

# UNOFFICIAL COPY



\*2222241016\*

Doc# 2222241016 Fee \$88.00

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

KAREN A. YARBROUGH

COOK COUNTY CLERK

DATE: 08/10/2022 11:33 AM PG: 1 OF 46

## Illinois Anti-Predatory Lending Database Program

### Certificate of Exemption



Report Mortgage Fraud  
844-768-1713

The property identified as: **PIN:** 12-26-201-077-0000

**Address:**

**Street:** 8355 West Belmont Avenue

**Street line 2:**

**City:** River Grove

**State:** IL

**ZIP Code:** 60170

**Lender:** American National Insurance Company

**Borrower:** ECA Buligo Thatcher Woods Partners, LP

**Loan / Mortgage Amount:** \$21,500,000.00

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

**Certificate number:** ECBBCC89-B942-48DB-86FA-59174FF81911

**Execution date:** 8/4/2022

3

# UNOFFICIAL COPY

THIS DOCUMENT PREPARED  
BY AND AFTER RECORDING  
RETURN TO:

Holland & Knight, LLP  
150 N. Riverside Plaza  
Suite 2700  
Chicago, Illinois 60606  
Attention: Frank L. Keldermans

Permanent Tax Index Number(s):

12-26-201-077-0000

Property Address(es):

8355 West Belmont Avenue  
River Grove, Illinois 60171

*This space reserved for Recorder's use only.*

**MORTGAGE, SECURITY AGREEMENT  
AND FINANCING STATEMENT  
(AND FIXTURE FILING)**

by

**ECA BULIGO THATCHER WOODS PARTNERS, LP,**  
A Delaware limited partnership, as Mortgagor

to and for the benefit of

**AMERICAN NATIONAL INSURANCE COMPANY,**  
a Texas insurance company, as Mortgagee

This document serves as a Fixture Filing under the Illinois Uniform Commercial Code,  
Chapter 810 ILCS 5/9-502(c) et seq.

63

# UNOFFICIAL COPY

## MORTGAGE, SECURITY AGREEMENT AND FINANCING STATEMENT (AND FIXTURE FILING)

This Mortgage, Security Agreement and Financing Statement (and Fixture Filing) (hereinafter termed "Agreement" or "Mortgage") is entered into as of the 4th day of August, 2022 ("Effective Date"), by ECA BULIGO THATCHER WOODS PARTNERS, LP, a Delaware limited partnership, whose mailing address is 13041 W. Linebaugh Ave., Tampa, Florida 33626 (hereinafter termed "Mortgagor"), and AMERICAN NATIONAL INSURANCE COMPANY, a Texas insurance company, whose mailing address is Attn: Mortgage and Real Estate Investment Department, 2525 South Shore Boulevard, Suite. 207, League City, Texas 77573 (hereinafter termed "Mortgagee").

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Mortgagor agrees as follows:

Mortgagor hereby mortgages, grants, assigns, remises, releases, warrants and conveys to Mortgagee, its successors and assigns, and grants a security interest in, the following described property, rights and interests, all of which property, rights and interests are hereby pledged primarily and on a parity with the Real Estate (as defined below) and not secondarily:

A. THE REAL ESTATE located in the State of Illinois commonly known as 8251-8359 W. Belmont Avenue, River Grove, Illinois 60171 and legally described on Exhibit "A" attached hereto and made a part hereof ("Real Estate"); and

B. TOGETHER WITH all improvements of every nature whatsoever now or hereafter situated on the Real Estate, and all fixtures and personal property of every nature whatsoever now or hereafter owned by Mortgagor and on or used in connection with the Real Estate or the improvements thereon, or in connection with any construction thereon, including all extensions, additions, improvements, betterments, renewals, substitutions and replacements to any of the foregoing and all of the right, title and interest of Mortgagor in and to any such personal property or fixtures together with the benefit of any deposits or payments now or hereafter made on such personal property or fixtures by Mortgagor or on its behalf ("Improvements").

TO HAVE AND TO HOLD the Mortgaged Premises, unto Mortgagee, its successors and assigns, forever, for the purposes and upon the uses herein set forth together with all right to possession of the Mortgaged Premises after the occurrence of any Event of Default; Mortgagor hereby **RELEASING AND WAIVING** all rights under and by virtue of the homestead exemption laws of the State of Illinois

### I. DEFINITIONS

1.1 The term "Affiliate" shall mean with respect to any Person, defined below, any other Person that, directly or indirectly, is in control of, is controlled by, or is under common control with such Person, or that is a director, officer, manager, managing member or partner of such Person. For purposes of this definition, "control" means, when used with respect to any Person, the possession, directly or indirectly, of the power to direct or cause the direction of the

# UNOFFICIAL COPY

management or polices of a Person, whether through the ability to exercise voting power, by contract or statute or otherwise, or the direct or indirect beneficial ownership of twenty percent (20%) or more of the outstanding equity interests of such Person.

1.2 The term “**Collateral**” shall mean and include all of the following now or hereafter owned by Mortgagor: (a) all of the goods, articles of personal property, accounts, general intangibles, instruments, documents, furniture, furnishings, equipment and/or fixtures of every kind and nature whatever (including, without limitation, the items described in subsections (b) through (f) below) now or hereafter owned by Mortgagor, in or hereafter placed in, or used or which may become used, in connection with or in the use, enjoyment, ownership or operation of the Mortgaged Premises, together with all additions thereto, replacements thereof, substitutions therefor and all proceeds thereof; (b) all rents, rentals, payments, compensations, revenues, profits, incomes, leases, licenses, concession agreements, parking agreements, insurance policies, plans and specifications, contract rights (including but not limited to all rights under that certain letter agreement dated on or about June 30, 2022 between Exron Capital, Inc. and IN Retail Fund Thatcher Woods, L.L.C., predecessor in interest to Mortgagor, and Thomas E. Gleitsman and Anthony E. Speiser as guarantors), accounts of Mortgagor; all escrowed funds and general intangibles of Mortgagor in any way relating to the Mortgaged Premises or used or useful in the use, enjoyment, ownership or operation of the Mortgaged Premises; (c) to the extent Mortgagor has a right to grant a security interest therein, all names, trade names, signs, marks and trademarks under or by which the Mortgaged Premises may at any time be operated or known, all rights to carry on business under any such names, trade names, logos, signs, marks and trade marks, or any variant thereof, any goodwill in any way relating to the Mortgaged Premises and all of Mortgagor’s rights to carry on the business of Mortgagor under all such names, trade names, signs, marks and trade marks, or any variant thereof; (d) all deposits, awards, damages, payments, escrowed monies (including, but not limited to, all escrowed funds under this Mortgage and under the Escrow Agreement, defined below), insurance proceeds, condemnation awards or other compensation of Mortgagor, and interests, fees, charges or payments accruing on or received from or to be received on any of the foregoing in any way relating to the Mortgaged Premises, or the ownership, enjoyment or operation of the Mortgaged Premises together with all proceeds of all of the foregoing described in this Section 1.2; (e) all cash, securities, uncertificated securities, investment property, securities accounts, financial assets, deposit accounts, securities entitlements and other personal property now or hereafter in or coming into or being credited to Mortgagor, or represented by any account or mutual fund, including, without limitation, all interest, dividends, rights, options, powers, splits and income thereon; and (f) all products, proceeds, substitutions, additions, renumberings and replacements of any of the collateral described in this Section 1.2.

1.3 The term “**Escrow Agreement**” shall mean, individually and collectively, (a) that certain Escrow Agreement of even date herewith by and between Mortgagor and Mortgagee for certain tenant improvements and leasing commissions at the Mortgaged Property, and (b) that certain Escrow Agreement of even date herewith by and between Mortgagor and Mortgagee for certain capital improvements at the Mortgaged Property.

1.4 The term “**Indebtedness**” shall mean:

# UNOFFICIAL COPY

(a) any and all sums becoming due and payable pursuant to the Note, as hereinafter defined, specifically including amounts representing future advances by Mortgagee to Mortgagor, any and all interest thereon, and any expenses relating thereto;

(b) any and all other sums becoming due and payable by Mortgagor to Mortgagee including, but not limited to, such sums as may hereafter be borrowed by Mortgagor from Mortgagee (it being contemplated that such future indebtedness may be incurred), including, but not limited to advancements or expenditures made by Mortgagee pursuant to the terms and conditions of this Mortgage or any other Loan Document, defined below;

(c) any and all advances made by Mortgagee for the payment of taxes, assessments, insurance premiums or costs incurred for the protection and preservation of the Mortgaged Property (as hereinafter defined) and all other sums due and payable by Mortgagor to Mortgagee including, but not limited to advancements or expenditures made by Mortgagee pursuant to the terms and conditions of this Mortgage or any other Loan Document;

(d) any and all obligations, covenants, agreements and duties of any kind or character of Mortgagor now or hereafter existing, known or unknown, arising out of or in connection with the Note or any other Loan Document, whether direct, indirect, primary or secondary, arising by operation of law or otherwise; and

(e) any and all renewals, extensions, modifications, increases, consolidations and rearrangements of any or all of the obligations of Mortgagor defined herein under the term Indebtedness, whether or not Mortgagor executes any renewal, extension or other such agreement.

1.5 The term "Loan Documents" shall mean this Mortgage, the Note, the Assignment of Leases and Rents of even date herewith, the Escrow Agreement and any other document evidencing, securing or relating to the Note now or hereafter executed by Mortgagor with or in favor of Mortgagee.

1.6 The term "Mortgaged Premises" shall mean and include: (a) the real property situated in the County of Cook, State of Illinois, described in Exhibit "A", which is attached hereto and incorporated herein for all purposes; together with all buildings and improvements of every kind and description now or hereafter erected or placed thereon and all materials now or hereafter placed thereon intended for construction, reconstruction, alteration and repairs of such buildings and improvements, all of which materials shall be deemed to be included as a part of said real property immediately upon the delivery thereof to said real property; and (b) all fixtures now or hereafter owned by Mortgagor and attached to, contained in or used in connection with said real property, and all renewals and replacements thereof, including but not limited to (i) all equipment, apparatus, machinery, motors, elevators, fittings and radiators, (ii) all plumbing, heating, lighting, ventilating, refrigerating, incinerating, air-conditioning and sprinkler equipment; (iii) all awnings, storm windows and doors, mantels, cabinets, rugs, computer flooring, carpeting, linoleum, stoves, shades, draperies, blinds and water heaters; (iv) such other goods and chattels and personal property as are usually furnished by landlords in letting an unfurnished building, or which shall be attached to said buildings and improvements by nails,

# UNOFFICIAL COPY

screws, bolts, pipe connections, masonry or in any other manner; and (v) all built-in equipment as may be shown by plans and specifications.

1.7 The term "**Mortgaged Property**" shall mean the Mortgaged Premises and Collateral.

1.8 The term "**Note**" shall mean that certain Promissory Note of even date herewith in the principal sum of \$21,500,000.00 executed by Mortgagor and payable to the order of Mortgagee, payable with interest in installments as stipulated therein and providing for the right to declare the unpaid principal balance due and payable upon the occurrence of an Event of Default and otherwise as provided therein and providing for reasonable attorneys' fees, and all renewals, extensions, modifications, increases, consolidations and rearrangements of said Promissory Note or any portion thereof.

1.9 The term "**Permitted Exceptions**" means, collectively: (1) the lien and security interests created by this Mortgage and the other Loan Documents; (2) all matters listed on **Exhibit "B"** attached hereto and made a part hereof; (3) liens, if any, for real estate taxes and assessments not yet due or payable; (4) existing leases and occupancy agreements and new leases and occupancy agreements entered into in accordance with this Mortgage or any of the other Loan Documents; (5) any matters being contested in accordance with this Mortgage or any other Loan Documents; and (6) such other title and survey exceptions as Mortgagee has approved or may approve in writing in Mortgagee's reasonable discretion or otherwise expressly permitted under the Loan Documents without Mortgagee's approval.

1.10 The term "**Person**" shall mean a natural person, corporation, limited liability company, general or limited partnership, trust, association or any other entity of any kind or character.

## II. **SECURITY**

As security for the Indebtedness, Mortgagor hereby mortgages, grants, assigns, remises, releases, warrants and conveys to Mortgagee, its successors and assigns, and grants a security interest in, all of Mortgagor's right, title and interest in the Mortgaged Premises, all of which property, rights and interests are hereby pledged primarily and on a parity with the Real Estate and not secondarily.

## III. **ADDITIONAL SECURITY**

As provided above, as security for the Indebtedness, Mortgagor hereby mortgages, grants, assigns, remises, releases, warrants and conveys to Mortgagee, its successors and assigns, and grants a security interest in, all of Mortgagor's right, title and interest in the Mortgaged Premises, all of which property, rights and interests are hereby pledged primarily and on a parity with the Real Estate and not secondarily.

# UNOFFICIAL COPY

## A. Security Interest.

(1) Mortgagor hereby grants and conveys to Mortgagee a security interest in and lien on all of Mortgagor's right, title and interest in and to the Collateral. This Mortgage shall serve as a Security Agreement created pursuant to the Uniform Commercial Code in effect in the State of Illinois ("UCC"), and Mortgagee shall have and may exercise all rights, remedies and powers of a secured party under the UCC. Mortgagor hereby represents, warrants and covenants that: (a) Mortgagor is the owner and holder of the Collateral free and clear of any adverse claim, security interest or encumbrance, except those created herein and Permitted Exceptions; (b) it will defend the Collateral, and the priority of the security interest created herein as a valid first security interest against all claims and demands of any person at any time claiming the same or any interest therein other than Permitted Exceptions; (c) there are no financing statements executed by Mortgagor, as Debtor, now on file in any public office except those financing statements which are being released contemporaneously with the delivery of this transaction or which have been authorized by Mortgagee; (d) Mortgagor authorizes Mortgagee to file or record such other and further agreements, financing statements and assignments in such offices and at such times as it is deemed by Mortgagee to be necessary or reasonably desirable; and (e) it will execute and deliver to Mortgagee such other and further agreements, financing statements and assignments as Mortgagee may reasonably request (provided such other and further agreements, financing statements and assignments do not increase the obligations of the Mortgagor or decrease the rights of the Mortgagor under the Loan Documents in any material respect) related to the transactions set forth in the Loan Documents.

(2) This Mortgage is intended to constitute a fixture filing in accordance with the applicable provisions of the UCC. The "Debtor" is Mortgagor and the "Secured Party" is Mortgagee and their addresses are those set forth at the beginning of this Mortgage. Certain of the Mortgaged Property is or will become "fixtures" (as that term is defined in the UCC), and this Mortgage, upon being filed for record in the real estate records of the county wherein the Mortgaged Premises are situated, shall operate also as a financing statement filed as a fixture filing in accordance with the applicable provisions of the UCC upon such Mortgaged Property that is or may become fixtures.

(3) Mortgagor covenants and agrees that Mortgagor will furnish Mortgagee with notice of any change in name, identity, organizational structure, mailing address, residence, state of formation or organization, principal place of business or location (as that term is defined in the UCC) thirty (30) days prior to the effective date of any such change. Mortgagor hereby authorizes the filing of any financing statements or other instruments deemed necessary by Mortgagee to prevent any filed financing statement from becoming misleading or losing its perfected status or to reinstate any lapsed financing statement.

(4) Mortgagor agrees that the filing of a financing statement in the records normally having to do with personal property shall never be construed as in any way derogating from or impairing the express declaration and intention of the parties hereto, hereinabove stated, that everything used in connection with the production of income from the Mortgaged Property and/or adapted for use therein and/or which is described or reflected in this Mortgage is, and at

# UNOFFICIAL COPY

all times and for all purposes and in all proceedings, legal or equitable, shall be regarded as real property irrespective of whether: (a) any such item is physically attached to the real property or improvements thereon; (b) serial numbers are used for the better identification of certain equipment items capable of being thus identified in a recital contained herein or in any list filed with Mortgagee; or (c) any such item is referred to or reflected in any such financing statement so filed at any time. Similarly, the mention in any such financing statement of (x) rights in or to the proceeds of any fire and/or hazard insurance policy, (y) any award in eminent domain proceedings for a taking or for loss of value or (z) Mortgagor's interest as lessor in any present or future leases or subleases or rights to rents growing out of the use and/or occupancy of the Mortgaged Property, whether pursuant to lease or otherwise, shall never be construed as in any way altering any of the rights of Mortgagee as determined by this instrument or impugning the priority of this Mortgage or any other Loan Document, but such mention in the financing statement is declared to be for the protection of Mortgagee in the event any court or judge shall at any time hold with respect to (x), (y), or (z) that notice of Mortgagee's priority of interest to be effective against a particular class of persons, including, but not limited to, the federal government and any subdivision or entity of the federal government, must be filed in the UCC records or otherwise perfected in the manner required by the UCC

B. Assignment of Condemnation Awards. To the extent of the full amount of the Indebtedness secured hereby and of the cost and expenses (including reasonable attorneys' fees) incurred by Mortgagee in the collection of any award or payment, Mortgagor hereby assigns to Mortgagee any and all awards or payments, including all interest thereon, together with the right to receive the same, which may be made with respect to the Mortgaged Property as a result of (a) the exercise of the right of eminent domain, (b) the alteration of the grade or of any street, or (c) any other injury to or decreased value in the Mortgaged Property, as well as the right, but not the obligation, to, at Mortgagor's expense, participate in and make decisions concerning the progress of any proceeding involving any such award or payment. Mortgagor shall give Mortgagee written notice of any such action or proceeding promptly upon Mortgagor becoming aware of same. All such damages, condemnation proceeds and consideration shall be paid directly and solely to Mortgagee whether or not an Event of Default has at such time occurred, and after first applying said sums to the payment of all costs and expenses (including reasonable attorneys' fees) incurred by Mortgagor and Mortgagee in obtaining such sums, Mortgagee may, at its option, apply the balance on the Indebtedness, in any order and whether or not then due, without prepayment or penalty, or to the restoration of the Mortgaged Property, or release the balance to Mortgagor; provided, however, to the extent that any written lease agreement on the date hereof that equals or exceeds 60,000 square feet of the Mortgaged Property (each such tenant a "Key Tenant" and each such lease a "Key Tenant Lease") or any other lease of the Mortgaged Property in equal to or excess of 16,000 square feet remains in full force and effect after such condemnation and such Key Tenant Lease requires restoration of the Mortgaged Property then Mortgagee shall allow such sums to be used for such restoration in compliance with such Key Tenant Lease and otherwise in accordance with the applicable provisions of Article X as if such sums were casualty insurance proceeds to the extent such provisions do not conflict with such lease). Said application or release shall not cure or waive any Event of Default.



# UNOFFICIAL COPY

## IV. ASSIGNMENT OF RENTS

A. Generally. In further consideration for the indebtedness evidenced by the Note, Mortgagor hereby absolutely and unconditionally assigns to Mortgagee all rents, revenues, profits and incomes from the Mortgaged Property or any portion thereof. Provided, however, so long as no Event of Default exists, Mortgagor is hereby granted a license to collect and retain the currently accruing rents, income and profits from the Mortgaged Property, but in no event may Mortgagor collect same for more than one (1) month in advance of the date upon such rents become due. If an Event of Default shall occur that continues beyond any cure period expressly provided in this Mortgage, Mortgagee may terminate such license and may, without any liability to Mortgagor, take possession and control of the Mortgaged Property and/or receive and collect all rents, revenues, profits and income, accrued or accruing thereafter so long as any of the Indebtedness remains unpaid, applying so much thereof as may be collected first to the expenses incident to taking possession and/or the collection thereof, and second to the payment of the Indebtedness other than the Note and then to the amount of the Note then remaining unpaid, at Mortgagee's discretion, either principal or interest, in any order, and whether then matured or not (but without any prepayment premium), paying the balance, if any, to the Mortgagor. It is intended by Mortgagor and Mortgagee that this assignment of rents constitutes an assignment for additional security only and that Mortgagee shall be entitled to exercise its rights hereunder whether or not Mortgagee is in possession of the Mortgaged Premises at such time. Mortgagor agrees to fulfill or perform in all material respects each and every covenant of any and all leases and guaranties of leases of the Mortgaged Property so as to keep them at all times in full force and effect. Except as expressly provided in Section IV(B) below, (a) Mortgagor agrees not to enter into any new lease or license of the Mortgaged Property without the prior written consent of Mortgagee, and (b) not to make any modification, consent to any modification of, or cancel, terminate or consent to the surrender of any lease or license of all or any part of the Mortgaged Property or any guaranty of such lease or license after such lease, license or guaranty has been executed by Mortgagor and the lessee, licensor or guarantor, as applicable, without the prior written consent of Mortgagee, not to be unreasonably withheld, conditioned or delayed (provided, however, that Mortgagee may withhold consent to any reduction in any rent or the term of a lease in Mortgagee's sole and absolute discretion), the failure to fulfill or perform any such covenant or the making of or consent to any such modification or cancellation, termination or surrender shall be an Event of Default. Nothing contained in this Mortgage or in any other Loan Document shall preclude Mortgagee from taking any action to cure or remedy any default of the Landlord under any lease of all or any portion of the Mortgaged Property or any guaranty of lease, or any act, omission or occurrence which but for the passage of time, the giving of notice, or both, would be a default under any such lease or guaranty of lease or take any other action in connection therewith and any amounts expended by Mortgagee in connection with such cure or remediation including, without limitation, reasonable and documented out-of-pocket attorneys' fees and expenses, shall be an advance under and secured by this Mortgage and shall be included in the Indebtedness and shall be paid by Mortgagor to Mortgagee on demand. The preceding sentence shall not be construed to obligate Mortgagee to cure any such actual or potential lease defaults or any guaranty of lease defaults.

B. Specific Leasing Rights. Notwithstanding anything in Section IV(A) above, Mortgagor shall be permitted, in good faith and the ordinary course of business, to execute one

# UNOFFICIAL COPY

or more new leases substantially in accordance with a standard lease form approved in writing by Mortgagee, not to be unreasonably withheld, conditioned or delayed, or a lease modification, including a lease renewal, modification, or termination (and any renewal, modification, or termination relating to any guaranty thereof) provided that such lease or modification complies with all of the following: (1) is made in good faith and the ordinary course of business; (2) is to or with a tenant that is not affiliated with Mortgagor; (3) if a new lease, the lease is substantially in accordance with a standard form lease that has been approved by Mortgagee, with such changes as may be negotiated as part of an arms' length transaction between a prospective landlord and tenant; (4) the proposed lease or modification is an arm's length transaction, on economic terms conforming to then current market conditions (but with respect to a lease amendment, such lease amendment does not reduce the rent or lease term or any payment due from tenant for any termination of such lease); (5) the rent is at market terms, including, but not limited to, base rent, reimbursements and tenant improvement costs; (6) the lease or amendment applies to 5,000 rentable square feet of leased premises or less; (7) the lease or amendment has a term (or extension of a term) for ten (10) years or less; and (8) unless such lease is expressly subordinate, by its terms, to all mortgages placed upon the Mortgaged Premises, such tenant executes a subordination, non-disturbance and attornment agreement with Mortgagee in a form and substance satisfactory to Mortgagee. Mortgagor shall provide Mortgagee with a complete and legible copy of such fully executed lease or amendment and, if applicable, the original subordination, non-disturbance and attornment agreement with such tenant's original notarized signature, within thirty days of execution of such lease or amendment.

## V. MORTGAGOR'S REPRESENTATIONS AND WARRANTIES

In order to induce Mortgagee to lend the funds evidenced by the Note, Mortgagor represents and warrants to Mortgagee as of the date hereof that:

A. Accurate Loan Information. All information and financial statements, excluding any projections and pro forma financial information, furnished or to be furnished to Mortgagee by or on behalf of Mortgagor in connection with the Indebtedness secured by this Mortgage at the time of delivery (in each case, as modified or supplemented by other information so furnished), does not contain any material misstatement of fact or omit to state any material fact necessary to make the statements therein, in the light of the circumstances under which they were made (taken as a whole), not materially misleading, provided that, with respect to projected financial information, Mortgagor represents only that such information was prepared in good faith based upon assumptions believed to be reasonable at the time (it being understood that such projections are subject to significant uncertainties and contingencies, many of which are beyond the control of Mortgagor, and no assurances can be given that such projections will be realized, and although reflecting Mortgagor's good faith estimate, projections or forecasts based on methods and assumptions which Mortgagor believed to be reasonable at the time such projections were prepared, are not to be viewed as facts, and that actual results during the period or periods covered by the projections may differ materially from projected or estimated results).

B. Valid Title. Mortgagor is the lawful owner of the Mortgaged Property and has good right and lawful authority to mortgage and pledge the same.

# UNOFFICIAL COPY

C. Freedom from Encumbrances. The Mortgaged Property is free from any and all liens and encumbrances save and except only the Permitted Exceptions, and Mortgagor does warrant and will defend title to the Mortgaged Property against all claims or demand by third parties whatsoever save and except only the Permitted Exceptions.

D. Maintenance of Lien Priority. Mortgagor shall take all steps necessary to preserve and protect the validity and first priority of the liens on the Mortgaged Property created hereby. Mortgagor shall execute, acknowledge and deliver such additional documents as Mortgagee may deem reasonably necessary in order to preserve, protect, continue, extend or maintain the liens and security interests created hereby as first liens on the Mortgaged Property. All reasonable out-of-pocket costs and expenses incurred in connection with the protection, preservation, continuation, extension or maintaining of the security interest and the liens herein created as valid first and subsisting liens shall be paid by Mortgagor.

E. Value of the Mortgaged Property. Mortgagor acknowledges that the value of the Mortgaged Property, as established by an appraisal submitted to Mortgagor, is in excess of the Indebtedness secured hereby. Mortgagor acknowledges but for the Mortgaged Property having a value in excess of the amount of the Indebtedness, Mortgagee would not make the loan evidenced by the Note and advance the funds hereunder. Mortgagor agrees that Mortgagee shall at all times have the benefit of the Mortgaged Property as the security for the Indebtedness even though the value thereof may now or in the future exceed the amount of the Indebtedness secured hereby; provided, the foregoing shall not serve to expand any limitation on recourse to Mortgagor contained herein, in the Note or in any of the other Loan Documents.

F. Representations, Warranties and Covenants of a Limited Partnership Mortgagor. Mortgagor hereby represents, warrants and covenants as of the date hereof that:

(1) Mortgagor is a Delaware limited partnership

(2) Mortgagor ratifies and reaffirms the Organizational Representations, as defined in the Note.

(3) Christopher F. Wild, is President of Mortgagor and is authorized on behalf of Mortgagor to execute and deliver the Note, this Mortgage and any and all other documents which Mortgagee may now or from time to time hereafter require to be executed on behalf of Mortgagor in connection with the Note, this Mortgage or the Indebtedness, including but not limited to renewals, extensions, modifications, increases, consolidations and rearrangements of the Note and this Mortgage, and no signature or any other action of any other person or entity shall be required to bind Mortgagor. The general partner of Mortgagor has authorized, by all appropriate action, the appointment of Christopher F. Wild as President of Mortgagor to execute and deliver, on behalf of Mortgagor, the Note, this Mortgage and the other Loan Documents.

(4) Except for Permitted Transfers, defined below, or to the extent not in violation any provision of this Mortgage that limits or prohibits transfers of Constituent Owners, defined below, Mortgagor will not permit any interest in the Mortgagor or any Constituent Owner to be sold, transferred, conveyed, encumbered or diluted or make any modification of the Limited

# UNOFFICIAL COPY

Partnership Agreement, as defined in the Note, which adversely affects Mortgagee in any material respect.

(5) Mortgagor is, and shall continue to be, (a) duly organized and existing under the laws of the State in which it is formed, and (b) duly qualified to transact business in each State where the conduct of its business requires it to be qualified.

G. Construction and Materials. Mortgagor hereby warrants, represents and covenants that all persons and entities who have provided labor or materials to or for the benefit of the Mortgaged Property by, through or under Mortgagor or otherwise at Mortgagor's direction or request at any time prior to the date of this Mortgage have been paid in full.

H. Hazardous Waste. Mortgagor hereby represents and warrants that, except as disclosed in the environmental report that have been provided to Mortgagee by or on behalf of Mortgagor concerning the Mortgaged Property (the "Environmental Reports"), Mortgagor is not aware of any facts or circumstances which are reasonably likely to give rise to any litigation, proceedings, investigations, citations or notices of violations resulting from the use, presence, generation, manufacture, storage, discovery or disposition of, on, under or about the Mortgaged Property or the transport to or from the Mortgaged Property of any Hazardous Materials, defined below. Except as may be disclosed in the Environmental Report, as of the date hereof to its knowledge, Mortgagor hereby represents and warrants that, to its knowledge, the Mortgaged Property is not in violation of and Mortgagor covenants and agrees not to use or permit the use of the Mortgaged Property for any purpose which would be in violation of, any federal, state or local health or environmental statute, regulation, ordinance or publication which is presently in effect or that may be promulgated in the future, as such statutes, regulations, ordinances and publications may be amended from time to time relating to Hazardous Materials, including, without limitation, with respect to industrial hygiene or to health or environmental conditions on, under, or about the Mortgaged Property (including, but not limited to, soil and ground water conditions) or with respect to the owner's or occupant's thereof. The foregoing representations and warranties of this subsection (H) shall survive foreclosure under this Mortgage and shall constitute continuing representations and warranties to Mortgagee, its successors and assigns, as to conditions existing prior to foreclosure or in deed in lieu of foreclosure only. The term "Hazardous Materials"; as used in this Mortgage, shall include but not be limited to:

- (i) petroleum, petroleum based products and oil;
- (ii) asbestos of any form which is or could become friable, urea formaldehyde foam insulation, transformers or other equipment which contain dielectric fluid containing levels of polychlorinated biphenyls (sometimes known as a "pcb");
- (iii) tanks, whether empty, filled or partially filled with any substance, material, chemical or other waste;
- (iv) any substance, material, chemical or other waste including, without limitation any explosive, flammable substances, explosives or radioactive materials, hazardous or toxic waste, hazardous or toxic materials, hazardous, toxic or radioactive substances, contaminants or

# UNOFFICIAL COPY

pollutants and any of the preceding which are defined as or included in the definition of "**Hazardous Substance**", "**Hazardous Waste**", "**Hazardous Material**" or "**Toxic Substance**" or other similar or related terms under any applicable local, state or federal statute, regulation, ordinance or publication including but not limited to the following, each of which are expressly included, without limitation, in the term "**Environmental Laws**":

(1) Resource Conservation and Recovery Act of 1976 (commonly referred to as the Solid Waste Disposal Act), 42 U.S.C. sec. 6901 et seq.;

(2) Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. sec. 9601 et seq., as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613;

(3) Clean Air Act, 42 U.S.C. sec. 7401 et seq.;

(4) The Water Pollution and Prevention and Control Act (commonly referred to as the Clean Water Act) 33 U.S.C. sec. 1251-et seq.;

(5) Hazardous Materials Transportation Act, 49 U.S.C. sec. 5101 et seq.;

(6) Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. sec. 136 et seq.;

(7) Toxic Substances Control Act 15 U.S.C. sec. 2601 et seq.;

(8) Safe Drinking Water Act, 42 U.S.C. sec. 300(f) et seq.; and

(9) any and all applicable statute, rule, regulation or order now in effect or enacted in the future in the State of Illinois,

as such statutes, regulations, ordinances and publications may be amended from time to time; and

(v) any other material, substance, chemical or other waste, exposure to which is prohibited, limited or regulated from time to time by any federal, state or local statute, regulation, ordinance or publication and may pose a hazard to the health and/or safety of the occupants of the Mortgaged Property or any other adjacent or nearby property.

NOTWITHSTANDING ANY NON-RECOURSE LANGUAGE OF THE NOTE OR THIS MORTGAGE, Mortgagor hereby agrees to INDEMNIFY AND HOLD HARMLESS Mortgagee, its directors, officers, employees, attorneys, contractors and agents, and any successors and assigns, their directors, officers, employees, and agents (individually and collectively the "**Indemnitees**"), from and against any and all loss, damage, expense or liability (including reasonable and documented out-of-pocket attorneys' fees and investigatory expenses) incurred arising out of the use, occurrence, generation, storage, transportation or disposal of Hazardous Materials on or about the Mortgaged Property by Mortgagor, its present tenants or any future tenants, any prior owner, operator or tenant of the Mortgaged Property, or any third

# UNOFFICIAL COPY

party, including, without limitation, (i) all foreseeable and all unforeseeable consequential damages, directly or indirectly arising out of the use, occurrence, generation, storage, transportation or disposal of Hazardous Materials by Mortgagor, past, present or future tenants, owners or operators of the Mortgaged Property, or any third party, and (ii) the cost of any required or necessary repair, cleanup or detoxification, claimed, threatened or asserted against any such Indemnitee; but such indemnity and hold harmless shall not apply with respect to any Hazardous Substances which first occurred on the Mortgaged Property after any foreclosure of this Mortgage or conveyance in lieu thereof or to the extent that such loss, damage, expense or liability is caused by or attributable to such Indemnitee's negligence or willful misconduct or that results from a claim brought by Mortgagor against an Indemnitee for a breach of such Indemnitee's obligations hereunder or under the Note. Mortgagor's obligations pursuant to the foregoing indemnity and hold harmless shall survive any termination of the estate created by this Mortgage whether as a result of the exercise by Mortgagee of any default remedies available to it at law or in equity or otherwise. Mortgagor acknowledges and agrees that as a condition precedent to making the loan to Mortgagor evidenced by the Note secured by this Mortgage, Mortgagee has required that Mortgagor provide to the Indemnitees the indemnity set forth herein and that Mortgagee would not consummate the loan without this indemnity and hold harmless and that the indemnity and harmless contained herein is a material inducement for Mortgagee's agreement to make the loan. Further, Mortgagor agrees that the foregoing indemnification is separate, independent of and in addition to its undertakings as Mortgagor under the Note, as Mortgagor under this Mortgage, as Assignor under the Assignment of Leases and Rents and any and all other documents, agreements and undertakings executed by Mortgagor in favor of Mortgagee pursuant to the Note. Mortgagor agrees that a separate action may be brought to enforce the provisions of this indemnification and hold harmless, which shall in no way be deemed to be an action on the Note or under this Mortgage, whether or not Mortgagee would be entitled to a deficiency judgment following a foreclosure sale of the Mortgaged Property.

## VI. COVENANTS OF MORTGAGOR

As long as any of the Indebtedness remains unpaid, Mortgagor covenants and agrees that:

A. Payment of Indebtedness. Subject to Section XII hereof, Mortgagor will pay the Indebtedness promptly when due and payable.

B. Payment of Taxes and Other Assessments. Mortgagor will pay all taxes, assessments and other governmental, municipal or other public dues, charges, fines, or impositions imposed or levied upon the Mortgaged Property or on the interest created by this Mortgage, or any tax or excise on rents or other tax, however described, assessed or levied by any state, federal or local taxing authority as a substitute, in whole or in part, for taxes assessed or imposed on the Mortgaged Property or on the interest created by this Mortgage (sometimes referred to herein as, "Taxes and Assessments"), and within thirty (30) days after the delinquency date, but not later than thirty (30) days after request by Mortgagee at or after the delinquency date, will provide receipts therefor to Mortgagee; provided, however, if a Termination of Escrow Waiver Event has occurred and Mortgagee then has sufficient funds in escrow for the payment of Taxes and Assessments, Mortgagee shall pay same in accordance with Section VI(D) and Mortgagor shall not be in default of its obligations hereunder as a result of

# UNOFFICIAL COPY

Mortgagee's failure to timely make such payment. If any tax or assessment is levied, assessed or imposed on Mortgagee as a legal holder of the Note or any interest in the documents securing, evidencing or relating to the Note by any governmental authority, then unless all such taxes are paid by Mortgagor as they become due and payable and in the reasonable opinion of general counsel of Mortgagee, such payment by Mortgagor is lawful and does not place Mortgagee in violation of any law, Mortgagee may, at its option, declare the Indebtedness immediately due and payable, but in this event no prepayment premium shall be due or payable. The Mortgagor may in good faith contest, by proper legal proceedings, the validity or amount of any tax, assessment, charge or levy which the Mortgagor has agreed to pay pursuant to the provisions of this Mortgage, or any third party liens or claims upon the Mortgaged Property or compliance with any laws, orders, rules or regulations and may delay payment, performance or discharge thereof during the period in which the same is being contested; provided, however, that if payment, performance or compliance is delayed: (a) such proceedings shall suspend the collection thereof from the Mortgagor, the Mortgagee and the Mortgaged Property, (b) in any such event the Mortgagor shall keep in reserve or, if requested by Mortgagee, shall deposit with the Mortgagee, as security for the payment or discharge of such contested item, an amount equal thereto plus interest, penalties, and costs, (c) such contested item and all costs and penalties, if any, shall have been paid at least thirty (30) days before the date on which the Mortgaged Property, or any portion thereof, may be sold in order to satisfy any such contested items, and (d) in the case of any matter described herein for which criminal or civil liability might accrue to Mortgagor, or Mortgagee, neither the Mortgagor nor the Mortgagee would be in violation of any civil or criminal law or otherwise in any danger of any criminal or civil liability for failure to comply therewith.

C. Insurance. Mortgagor shall keep the Mortgaged Property insured against loss or damage by fire, windstorm, extended coverage perils, flood (in the event any of the Mortgaged Premises is within a 100-year flood plain and flood insurance is available pursuant to the United States Flood Disaster Protection Act of 1973 or any similar or successor statute or successor governmental authority), vandalism, malicious mischief and such other hazards, casualties or other contingencies and in such amounts (but in no event less than the greater of the amount of the Indebtedness from time to time secured hereby or the full replacement value thereof) as from time to time may be required by Mortgagee, and maintain rents or rental value insurance coverage, in an amount at least adequate to cover twelve (12) months' principal and interest installments on the Note and together with twelve (12) months' property taxes and insurance premiums, with respect to the Mortgaged Property covering the risk of loss due to the occurrence of any of the foregoing hazards, in each case and in such amounts, in such manner and with such insurance companies as the Mortgagee may approve and shall contain a waiver of subrogation and provide that any losses payable thereunder shall (pursuant to standard mortgagee clauses without contribution, including one providing that such insurance as to the interest of Mortgagee shall not be invalidated by any act or omission or neglect of Mortgagor, to be attached to each policy) be payable to Mortgagee. Mortgagor shall cause duplicate originals or certified copies of any and all such insurance policies to be deposited with Mortgagee, or certificates of the insurers under such policies evidencing same. Prior to expiration of any policy or within ten (10) days after any subsequent request by Mortgagee, Mortgagor shall furnish to Mortgagee evidence of the payment of such premiums. Each of such policies shall contain an agreement by the insurer that the same shall not be canceled or modified without at least ten (10) days' prior written notice

# UNOFFICIAL COPY

to Mortgagee. In the event of loss under any such policy, Mortgagor shall give immediate written notice to the insurance carrier and to Mortgagee. Subject to Article X, with respect to all insurance policies except public liability insurance, Mortgagee is hereby authorized, but not required, on behalf of and at the expense of Mortgagor, whether or not an Event of Default has then occurred, to make proof of loss, to collect for, adjust or compromise any losses under any insurance policy on the Mortgaged Property, to appear in and prosecute any action arising from any of such insurance policies, and to apply, at Mortgagee's option, the loss proceeds (less expenses of collection) on the Indebtedness, in any order and whether due or not, or to the restoration of the Mortgaged Property, or to be released to Mortgagor, but any such application or release shall not cure or waive any default. In case of a sale pursuant to the foreclosure provision hereunder, or any conveyance of all or any part of the Mortgaged Property in extinguishment of the Indebtedness, complete title to all insurance policies on or related to the Mortgaged Property, and the unearned premiums of same shall pass to and vest in the purchaser or grantee of the Mortgaged Property. Without limiting the generality of any of the provisions of this paragraph, Mortgagor acknowledges and agrees that notwithstanding any right of the tenant in the Key Tenant Lease to self-insure for a casualty, the Mortgagor shall be required to provide to Mortgagee the casualty insurance as required in this paragraph as and when received by Mortgagor. Anything in this Subsection (C) to the contrary notwithstanding, if a Termination of Escrow Waiver Event has occurred and Mortgagee then has sufficient funds in escrow for the payment of insurance premiums, Mortgagee shall pay same in accordance with Section VI(D) and Mortgagor shall not be in default of its obligations hereunder as a result of Mortgagee's failure to timely make such payment.

D. Escrow for Taxes and Insurance The requirements for escrows for taxes and insurance have been conditionally waived by Mortgagee so long as no Termination of Escrow Waiver Event occurs. A "Termination of Escrow Waiver Event" means one or more of the following: (i) an Event of Default has occurred and is continuing; (ii) any Taxes and Assessments is not paid prior to delinquency, unless being contested in accordance with Section VI(B)(2) above, or any premium to maintain the insurance required in this Mortgage is not paid when due and within any applicable grace or cure period; (iii) the Mortgagor does not own the Mortgaged Property unless the subject loan has been assumed by a borrower approved in writing by Mortgagee, in Mortgagee's sole and absolute discretion; or (iv) Mortgagee has notified Mortgagor that Mortgagee has determined in Mortgagee's sole and absolute discretion of a material adverse change in the financial capacity of any tenant of 10,000 square feet or more of the Mortgaged Property that is obligated to pay for or reimburse Mortgagor for all or any portion of the taxes or insurance on all or any portion of the Mortgaged Property or the financial capacity of any guarantor of any such tenant's obligations. If a Termination of Escrow Waiver Event occurs, thereafter Mortgagor shall pay, in addition to the installments payable under the Note, on the same day as such installments are due and payable, a sum equal to 1/12th of the estimated annual taxes, hazard and rental insurance premiums, and special assessments, if any, next due on the Mortgaged Property. If the amount so paid is not sufficient to pay such taxes, insurance premiums and assessments when due, then Mortgagor will, promptly following receipt of written demand from Mortgagee, deposit with Mortgagee amounts sufficient to pay the same. Funds deposited by Mortgagor pursuant to this provision shall be used by Mortgagee to pay such taxes, insurance premiums and assessments when due, provided that Mortgagor has furnished Mortgagee with all tax statements, premium notices and other such notices at least ten (10) days



# UNOFFICIAL COPY

prior to the date that any such taxes, premiums and assessments may be due. If there is an Event of Default under this Mortgage, beyond a cure period, if any, or waiver, if any, that has been agreed to in writing by Mortgagee, in Mortgagee's sole and absolute discretion, Mortgagee may elect, at any time after an Event of Default, beyond a cure period, if any, or waiver, if any, that has been agreed to in writing by Mortgagee, in Mortgagee's sole and absolute discretion to apply the funds accumulated under this provision against the Indebtedness in any manner or order. No interest shall accrue or be allowed on any payments under the provisions of this paragraph. Mortgagee shall not be required to deposit or hold monies in an account special or separate from its general funds. Mortgagor further indemnifies Mortgagee against claims arising out of payment of taxes or insurance premiums where Mortgagor has failed to provide Mortgagee with tax statements and premium notices as required hereby. The maintenance by Mortgagee of an escrow for Taxes and Assessments and insurance shall not relieve Mortgagor of its obligations under this Mortgage respecting Taxes and Assessments and insurance on the Mortgaged Property if such escrow is insufficient or otherwise applied as provided in accordance with this Mortgage.

## E. PATRIOT Act.

(1) As of the date of this Mortgage, Mortgagor is and, during the term of this Mortgage shall remain, in full compliance with all the applicable laws and regulations of the United States of America that prohibit, regulate or restrict financial transactions, including but not limited to, conducting any activity or failing to conduct any activity, if such action or inaction constitutes a money laundering crime, including any money laundering crime prohibited under the Money Laundering Control Act, 18 U.S.C. sec. 1956, 1957, or the Bank Secrecy Act, 31 U.S.C. sec. 5311 et seq., and any amendments or successors thereto and any applicable regulations promulgated thereunder.

(2) Neither Mortgagor, nor any Constituent Owner (defined below), is any of the following (each a "**Blocked Person**"): (a) a Person that is listed in the annex to, or is otherwise subject to the provisions of, Executive Order No. 13224; (b) a Person owned or controlled by, or acting for or on behalf of, any Person that is listed in the annex to, or is otherwise subject to the provisions of, Executive Order No. 13224; (c) a Person with which any Bank is prohibited from dealing or otherwise engaging in any transaction by any Anti-Terrorism Law; (d) a Person that commits, threatens or conspires to commit or supports "terrorism" as defined in Executive Order No. 13224; or (e) a Person that is named as a "specially designated national" on the most current list published by the U.S. Treasury Department Office of Foreign Asset Control at its official website or any replacement website or other replacement official publication of such list. Neither Mortgagor, nor to Mortgagor's knowledge, any Constituent Owner (i) conducts any business or engages in making or receiving any contribution of funds, goods or services to or for the benefit of any Blocked Person, or (ii) deals in, or otherwise engages in any transaction relating to, any property or interests in property blocked pursuant to Executive Order No. 13224. Neither Mortgagor nor, to Mortgagor's knowledge, any Constituent Owner, is a "Special Designated National" or "Blocked Person" as those terms are defined in the office of Foreign Asset Control Regulations (31 C.F.R. sec. 500 et seq.).

(3) Mortgagor acknowledges that it understands and has been advised by legal counsel on the requirements of the applicable laws referred to above, including the Money

# UNOFFICIAL COPY

Laundering Control Act, 18 U.S.C. sec. 1956, 1957, the Bank Secrecy Act, 31 U.S.C. sec. 5311 et seq., the applicable regulations promulgated thereunder, and the Foreign Assets Control Regulations, 31 C.F.R. sec. 500 et seq.

(4) Mortgagor shall notify Mortgagee immediately upon receipt of any information indicating a breach of this Section 6(E), or if Mortgagor or any officer, director, partner, member, manager, member, employee or Constituent Owner of Mortgagor is custodially detained on charges relating to money laundering, whereupon Mortgagee shall be entitled to take all actions necessary so that Mortgagee is in compliance with all anti-money laundering regulations. Any and all loss, damage, liability, penalty, fine or expense (including reasonable attorney's fees and investigatory expenses) incurred by Mortgagee in connection therewith, including but not limited to attorney's fees, shall be included in the indebtedness secured hereunder and shall be due and payable by Mortgagor to Mortgagee promptly upon demand.

F. Waste, Demolition, Alteration or Replacement. Mortgagor will cause the Mortgaged Property and every part thereof to be maintained, preserved and kept in safe and good repair, working order and condition, will not commit or permit waste thereon, will not remove, demolish or alter the design or structural character of any building now or hereafter erected on the Mortgaged Premises, without the prior written consent of Mortgagee (which consent shall be deemed granted if such alteration is pursuant to a lease approved by Mortgagee or permitted by the terms of this Mortgage), and will comply in all material respects with all laws and regulations of any governmental authority with reference to the Mortgaged Property and the manner and use of the same, and will from time to time make all necessary repairs, renewals, additions and restorations thereto so that the value and efficient use thereof shall be fully preserved and maintained. Mortgagor agrees not to remove any of the fixtures or personal property included in the Mortgaged Property without the prior written consent of Mortgagee and unless immediately replaced with like property of at least equal value unless such property is obsolete or no longer necessary for the conduct of Mortgagor's business. Mortgagor shall act as necessary to continue or cause the continuance of such income producing activity as is presently conducted upon or contemplated for the Mortgaged Property.

G. Inventory of Personal Property. Upon request of Mortgagee (but in any event no more frequently than annually), Mortgagor shall deliver to Mortgagee an inventory describing and showing the make, model and location of all fixtures (other than business systems) and personal property owned by Mortgagor and from time to time used in the management, maintenance and operation of the Mortgaged Property (other than inventory or property, if any, expressly excluded from the operation of this Mortgage by separate written agreement) with a certification by Mortgagor that said inventory is a true and complete schedule of such fixtures and material personal property owned by Mortgagor and used in the management, maintenance and operation of the Mortgaged Property and that such items specified in the inventory constitute all of the fixtures and material personal property required in the management, maintenance and operation of the Mortgaged Property and that such items are owned by Mortgagor free and clear of security interests, liens, conditional sales contracts or title retention arrangements. Mortgagor hereby grants to Mortgagee a security interest in all such items of fixtures and personal property owned by Mortgagor under the terms and conditions of this Mortgage.

# UNOFFICIAL COPY

H. Financial Statement. April 30<sup>th</sup> of each and every year is the "Financial Statement Due Date". The requirement for escrows for audited financial statements has been conditionally waived by Mortgagee so long as no Termination of Certified Statement Waiver Event occurs. A "Termination of Certified Statement Waiver Event" means one or more of the following: (i) an Event of Default has occurred and is then continuing; or (ii) on or before the Financial Statement Due Date, Mortgagor has not furnished Mortgagee within any applicable grace or cure period (a) annual operating information relating to the Mortgaged Property for each calendar year in the form required by the most recent version of the CRE Finance Council Investor Reporting Package, (or such other form as required by Mortgagor from time to time), signed by an executive officer of Mortgagor or Mortgagor's general partner and which includes the certification that, to the best of Mortgagor's knowledge, during the period of time covered by the particular statement, (1) no activity has been conducted upon the property in violation of any state, federal or local law, ordinance or regulation pertaining to toxic or hazardous materials, industrial hygiene or environmental conditions, and (2) the Mortgaged Property complies in all material respects with the Americans with Disabilities Act of 1990, as it may be amended from time to time, or any state equivalent statute and (b) a detailed listing of all tenants leasing space in the Mortgaged Property which listing evidences the rate, the term, the amount of space, annual rent, any other reimbursements paid by each tenant, and, where appropriate, sales information provided by such tenant on the form attached hereto as **Exhibit "C"** attached hereto and incorporated herein for all purposes (c) such other form as required by Mortgagee from time to time) signed by an executive officer of Mortgagor or Mortgagor's general partner. If a Termination of Certified Statement Waiver Event occurs, thereafter Mortgagor shall furnish to Mortgagee on or before Financial Statement Due Date until the Indebtedness secured hereby has been fully paid, annual certified financial statements prepared by or for Mortgagor pertaining to Mortgagor's operation of the Mortgaged Property, each such statement prepared in accordance with generally accepted accounting principles, the income tax method of accounting or such other accounting method reasonably acceptable to Mortgagee and consistently applied, and each such statement prepared and signed by an independent certified public accountant approved by and acceptable to Mortgagee. The financial statements to be delivered by Mortgagor following a Termination of Certified Statement Waiver Event shall also contain Mortgagor's certification that, during the period of time covered by the particular statement, to Mortgagor's knowledge, (1) no activity has been conducted upon the Mortgaged Property in violation of any state, federal or local law, ordinance or regulation pertaining to Hazardous Materials, industrial hygiene or environmental conditions and (2) the Mortgaged Property complies in all material respects with the Americans With Disabilities Act of 1990, as it may be amended from time to time, or any state equivalent statute. In addition to any other right or remedy of Mortgagee for failure to timely deliver any of the operating statements, lists, certifications or other documents and information required in this paragraph, Mortgagor shall pay Mortgagee \$200 per month or portion thereof as an administrative fee for each successive month that all financial statements are not delivered to Mortgagee by the Financial Statement Due Date; provided that no such fee shall be assessed unless Mortgagee has sent Mortgagor written notice that Mortgagor is in default (or will be in default if such notice is sent on or within the 30 days prior to such Financial Statement Due Date) in providing such statements and Mortgagor has failed to cure such default within 30 days after such notice was given.

# UNOFFICIAL COPY

I. Restrictions upon Sale, Transfer or Mortgaging the Mortgaged Property or the Interest in Mortgagor. Mortgagor acknowledges that Mortgagee is relying on the credit worthiness and skill of Mortgagor in advancing sums secured hereby. Except for (a) a natural person's transfer by will or applicable state intestacy laws, or to trusts set up for the benefit of immediate family members for estate planning purposes and controlled by the transferor, (b) transfers between Constituent Owners so long as same does not result in a change in control of Mortgagor and the Designated Tier Five Owners, defined below, maintain their direct and indirect ownership in the applicable Constituent Owners, or (c) an initial public offering on a recognized stock exchange (collectively, "**Permitted Transfers**"): (i) if the Mortgagor should sell, trade, convey, transfer, mortgage, assign, exchange, pledge or encumber (including, without limiting these provisions or any similar references in this Mortgage, the granting of a security interest in) all or any part of the Mortgaged Property, or any interest of Mortgagor therein, absolutely or as security for a debt or other obligation, whether done in a direct or indirect method; (ii) if a shareholder, member, partner, trustee, beneficiary or other owner of Mortgagor (sometimes, a "**Tier Two Owner**") should sell, trade, convey, transfer, mortgage, assign, exchange, pledge or encumber (including, without limiting these provisions or any similar references in this Mortgage, the granting of a security interest in) all or any part of its interest in Mortgagor; (iii) if any shareholder, member, partner, trustee, beneficiary or other owner of any Tier Two Owner, but expressly excluding any shareholder, member, partner, trustee, beneficiary or other owner of Thatcher Woods Buligo LP, (sometimes, a "**Tier Three Owner**") should sell, trade, convey, transfer, mortgage, assign, exchange, pledge or encumber (including, without limiting these provisions or any similar references in this Mortgage, the granting of a security interest in) all or any part of its interest in a Tier Two Owner, which would result in a change in control of Mortgagor; (iv) if a shareholder, member, partner, trustee, beneficiary or other owner of any Tier Three Owner (sometimes, a "**Tier Four Owner**") should sell, trade, convey, transfer, mortgage, assign, exchange, pledge or encumber (including, without limiting these provisions or any similar references in this Mortgage, the granting of a security interest in) all or any part of its interest in a Tier Three Owner, which would result in a change in control of Mortgagor or any Designated Tier Five Owner ceasing to maintain any of his direct and indirect ownership in any applicable Constituent Owner; or (v) if either or both of Christopher F. Wild or Elliot Sasson (sometimes, the "**Designated Tier Five Owner**"; Designated Tier Five Owners, Tier Two Owners, Tier Three Owners and Tier Four Owners are individually and collectively sometimes, a "**Constituent Owner**") should sell, trade, convey, transfer, mortgage, assign, exchange, pledge or encumber (including, without limiting these provisions or any similar references in this Mortgage, the granting of a security interest in) all or any part of their respective beneficial interests in ECA Thatcher Woods, LLC, a Tier Four Owner; or (v) if Mortgagor shall in any way, voluntarily or involuntarily be divested of title or of any interest in the Mortgaged Property, then such event shall be an Event of Default and the Mortgagee, at its option, may elect to accelerate the maturity of the Note and declare the entire amount of the Indebtedness immediately due and payable whereupon Mortgagor shall have thirty (30) days to pay the full sum of the Indebtedness including, without limitation, principal and interest, whether or not any such sale, trade, conveyance, transfer, mortgage, assignment, exchange, pledge, or encumbrance might diminish the value of the security for the Indebtedness or increase the likelihood of an Event of Default or increase the likelihood of the Mortgagee having to resort to any other security for the Indebtedness after default or add or remove liability of any party for payment or performance of the Indebtedness. Mortgagor further agrees that the foregoing restriction shall be

# UNOFFICIAL COPY

effective and remain in full force and effect throughout the term of this Mortgage and shall be applicable to Mortgagor, each Constituent Owner and their respective heirs, executors, administrators, successors and assigns, as applicable. The consent by the Mortgagee to any one such sale, trade, conveyance, transfer, mortgage, assignment, exchange, pledge, or encumbrance prohibited by this Section (VI)(I) (one or more of the preceding a "Transaction") shall not waive or forfeit the right of Mortgagee to elect to accelerate the Indebtedness to maturity as to any other Transaction. Mortgagor further covenants and agrees to give written notice to Mortgagee in the event there occurs any Transaction which would violate the terms and conditions of this provision. The term "Transaction" shall include any voluntary or involuntary act or omission of Mortgagor. Nothing herein contained shall prevent Mortgagee from accelerating the Note at any time in the event Mortgagor enters into such a Transaction and does not notify Mortgagee of same. The Mortgagor may request Mortgagee to waive the right to declare the entire amount of the Indebtedness immediately due and payable and Mortgagee may, in its absolute discretion, consent or refuse to consent to the Transaction. As a condition of consenting to the Transaction, Mortgagee may, in its absolute discretion, make one or more of the following requirements:

- (1) That the rate of interest contained in the Note be increased to a rate acceptable to Mortgagee;
- (2) That a transfer fee, in an amount determined by Mortgagee, be paid;
- (3) That a principal payment be made against the Note;
- (4) That the proposed transferee execute an assumption agreement or other document as Mortgagee may reasonably require; or
- (5) That any other requirement deemed appropriate by Mortgagee be satisfied.

No Transaction pursuant to the foregoing provisions of this Section (VI)(I), defined as a Permitted Transfer shall in any way release Mortgagor or any other party liable on any of the Indebtedness or liable under any document securing, evidencing or relating to the Indebtedness from any such liability unless expressly provided in this Mortgage.

J. Delivery of Substitute Note. Mortgagor will, if the Note is mutilated, destroyed, lost or stolen, deliver to Mortgagee, in substitution therefor, a new promissory note containing the same terms and conditions as the Note with a notation thereon of the unpaid principal and accrued but unpaid interest. Mortgagor shall be furnished with satisfactory evidence of the mutilation, destruction, loss or theft of the Note, and also such security or indemnity as may be reasonably requested by Mortgagee; provided, however, that if the original Mortgagee named herein is the then mortgagee under this Mortgage, an unqualified indemnity from the original mortgagee named herein shall be deemed to be satisfactory security or indemnification.

K. Compliance with Covenants, Conditions, Restrictions and Recorded Documents. Mortgagor shall, and shall cause the Mortgaged Property, to fully and timely comply with all restrictions covenants, conditions and agreements benefiting, burdening or imposed on the

# UNOFFICIAL COPY

Mortgaged Property or any portion thereof or the owner of all or such portion of the Mortgaged Property.

L. ERISA. As of the date hereof and throughout the term of this Mortgage, (i) Mortgagor is not and will not be an "employee benefit plan" as defined in Section 3(3) of ERISA, which is subject to Title I of ERISA; (ii) the assets of Mortgagor do not and will not constitute "plan assets" of one or more such plans for purposes of Title I of ERISA; (iii) Mortgagor is not and will not be a "governmental plan" within the meaning of Section 3(3) of ERISA; (iv) transactions by or with Mortgagor are not and will not be subject to state statutes applicable to Mortgagor regulating investments of fiduciaries with respect to governmental plans; and (v) Mortgagor shall not engage in any transaction which would cause any obligation, or action taken or to be taken, hereunder (or the exercise by Mortgagee of any of its rights under this Mortgage, the Note, or the other Loan Documents) to be a non-exempt (under a statutory or administrative class exemption) prohibited transaction under ERISA. Mortgagor further agrees to deliver to Mortgagee such certifications or other evidence of compliance with the provisions of this section as Mortgagee may from time to time request.

M. Special Purpose Entity. Mortgagor represents, warrants and covenants as follows:

(1) Limited Purpose. The sole purpose conducted or promoted by Mortgagor is to engage in the following activities:

(i) to acquire, own, hold, lease, operate, manage, maintain, develop and improve the Mortgaged Premises (or an undivided interest therein) and to contract for the operation, maintenance, management and development of the Mortgaged Premises;

(ii) to enter into and perform its obligations under the Loan Documents;

(iii) to sell, transfer, service, convey, dispose of, pledge, assign, borrow money against, finance, refinance or otherwise deal with the Mortgaged Premises to the extent permitted under the Loan Documents; and

(iv) to engage in any lawful act or activity and to exercise any powers permitted to limited partnerships organized under the laws of the State of Delaware that are related or incidental to and necessary, convenient or advisable for the accomplishment of the above mentioned purposes.

(b) Limitations on Debt, Actions. Notwithstanding anything to the contrary in the Loan Documents or in any other document governing the formation, management or operation of Mortgagor, Mortgagor shall not:

(i) guarantee any obligation of any Person, including any affiliate, or become obligated for the debts of any other Person or hold out its credit as being available to pay the obligations of any other Person;

# UNOFFICIAL COPY

(ii) engage, directly or indirectly, in any business other than as required or permitted to be performed under this Section;

(iii) incur, create or assume any debt other than (A) the loan evidenced by the Note, or (B) unsecured trade payables incurred in the ordinary course of its business that are related to the ownership and operation of the Mortgaged Premises;

(iv) make or permit to remain outstanding any loan or advance to, or own or acquire any stock or securities of, any Person, except that Mortgagor may invest in those investments permitted under the Loan Documents and except that Mortgagor shall be permitted to advance funds to affiliates of Mortgagor upon terms and conditions that are intrinsically fair and substantially similar to those that would be available on an arms-length basis with third parties;

(v) other than transfers permitted by the Loan Documents; to the fullest extent permitted by law, engage in any dissolution, liquidation, consolidation, merger, sale or other transfer of any of its assets outside the ordinary course of Mortgagor's business;

(vi) buy or hold evidence of indebtedness issued by any other Person (other than cash, checking accounts or investment-grade securities);

(vii) form, acquire or hold any subsidiary (whether corporate, partnership, limited liability company or other) or own any equity interest in any other entity;

(viii) own any asset or property other than the Mortgaged Property (or an undivided interest therein) and incidental personal property necessary for the ownership or operation of the Mortgaged Property; or

(ix) take any action under any bankruptcy or debtor relief law without the unanimous written approval of all members of Mortgagor.

(c) Separateness Covenants. In order to maintain its status as a separate entity and to avoid any confusion or potential consolidation with any affiliate, Mortgagor represents and warrants that in the conduct of its operations since its organization it has observed, and covenants that it will continue to observe, the following covenants:

(i) maintain books and records and bank accounts separate from those of any other Person;

(ii) maintain its assets in such a manner that it is not costly or difficult to segregate, identify or ascertain such assets;

(iii) comply with all organizational formalities necessary to maintain its separate existence;

# UNOFFICIAL COPY

(iv) hold itself out to creditors and the public as a legal entity separate and distinct from any other entity;

(v) maintain separate financial statements, showing its assets and liabilities separate and apart from those of any other Person and not have its assets listed on any financial statement of any other Person; except that Mortgagor's assets may be included in a consolidated financial statement of its affiliate so long as appropriate notation is made on such consolidated financial statements to indicate the separateness of Mortgagor from such affiliate and to indicate that Mortgagor's assets and credit are not available to satisfy the debts and other obligations of such affiliate or any other Person;

(vi) prepare and file its own tax returns separate from those of any Person to the extent required by applicable law, and pay any taxes required to be paid by applicable law, provided that Mortgagor may file or may be part of a consolidated federal tax return to the extent required or permitted by applicable law so long as there is an appropriate notation indicating the separate existence of such entity and its assets and liabilities;

(vii) allocate and charge fairly and reasonably any common employee or overhead shared with affiliates;

(viii) not enter into any new transaction with affiliates except on an arm's-length basis on terms which are intrinsically fair and no less favorable than would be available for unaffiliated third parties, and pursuant to written, enforceable agreements;

(ix) conduct business in its own name, and use separate stationery, invoices and checks;

(x) not commingle its assets or funds with those of any other Person;

(xi) not assume, guarantee or pay the debts or obligations of any other Person;

(xii) correct any known misunderstanding as to its separate identity;

(xiii) not make loans or advances to any other Person except that Mortgagor shall be permitted to advance funds to affiliates of Mortgagor upon terms and conditions that are intrinsically fair and substantially similar to those that would be available on an arms-length basis with third parties;

(xiv) pay its liabilities and expenses out of and to the extent of its own funds;



# UNOFFICIAL COPY

(xv) maintain a sufficient number of employees in light of its contemplated business purpose and pay the salaries of its own employees, if any, only from its own funds, provided that Mortgagor may engage a professional employer organization to be a co-employer for employee staffing and related matters; and

(xvi) maintain adequate capital in light of its contemplated business purpose, transactions and liabilities to the extent funds are available from operation of the Mortgaged Property; provided, however, that the foregoing shall not require any equity owner to make additional capital contributions to Mortgagor.

Failure of Mortgagor to comply with any of the foregoing covenants or any other covenants contained in this Mortgage shall not affect the status of Mortgagor as a separate legal entity.

N. Segregated Parcel. The Mortgaged Property shall be taxed separately without regard to any other real estate and the real property described on Exhibit "A" shall constitute a legally subdivided lot under all applicable statutes, regulations, ordinances or publications and for all purposes may be mortgaged, conveyed and otherwise dealt with as an independent parcel.

O. Approvals; Condemnation. Mortgagor represents and warrants to Mortgagee that Mortgagor (i) has obtained all necessary certificates, licenses, permits, and other approvals, governmental and otherwise, necessary for the construction and operation of the Mortgaged Premises, and the occupancy and operation thereof, and the conduct of its business and all required zoning, building code, land use, environmental and other similar permits or approvals have been obtained, and all of them are in full force and effect as of the date hereof and, to Mortgagor's knowledge, none of them are subject to any pending or anticipated revocation, suspension, forfeiture, or modification, and (ii) to Mortgagor's knowledge and belief there is no proceeding pending (or notice of such proceeding received by Mortgagor) for the total or partial condemnation of, or affecting, the Mortgaged Premises.

P. Compliance with Law. Mortgagor represents and warrants to Mortgagee that the Improvements and remainder of the Mortgaged Premises and the present and contemplated use and occupancy thereof are, and Mortgagor covenants and agrees to cause the Mortgaged Premises and the use and occupancy thereof at all times to remain, in compliance in all material respects with all laws, statutes, ordinances, regulations and other governmental or quasi-governmental requirements and recorded covenants and restrictions now or hereafter relating to the ownership, construction, use, operation, and leasing of the Mortgaged Property.

Q. Compliance with Escrow Agreement. Grantor shall fully comply with any and all terms and conditions of the Escrow Agreement.

# UNOFFICIAL COPY

## VII. RELEASE OF MORTGAGE

If Mortgagor shall well and truly pay, or cause to be paid, all of the Indebtedness and does keep and perform each and every covenant, duty, condition, and stipulation herein imposed on Mortgagor, in the Note contained, or in any other document securing, evidencing or relating to the Indebtedness, then this Mortgage and the grants and conveyances contained herein shall become null and void, and the Mortgaged Property shall revert to Mortgagor and the entire estate, right, title and interest of Mortgagee will thereupon cease; and Mortgagee in such case shall deliver to Mortgagor a release of mortgage and any other proper documents acknowledging satisfaction and release of this document; otherwise, this Mortgage shall remain in full force and effect.

## VIII. EVENTS OF DEFAULT

8.1 Acts Constituting Default. Mortgagor will be in default under this Mortgage upon the happening of any of the following events or conditions, or the happening of any other Event of Default as defined elsewhere in this Mortgage (herein collectively referred to as an "Event of Default"):

(1) Mortgagor fails to make when due any payment of principal or interest or any installment of principal and interest under the indebtedness.

(2) Mortgagor fails to keep or perform any of the covenants, conditions or stipulations contained in this Mortgage, the Note or in any other documents securing, evidencing or relating to the Indebtedness other than any event or condition specified in Section 8.1(1), 8.1(4), 8.1(5), 8.1(6) or 8.1(7) within thirty (30) days of receipt of written notice of same from Mortgagor, or in the event that such matter is not reasonably capable of being cured within such thirty (30) day period so long as is reasonably necessary to cure such matters not to exceed an additional sixty (60) days and only so long as Mortgagor is diligently pursuing such cure.

(3) Any warranty or representation made in this Mortgage by Mortgagor is determined by Mortgagee to be untrue in any material respect.

(4) Mortgagor (i) admits in writing its inability to pay its debts generally as they become due, (ii) files a petition or answer in bankruptcy as a Debtor or seeking reorganization or an arrangement or otherwise to take advantage of any State or Federal bankruptcy or insolvency law, (iii) makes an assignment for the benefit of creditors, (iv) files a petition for or consents to the appointment of a receiver for its assets or any part thereof, or (v) without its consent has a petition filed in any bankruptcy or insolvency proceeding or an order, decree or judgment entered by a court of competent jurisdiction appointing a receiver of the Mortgaged Property or approving a petition filed against it seeking reorganization or an arrangement of it or its assets or debts under any bankruptcy or insolvency law and such petition, order, decree or judgment is not dismissed, vacated, set aside or stayed within ninety (90) days from the date of entry.

# UNOFFICIAL COPY

(5) Except for Permitted Transfers, Mortgagor sells, trades, conveys, transfers, mortgages, assigns, exchanges, pledges or encumbers (including, without limiting these provisions or any similar references in this Mortgage, the granting of a security interest in) the Mortgaged Property, the Collateral or any portion thereof or interest therein, or, except for Permitted Transfers, Mortgagor or any shareholder, partner, member, trustee or beneficiary of Mortgagor or a Constituent Owner sells, trades, conveys, transfers, mortgages, assigns, exchanges, pledges or encumbers (including, without limiting any of the provisions of this subparagraph, the granting of a security interest in) any part of its interest in Mortgagor or any Constituent Owner, except for Permitted Transfers, or any such event occurs involuntarily to Mortgagor or such shareholder, partner, member, trustee or beneficiary of Mortgagor or any shareholder, partner, member, trustee or beneficiary of any Constituent Owner, all without the prior written consent of Mortgagee.

(6) The authority and right of Mortgagor to do business in the State of Illinois is terminated, withdrawn, cancelled or modified in any way adverse to Mortgagee and is not reinstated within forty-five (45) days thereafter.

(7) Mortgagor's existence as a legal entity for any reason, by operation of law or otherwise, is modified in any way adverse to Mortgagee or terminates and is not reinstated within forty-five (45) days thereafter.

## IX. RIGHTS OF MORTGAGEE UPON DEFAULT

B. 9.1 Acceleration of Indebtedness. Upon occurrence of an Event of Default that continues beyond any express cure period provided for in this Mortgage, Mortgagee may at its option and without demand or notice to Mortgagor, accelerate the maturity of the Note and declare the Indebtedness secured hereby immediately due and payable. Unless otherwise provided herein, Mortgagor hereby waives presentment for payment, protest and demand, notice of protest, demand, dishonor and default, notice of intent to declare the Indebtedness immediately due and payable and notice of the declaration that the Indebtedness is immediately due and payable, and any and all rights Mortgagor may have to a hearing before any judicial authority prior to the exercise by Mortgagee of any of its rights under this Mortgage or any other agreements securing or executed in connection with the Indebtedness, all to the extent authorized by law.

C. Operation of Property by Mortgagee. Upon the occurrence of an Event of Default that continues beyond any express cure period provided for in this Mortgage (including, but not limited to, at any time after the maturity of the Note or any acceleration of the maturity of the Note) in addition to all other rights herein conferred on Mortgagee, but subject to Section XII hereof, Mortgagee (or any person, firm or corporation designated by Mortgagee) may, but will not be obligated to, enter upon and take possession of any or all of the Mortgaged Property, exclude Mortgagor therefrom, and hold, use, administer, manage and operate the same to the extent that Mortgagor could do so. If the Mortgaged Property includes any type of business enterprise, Mortgagee may operate and manage such business without any liability of Mortgagee to Mortgagor resulting therefrom (excepting failure to use ordinary care in the operation and management of the Mortgaged Property); and Mortgagee or Mortgagee's designee may collect,

# UNOFFICIAL COPY

receive and receipt for all proceeds accruing from such operation and management, and, at Mortgagor's expense, make repairs and purchase needed additional property, and exercise every power, right and privilege of Mortgagor with respect to the Mortgaged Property. When and if the expenses of such operation and management have been paid and the Indebtedness has been paid, the Mortgaged Property shall be returned to Mortgagor (providing there has been no foreclosure sale). This provision is a right created by this Mortgage and cumulative of, and is not in any way to affect, the right of Mortgagee to the appointment of a receiver given Mortgagee by law.

D. Judicial Proceedings. Upon the occurrence of an Event of Default, or at any time thereafter during the continuance thereof (including, but not limited to, at any time after the maturity of the Note or any acceleration of the maturity of the Note), but subject to Section XII hereof, Mortgagee may proceed by suit for a foreclosure of its lien on the Mortgaged Property, or to sue Mortgagor for damages on, arising out of said Event of Default, or for specific performance of any provision contained herein, or to enforce any other appropriate legal or equitable right.

E. Foreclosure: Expense of Litigation. Subject to Section XII of this Mortgage:

(1) When all or any part of the Indebtedness shall become due and is not paid by Mortgagor when due, whether by acceleration or otherwise, Mortgagee shall have the right to foreclose the lien hereof for such Indebtedness or part thereof and/or exercise any right, power or remedy provided in this Mortgage or any of the other Loan Documents in accordance with the Illinois Mortgage Foreclosure Act (Chapter 735, sec. 5/15-1101 et seq., Illinois Compiled Statutes) (as may be amended from time to time, the "Act"). In the event of a foreclosure sale, Mortgagee is hereby authorized, without the consent of Mortgagor, to assign any and all insurance policies to the purchaser at such sale or to take such other steps as Mortgagee may deem advisable to cause the interest of such purchaser to be protected by any of such insurance policies.

(2) In any suit to foreclose the lien hereof, there shall be allowed and included as additional indebtedness in the decree for sale all expenditures and expenses which may be paid or incurred by or on behalf of Mortgagee for reasonable attorneys' fees, appraisers' fees, outlays for documentary and expert evidence, stenographers' charges, publication costs, and costs (which may be estimated as to items to be expended after entry of the decree) of procuring all such abstracts of title, title searches and examinations, title insurance policies, and similar data and assurances with respect to the title as Mortgagee may deem reasonably necessary either to prosecute such suit or to evidence to bidders at any sale which may be had pursuant to such decree the true condition of the title to or the value of the Mortgaged Property. All expenditures and expenses of the nature mentioned in this paragraph and such other expenses and fees as may be incurred in the enforcement of Mortgagor's obligations hereunder, the protection of said Mortgaged Property and the maintenance of the lien of this Mortgage, including the reasonable fees of any attorney employed by Mortgagee in any litigation or proceeding affecting this Mortgage, the Note, or the Mortgaged Property, including probate and bankruptcy proceedings, or in preparations for the commencement or defense of any proceeding or threatened suit or proceeding shall be immediately due and payable by Mortgagor, with interest thereon from the date of demand until paid at the Default Rate and shall be secured by this Mortgage.

# UNOFFICIAL COPY

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

G. Appointment of Receiver. Upon or at any time after the filing of a complaint to foreclose this Mortgage, the court in which such complaint is filed shall, upon petition by Mortgagee, appoint a receiver for the Mortgaged Property in accordance with the Act. Such appointment may be made either before or after sale, without notice, without regard to the solvency or insolvency of Mortgagor at the time of application for such receiver and without regard to the value of the Mortgaged Property or whether the same shall be then occupied as a homestead or not and Mortgagee hereunder or any other holder of the Note may be appointed as such receiver. Such receiver shall have power to collect the rents, issues and profits of the Mortgaged Premises (i) during the pendency of such foreclosure suit, (ii) in case of a sale and a deficiency, during the full statutory period of redemption, whether there be redemption or not, and (iii) during any further times when Mortgagor, but for the intervention of such receiver, would be entitled to collect such rents, issues and profits. Such receiver also shall have all other powers and rights that may be necessary or are usual in such cases for the protection, possession, control, management and operation of the Mortgaged Property during said period, including, to the extent permitted by law, the right to lease all or any portion of the Mortgaged Property for a term that extends beyond the time of such receiver's possession without obtaining prior court approval of such lease. The court from time to time may authorize the application of the net income received by the receiver in payment of (a) the Indebtedness, or by any decree foreclosing this Mortgage, or any tax, special assessment or other lien which may be or become superior to the lien hereof or of such decree, provided such application is made prior to foreclosure sale, and (b) any deficiency upon a sale and deficiency.

H. Mortgagee's Right of Possession in Case of Default. At any time during the continuance of an Event of Default (including, but not limited to, at any time after the maturity of the Note or any acceleration of the maturity of the Note), Mortgagor shall, upon demand of Mortgagee, surrender to Mortgagee possession of the Mortgaged Property. Mortgagee, in its discretion, may, with process of law, enter upon and take and maintain possession of all or any part of the Mortgaged Property, together with all documents, books, records, papers and accounts relating thereto, and may exclude Mortgagor and its employees, agents or servants therefrom, and Mortgagee may then hold, operate, manage and control the Mortgaged Property, either personally or by its agents. Mortgagee shall have full power to use such measures, legal or equitable, as in its discretion may be deemed proper or necessary to enforce the payment or security of the avails, rents, issues, and profits of the Mortgaged Property, including actions for the recovery of rent, actions in forcible detainer and actions in distress for rent. Without limiting the generality of the foregoing, Mortgagee shall have full power to:

- (1) cancel or terminate any lease or sublease for any cause or on any ground which would entitle Mortgagor to cancel the same;
- (2) elect to disaffirm any lease or sublease which is then subordinate to the lien hereof;

# UNOFFICIAL COPY

(3) extend or modify any then existing leases and to enter into new leases, which extensions, modifications and leases may provide for terms to expire, or for options to lessees to extend or renew terms to expire, beyond the Maturity Date and beyond the date of the issuance of a deed or deeds to a purchaser or purchasers at a foreclosure sale, it being understood and agreed that any such leases, and the options or other such provisions to be contained therein, shall be binding upon Mortgagor and all persons whose interests in the Mortgaged Property are subject to the lien hereof and upon the purchaser or purchasers at any foreclosure sale, notwithstanding any redemption from sale, discharge of the Indebtedness, satisfaction of any foreclosure judgment, or issuance of any certificate of sale or deed to any purchaser;

(4) make any repairs, renewals, replacements, alterations, additions, betterments and improvements to the Mortgaged Premises as Mortgagee deems are necessary;

(5) insure and reinsure the Mortgaged Property and all risks incidental to Mortgagee's possession, operation and management thereof; and

(6) receive all of such avails, rents, issues and profits.

I. Application of Income Received by Mortgagee. Mortgagee, in the exercise of the rights and powers hereinabove conferred upon it, shall have full power to use and apply the avails, rents, issues and profits of the Mortgaged Property to the payment of or on account of the following, in such order as Mortgagee may determine:

(1) to the payment of the operating expenses of the Mortgaged Property, including cost of management and leasing thereof (which shall include compensation to Mortgagee and its agent or agents, if management be delegated to an agent or agents, and shall also include lease commissions and other compensation and expenses of seeking and procuring tenants and entering into leases), established claims for damages, if any, and premiums on insurance hereinabove authorized;

(2) to the payment of taxes and special assessments now due or which may hereafter become due on the Mortgaged Premises; and

(3) to the payment of any Indebtedness, including any deficiency which may result from any foreclosure sale.

J. Compliance with Illinois Mortgage Foreclosure Law.

(1) If any provision in this Mortgage shall be inconsistent with any provision of the Act, provisions of the Act shall take precedence over the provisions of this Mortgage, but shall not invalidate or render unenforceable any other provision of this Mortgage that can be construed in a manner consistent with the Act.

(2) If any provision of this Mortgage shall grant to Mortgagee (including Mortgagee acting as a mortgagee-in-possession) or a receiver appointed pursuant to the provisions of Section IX(F) of this Mortgage any powers, rights or remedies upon or following the occurrence of an Event of Default which are more limited than the powers, rights or remedies that would otherwise be vested in Mortgagee or in such receiver under the Act in the absence of

# UNOFFICIAL COPY

said provision, Mortgagee and such receiver shall be vested with the powers, rights and remedies granted in the Act to the full extent permitted by law.

(3) Without limiting the generality of the foregoing, all expenses incurred by Mortgagee which are of the type referred to in Sec. 5/15-1510 or 5/15-1512 of the Act, whether incurred before or after any decree or judgment of foreclosure, and whether or not enumerated in this Mortgage, shall be added to the Indebtedness and/or by the judgment of foreclosure.

K. Waiver of Rights. Mortgagor hereby covenants and agrees that it will not at any time insist upon or plead, or in any manner claim or take any advantage of, any stay, exemption or extension of law or any so-called "Moratorium Law" now or at any time hereafter in force providing for the valuation or appraisal of the Mortgaged Premises, or any part thereof, prior to any sale or sales thereof to be made pursuant to any provisions herein contained, or to decree, judgment or order of any court of competent jurisdiction; or, after such sale or sales, claim or exercise any rights under any statute now or hereafter in force to redeem the property so sold, or any part thereof, or relating to the marshalling thereof, upon foreclosure sale or other enforcement hereof; and without limiting the foregoing:

(1) To the fullest extent allowed by law, Mortgagor hereby expressly waives any and all rights of reinstatement and redemption, if any, under any order or decree of foreclosure of this Mortgage, on its own behalf and on behalf of each and every person, it being the intent hereof that any and all such rights of reinstatement and redemption of Mortgagor and of all other persons are and shall be deemed to be hereby waived to the full extent permitted by the provisions of Illinois Compiled Statutes 735 ILCS 5/15 - 1601 or other applicable law or replacement statutes;

(2) To the fullest extent allowed by law, Mortgagor will not invoke or utilize any such law or laws or otherwise hinder, delay or impede the execution of any right, power remedy herein or otherwise granted or delegated to Mortgagee but will suffer and permit the execution of every such right, power and remedy as though no such law or laws had been made or enacted; and

To the fullest extent allowed by law, if Mortgagor is a trustee, Mortgagor represents that the provisions of this paragraph (including the waiver of reinstatement and redemption rights) were made at the express direction of Mortgagor's beneficiaries and the persons having the power of direction over Mortgagor, and are made on behalf of the trust estate of Mortgagor and all beneficiaries of Mortgagor, as well as all other persons mentioned above

## X. USE OF INSURANCE PROCEEDS

10.1 Holding of Proceeds. Notwithstanding the provisions of Section 6(C) herein, any insurance proceeds paid to Mortgagee will be first applied in payment of the reasonable out-of-pocket expenses, if any, incurred by Mortgagor and Mortgagee in the collection of said insurance proceeds and the balance, if any, will be held and disbursed by Mortgagee in accordance with the following provisions:

# UNOFFICIAL COPY

A. (1) Should there exist an Event of Default at the time of the casualty or should an Event of Default occur at any time thereafter and prior to the final disbursement of such insurance proceeds; (2) should any insurance proceeds be remaining after the completion of all repair and restoration work; (3) should Mortgagor fail to comply with the requirements for disbursing the insurance proceeds and fail to cure the same within thirty (30) days of written notice from Mortgagee; (4) should one year or less remain before the maturity date of the Note, provided the Mortgagor shall be entitled at such time to exercise any options in the Note to extend the Scheduled Maturity Date (as defined therein), to the extent same would cause there to be more than one year remaining on the term of the Note; or (5) should any Key Tenant Lease of the Mortgaged Property not remain in full force and effect (subject to abatements permitted by the Key Tenant Lease during periods of restoration) at the time of such casualty or be terminated due to or in any way resulting from such casualty; then in any of the said events, Mortgagee may, at its option, apply the insurance proceeds on the Indebtedness, in any order and whether due or not, or to the restoration of the Mortgaged Property, or to be released to Mortgagor, but any such application or release shall not cure or waive any default. Notwithstanding the foregoing, if the Key Tenant Lease (as defined below) remains in full force and effect and is not terminated due to or in any way resulting from any such casualty then Mortgagee shall permit the casualty insurance proceeds to be made available for the repair and restoration the Mortgaged Property and otherwise in accordance with any applicable requirements of this Mortgage if and to the extent that such Key Tenant Lease requires that such proceeds be made available for said purpose.

B. If the insurance proceeds have not been disbursed under the provisions of subparagraph A hereof or if under subparagraph A Mortgagee elects or has agreed to permit the insurance proceeds to be used for restoration of the Mortgaged Property, the proceeds will be held and disbursed as follows:

(1) Should the insurance proceeds be less than \$250,000.00, Mortgagor shall immediately commence and complete the work of restoring the damaged property and Mortgagee will disburse the portion of the insurance proceeds to pay actual costs to replace, repair and restore the damaged property to Mortgagor upon (i) completion of the restoration work, or an independent phase thereof, in a form and substance reasonably acceptable to Mortgagee. (ii) submission of a written report by Mortgagor in a form and substance reasonably acceptable to Mortgagee that all restoration work, or an independent phase thereof, has been completed and (iii) receipt by Mortgagee of such other evidence as Mortgagee may require that all mechanics and materialmen performing work or supplying materials for the restoration work have been fully paid.

(2) Should the insurance proceeds equal or be in excess of \$250,000.00, but less than \$1,000,000.00, Mortgagor shall cause plans and specifications ("Plans") for the restoration of the damaged property to be submitted to Mortgagee for approval, such approval not to be unreasonably withheld or delayed. Upon receipt of Mortgagee's approval, Mortgagor shall forthwith commence and complete the restoration of the damaged property in accordance with the Plans. Mortgagee will disburse the portion of the insurance proceeds to pay the actual costs to repair and restore the damaged property to Mortgagor, not more often than once in any thirty day period, within ten days after (i) completion of the restoration work to a condition



# UNOFFICIAL COPY

reasonably satisfactory to Mortgagee, (ii) submission of a written report by Mortgagor that all restoration work has been completed in a form and substance reasonably acceptable to Mortgagee and (iii) receipt by Mortgagee of such evidence as Mortgagee may reasonably require that all mechanics and materialmen performing work or supplying materials for the restoration work have been completely paid.

(3) If the insurance proceeds are equal to or in excess of \$1,000,000.00, then

(a) Plans for the restoration of the damaged property and a cost estimate will both be prepared by an architect employed by Mortgagor and acceptable to Mortgagee, unless such requirement is expressly waived in writing by Mortgagee. The Plans and cost estimates will be submitted to Mortgagee for approval, such approval not to be unreasonably withheld or delayed. Upon receipt of Mortgagee's approval, Mortgagor will promptly commence and diligently pursue the restoration work in accordance with the approved Plans. (b) If prior to or during the commencement of, or at any time during the restoration work, Mortgagee shall determine that the total cost of the restoration work shall exceed the balance of the insurance proceeds held in its possession, Mortgagor shall immediately pay, in cash, to Mortgagee the amount of such excess costs. The insurance proceeds and the amount of excess costs paid by Mortgagor are hereinafter called "**Construction Funds**". Until the amount of said excess costs is paid to Mortgagee, Mortgagee shall not be obligated to disburse any of the insurance proceeds held by it. The amount of such excess costs paid by Mortgagor shall be disbursed prior to the disbursement of any of the insurance proceeds held by Mortgagee. (c) The Construction Funds will be made available to Mortgagor as restoration repair work progresses pursuant to the approved Plans and certificates of the architect, submitted not more than once every thirty (30) days. There shall be delivered to Mortgagee such other evidences as Mortgagee may reasonably request, from time to time, during the restoration work, as to the progress of the work, the compliance with the approved Plans, the total cost of restoration work to date of request, the total cost needed to complete the restoration work, lien waivers or evidence of no liens against the Mortgaged Property in a frequency of no more than one time per month. If at any time during the course of the restoration work, Mortgagee learns of any fact concerning the restoration work which is materially adverse to Mortgagee, or payment or nonpayment of mechanics and materialmen, or material inaccuracy of any information furnished with respect to it, upon notice to Mortgagor of the same, Mortgagee may withhold the disbursement of funds until such time as it is prudent (based on the reasonable judgment of Mortgagee) to continue to disburse the Construction Funds or may determine not to make any further disbursements of the Construction Funds and instead to apply all such funds remaining to the payment of the Indebtedness then outstanding, whether due or not at such time, and in such order as determined by Mortgagee.

C. Mortgagee shall not be required to hold any funds received by it described in this Article X in any account special or separate from Mortgagee's general account. Such funds shall be required to be placed in an interest bearing account, and any interest earned thereon shall constitute additional insurance proceeds to be applied as provided in this Mortgage.

## XI. SPECIAL CONDITIONS

This document is expressly made subject to the following special conditions.

# UNOFFICIAL COPY

11.1 Jury Trial Waiver. EACH OF MORTGAGOR AND MORTGAGEE (BY ITS ACCEPTANCE OF THIS MORTGAGE) RECOGNIZES THAT DISPUTES ARISING OUT OF THE LOAN TRANSACTION SECURED BY THIS MORTGAGE ARE LIKELY TO BE COMPLEX AND WISH TO STREAMLINE AND MINIMIZE THE COST OF THE DISPUTE RESOLUTION PROCESS BY AGREEING TO WAIVE ITS RIGHT TO JURY TRIAL. EACH OF MORTGAGOR AND MORTGAGEE (BY ITS ACCEPTANCE OF THIS MORTGAGE) HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, SUIT, PROCEEDING, OR COUNTERCLAIM THAT RELATES TO OR ARISES OUT OF ANY OF THE LOAN DOCUMENTS OR THE ACTS OR FAILURE TO ACT OF OR BY MORTGAGEE IN THE ENFORCEMENT OF ANY OF THE TERMS OR PROVISIONS OF THIS MORTGAGE OR THE OTHER LOAN DOCUMENTS.

11.2 Waiver and Election. The exercise of any right or remedy by Mortgagee shall not be considered as a waiver of any right or remedy nor shall any acceptance by Mortgagee of Mortgagor's partial payment or partial performance of obligations under the Note or hereunder, nor shall any failure or delay by Mortgagee in exercising any of its rights or remedies as to any Event of Default which may occur operate as a waiver by Mortgagee of its rights or remedies with respect to the occurrence of any other or further Event of Default or to the recurrence of the same Event of Default. The filing of a suit to foreclose the lien granted by this Mortgage either on any matured portion of the Indebtedness or for the whole of the Indebtedness, shall never be considered an election so as to preclude foreclosure under power of sale after a dismissal of the suit; nor shall the filing of the necessary notices for foreclosure, as provided in this Mortgage, preclude the exercise by Mortgagee of any other right or remedy including, without limitation, the prosecution of a later suit thereon.

11.3 Usury. Notwithstanding any provision in this Mortgage to the contrary, it is expressly provided that in no case or event should the aggregate amounts, which by applicable law are deemed to be interest with respect to this Mortgage, the Note or any other Loan Document ever exceed the "Maximum Nonusurious Rate" (as defined in the Note). In this connection, it is expressly stipulated and agreed that it is the intention of Mortgagee and the Mortgagor to contract in strict compliance with applicable usury laws of the State of Illinois and/or of the United States (whichever permits the higher rate of interest) from time to time in effect. Nothing in this Mortgage, the Note or any other Loan Document shall ever be construed to create a contract to pay, as consideration for the use, forbearance or detention of money, interest at a rate in excess of the Maximum Nonusurious Rate. If under any circumstances the aggregate amounts contracted for, charged or paid with respect to the Note, whether by fulfillment of any provision thereof or any other Loan Document, which by applicable law are deemed to be interest, would produce an interest rate greater than the Maximum Nonusurious Rate, the Mortgagor and any other person obligated to pay the Note, stipulates that the amounts will be deemed to have been paid, charged or contracted for as a result of an error on the part of Mortgagor, any other person obligated for the payment of the Note and the Mortgagee and upon discovery of the error or upon notice thereof from the Mortgagor or the party making such payment, the Mortgagee or the party receiving such excess payment shall, at its option, refund the amount of such excess payment or credit the excess payment against any other amount due under the Note; provided that any amount applied to pay any principal due under this Note shall

# UNOFFICIAL COPY

not require payment of any prepayment fee. In addition, all sums paid or agreed to be paid to the holder of the Note for the use, forbearance or detention of monies shall be, to the extent permitted by applicable law, amortized, prorated, allocated and spread through the term of the Note so that the amount of interest on account of the indebtedness evidenced hereby does not exceed the maximum permitted by law.

11.4 Enforceability. If any provision hereof is presently or at any time becomes invalid or unenforceable, the other provisions hereof shall remain in full force and effect, and the remaining provisions hereof shall be construed in favor of the Mortgagee to effectuate the provisions hereof.

11.5 Application of Payments. If the lien or liens created by this Mortgage are invalid or unenforceable as to any part of the Indebtedness or if such lien or liens are invalid or unenforceable as to any part of the Mortgaged Property, the unsecured or partially unsecured portion of the Indebtedness shall be completely paid prior to the payment of the remaining and secured or partially secured portion of the Indebtedness and all payments made on the Indebtedness, whether voluntary or under foreclosure or other enforcement action or procedures, shall be considered to have been first paid on and applied to the full payment of that portion of the Indebtedness which is not secured or not fully secured by the lien or liens created herein.

11.6 Meaning of Particular Terms. Whenever used, the singular number shall include the plural, the plural the singular and the use of any gender shall include all genders. Without waiving any limits or prohibitions on assignment contained in this Mortgage, the words "Mortgagor" and "Mortgagee" shall include their successors and assigns. For convenience of drafting the following groups of words, and derivations thereof, are used interchangeably and any reference to one or more shall include the others notwithstanding anything seemingly to the contrary: (a) the words "act", "omission" and "occurrence"; and (b) "instrument" and "document". For convenience of drafting the following groups of words, and derivations thereof, are used interchangeably and any reference to one or more shall include the others notwithstanding anything seemingly to the contrary: (a) the words "act", "omission" and "occurrence"; (b) "instrument" and "document"; (c) the words "amendment" and "modification", "amended" and "modified", and derivations of the foregoing; and (d) the words "term", "condition", "covenant", "covenants", "condition", "stipulation" or "provision", and derivations of the foregoing. The words "include" and "including" and derivations thereof, mean "include, without limitation," and "including, without, limitation" as applicable, whether or not such additional language is specified, notwithstanding anything seemingly to the contrary. The words "as amended" and "as modified", and derivations thereof, include all renewals, extension, increases, consolidations or rearrangements of an applicable document, notwithstanding anything seemingly to the contrary. For convenience of drafting, references in this Mortgage to a document, as "amended" or as "modified" or any derivations thereof or any similar or related terminology, include, without limitation, all renewals, extensions, modifications, amendments, increases, consolidations and rearrangements thereof but do not imply any obligation to make any such renewals, extensions, modifications, amendments, increases, consolidations and rearrangements.

# UNOFFICIAL COPY

11.7 Advances by Mortgagee. If Mortgagor shall fail to comply with the provisions with respect to the securing of insurance, payment of taxes, assessments, and other charges, the keeping of the Mortgaged Property in repair, or any other term or covenant herein contained, Mortgagee may, but shall not be obligated to, incur such expenses as deemed necessary by Mortgagee, and make advances to perform such provisions, terms or covenants, and where necessary enter the Mortgaged Property for the purpose of performing any such term or covenant. Mortgagee is further empowered, but not obligated, to make advances for any expenditure deemed advisable by Mortgagee for the preservation of the Mortgaged Property or for the continuation of the operation thereof. Mortgagor agrees to repay all sums so advanced or expended, and all expenses incurred by Mortgagee in connection with the exercise of any of its rights under this Mortgage, upon demand, with interest from the date such advances or expenditures are made, determined on the same basis as matured principal in the Note and all sums so advanced or expended, with interest, shall be secured hereby.

11.8 Release or Extension by Mortgagee. Mortgagee, without notice, may release any part of the Mortgaged Property or any person liable for the Indebtedness without in any way affecting the liens hereof on any part of the Mortgaged Property not expressly released and may agree in writing with any party with an interest in the Mortgaged Property to extend the time for payment of all or any part of the Indebtedness or to waive the prompt and full performance of any term, condition or covenant of any document securing, evidencing or relating to the Indebtedness.

11.9 Partial Payments. Acceptance by Mortgagee of any payment of less than the amount due on the Indebtedness shall be deemed acceptance on account only and the failure to pay the entire amount then due shall be and continue to be a default; and at any time thereafter and until the entire amount due on the Indebtedness has been paid, Mortgagee shall be entitled to exercise all rights conferred on it by the terms of this Mortgage upon the occurrence of an Event of Default.

11.10 Titles not to be Considered. All section, subsection, paragraph or other titles contained in this Mortgage are for reference purposes only and this Mortgage shall be construed without reference to said titles.

11.11 Construction of Mortgage. This Mortgage may be construed as a mortgage, deed of trust, chattel mortgage, security agreement, pledge, financing statement, hypothecation or contract, or any one or more of them, in order fully to effectuate the lien hereof and the purposes and agreements herein set forth.

11.12 Additional Taxes and Indemnification. Mortgagor agrees that if any state, federal or municipal government, or any of its subdivisions having jurisdiction, shall levy, assess or charge any tax, assessment or imposition upon this Mortgage or the credit or indebtedness secured hereby or the Note or the interest of Mortgagee in the Mortgaged Premises or upon Mortgagee by reason of any of the foregoing (excepting therefrom any income tax on interest payments on the principal portion of the Indebtedness secured hereby, but expressly including any documentary stamp taxes and/or intangible taxes under Illinois law) then, Mortgagor shall pay all such taxes to or for Mortgagee as they become due and payable, and provided further that

# UNOFFICIAL COPY

in the event of passage of any law or regulation permitting, authorizing or requiring the tax, assessment or imposition to be levied, assessed or charged, which law or regulation prohibits Mortgagor from paying the tax, assessment or imposition, to or for Mortgagee, then all sums hereby secured shall, upon ninety (90) days' notice to Mortgagor, become immediately due and payable at the option of the Mortgagee. Mortgagor agrees to exhibit to Mortgagee at any time upon request, official receipts showing payment of all taxes, assessments and charges which Mortgagor is required or elects to pay hereunder. Mortgagor agrees that if the United States Government or any department or bureau thereof shall at any time require revenue stamps to be affixed to the Note or this Mortgage, Mortgagor will upon thirty (30) days of demand from Mortgagee pay for stamps in the required amount and deliver them to Mortgagee. Mortgagor agrees to INDEMNIFY and HOLD HARMLESS Mortgagee against loss, damage, liability or expense (including reasonable attorney's fees and investigatory expenses) on account of such revenue stamps, whether such loss, damage, liability or expense arises before or after payment of the Note and any termination of the estate created by this Mortgage whether as a result of the exercise by Mortgagee of any default remedies available to it at law or in equity or otherwise; SUCH INDEMNITY AND HOLD HARMLESS SPECIFICALLY INCLUDES ANY LOSS, DAMAGE, EXPENSE OR LIABILITY CAUSED BY OR ATTRIBUTABLE TO THE ORDINARY OR SIMPLE NEGLIGENCE, AS OPPOSED TO THE GROSS NEGLIGENCE, OF AN INDEMNITEE. Such indemnity and hold harmless shall not apply to the extent that such loss, damage, expense or liability is caused by or attributable to Mortgagee's gross negligence or willful misconduct or breach of this Mortgage, the Note or any other Loan Document by Mortgagee.

11.13 Indemnification. MORTGAGOR AGREES TO INDEMNIFY AND HOLD HARMLESS MORTGAGEE FROM ALL LOSS, DAMAGE AND EXPENSE, INCLUDING REASONABLE ATTORNEYS' FEES AND INVESTIGATORY EXPENSES, INCURRED IN CONNECTION WITH ANY SUIT OR PROCEEDING IN OR TO WHICH MORTGAGEE MAY BE MADE A PARTY WITH RESPECT TO THE MORTGAGED PROPERTY OR FOR THE PURPOSE OF PROTECTING THE LIEN OF THIS MORTGAGE, EXCEPT TO THE EXTENT CAUSED BY THE NEGLIGENCE OR WILFUL MISCONDUCT OF MORTGAGEE, but such indemnity and hold harmless shall not apply to the extent that such loss, damage, expense or liability is caused by or attributable to Mortgagee's negligence or willful misconduct or breach of this Mortgage, the Note or any other Loan Document by Mortgagee. Mortgagor's obligations pursuant to the foregoing indemnity and hold harmless shall survive any termination of the estate created by this Mortgage whether as a result of the exercise by Mortgagee of any default remedies available to it at law or in equity or otherwise.

11.14 Additional Documents. Mortgagor agrees that upon request of Mortgagee it will from time to time execute, acknowledge and deliver all such additional documents and further assurances of title and will do or cause to be done all such further acts and things as may be reasonably necessary fully to effectuate the intent of this Mortgage but such additional documents further assurances of title and such further acts and things shall not increase the obligations of the Mortgagor or decrease the rights of the Mortgagor under the Loan Documents in any material respect. The Mortgagor within ten (10) days upon request in person or by mail will furnish a duly acknowledged written statement setting forth the amount of the debt secured by this Mortgage, the date to which interest has been paid and stating either that no offsets or

# UNOFFICIAL COPY

defenses exist against the debt secured hereby, or, if such offsets or defenses are alleged to exist, the nature thereof.

11.15 Disclosure. Mortgagor agrees to disclose to Mortgagee upon request, the then ownership of the beneficial interest in any trust which then holds legal title to the Mortgaged Property and shall cause the owner(s) of such beneficial interest to furnish sufficient evidence to Mortgagee for it to determine the identity of all of the parties which compose such owner(s).

11.16 Successors and Assigns. Without waiving any limits or prohibitions on assignment contained in this Mortgage, this Mortgage and all provisions hereof shall be binding upon and enforceable against Mortgagor and its assigns and other successors. Without waiving any limits or prohibitions on assignment contained in this Mortgage, this Mortgage and all provisions hereof shall inure to the benefit of Mortgagee, its successors and assigns and any holder or holders, from time to time, of the Note.

11.17 Time. Time is of the essence of this Mortgage.

11.18 Multiple Counterparts. This Mortgage may be executed in multiple counterparts, each of which shall be an original document and which, taken together, constitute one and the same agreement.

11.19 Landlord-Tenant Relationship. Any sale of the Mortgaged Property under this Mortgage shall, without further notice, create the relationship of landlord and tenant at sufferance between the purchaser and Mortgagor and any person or entity claiming an interest in the Mortgaged Property through Mortgagor or otherwise occupying any of the Mortgaged Property, upon failure to surrender possession thereof Mortgagor and all such persons and entities may be removed by a writ of possession upon suit by the purchaser.

11.20 Notices. All notices, demands, requests, and other communications desired or required to be given hereunder or in any other Loan Document (hereinafter individually referred to as a "Notice" and collectively referred to as the "Notices") shall be in writing and shall be given by: (i) hand delivery to the address for Notices; (ii) delivery by overnight courier service to the address for Notices; or (iii) sending the same by United States mail, postage prepaid, certified mail, return receipt requested, addressed to the address for Notices. All Notices shall be deemed given and effective upon the earliest to occur of: (a) the hand delivery of such Notice to the address for Notices; (b) one (1) business day after the deposit of such Notice with an overnight courier service by the time deadline for next day delivery addressed to the address for Notices; or (c) the earlier of actual receipt or three (3) business days after depositing the Notice in the United States mail as set forth in clause (iii) above. All Notices shall be addressed to the addresses contained on the first paragraph of this Mortgage or to such other person or at such other place as any party hereto may by Notice designate as a place for service of Notice in place of such person or address upon at least thirty (30) days prior Notice to the other party.

11.21 Illinois Law Controls. This Mortgage shall be interpreted, construed and enforced in accordance with the internal laws of the State of Illinois, without regard to Illinois law with respect to conflict of laws.

# UNOFFICIAL COPY

11.22 The Loan as evidenced by the Note is a business loan within the purview of the Illinois Interest Act, 815 ILCS 205/4(1)(c) and a loan secured by a mortgage on real estate within the purview of 815 ILCS 205/4(1)(l).

11.23 Collateral Protection Act. Pursuant to the requirements of the Illinois Collateral Protection Act, Mortgagor is hereby notified as follows: Within ten (10) days after Mortgagee's written request to Mortgagor, unless the Mortgagor provides the Mortgagee with evidence of the insurance coverage required by this Mortgage, or any of the other Loan Documents, Mortgagee may purchase insurance at Mortgagor's expense to protect Mortgagee's interests in the Mortgaged Premises or any other collateral for the Indebtedness. This insurance may, but need not protect Mortgagor's interests. The coverage the Mortgagee purchases may not pay any claim that Mortgagor makes or any claim that is made against Mortgagor in connection with the Mortgaged Premises or any other collateral for the Indebtedness. Mortgagor may later cancel any insurance purchased by Mortgagee but only after providing Mortgagee with evidence that Mortgagor has obtained insurance as required by this Mortgage, or any of the other Loan Documents. If Mortgagee purchases insurance for the Mortgaged Premises or any other collateral for the Indebtedness, Mortgagor will be responsible for the costs of that insurance, including interest and any other charges that Mortgagee may lawfully impose in connection with the placement of the insurance, until the effective date of the cancellation or expiration of the insurance. The costs of the insurance may be added to the total outstanding Indebtedness. The costs of the insurance may be more than the cost of insurance that Mortgagor may be able to obtain on its own.

11.24 Subrogation. In the event the Note is given for money advanced in the payment of a sum owing upon another note or indebtedness, Mortgagor hereby acknowledges that it has requested and does hereby request Mortgagee to advance the money necessary to pay such note or indebtedness, whether or not a release or transfer of said other note or indebtedness has been or will be executed by the owner and holder thereof, and Mortgagor hereby agrees that Mortgagee and Mortgagee's assigns shall be, and are hereby, subrogated to any and all the rights, liens, remedies, equities, superior title and benefits held, owned, possessed or enjoyed at any time by any owner or holder of said other note or indebtedness, to secure payment to Mortgagee of the Note hereby secured and, accordingly, any such other note and indebtedness, and all liens securing same are hereby extended to the maturity date of the Note hereby secured in order to additionally secure such Note. Nothing in this Section 11.24 shall alter any obligation of Mortgagor hereunder or under the Note.

11.25 Disclosure. Mortgagor agrees to disclose to Mortgagee upon request, the then ownership of the beneficial interest in any trust which then holds legal title to the Mortgaged Property and shall cause the owner(s) of such beneficial interest to furnish sufficient evidence to Mortgagee for it to determine the identity of all of the parties which compose such owner(s).

## XII. LIMITATION OF LIABILITY

# UNOFFICIAL COPY

A. Except as otherwise specifically provided herein, in the event of an Event of Default in the payment of the Note or any other Event of Default under any Loan Document, Mortgagee's sole recourse against Mortgagor shall be against the Mortgaged Property described in this Mortgage, and Mortgagee shall not be entitled to recover any deficiency judgment against Mortgagor if the foreclosure or recovery of such Mortgaged Property is not sufficient to pay the amount owed by Mortgagor hereunder. Notwithstanding the foregoing limitation of liability, Mortgagor shall be fully liable (a) for fraud or misrepresentation made in or in connection with the Note or any Loan Document or the apparent purpose of which is to deprive Mortgagee of the security for the Note; (b) for failure to pay taxes, assessments, charges for labor or materials or any other charges which can create liens on any portion of this Mortgaged Property, except to the extent Mortgagee (x) is escrowing for same, (y) has sufficient funds on account to pay same, and (z) fails to timely make such payment; (c) for the misapplication of (i) proceeds of insurance covering any portion of this Mortgaged Property, or (ii) proceeds of the sale or condemnation of any portion of this Mortgaged Property, or (iii) rentals and security deposits received by or on behalf of Mortgagor subsequent to the date on which Mortgagee gives written notice of the posting of foreclosure notices or the exercise of Mortgagee's assignment of rents; (d) for failure to maintain, repair or restore this Mortgaged Property in accordance with any Loan Document, unless this Mortgaged Property is not generating sufficient net cash flow to pay for such maintenance, repair or restoration; (e) for any act or omission knowingly or intentionally committed or permitted by Mortgagor which results in the material physical waste, damage or destruction to this Mortgaged Property, but only to the extent such events are not covered by insurance proceeds which are received by Mortgagee; (f) for the return to Mortgagee of all unearned advance rentals and security deposits paid by tenants of this Mortgaged Property or any guarantors of the leases of such tenants which are not rightfully refunded to or which are forfeited by such tenants or guarantors; (g) for the return of, or reimbursement for, all personal property taken from this Mortgaged Property by or on behalf of Mortgagor except as expressly permitted in this Mortgage; (h) for any liability of Mortgagor pursuant to the provision contained in this Mortgage pertaining to hazardous or toxic materials or substances; (i) for any liability of Mortgagor pursuant to the Certificate and Indemnity Regarding Hazardous Substances executed by Mortgagor and delivered to Mortgagee in connection with the indebtedness evidenced by the Note; (j) for any delay after an Event of Default which is not cured, in deeding over this Mortgaged Property to Mortgagee or failure to cooperate in a consensual foreclosure, within one hundred twenty (120) days of Mortgagee's request, in each case, subject to Mortgagor's right to assert valid defenses; (k) for failure to maintain or alter this Mortgaged Property in compliance with the Americans with Disabilities Act of 1990, as it may be amended from time to time, unless this Mortgaged Property is not generating sufficient net cash flow to pay for such maintenance or alteration; (l) for the failure to pay any documentary stamp taxes and intangible taxes with respect to this Mortgage or the Note; and (m) for all court costs and reasonable attorneys' fees incurred in connection with the enforcement of one or more of the above subparagraphs (a) through (l), inclusive. Nothing in the Note, this Mortgage or in any other Loan Document that may limit Mortgagee's recourse against Mortgagor shall alter, waive or otherwise limit any liability or obligation of any guarantor under any guaranty.

L. **CONSENT TO JURISDICTION.** TO INDUCE MORTGAGEE TO ACCEPT THE NOTE, MORTGAGOR IRREVOCABLY AGREES THAT, SUBJECT TO MORTGAGEE'S SOLE AND ABSOLUTE ELECTION, ANY ACTIONS OR PROCEEDINGS ARISING OUT OF OR RELATED TO THIS MORTGAGE WHICH



# UNOFFICIAL COPY

ARE REQUIRED TO BE LITIGATED IN THE STATE IN WHICH THE MORTGAGED PROPERTY IS LOCATED, WILL BE LITIGATED IN COURTS HAVING SITUS IN COOK COUNTY, ILLINOIS AND ALL OTHER ACTIONS SHALL BE LITIGATED IN COURTS HAVING SITUS IN COOK COUNTY, ILLINOIS. MORTGAGOR HEREBY CONSENTS AND SUBMITS TO THE JURISDICTION OF ANY COURT LOCATED WITHIN COOK COUNTY, ILLINOIS, AND AGREES THAT ALL SERVICE OF PROCESS MAY BE MADE BY REGISTERED MAIL DIRECTED TO MORTGAGOR AT THE ADDRESS STATED HEREIN, AND SERVICE SO MADE WILL BE DEEMED TO BE COMPLETED UPON ACTUAL RECEIPT.

M. Maximum Indebtedness. Notwithstanding anything contained herein to the contrary, in no event shall the Indebtedness exceed an amount equal to two (2) times the face value of the Note; provided, however, that in no event shall Mortgagee be obligated to advance funds in excess of the face amount of the Note.

[THE REMAINDER OF THIS PAGE INTENTIONALLY RESERVED]

UNOFFICIAL COPY

EXECUTED TO BE EFFECTIVE as of the Effective Date.

MORTGAGOR:

ECA Buligo Thatcher Woods Partners, LP,  
a Delaware limited partnership

By: Christopher F. Wild  
Christopher F. Wild, President

Address:  
13041 W. Linebaugh Ave.  
Tampa, Florida 33626

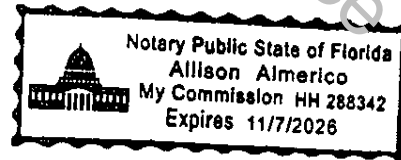
STATE OF Florida  
COUNTY OF Hillsborough

I, Allison Almerico a Notary Public in and for said County, in the State  
aforesaid, do hereby certify that Christopher F. Wild, the President of ECA Buligo Thatcher  
Woods Partners, LP, a Delaware limited partnership ("Partnership") who is personally known  
to me to be the same person whose name is subscribed to the foregoing instrument as such  
President, appeared before me this day in person and acknowledged that he signed and delivered  
the said instrument as his own free and voluntary act and as the free and voluntary act of said  
Partnership for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal, this 2<sup>nd</sup> day of August, 2022.

Allison Almerico  
NOTARY PUBLIC

(SEAL)



Signature/Notary Page to Mortgage, Assignment of Rents,  
Security Agreement, Financing Statement and Fixture Filing

# UNOFFICIAL COPY

## EXHIBIT "A"

### Legal Description

Lot "A" in River Grove Estate, being a subdivision in the Northeast Fractional 1/4 of Section 26, Township 40 North, Range 12, East of the Third Principal Meridian, excepting therefrom the following described parcel:

That part of Lot "A" in River Grove Estate aforesaid bounded and described as follows: Beginning at the most Northerly Northwest corner of said Lot "A"; thence East on the North line of said Lot "A" a distance of 31.58 feet; thence South at right angles to said North line of Lot "A" to the Southeasterly line of Lot "B" in said River Grove Estate, extended Northeasterly; thence Southwesterly on said Southeasterly line of Lot "B" extended to the most Easterly corner of Lot "B"; thence Northwesterly on the Northeasterly line of Lot "B" and said Northeasterly line, extended to the Northwesterly line of said Lot "A" to the point of beginning, all in Cook County, Illinois.

Property Address: 8355 West Belmont Avenue, River Grove, Illinois 60171

Permanent Tax Index Number: 12-26-201, 077-0000

Exhibit "A" to Mortgage, Assignment of Rents, Security Agreement, Financing Statement and Fixture Filing

# UNOFFICIAL COPY

## EXHIBIT "B"

### Permitted Exceptions

- 1) GENERAL REAL ESTATE TAXES FOR THE SECOND INSTALLMENT OF TAX YEAR 2021 AND SUBSEQUENT YEARS WHICH ARE NOT YET DUE AND PAYABLE.
- 2) EASEMENT FOR INGRESS AND EGRESS AS SHOWN ON THE PLAT OF SUBDIVISION RECORDED JULY 28, 1964 AS DOCUMENT NUMBER 19197813.
- 3) EASEMENT IN FAVOR OF ILLINOIS BELL, NORTHERN ILLINOIS GAS COMPANY, AND THE COMMONWEALTH EDISON COMPANY, AND 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 28, 1964 AS DOCUMENT NO. 19197813.
- 4) EASEMENT IN FAVOR OF THE COMMONWEALTH EDISON COMPANY, AND ITS RESPECTIVE SUCCESSORS AND ASSIGNS, TO INSTALL, OPERATE AND MAINTAIN ALL EQUIPMENT NECESSARY FOR THE PURPOSE OF SERVING THE LAND AND OTHER PROPERTY, TOGETHER WITH THE RIGHT OF ACCESS TO SAID EQUIPMENT, AND THE PROVISIONS RELATING THERETO CONTAINED IN THE GRANT RECORDED AUGUST 7, 1979 AS DOCUMENT NO. 25087327, AFFECTING THE EAST 15 FEET OF THE WEST 190 FEET OF THE NORTH 10 FEET OF THE LAND.
- 5) EASEMENT IN FAVOR OF COMMONWEALTH EDISON COMPANY AND ILLINOIS BELL TELEPHONE COMPANY, AND THEIR RESPECTIVE SUCCESSORS AND ASSIGNS, TO INSTALL, OPERATE AND MAINTAIN ALL EQUIPMENT NECESSARY FOR THE PURPOSE OF SERVING THE LAND AND OTHER PROPERTY, TOGETHER WITH THE RIGHT OF ACCESS TO SAID EQUIPMENT, AND THE PROVISIONS RELATING THERETO CONTAINED IN THE GRANT RECORDED OCTOBER 24, 1985 AS DOCUMENT NO. 85251221, AFFECTING THE SOUTH 10 FEET OF THE NORTH 130 FEET OF THE EAST 130 FEET OF THE LAND.
- 6) COVENANTS, RESTRICTIONS, AND EASEMENTS IN AGREEMENT BETWEEN PIONEER BANK AND TRUST COMPANY AS TRUSTEE UNDER TRUST AGREEMENT DATED FEBRUARY 13, 1976 KNOWN AS TRUST NUMBER 21000 AND FIRST BANK OF OAK PARK AS TRUSTEE UNDER TRUST AGREEMENT DATED SEPTEMBER 11, 1979 KNOWN AS TRUST NUMBER 11797 RECORDED DECEMBER 21, 1983 AS DOCUMENT NUMBER 26904820, MODIFIED BY AGREEMENT RECORDED AUGUST 21, 1989 AS DOCUMENT NUMBER 89395276 CONCERNING, AMONG OTHER MATTERS, PARKING AND PASSAGE FOR MOTOR VEHICLES AND PEDESTRIANS, USE, BANK FACILITY, WATER MAINS, SEWER LINES, STORM DRAINS, AND SIGNS.

Exhibit "B" to Mortgage, Assignment of Rents, Security Agreement, Financing Statement and Fixture Filing

# UNOFFICIAL COPY

- 7) EASEMENT FOR INGRESS, EGRESS, AND PARKING IN FAVOR OF PIONEER BANK & TRUST COMPANY AS TRUSTEE UNDER TRUST NO. 14449 CREATED BY GRANT FROM PIONEER BANK & TRUST COMPANY AS TRUSTEE UNDER TRUST NO. 21000 RECORDED JULY 18, 1983 AS DOCUMENT NUMBER 26692556.
- 8) NO FURTHER REMEDIATION LETTER RECORDED MARCH 13, 2000 AS DOCUMENT NUMBER 00176313.
- 9) NO FURTHER REMEDIATION LETTER ISSUED BY THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY IN CONNECTION WITH LEAKING UNDERGROUND STORAGE TANK ENVIRONMENTAL NOTICE RECORDED AUGUST 22, 2003 AS DOCUMENT NUMBER 0323442380.
- 10) INTEREST AND RIGHTS OF CHICAGO METROPOLITAN FIRE PREVENTION COMPANY IN A FIRE ALARM SYSTEM, DISCLOSED BY NOTICE RECORDED OCTOBER 4, 2013 AS DOCUMENT NUMBER 1327748005.
- 11) SURVEY BY AMERICAN SURVEYING & MAPPING, INC., DATED 8/2/2022 ENTITLED, "ALTA/NSPS LAND TITLE SURVEY FOR THATCHER WOODS CENTER 8355 W BELMONT AVENUE", DISCLOSES THE FOLLOWING:
- A. DRIVEWAYS ENCROACH ONTO THATCHER AVENUE.
  - B. WALKWAYS ENCROACH UP TO 4.2 FEET ONTO THATCHER AVENUE.
  - C. DRIVEWAYS ENCROACH ONTO WEST BELMONT AVENUE.
  - D. OVERHEARD UTILITY LINES THROUGHOUT SUBJECT PREMISES.
  - E. UTILITY APPURTENANCES THROUGHOUT SUBJECT PREMISES.
  - F. CROSS ACCESS ON THE NORTHWESTERLY PORTION OF SUBJECT PREMISES APPEARS TO BE USED IN COMMON WITH PREMISES TO THE NORTH. POLICY EXCEPTS POSSIBLE EASEMENT RIGHTS OF THE ADJOINING OWNER BY REASON THEREOF, BUT NO EASEMENT RIGHTS IN FAVOR OF SUBJECT PREMISES IS HEREBY INSURED.
  - G. FENCES VARY WITH RECORD LINES.

Exhibit "B" to Mortgage, Assignment of Rents, Security Agreement, Financing Statement and Fixture Filing

# UNOFFICIAL COPY

## EXHIBIT "C"

### Form of Detailed Listing of Tenants and Lease and Rental Information

(This form must be submitted with each loan application except where entire property is owner-occupied.)							
Loan Application of:				Property Address:			
Name of Lessee or Tenant and guarantor, if any (Where applicable, list national tenants first, then regional then local.)	Type of Business	Date Lease Expires	Guaranteed Minimum Annual Rent	Actual Annual Overage Rent (If any)	Number of Sq. Ft. Leased	Guaranteed Rent per Sq. Ft.	Has Lease Been Signed?
Total							
Number of units not leased		Total square feet not leased		Do tenants pay any part of expenses?		(Explain if yes)	
Remarks:							
The above information is correct and this information is to be made a part of our mortgage loan application. We agree to assign all of the above leases and any additional leases to American National Insurance Company as additional security.							
Date: _____, 20__				By: _____ President			

Exhibit "C" to Mortgage, Assignment of Rents, Security Agreement, Financing Statement and Fixture Filing