OF THE CANCELLATION OR EXPIRATION OF THE INSURANCE. THE COSTS OF THE INSURANCE MAY BE ADDED TO YOUR TOTAL OUTSTANDING BALANCE OR OBLIGATION. THE COSTS OF THE INSURANCE MAY BE MORE THAN THE COST OF INSURANCE YOU MAY BE ABLE TO OBTAIN ON YOUR OWN.

**10.5 Marshalling and Other Matters.** Mortgagor hereby expressly waives any and all rights of reinstatement and redemption in connection with any foreclosure of this Mortgage on behalf of Mortgagor, and on behalf of each and every person acquiring any interest in or title

# UNOFFICIAL COPY

to the Property subsequent to the date of this Mortgage and on behalf of all persons to the extent permitted by applicable law. Mortgagor acknowledges that the Property does not constitute agricultural real estate or residential real estate as defined in 735 ILC 5/15-1201 and 5/15-1219. To the extent permitted by law, Mortgagor waives any rights of redemption pursuant to 735 ILC 5/15-1601(b). Mortgagor also hereby releases and waives all rights under and by virtue of the homestead exemption of the State of Illinois.

**10.6 Expenses.** Without limiting any provision set forth herein, all expenses incurred by Mortgagee, to the extent reimbursable under Sections 5/15-1510, 5/15-1512 of the Act (as hereinafter defined), or any other provision of the Act, whether incurred before or after any decree or judgment of foreclosure, and whether or not enumerated in any other provision of this Mortgage, shall be added to the indebtedness secured by this Mortgage and by the judgment of foreclosure. For purposes herein, the "Act" shall mean the Illinois Mortgage Foreclosure Law, Illinois Compiled Statutes Chapter 735, Section 5/15 – 1101 et seq.

**10.7 Business Loan.** Mortgagor stipulates, represents, warrants, affirms and agrees that the Loan secured hereby constitutes a "business loan" within the meaning of Sections 205/4(1) of Chapter 815 of the Illinois Compiled Statutes, as amended.

**10.8 Waiver.** Mortgagor waives, to the extent permitted by law, (a) the benefit of all laws now existing or that may hereafter be enacted providing for any appraisal before sale of any portion of the Property, (b) all rights and remedies which Mortgagor may have or be able to assert by reason of the laws of the State of Illinois pertaining to the rights and remedies of sureties, (c) the right to assert any statute of limitations as a bar to the enforcement of the lien of this Mortgage or to any action brought to enforce the secured obligations, and (d) any rights, legal or equitable to require marshaling of assets or to require foreclosure sales in a particular order. Without limiting the generality of the preceding sentence, Mortgagor, on its own behalf and on behalf of each and every person acquiring any interest in or title to the Property subsequent to the date of this Mortgage, hereby irrevocably waives any and all rights of reinstatement or redemption from sale or from or under any order, judgment or decree of foreclosure of this Mortgage or under any power contained herein or under any sale pursuant to any statute, order, decree or judgment of any court. Mortgagor, for itself and for all persons hereafter claiming through or under it or who may at any time hereafter become holders of liens junior to the lien of this Mortgage, hereby expressly waives and releases all rights to direct the order in which any of the Property shall be sold in the event of any sale or sales pursuant hereto and to have any of the Property and/or any other property now or hereafter constituting security for any of the indebtedness secured hereby marshaled upon any foreclosure of this Mortgage or of any other security for any of said indebtedness. Mortgagee shall have the right to determine the order in which any or all of the Property shall be subjected to the remedies provided herein. Mortgagee shall have the right to determine the order in which any or all portions of the secured obligations are satisfied from the proceeds realized upon the exercise of the remedies provided herein. Mortgagor, on behalf of itself and all persons now or hereafter interested in the Property, voluntarily and knowingly hereby acknowledges that the transaction of which this Mortgage is a part is a transaction which does not include either agricultural real estate (as defined in the Act) or residential real estate (as defined in the Act).

# UNOFFICIAL COPY

**10.9 No Property Manager Lien.** Any Management Agreement for or relating to all or any part of the Property, whether now in effect or entered into hereafter by Mortgagor or on behalf of Mortgagor, shall contain a subordination provision whereby the property manager forever and unconditionally subordinates to the lien of this Mortgage and the Loan Documents any and all mechanic's lien rights and claims that it or anyone claiming through or under it may have at any time pursuant to any statute or law, including, without limitation, Illinois Compiled Statutes, Chapter 770, Section 60/1. Such Management Agreement or a short form thereof, including such subordination, shall, at the Mortgagee's request, be recorded with the office of the recorder of deeds for the county in which the Property is located. Mortgagor's failure to cause any of the foregoing to occur shall constitute an Event of Default under this Mortgage.

**10.10 Transfer Tax Obligation and Indemnification.** The present amount of the Loan secured hereby is \$24,200,000.00; the maximum amount, including present and future Obligations, which may be secured hereby at any one time is \$48,400,000.00, plus interest, plus any disbursements and taxes and insurance on the Property, plus interest thereon at the rate set forth in the Loan Agreement, and any other sums advanced in accordance with the terms hereof or any of the other Loan Documents to protect the security of this Mortgage or any of the Loan Documents.

[END OF TEXT]





# UNOFFICIAL COPY

## EXHIBIT A

### LEGAL DESCRIPTION

#### PARCEL 1:

LOTS 1, 2 AND 3 IN WASHINGTON PARK PLAZA, BEING A RESUBDIVISION OF PART OF THE EAST 1/2 OF SECTION 32, TOWNSHIP 36 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN, ACCORDING TO THE PLAT THEREOF RECORDED DECEMBER 7, 2005 AS DOCUMENT 0534145044, AND CERTIFICATE OF CORRECTION RECORDED JULY 5, 2007 AS DOCUMENT 0718618033, IN COOK COUNTY, ILLINOIS.

#### PARCEL 2:

LOTS 1, 2 AND 3 IN THE PLAT OF RESUBDIVISION OF LOT 4 OF WASHINGTON PARK

PLAZA, BEING A RESUBDIVISION OF LOT 4 OF WASHINGTON PARK PLAZA, BEING A RESUBDIVISION OF PART OF THE EAST 1/2 OF SECTION 32, TOWNSHIP 36 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN, ACCORDING TO THE PLAT THEREOF RECORDED JULY 18, 2005 AS DOCUMENT 0619945052, IN COOK COUNTY, ILLINOIS.

#### PARCEL 3:

THAT PART OF LOT 1 IN RICHARD HOFFMAN'S CONSOLIDATION, BEING A CONSOLIDATION OF THAT PART OF THE EAST HALF OF THE NORTHEAST QUARTER OF SECTION 32, TOWNSHIP 36 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN, ACCORDING TO THE PLAT THEREOF RECORDED JULY 13, 1988 AS DOCUMENT NUMBER 88307656, IN COOK COUNTY, ILLINOIS, DESCRIBED AS FOLLOWS: COMMENCING AT THE NORTHWEST CORNER OF SAID LOT 1, THENCE ON AN ASSUMED BEARING OF NORTH 90 DEGREES 00 MINUTES 00 SECONDS EAST ALONG THE NORTH LINE OF LOT 1, A DISTANCE OF 285.75 FEET FOR A POINT OF BEGINNING; THENCE EASTERLY ALONG A TANGENTIAL CURVE, CONCAVE TO THE SOUTH, RADIUS 180.00 FEET, CENTRAL ANGLE 25 DEGREES 40 MINUTES 50 SECONDS, 20.68 FEET; THENCE SOUTH 64 DEGREES 19 MINUTES 10 SECONDS EAST ALONG TANGENT, 9.17 FEET TO A LINE 167 FEET WEST OF AND PARALLEL WITH THE EAST LINE OF LOT 1 AFORESAID; THENCE SOUTH 00 DEGREES 00 MINUTES 00 SECONDS WEST ALONG SAID PARALLEL LINE, 98.25 FEET TO THE SOUTH LINE OF SAID LOT 1; THENCE SOUTH 90 DEGREES 00 MINUTES 00 SECONDS EAST ALONG SAID SOUTH LINE, 167.00 FEET TO THE SOUTHEAST CORNER OF SAID LOT 1; THENCE NORTH 00 DEGREES 00 MINUTES 00 SECONDS EAST ALONG THE EAST LINE THEREOF 70.00 FEET TO THE NORTHEAST CORNER OF LOT 1; THENCE WESTERLY ALONG THE NORTH AND NORTHERLY LINE OF LOT 1 (BEING ALSO THE SOUTH LINE AND SOUTHERLY LINE OF MAPLE AVENUE AS DEDICATED BY DOCUMENT NO. 26661237) THE FOLLOWING 4 COURSES: NORTH 90 DEGREES 00 MINUTES 00 SECONDS WEST 7.73 FEET; THENCE WESTERLY ALONG TANGENTIAL CURVE CONCAVE TO THE NORTH, RADIUS 330.00 FEET, CENTRAL ANGLE

# UNOFFICIAL COPY

19 DEGREES 01 MINUTES 40 SECONDS, 109.59 FEET; THENCE NORTH 70 DEGREES 58 MINUTES 28 SECONDS WEST ALONG TANGENT 52.84 FEET; THENCE WESTERLY ALONG A TANGENTIAL CURVE CONCAVE TO THE SOUTH, RADIUS 270.00 FEET, CENTAL ANGLE 19 DEGREES 01 MINUTES 18 SECONDS, 89.64 FEET TO THE POINT OF BEGINNING.

29-32-200-059-0000  
29-32-200-095-0000  
29-32-200-096-0000  
29-32-200-097-0000  
29-32-401-034-0000  
29-32-401-035-0000  
29-32-401-036-0000  
29-32-200-061-0000  
29-32-401-037-0000

17800, 17810, 17812, 17816, 17818, 17820, 17840, 17850, 17900, 17910, 17928-17860, 17920  
17930, 17936-17938, 17940, 17944-17948, 17956, 17928, 17932 AND 17958-17960 HALSTED  
STREET, HOMEWOOD, IL

Property of Cook County Clerk's Office

# UNOFFICIAL COPY

## EXHIBIT B

### PERMITTED EXCEPTIONS

1. TAXES FOR THE YEARS 2015 AND 2016 SECOND INSTALLMENT OF 2015 TAXES AND TAXES FOR THE YEAR 2016 ARE NOT YET DUE OR PAYABLE.
2. SIGN AND UTILITY EASEMENT RECORDED FEBRUARY 9, 1995 AS DOCUMENT NUMBER 95098945 IN FAVOR OF THE LAND IMMEDIATELY WEST OF PARCEL 3 AND SHOWN ON ALTA/NSPS LAND TITLE SURVEY PREPARED BY JOHN MARK NORWOOD, PLS 035-003795, MILLMAN NATIONAL LAND SERVICES DATED MAY 4, 2016, LAST REVISED JUNE 23, 2016 AND DESIGNATED AS PROJECT NO. 38245 (THE "SURVEY")
3. EASEMENT IN, UPON, UNDER, OVER AND ALONG THAT PART OF THE LAND THEREIN DESCRIBED TO INSTALL AND MAINTAIN ALL EQUIPMENT FOR THE PURPOSE OF SERVING THE LAND AND OTHER PROPERTY WITH ELECTRIC SERVICE, TOGETHER WITH RIGHT OF ACCESS TO SAID EQUIPMENT, AS CREATED BY GRANT TO THE COMMONWEALTH EDISON COMPANY RECORDED MAY 2, 1974 AS DOCUMENT 22703488 AND SHOWN ON THE SURVEY
4. EASEMENT IN, UPON, UNDER, OVER AND ALONG THAT PART OF THE LAND THEREIN DEPICTED, TO INSTALL AND MAINTAIN EQUIPMENT FOR THE PURPOSE OF SERVING THE LAND AND OTHER PROPERTY WITH ELECTRIC SERVICE, TOGETHER WITH RIGHT OF ACCESS TO SAID EQUIPMENT, AS CREATED BY GRANT TO THE COMMONWEALTH EDISON COMPANY RECORDED MAY 2, 1974 AS DOCUMENT 22703489 AND SHOWN ON THE SURVEY.
5. A NON-EXCLUSIVE GRANT OF EASEMENT OVER THE STRIPS OF LAND FOR THE PURPOSE OF INSTALLING AND MAINTAINING ALL EQUIPMENT NECESSARY FOR THE PURPOSE OF ELECTRICAL SERVICE, TO THE COMMONWEALTH EDISON COMPANY, ITS SUCCESSORS AND ASSIGNS, AND THE RIGHT TO CONSTRUCT, OPERATE, MAINTAIN, RENEW, RELOCATE AND REMOVE, FROM TIME TO TIME, POLES, WIRES, CABLES, CONDUITS, MANHOLES, TRANSFORMERS, PEDESTALS AND OTHER FACILITIES USED IN CONNECTION WITH OVERHEAD AND UNDERGROUND TRANSMISSION AND DISTRIBUTION OF ELECTRICITY, TOGETHER WITH RIGHT OF ACCESS TO THE SAME AND THE RIGHT, FROM TIME TO TIME, TO TRIM OR REMOVE TREES, BUSHES AND SAPLINGS AND TO CLEAR OBSTRUCTIONS FROM THE SURFACE AND SUBSURFACE AS MAY BE REASONABLY REQUIRED INCIDENT TO THE GRANT THEREIN GIVEN IN, OVER, UNDER, ACROSS, ALONG AND UPON THE SURFACE OF THE PROPERTY RECORDED MARCH 3, 1974 AS DOCUMENT 23009664 AND SHOWN ON THE SURVEY.
6. A NON-EXCLUSIVE GRANT OF EASEMENT OVER STRIPS OF LAND FOR THE PURPOSE OF ELECTRICAL SERVICE, TO THE COMMONWEALTH EDISON COMPANY, ITS SUCCESSORS AND ASSIGNS, AND THE RIGHT TO CONSTRUCT, OPERATE, MAINTAIN, RENEW, RELOCATE AND REMOVE, FROM TIME TO TIME POLES, WIRES, CABLES, CONDUITS, MANHOLES, TRANSFORMERS, PEDESTALS, AND OTHER FACILITIES USED IN

# UNOFFICIAL COPY

- CONNECTION WITH OVERHEAD AND UNDERGROUND TRANSMISSION AND DISTRIBUTION OF ELECTRICITY, TOGETHER WITH RIGHT OF ACCESS TO THE SAME AND THE RIGHT, FROM TIME TO TIME, TO TRIM OR REMOVE TREES, BUSHES AND SAPLINGS AND TO CLEAR OBSTRUCTIONS FROM THE SURFACE AND SUBSURFACE AS MAY BE REASONABLY REQUIRED INCIDENT TO THE GRANT THEREIN GIVEN IN, OVER, UNDER, ACROSS, ALONG AND UPON THE SURFACE OF THE PROPERTY RECORDED MARCH 3, 1974 AS DOCUMENT 23009671 AND SHOWN ON THE SURVEY.
7. ENCROACHMENT OF THE IMPROVEMENTS FOR THE BUILDING OVER THE EASEMENTS SHOWN AT EXCEPTION LETTER 'V' AS DISCLOSED BY THE SURVEY.
  8. A NON-EXCLUSIVE GRANT OF EASEMENT OVER THE STRIPS OF LAND FOR THE PURPOSE OF INSTALLING AND MAINTAINING ALL EQUIPMENT NECESSARY FOR THE PURPOSE OF ELECTRICAL SERVICE, TO THE COMMONWEALTH EDISON COMPANY, ITS SUCCESSORS AND ASSIGNS, AND THE RIGHT TO CONSTRUCT, OPERATE, MAINTAIN, RENEW, RELOCATE AND REMOVE, FROM TIME TO TIME, POLES, WIRES, CABLES, CONDUITS, MANHOLES, TRANSFORMERS, PEDESTALS AND OTHER FACILITIES USED IN CONNECTION WITH OVERHEAD AND UNDER GROUND TRANSMISSION AND DISTRIBUTION OF ELECTRICITY, TOGETHER WITH RIGHT OF ACCESS TO THE SAME AND THE RIGHT FROM TIME TO TIME, TO TRIM OR REMOVE TREES, BUSHES AND SAPLINGS AND TO CLEAR OBSTRUCTIONS FROM THE SURFACE AND SUBSURFACE AS MAY BE REASONABLY REQUIRED INCIDENT TO THE GRANT THEREIN GIVEN IN, OVER, UNDER, ACROSS, ALONG AND UPON THE SURFACE OF THE PROPERTY RECORDED SEPTEMBER 6, 1974 AS DOCUMENT 22840115 AND SHOWN ON THE SURVEY.
  9. A NON-EXCLUSIVE GRANT OF EASEMENT OVER THE STRIPS OF LAND FOR THE PURPOSE OF INSTALLING AND MAINTAINING ALL EQUIPMENT NECESSARY FOR THE PURPOSE OF ELECTRICAL SERVICE, TO THE COMMONWEALTH EDISON COMPANY, ITS SUCCESSORS AND ASSIGNS, AND THE RIGHT TO CONSTRUCT, OPERATE, MAINTAIN, RENEW, RELOCATE AND REMOVE, FROM TIME TO TIME, POLES, WIRES, CABLES, CONDUITS, MANHOLES, TRANSFORMERS, PEDESTALS AND OTHER FACILITIES USED IN CONNECTION WITH OVERHEAD AND UNDER GROUND TRANSMISSION AND DISTRIBUTION OF ELECTRICITY, TOGETHER WITH RIGHT OF ACCESS TO THE SAME AND THE RIGHT FROM TIME TO TIME, TO TRIM OR REMOVE TREES, BUSHES AND SAPLINGS AND TO CLEAR OBSTRUCTIONS FROM THE SURFACE AND SUBSURFACE AS MAY BE REASONABLY REQUIRED INCIDENT TO THE GRANT THEREIN GIVEN IN, OVER, UNDER, ACROSS, ALONG AND UPON THE SURFACE OF THE PROPERTY RECORDED NOVEMBER 14, 1974 AS DOCUMENT 22907791.
  10. A NON-EXCLUSIVE GRANT OF EASEMENT OVER THE STRIPS OF LAND FOR THE PURPOSE OF INSTALLING AND MAINTAINING ALL EQUIPMENT NECESSARY TO NORTHERN ILLINOIS GAS COMPANY, ITS SUCCESSORS AND ASSIGNS, RECORDED AS DOCUMENT 22917298.

# UNOFFICIAL COPY

11. GRANT OF EASEMENT RECORDED JANUARY 18, 1977 AS DOCUMENT 23791695 MADE BY ILLINOIS STATE BANK OF CHICAGO, AS TRUSTEE UNDER TRUST NO 161 AND LASALLE NATIONAL BANK, AS TRUSTEE UNDER TRUST NO 39122 TO THE COMMONWEALTH EDISON COMPANY, ITS SUCCESSORS AND ASSIGNS, AN EASEMENT TO CONSTRUCT, OPERATE, MAINTAIN, RENEW, RELOCATE AND REMOVE FROM TIME TO TIME, WIRES, CABLES, CONDUITS, MANHOLES, TRANSFORMERS, PEDESTALS AND OTHER FACILITIES USED IN CONNECTION WITH UNDERGROUND TRANSMISSION AND DISTRIBUTION OF ELECTRICITY TOGETHER WITH RIGHT OF ACCESS TO THE SAME AND THE RIGHT, FROM TIME TO TIME, TO TRIM OR REMOVE TREES, BUSHES AND SAPLINGS AND TO CLEAR OBSTRUCTIONS FROM THE SURFACE AND SUBSURFACE AS MAY BE REASONABLY REQUIRED INCIDENT TO THE GRANT THEREIN GIVEN IN, OVER, UNDER, ACROSS, ALONG AND UPON THE SURFACE OF THE PROPERTY AND SHOWN ON THE SURVEY.
12. EASEMENT IN, UPON, UNDER OVER AND ALONG THE WEST 10 FEET OF THE SOUTH 692.12 FEET OF THE EAST 450 FEET OF THE LAND TO INSTALL AND MAINTAIN ALL EQUIPMENT FOR THE PURPOSE OF SERVING THE LAND AND OTHER PROPEYTY WITH TELEPHONE AND ELECTRIC SERVICE, TOGETHER WITH RIGHT OF ACCESS TO SAID EQUIPMENT AS CREATED BY GRANT TO THE ILLINOIS BELL TELEPHONE COMPANY RECORDED MARCH 2, 1984 AS DOCUMENT 26991407 TOGETHER WITH THE TERMS, PROVISIONS AND CONDITIONS CONTAINED THEREIN AND SHOWN ON THE SURVEY.
13. TERMS AND CONDITIONS OF THE EASEMENT MADE BY INLAND AMERICAN HOMEWOOD WASHINGTON PARK LIMITED LIABILITY COMPANY TO THE VILLAGE OF HOMEWOOD FOR INSTALLATION OF HISTORIC MONUMENT, HISTORIC MARKER AND SEATING AREA, RECORDED JUNE 13, 2011 AS DOCUMENT 1116440010 AND SHOWN ON THE SURVEY.
14. TERMS, PROVISIONS AND CONDITIONS CONTAINED IN THE ORDINANCE GRANTING A SPECIAL USE PERMIT FOR AN AUTOMOTIVE SERVICE BUSINESS IN THE VILLAGE OF HOMEWOOD, A COPY OF WHICH WAS RECORDED MARCH 27, 1997 AS DOCUMENT 97210816.
15. TERMS, PROVISIONS AND CONDITIONS CONTAINED IN ORDINANCE NO. 1320, BY THE VILLAGE OF HOMEWOOD GRANTING A ZONING VARIATION, A COPY OF WHICH WAS RECORDED APRIL 1, 1998 AS DOCUMENT 96255897.
16. TERMS, PROVISIONS AND CONDITIONS CONTAINED IN ORDINANCE NO. M-1651, GRANTING A SPECIAL USE PERMIT AND VARIANCE TO ALLOW TCF BANK TO OPERATE A DRIVE-THRU FINANCIAL INSTITUTION WITH REDUCED STACKING SPACES FOR THE PROPERTY IDENTIFIED AS OUTLOT 2 IN WASHINGTON PARK PLAZA, HOMEWOOD, COOK COUNTY, ILLINOIS, A COPY OF WHICH WAS RECORDED SEPTEMBER 6, 2005 AS DOCUMENT 0524945029.
17. TERMS, PROVISIONS AND CONDITIONS CONTAINED IN ORDINANCE NO. M-1611, GRANTING APPROVAL OF FINAL DEVELOPMENT PLAT FOR PLANNED UNIT DEVELOPMENT, A COPY OF WHICH WAS RECORDED DECEMBER 7, 2005 AS DOCUMENT 0534145044.

# UNOFFICIAL COPY

18. TERMS, PROVISIONS AND CONDITIONS CONTAINED IN THE AGREEMENT EXECUTED BY AND BETWEEN THE VILLAGE OF HOMEWOOD AND WASHINGTON PARK PLAZA PARTNERS, LLC, RECORDED NOVEMBER 16, 2006 AS DOCUMENT 0632018002, RELATING TO THE REGULATION AND ENFORCEMENT OF PARKING OF VEHICLES AND TRAFFIC AND THE USE OF PARKING LOTS ON THE LAND.
19. TERMS, PROVISIONS AND CONDITIONS CONTAINED IN AN ORDINANCE APPROVING A RESUBDIVISION OF LOT 4 IN WASHINGTON PARK PLAZA PLANNED UNIT DEVELOPMENT, HOMEWOOD, COOK COUNTY, ILLINOIS, AND REPEALING A PREVIOUS RESUBDIVISION OF THE SUBJECT PROPERTY, A COPY OF WHICH WAS RECORDED JULY 18, 2006 AS DOCUMENT 0619945052.
20. TERMS AND CONDITIONS CONTAINED IN THE UNRECORDED REAL ESTATE CONVEYANCE AGREEMENT BETWEEN THE VILLAGE OF HOMEWOOD AND WASHINGTON PARK PLAZA PARTNERS LLC.
21. TERMS AND CONDITIONS REQUIRED BY THE VILLAGE OF HOMEWOOD, CONTAINED IN THE UNRECORDED INTERGOVERNMENTAL AGREEMENT, DATED MARCH 2005 AND THE UNRECORDED BUSINESS DEVELOPMENT AGREEMENT, DATED MARCH 8, 2005 WHICH WAS ASSIGNED TO INLAND AMERICAN HOMEWOOD WASHINGTON PARK, L.L.C. ON JULY 10, 2007.
22. EASEMENT FOR VEHICULAR INGRESS AND EGRESS OVER PART OF THE LAND, AS CONTAINED IN THE DECLARATION OF EASEMENT MADE BY ARLINGTON PARK-WASHINGTON PARK RACE TRACKS CORPORATION, A CORPORATION OF DELAWARE, TO LASALLE NATIONAL BANK, AS TRUSTEE UNDER TRUST NUMBER 39122, AND THE TERMS, PROVISIONS AND CONDITIONS CONTAINED IN SAID DECLARATION OF EASEMENT RECORDED JANUARY 11, 1974 AS DOCUMENT 22592742. AS AMENDED BY PLAT OF EASEMENT DATED APRIL 18, 1983 AND RECORDED APRIL 25, 1983 AS DOCUMENT 26580500. AND SHOWN ON THE SURVEY.
23. EASEMENT IN FAVOR OF THE VILLAGE OF HOMEWOOD, ITS SUCCESSORS AND ASSIGNS FOR INSTALLATION, MAINTENANCE, REMOVAL AND RELOCATION OF SEWER MAIN IN A 15 FOOT EASEMENT DESCRIBED AS 7 1/2 FEET ON EACH SIDE OF THE SANITARY SEWER CREATED BY PLAT OF EASEMENT RECORDED FEBRUARY 10, 1984 AS DOCUMENT NUMBER 26966063 AND RERECORDED JANUARY 3, 1985 AS DOCUMENT NUMBER 27393567 AND SHOWN ON THE SURVEY.
24. EASEMENT FOR PUBLIC UTILITIES, DRAINAGE AND C.A.T.V. AND THE EASEMENT PROVISIONS AND GRANTEES AS SHOWN ON THE PLAT OF COMMERCIAL SUBDIVISION UNIT 1 RECORDED JUNE 27, 1983 AS DOCUMENT NUMBER 2661238.
25. EASEMENT GRANTED TO A HOLDER OF A C.A.T.V. FRANCHISE GRANTED BY THE VILLAGE OF HOMEWOOD, ITS SUCCESSORS AND ASSIGNS, TO INSTALL, OPERATE, MAINTAIN AND REMOVE FROM TIME TO TIME FACILITIES USED IN CONNECTION WITH UNDERGROUND TRANSMISSION AND DISTRIBUTION OF ELECTRIC SOUNDS AND SIGNALS, AND THE

# UNOFFICIAL COPY

- PROVISIONS RELATING THERETO CONTAINED IN THE PLAT RECORDED JULY 13, 1988, AS DOCUMENT NO. 88307656 AND SHOWN ON THE SURVEY.
26. EASEMENT IN FAVOR OF COMMONWEALTH EDISON COMPANY, ILLINOIS BELL TELEPHONE COMPANY AND NORTHERN ILLINOIS GAS COMPANY, AND ITS/THEIR RESPECTIVE SUCCESSORS AND ASSIGNS, TO INSTALL, OPERATE AND MAINTAIN ALL EQUIPMENT NECESSARY FOR THE PURPOSE OF SERVING THE LAND AND OTHER PROPERTY, TOGETHER WITH THE RIGHT OF ACCESS TO SAID EQUIPMENT, AND THE PROVISIONS RELATING THERETO CONTAINED IN THE PLAT RECORDED JULY 13, 1988, AS DOCUMENT NO. 88307656.
  27. RIGHTS OF THE PUBLIC, THE STATE OF ILLINOIS AND THE MUNICIPALITY IN AND TO THAT PART OF THE LAND, IF ANY, TAKEN OR USED FOR ROAD PURPOSES.