

R&S.161700-178
MKB 11/010
07/20/88

UNOFFICIAL COPY

COOK COUNTY, ILLINOIS
CLERK OF THE CLERK'S OFFICE

1988 JUL 22 PM 2:43

88324760

FIRST MORTGAGE

38⁰⁰

Dated July 11, 1988

in the amount of \$18,200,000.00

from **RANDOLPH TOWER PARTNERS**, an Illinois general partnership

(the "Mortgagor")

to **GENERAL ELECTRIC CAPITAL CORPORATION**

(the "Mortgagee")

LOCATION OF PREMISES:

188 West Randolph Street
Chicago, Illinois

Property of Cook County Clerk's Office

Stoken 6219

After recording, please return to:
Rosenthal and Schanfield
55 East Monroe Street
Suite 4620
Chicago, Illinois 60603
Att: Martin K. Blonder

88324760

This instrument was prepared by the above named attorney.

PL 78

71-57-115
D-3

UNOFFICIAL COPY

FIRST MORTGAGE

THIS MORTGAGE, made as of the 11th day of July, 1988 by **RANDOLPH TOWER PARTNERS**, an Illinois general partnership, having an office at 188 West Randolph Street, Chicago, Illinois 60601, (the "Mortgagor") to **GENERAL ELECTRIC CAPITAL CORPORATION**, a corporation having an office at Two Galleria Tower, 13455 Noel Road, Suite 1750, L.B. 24, Dallas, Texas 75240 (the "Mortgagee").

WITNESSETH, that to secure the payment of an indebtedness in the sum of **EIGHTEEN MILLION TWO HUNDRED THOUSAND DOLLARS (\$18,200,000.00)**, together with Deferred Interest, in lawful money of the United States, to be paid according to a certain note bearing even date herewith in the form of Exhibit A attached hereto and by this reference incorporated in and made a part hereof, as said note may be hereafter amended or extended (the "Note"), all other obligations and liabilities due or to become due the Mortgagee hereunder or under the Note, all amounts, sums and expenses paid hereunder by the Mortgagee according to the terms hereof and all other obligations and liabilities of the Mortgagor under this Mortgage and the Note, together with all interest on the said indebtedness, obligations, liabilities, amounts, sums and expenses (all of the aforesaid are hereinafter collectively referred to as the "Indebtedness"), the Mortgagor hereby mortgages, grants, bargains, sells, warrants, conveys, aliens, remises, releases, assigns, sets over and confirms to the Mortgagee:

All that certain lot, piece or parcel of land more particularly described in Exhibit B attached hereto and by this reference made a part hereof:

TOGETHER with the buildings and improvements now or hereafter located on said land and all right, title and interest, if any, of the Mortgagor in and to the streets and roads abutting said land to the center lines thereof, and strips and gores within or adjoining said land, the air space and right to use said air space above said land, all rights of ingress and egress by motor vehicles to parking facilities on or within said land, all easements now or hereafter affecting said land, royalties and all rights appertaining to the use and enjoyment of said land, including, without limitation, alley, drainage, mineral, water, oil and gas rights (said land and/or leasehold estate, together with said building and improvements, the property and other rights, privileges and interests encumbered or conveyed hereby, are hereinafter collectively referred to as the "Premises");

TOGETHER with all fixtures and articles of personal property and all appurtenances and additions thereto and substitutions or replacements thereof, owned by the Mortgagor and now or hereafter attached to, contained in, or used in connection with the Premises or placed on any part thereof, though not attached thereto, including, but not limited to, all screens, awnings, shades, blinds, curtains, draperies, carpets, rugs, furniture and furnishings, heating, lighting, plumbing, ventilating, air conditioning, refrigerating, incinerating and elevator plants, stoves, ranges, vacuum cleaning systems, call systems, sprinkler systems and other fire prevention and extinguishing apparatus and materials, motors, machinery, pipes, appliances, equipment, fittings and fixtures, and the trade name, good will and books and records relating to the business operated on the Premises. Without limiting the foregoing, the Mortgagor hereby grants to the Mortgagee a security interest in all of the Mortgagor's present and future "equipment" and "general intangibles" (as said quoted terms are defined in the Uniform Commercial Code of the State wherein the Premises is located) (the Premises and said fixtures and articles of personal property and said "equipment" and "general intangibles" encumbered and conveyed hereby are hereinafter sometimes called the "Mortgaged Property") and the Mortgagee shall have, in addition to all rights and remedies provided herein, and in any other agreements, commitments and undertakings made by the Mortgagor to the Mortgagee, all of the rights and remedies of a "secured party" under the said Uniform Commercial Code. To the extent permitted under applicable law, this Mortgage shall be deemed to be a "security agreement" (as defined in the aforesaid Uniform Commercial Code). If the lien of this Mortgage is subject to a security interest covering any such personal property, then all of the right, title and interest of the Mortgagor in and to any and all such property is hereby assigned to the Mortgagee, together with the benefits of all deposits and payments now or hereafter made thereon by the Mortgagor;

TOGETHER with all leases, lettings and licenses of the Premises or any part thereof now or hereafter entered into and all right, title and interest of the Mortgagor thereunder, including, without limitation, cash and securities deposited thereunder and the right to receive and collect the rents, issues and profits payable thereunder;

TOGETHER with all unearned premiums, accrued, accruing or to accrue under insurance policies now or hereafter obtained by the Mortgagor and all proceeds of the conversion, voluntary or involuntary, of the Mortgaged Property or any part thereof into cash or liquidated claims, including, without limitation, proceeds of hazard and title insurance and all awards and compensation heretofore and hereafter made to the present and all subsequent owners of the Mortgaged Property by any governmental or other lawful authorities for the taking by eminent domain, condemnation or otherwise, of all or any part of the Mortgaged Property or any easement therein, including awards for any change of grade of streets;

TOGETHER with all right, title and interest of the Mortgagor in and to all extensions, improvements, betterments, renewals, substitutes and replacements of, and all additions and appurtenances to, the Mortgaged Property, hereafter acquired by, or released to, the Mortgagor or constructed, assembled or placed by the Mortgagor on the Mortgaged Property, and all conversions of the security constituted thereby, immediately upon such acquisition, release, construction, assembling, placement or conversion, as the case may be, and in each such case, without any further mortgage, conveyance, assignment or other act by the Mortgagor, shall become subject to the lien of this Mortgage as fully and completely, and with the same effect, as though now owned by the Mortgagor and specifically described herein.

TO HAVE AND TO HOLD the Mortgaged Property unto the Mortgagee and its successors and assigns until the Indebtedness is paid in full.

ARTICLE I

Covenants of the Mortgage

AND the Mortgagor covenants and agrees with the Mortgagee as follows:

Section 1.01. Payment of the Indebtedness. The Mortgagor will punctually pay the indebtedness in immediately available funds as provided herein and in the Note, all in the coin and currency of the United States of America which is legal tender for the payment of public and private debts.

Section 1.02. Title to the Mortgaged Property. The Mortgagor warrants that: (i) it has title to the Mortgaged Property subject only to those exceptions to title set forth in the policy of title insurance insuring the lien of this Mortgage; (ii) it has full power and lawful authority to encumber the Mortgaged Property in the manner and form herein set forth; (iii) it will own all fixtures and articles of personal property now or hereafter affixed and/or used in connection with the Premises, including any substitutions or replacements thereof, free and clear of liens and claims; (iv) this Mortgage is and will remain a valid and enforceable first lien on the Mortgaged Property, and (v) it will preserve such title, and will forever warrant and defend the same to the Mortgagee and will forever warrant and defend the validity and priority of the lien hereof against the claims of all persons and parties whomsoever.

Section 1.03. Maintenance of the Mortgaged Property. The Mortgagor shall maintain the Mortgaged Property in good repair, shall comply with the requirements of any governmental authority claiming jurisdiction over the Mortgaged Property within thirty (30) days after an order containing such requirement has been issued by any such authority and shall permit the Mortgagee to enter upon the Premises and inspect the Mortgaged Property at all reasonable hours and without prior notice. The Mortgagor shall not, without the prior written consent of the Mortgagee, threaten, commit, permit or suffer to occur any waste, material alteration, demolition or removal of the Mortgaged Property or any part thereof; provided, however, that fixtures and articles of personal property may be removed from the Premises if the Mortgagor concurrently therewith replaces same with similar items of equal or greater value, free of any lien, charge or claim of superior title.

all risk

Section 1.04. Insurance; Restoration. (a) The Mortgagor shall keep the buildings and improvements now or hereafter located within the Premises insured against damage by fire and the other hazards covered by a standard extended coverage insurance policy for the full insurable value thereof (which, unless the Mortgagee shall otherwise agree in writing, shall mean the full repair and replacement value thereof without reduction for depreciation or co-insurance). In addition, the Mortgagee may require the Mortgagor to carry such other insurance on the buildings and improvements now or hereafter located within the Premises, in such amounts as may from time to time be reasonably required by institutional lenders, against insurable casualties (including risks of war and nuclear explosion) which at the time are commonly insured against in the case of premises similarly situated, due regard being given to the site and the type of the building, the construction, location, utilities and occupancy or any replacements or substitutions therefor. The Mortgagor shall additionally keep the buildings, improvements and equipment located therein and thereon now or hereafter located on the Premises insured against loss by flood if the Premises are located in an area identified by the Secretary of Housing and Urban Development as an area having special flood hazards and in which flood insurance has been made available under the National Flood Insurance Act of 1968 (and any successor act thereto) in an amount at least equal to the outstanding indebtedness or the maximum limit of coverage available with respect to the buildings under said Act, whichever is less, and will assign and deliver the policy or policies of such insurance to the Mortgagee, which policy or policies shall have endorsed thereon the standard New York (or local equivalent) mortgagee clause in the name of the Mortgagee, so and in such manner and form that the Mortgagee and its successors and assigns shall at all times have and hold the said policy or policies as collateral and further security for the payment of the indebtedness until the full payment of the indebtedness. In addition, from time to time, upon the occurrence of any change in the use, operation or value of the Premises, or in the availability of insurance in the area in which the Premises are located, the Mortgagor shall, within five (5) days after demand by the Mortgagee, take out such additional amounts and/or such other kinds of insurance as the Mortgagee may reasonably require. Otherwise, the Mortgagor shall not take out any separate or additional insurance which is contributing in the event of loss unless it is properly endorsed and otherwise satisfactory to the Mortgagee in all respects. The proceeds of insurance paid on account of any damage or destruction to the Premises or any part thereof shall be paid over to the Mortgagee to be applied as hereinafter provided.

(b) The Mortgagee shall have the option in its sole discretion to apply any insurance proceeds it may receive pursuant to this Section 1.04 to the payment of the Indebtedness or to allow all or a portion of such proceeds to be used for the restoration of the Premises. In the event that the Mortgagee elects to allow the use of such proceeds for the restoration of the Premises, then such use of the proceeds shall be governed as hereinafter provided. Notwithstanding the provisions of this subsection (b) or subsection (f) of Section 1.04, but in all events subject to

(c) In the event of damage or destruction to the Premises, the Mortgagor shall give prompt written notice thereof to the Mortgagee and shall promptly commence and diligently continue to perform repair, restoration and rebuilding of the Premises so damaged or destroyed (hereinafter referred to as the "work") to restore the Premises in full compliance with all legal requirements and so that the Premises shall be at least equal in value and general utility as they were prior to the damage or destruction, and if the work to be done is structural or if the cost of the work as estimated by the Mortgagee shall exceed Five Hundred Dollars (\$500,000) (hereinafter referred to as "major work"), then the Mortgagor shall, prior to the commencement of the work, furnish to the Mortgagee: (1) complete plans and specifications for the work (approved by all governmental authorities whose approval is required), for the Mortgagee's approval, which approval shall not be unreasonably withheld. Said plans and specifications shall bear the signed approval thereof by an architect satisfactory to the Mortgagee (hereinafter referred to as the "Architect") and shall be accompanied by the Architect's signed estimate, bearing the Architect's seal, of the entire cost of completing the work; (2) certified or photostatic copies of all permits and approvals required by law in connection with the commencement and conduct of the work; and (3) a surety bond for and/or guaranty of the payment for and completion of, the work, which bond or guaranty shall be in form satisfactory to the Mortgagee and shall be signed by a surety or sureties, or guarantor or guarantors, as the case may be, who are acceptable to the Mortgagee, and in an amount not less than the Architect's estimate of the entire cost of completing the work, less the amount of insurance proceeds, if any, then held by the Mortgagee for application toward the cost of the work.

(d) The Mortgagor shall not commence any of the work until the Mortgagor shall have complied with the applicable requirements referred to in subparagraph (c) above, and after commencing the work the Mortgagor shall perform the work diligently and in good faith in accordance with the plans and specifications referred to in subparagraph (c) (1) above, if applicable.

(e) All insurance proceeds recovered by the Mortgagee on account of damage or destruction to the Premises less the cost, if any, to the Mortgagee of such recovery and of paying out such proceeds (including attorneys' fees and costs allocable to inspecting the work and the plans and specifications therefor), shall, upon the written request of the Mortgagor, be applied by the Mortgagee to the payment of the cost of the work referred to in subparagraph (c) above and shall be paid out from time to time to the Mortgagor and/or, at the Mortgagee's option exercised from time to time, directly to the contractor, subcontractors, materialmen, laborers, engineers, architects and other persons rendering services or materials for the work, as said work progresses except as otherwise hereinafter provided, but subject to the following conditions, any of which the Mortgagee may waive:

1. If the work to be done is structural or if it is major work, as determined by the Mortgagee, the Architect shall be in charge of the work;

subsections (d), (e) and (g) hereof, if the cost of repair or restoration as estimated by Mortgagee is Five Hundred Thousand Dollars (\$500,000) or less, Mortgagee shall allow the proceeds of insurance to be used for the restoration of the Premises.

notice (from Mortgagor or otherwise) of

Except in the case of an emergency where security of property is in jeopardy

Five Hundred Thousand Dollars (\$500,000)

UNOFFICIAL COPY

2. Each request for payment shall be made on seven (7) days' prior notice to the Mortgagee and shall be accompanied by a certificate of the Architect if one be required under subparagraph (c) above, otherwise by an executive or fiscal officer of the Mortgagor, stating (i) that all of the work completed has been done in compliance with the approved plans and specifications, if any be required under said subparagraph (c), and in accordance with all provisions of law; (ii) the sum requested is justly required to reimburse the Mortgagor for payments by the Mortgagor to, or is justly due to, the contractor, subcontractors, materialmen, laborers, engineers, architects or other persons rendering services or materials for the work (giving a brief description of such services and materials), and that when added to all sums, if any, previously paid out by the Mortgagee does not exceed the value of the work done to the date of such certificate; and (iii) that the amount of such proceeds remaining in the hands of the Mortgagee will be sufficient on completion of the work to pay for the same in full (giving in such reasonable detail as the Mortgagee may require an estimate of the cost of such completion);

3. Each request shall be accompanied by waivers of liens satisfactory to the Mortgagee covering that part of the work previously paid for, if any, and by a search prepared by a title company or licensed abstractor or by other evidence satisfactory to the Mortgagee, that there has not been filed with respect to the Premises any mechanic's lien or other lien or instrument for the retention of title in respect of any part of the work not discharged of record and that there exist no encumbrances on or affecting the Premises other than encumbrances, if any, which are set forth in the title policy issued to the Mortgagee insuring the lien of this Mortgage;

~~4. No lease affecting the Premises immediately prior to the damage or destruction shall have been cancelled, nor contain any null or voidable right to cancel, due to such damage or destruction;~~

5. There shall be no default on the part of the Mortgagor under this Mortgage or the Note or any other instrument securing the same; and

6. The request for any payment after the work has been completed shall be accompanied by a copy of any certificate or certificates required by law to render occupancy of the Premises legal.

Upon completion of the work and payment in full therefor, or upon failure on the part of the Mortgagor promptly to commence or diligently to continue the work, or at any time upon request by the Mortgagor, the Mortgagee may apply the amount of any such proceeds then or thereafter in the hands of the Mortgagee to the payment of the Indebtedness, provided, however, that nothing herein contained shall prevent the Mortgagee from applying at any time the whole or any part of such proceeds to the curing of any default under this Mortgage or the Note.

(f) In the event the work to be done is not structural or it is not major work as determined by the Mortgagee, then the net insurance proceeds held by the Mortgagee for application thereto shall be paid to the Mortgagor by the Mortgagee upon completion of the work, subject to the provisions of the foregoing subparagraphs (c), (d) and (e) except those which are applicable only if the work to be done is structural or it is major work as determined by the Mortgagee.

(g) If within one hundred twenty (120) days after the occurrence of any damage or destruction to the Premises requiring structural work or major work in order to restore the Premises, the Mortgagor shall not have submitted to the Mortgagee and received the Mortgagee's approval of plans and specifications for the repair, restoration and rebuilding of the Premises so damaged or destroyed (approved by the Architect and by all governmental authorities whose approval is required), or if, after such plans and specifications are approved by all such governmental authorities and the Mortgagee, the Mortgagor shall fail to commence promptly such repair, restoration and rebuilding, or if thereafter the Mortgagor fails diligently to continue such repair, restoration and rebuilding or is delinquent in the payment to mechanics, materialmen or others of the costs incurred in connection with such work, or, in the case of any damage or destruction requiring neither structural work nor major work, as determined by the Mortgagee in order to restore the Premises, if the Mortgagor shall fail to repair, restore and rebuild promptly the Premises so damaged or destroyed then, in addition to all other rights herein set forth, and after giving the Mortgagor ten (10) days' written notice of the nonfulfillment of one or more of the foregoing conditions, the Mortgagee, or any lawfully appointed receiver of the Premises, may at their respective options, perform or cause to be performed such repair, restoration and rebuilding, and may take such other steps as they deem advisable to perform such repair, restoration and rebuilding, and upon twenty-four (24) hours' prior notice to the extent reasonably necessary for any of the foregoing purposes, and the Mortgagor hereby waives, for the Mortgagor and all others holding under the Mortgagor, any claim against the Mortgagee and such receiver arising out of anything done by the Mortgagee or such receiver pursuant hereto, and the Mortgagee may apply insurance proceeds (without the need to fulfill any other requirements of this Section 1.04) to reimburse the Mortgagee, and/or such receiver, for all amounts expended or incurred by them, respectively, in connection with the performance of such work, and any excess costs shall be paid by the Mortgagor to the Mortgagee upon demand. Mortgagee will use its best efforts to respond as promptly as possible to requests by the Mortgagor of approvals required hereunder.

(h) The Mortgagor shall (i) provide public liability insurance with respect to the Premises providing for limits of liability of not less than \$1,000,000 for both injury to or death of a person and for property damage, and (ii) unless the Mortgagee agrees otherwise in writing, provide rent insurance in an amount at least equal at all times to the annual rent roll of the Premises.

(i) All insurance policies required pursuant to this Section 1.04 shall be endorsed to name the Mortgagee as an insured thereunder, as its interest may appear, with loss payable to the Mortgagee, without contribution, under a standard New York (or local equivalent) mortgagee clause. All such insurance policies and endorsements shall be fully paid for and contain such provisions and expiration dates and be in such form and issued by such insurance companies licensed to do business in the State where the Premises are located, with a rating of "A-12" or better as established by Best's Rating Guide or an equivalent rating with such other publication of a similar nature as shall be in current use, as shall be approved by the Mortgagee. Without limiting the foregoing, each policy shall provide that such policy may not be cancelled or materially changed except upon thirty (30) days' prior written notice of intention of non-renewal, cancellation or material change to the Mortgagee (ten (10) days in event of cancellation or non-renewal resulting solely from non-payment of premium) and that no act or thing done by the Mortgagor shall invalidate the policy as against the Mortgagee. In the event the Mortgagor fails to maintain insurance in compliance with this Section 1.04, the Mortgagee may, but shall not be obligated to, obtain such insurance and pay the premium therefor and the Mortgagor shall, on demand, reimburse the Mortgagee for all sums, advances and expenses incurred in connection therewith. The Mortgagor shall deliver copies of all original policies, certified by the insurance company or authorized agent as being true copies to the Mortgagee together with the endorsements thereto required hereunder. Notwithstanding anything to the contrary contained herein or in Section 254 of the Real Property Law of the State of New York (if the Premises are located in the State of New York) or any other provision of applicable law of any other State, the proceeds of insurance policies coming into the possession on the Mortgagee shall not be deemed trust funds and the Mortgagee shall be entitled to dispose of such proceeds as herein provided.

Section 1.05. Maintenance of Existence. The Mortgagor will, so long as it is owner of the Mortgaged Property, do all things necessary to preserve and keep in full force and effect its existence, franchises, rights and privileges under the laws of the state of its incorporation, or formation, as the case may be, and will comply with all regulations, rules, ordinances, statutes, orders and decrees of any governmental authority or court applicable to the Mortgagor or to the Mortgaged Property or any part thereof.

(unless a stay is in effect with respect thereto)

Section 1.06. Taxes and Other Charges. The Mortgagor shall pay and discharge when due all taxes of every kind and nature, water rates, sewer rents, assessments, levies, permits, excise taxes and license fees and all other charges imposed upon or assessed against the Mortgaged Property or any part thereof or upon the rents, issues, income and profits of the Premises arising in respect of the occupancy, uses or possession thereof and, unless the Mortgagor is making monthly deposits with the Mortgagee in accordance with Section 1.14 hereof, the Mortgagor shall exhibit to the Mortgagee within five (5) days after the same shall have become due, validated receipts showing the payment of such taxes, assessments, water rates, sewer rents, levies, fees and other charges which may be or become a prior lien on the Mortgaged Property. Should the Mortgagor default in the payment of any of the foregoing taxes, assessments, water rates, sewer rents, or other charges, the Mortgagee may, but shall not be obligated to, pay the same or any part thereof and the Mortgagor shall, on demand, reimburse the Mortgagee for all amounts so paid.

(b) Nothing in this Section 1.06 shall require the payment or discharge of any obligation imposed upon the Mortgagor by subparagraph (a) of this Section 1.06 so long as the Mortgagor shall in good faith and at its own expense contest the same or the validity thereof by appropriate legal proceedings which proceedings must operate to prevent the collection thereof or other realization thereon and the sale or forfeiture of the Mortgaged Property or any part thereof to satisfy the same; provided that during such contest the Mortgagor shall, at the option of the Mortgagee, provide security satisfactory to the Mortgagee, assuring the discharge of the Mortgagor's obligation hereunder and of any additional interest charge, penalty or expense arising from or incurred as a result of such contest; and provided, further, that if at any time payment of any obligation imposed upon the Mortgagor by subsection (a) of this Section 1.06 shall become necessary to prevent the delivery of a tax deed conveying the Mortgaged Property or any portion thereof because of non-payment, then Mortgagor shall pay the same in sufficient time to prevent the delivery of such tax deed.

For purposes of this Section 1.06, taxes or other charges shall be deemed to be "due" on the last day permitted for payment prior to the imposition of a late charge or penalty.

Section 1.07. Mechanics' and Other Liens. The Mortgagor shall pay, from time to time when the same shall become due, all lawful claims and demands of mechanics, materialmen, laborers, and others which, if unpaid, might result in, or permit the creation of, a lien on the Mortgaged Property or any part thereof, or on the revenues, rents, issues, income or profits arising therefrom and, in general, the Mortgagor shall do, or cause to be done, at the cost of the Mortgagor and without expense to the Mortgagee, everything necessary to fully preserve the lien of this Mortgage. In the event the Mortgagor fails to make payment of such claims and demands, the Mortgagee may, but shall not be obligated to, make payment thereof, and the Mortgagor shall, on demand, reimburse the Mortgagee for all sums so expended.

Section 1.08. Condemnation Awards. The Mortgagor, immediately upon obtaining knowledge of the institution of any proceedings for the condemnation of the Premises or any portion thereof, will notify the Mortgagee of the pendency of such proceedings. The Mortgagee may participate in any such proceedings and the Mortgagor from time to time will deliver to the Mortgagee all instruments requested by it to permit such participation. All awards and compensation or other taking or purchase in lieu thereof, of the Premises or any part thereof, are hereby assigned to and shall be paid to the Mortgagee. The Mortgagor hereby authorizes the Mortgagee to collect and receive such awards and compensation, to give proper receipts and acquittances therefor and in the Mortgagee's sole discretion to apply the same toward the payment of the indebtedness, notwithstanding the fact that the indebtedness may not then be due and payable, or to the restoration of the Premises. In the event that any portion of the condemnation awards or compensation shall be used to reduce the indebtedness, same shall be applied to the then unpaid installments of principal due under the Note in the inverse order of their maturity, such that the regular payments under the Note shall not be reduced or altered in any manner. The Mortgagor, upon request by the Mortgagee, shall make, execute and deliver any and all instruments requested for the purpose of confirming the assignment of the aforesaid awards and compensation to the Mortgagee free and clear of any liens, charges or encumbrances of any kind or nature whatsoever. The Mortgagee shall not be limited to the interest paid on the proceeds of any award or compensation, but shall be entitled to the payment by the Mortgagor of interest at the applicable rate provided for herein or in the Note. The amount of any such Award in excess of the amount due

Section 1.09. Mortgage Authorized. The Mortgagor hereby warrants and represents that the execution and delivery of this Mortgage and the Note has been duly authorized and that there is no provision in its certificate of incorporation or by-laws (if the Mortgagor is a corporation) or its partnership agreement (if the Mortgagor is a partnership), as same may have been amended, requiring further consent for such action by any other entity or person; it is duly organized, validly existing and in good standing under the laws of the state of its incorporation or formation, as the case may be, and has (a) all necessary licenses, authorizations, registrations and approvals and (b) full power and authority to own its properties and carry on its business as presently conducted; and the execution and delivery by and performance of its obligations under this Mortgage and the Note will not result in the Mortgagor being in default under any provision of its certificate of incorporation or by-laws (if the Mortgagor is a corporation) or of its partnership agreement (if the Mortgagor is a partnership), as the same may have been amended, or of any mortgage, credit or other agreement to which it is a party.

Section 1.10. Costs of Defending and Upholding the Lien. If any action or proceeding is commenced to which action or proceeding the Mortgagee is made a party or in which it becomes necessary to defend or uphold the lien of this Mortgage, the Mortgagor shall, on demand, reimburse the Mortgagee for all expenses (including, without limitation, reasonable attorneys' fees and appellate attorneys' fees) incurred by the Mortgagee in any such action or proceeding. In any action or proceeding to foreclose this Mortgage or to recover or collect the Indebtedness, the provisions of law relating to the recovering of costs, disbursements and allowances shall prevail unaffected by this covenant.

Section 1.11. Additional Advances and Disbursements. Subject to the remaining provisions of this Mortgage the Mortgagor shall pay when due all payments and charges on all liens, encumbrances, ground and other leases, and security interests which may be or become superior or inferior to the lien of this Mortgage, and in default thereof, the Mortgagee shall have the right, but shall not be obligated, to pay such payments and charges and the Mortgagor shall, on demand, reimburse the Mortgagee for amounts so paid. Except in instances where, in Mortgagee's sole and absolute discretion, an emergency exists or the security or financial viability of the Premises is in jeopardy, Mortgagee shall notify Mortgagor not less than five (5) days prior to making such advance. In addition, upon default of the Mortgagor in the performance of any other terms, covenants, conditions or obligations by it to be performed under any such prior or subordinate lien, encumbrance, lease or security interest, the Mortgagee shall have the right, but shall not be obligated, to cure such default in the name and on behalf of the Mortgagor. All sums advanced and reasonable expenses incurred at any time by the Mortgagee pursuant to this Section 1.11 or as otherwise provided under the terms and provisions of this Mortgage or under applicable law shall bear interest from the date that such sum is advanced or expense incurred, to and including the date of reimbursement, computed at an interest rate ("Default Rate") equal to Five Percent (5%) per annum in excess of the Contract Index Rate defined in the Note. All sums described in this Section 1.11 shall be additional indebtedness secured by this Mortgage.

Section 1.12. Costs of Enforcement. The Mortgagor agrees to bear and pay all expenses (including reasonable attorneys' fees and appellate attorneys' fees) of or incidental to the enforcement of any provision hereof, or the enforcement, compromise or settlement of this Mortgage or the Indebtedness, and for the curing thereof, or for defending or asserting the rights and claims of the Mortgagee in respect thereof, by litigation or otherwise. All rights and remedies of the Mortgagee shall be cumulative and may be exercised singly or concurrently. Notwithstanding anything herein contained to the contrary, the Mortgagor: (a) hereby waives trial by jury; (b) will not (i) at any time insist upon, or plead, or in any manner whatever claim or take any benefit or advantage of any stay or extension or moratorium law, any exemption from execution or sale of the Mortgaged Property or any part thereof, wherever enacted, now or at any time hereafter in force, which may affect the covenants and terms of performance of this Mortgage, nor (ii) claim, take or insist upon any benefit or advantage of any law now or hereafter in force providing for the valuation or appraisal of the Mortgaged Property, or any part thereof, prior to any sale or sales thereof which may be made pursuant to any provision herein, or pursuant to the decree, judgment or order of any court of competent jurisdiction, nor (iii) after any such sale or sales, claim or exercise any right under any statute heretofore or hereafter enacted to redeem the property so sold or any part thereof; (c) hereby expressly waives all benefit or advantage of any such law or laws, and (d) covenants not to hinder, delay or impede the execution of any power herein granted or delegated to the Mortgagee, but to suffer and permit the execution of every power as though no such law or laws had been made or enacted. The Mortgagor, for itself and all who may claim under it, waives, to the extent that it lawfully may, all right to have the Mortgaged Property marshaled upon any foreclosure hereof.

Mortgagee shall be paid over to the Mortgagor.

88322760

Section 1.13. Mortgage Taxes. The Mortgagor shall pay any and all taxes, charges, filing, registration and recording fees, excises and levies imposed upon the Mortgagee by reason of its ownership of the Note or this Mortgage or any mortgage supplemental hereto, any security instrument with respect to any fixtures or personal property owned by the Mortgagor at the Premises and any instrument of further assurance, other than income, franchise and doing business taxes, and shall pay all stamp taxes and other taxes required to be paid on the Note. In the event the Mortgagor fails to make such payment within five (5) days after written notice thereof from the Mortgagee, then the Mortgagee shall have the right, but shall not be obligated, to pay the amount due, and the Mortgagor shall, on demand, reimburse the Mortgagee for said amount.

Section 1.14. Escrow Deposits. The Mortgagee, at its option, may require that the Mortgagor deposit with the Mortgagee, monthly, one-twelfth (1/12th) of the annual charges for ground or other rent, if any, insurance premiums and real estate taxes, assessments, water, sewer and other charges which might become a lien upon the Mortgaged Property and the Mortgagor shall, accordingly, make such deposits. In addition, if required by the Mortgagee, the Mortgagor shall simultaneously therewith deposit with the Mortgagee a sum of money which together with the monthly installments aforementioned will be sufficient to make each of the payments aforementioned at least thirty (30) days prior to the date such payments are due. Should said charges not be ascertainable at the time any deposit is required to be made with the Mortgagee, the deposit shall be made on the basis of the charges for the prior year, and when the charges are fixed for the then current year, the Mortgagor shall deposit any deficiency with the Mortgagee. All funds so deposited with the Mortgagee shall be held by it without interest, may be commingled by the Mortgagee with its general funds and, provided that no Event of Default has occurred, shall be applied in payment of the charges aforementioned when and as payable, to the extent the Mortgagee shall have such funds on hand. Should an Event of Default occur, the funds deposited with the Mortgagee, as aforementioned, may be applied in payment of the charges for which such funds shall have been deposited or to the payment of the Indebtedness or any other charges affecting the security of the Mortgagee, as the Mortgagee sees fit, but no such application shall be deemed to have been made by operation of law or otherwise until actually made by the Mortgagee as herein provided. If deposits are being made with the Mortgagee, the Mortgagor shall furnish the Mortgagee with bills for the charges for which such deposits are required to be made hereunder and for such other documents necessary for the payment of same, at least fifteen (15) days prior to the date on which the charges first become payable. In the event the Mortgagor fails to pay any such amount, the Mortgagee may, but shall not be obligated to, make payment thereof, and the Mortgagor shall, on demand, reimburse the Mortgagee for all sums so expended.

Section 1.15. Late Charges. In the event any late charge shall be imposed hereunder or under the Note, such late charge shall become immediately due to the Mortgagee, at the Mortgagee's option, as liquidated damages for failure to make prompt payment. Late charges shall be payable with the next installment of principal and/or interest due under the Note.

Section 1.16. Financial Statements. The Mortgagor shall furnish and shall cause any guarantors of the Indebtedness (the "Guarantor") to furnish to the Mortgagee, within ninety (90) days after the end of each fiscal year of the Mortgagor's operation of the Premises, a balance sheet and statement of profit and loss prepared by an independent certified public accountant of recognized standing and satisfactory to the Mortgagee in accordance with generally accepted accounting principles consistently applied. In addition, contemporaneously therewith, the Mortgagor shall furnish and shall cause any Guarantor to furnish an audited annual report of the Mortgagor and such Guarantor certified by an independent certified public accountant of recognized standing and satisfactory to the Mortgagee in all respects and prepared in accordance with generally accepted accounting principles consistently applied. In addition, the Mortgagor shall, from time to time within fifteen (15) days after request by the Mortgagee, furnish and shall cause any Guarantor to furnish balance sheets and statements of profit and loss as at such other dates and for such other periods as the Mortgagee shall require, all certified by a financial officer of the Mortgagor or the relevant Guarantor, as the case may be, and shall permit or cause any Guarantor to permit the Mortgagee to examine in the city where the Mortgagor's (or such Guarantor's) main office is located or at the Premises (at the option of the Mortgagee), such records, books and papers of the Mortgagor or such Guarantor which reflect upon its financial condition and the income and expense relative to the Premises, and the business conducted thereat. The Mortgagor further agrees that, within ten (10) days after request by the Mortgagee, it shall furnish or cause any Guarantor to furnish to the Mortgagee, but not more often than once in each calendar month a written statement of receipts and disbursements of the Premises for the twelve (12) months next preceding the first day of the month in which the request is made and a written statement containing the names of all tenants of the Premises, the terms of their respective tenancies, the spaces occupied and the rentals paid therefor. Each such written statement shall be certified by a principal officer or partner of the Mortgagor and such Guarantor. All financial statements of the Mortgagor and each Guarantor shall be delivered in duplicate, and, in the case of the Mortgagor, shall be accompanied by the certificate of a principal financial or accounting officer of the Mortgagor, dated within five (5) days of the delivery of such statements to the Mortgagee, stating that he knows of no Event of Default, nor of any event which after notice or lapse of time or both would constitute an Event of Default, which has occurred and is continuing, or, if such event or Event of Default has occurred and is continuing, specifying the nature and period of existence thereof and what action the Mortgagor has taken or proposes to take with respect thereto, and, except as otherwise specified, stating that the Mortgagor has fulfilled all its obligations under this Mortgage which are required to be fulfilled on or prior to the date of such certificate.

Section 1.17. Restrictive Covenants. Without the prior written consent of the Mortgagee, the Mortgagor shall not: (a) execute or permit to exist any lease of all or a substantial portion of the Premises except for occupancy by the lessee thereunder; (b) modify any lease affecting the Premises resulting in terms less favorable than those existing as of the date of lease; (c) discount any rents or collect the same for a period of more than one month in advance; (d) cancel any lease affecting the Premises except upon the default of the tenant thereunder; reference is made to Section 291-f of the Real Property Law of the State of New York (if the Premises are located in the State of New York) or other applicable laws of other states to establish for the Mortgagee the rights and benefits provided therein; (e) execute any conditional bill of sale, chattel mortgage or other security instruments covering any furniture, furnishings, fixtures and equipment, intended to be incorporated in the Premises or the appurtenances thereto, or covering articles of personal property placed in the Premises or purchase any of such furniture, furnishings, fixtures and equipment so that ownership of the same will not vest unconditionally in the Mortgagor, free from encumbrances on delivery to the Premises; (f) further assign the leases and rents affecting the Premises; (g) sell, transfer, convey or assign any interest in the Mortgaged Property or any part thereof; or (h) further encumber, alienate, hypothecate, grant a security interest in or grant any other interest whatsoever in the Mortgaged Property or any part thereof.

Section 1.18. Estoppel Certificates. The Mortgagor within three (3) days upon request in person or within five (5) days upon request by mail, shall furnish to the Mortgagee a written statement, duly acknowledged, setting forth the amount due on this Mortgage, the terms of payment and maturity date of the Note, the date to which interest has been paid, whether any offsets or defenses exist against the Indebtedness and, if any are alleged to exist, the nature thereof shall be set forth in detail.

Section 1.19. Trust Funds. ~~(a) The Mortgagor will receive the advances secured hereby, and will hold the same as trust funds, as a trust fund to be applied first for the purpose of paying the cost of the improvements before using any part of such advances for any other purpose. The covenants of subparagraph (b) of this Section 1.19 are made subject to and in compliance with the trust fund provisions of Section 13 of the Lien Law of the State of New York (if the Premises are located in the State of New York) or other applicable laws of other states.~~

(b) All lease securities of tenants of the Premises shall be treated as trust funds not to be commingled with any other funds of the Mortgagor. Within ten (10) days after request by the Mortgagee, the Mortgagor shall furnish to the Mortgagee satisfactory evidence of compliance with this subparagraph (b) of this Section 1.19 together with a statement of all lease securities deposited by the tenants and copies of all leases not theretofore delivered to the Mortgagee, certified by the Mortgagor.

Section 1.20. Assignment of Rents. The Mortgagor hereby assigns to the Mortgagee, as further security for the payment of the Indebtedness, the rents, issues and profits of the Premises, together with all leases and other documents evidencing such rents, issues and profits now or hereafter in effect and any and all deposits held as security under said leases, and shall, upon demand, deliver to the Mortgagee an executed counterpart of each such lease or other document. Nothing contained in the foregoing sentence shall be construed to bind the Mortgagee to the performance of any of the covenants, conditions or provisions contained in any such lease or other document or otherwise to impose any obligation on the Mortgagee (including, without limitation, any liability under the covenant of quiet enjoyment contained in any lease or in any law of any applicable state in the event that any tenant shall have been joined as a party defendant in any action to foreclose this Mortgage and shall have been barred and foreclosed thereby of all right, title and interest and equity of redemption in the Premises), except that the Mortgagee shall be accountable for any money actually received pursuant to such assignment. The Mortgagor hereby further grants to the Mortgagee the right (i) to enter upon and take possession of the Premises for the purpose of collecting the said rents, issues and profits, (ii) to dispossess by the usual summary proceedings any tenant defaulting in the payment thereof to the Mortgagee, (iii) to let the Premises, or any part thereof, and (iv) to apply said rents, issues and profits, after payment of all necessary charges and expenses, on account of said Indebtedness. Such assignment and grant shall continue in effect until the Indebtedness is paid, the execution of this Mortgage constituting and evidencing the irrevocable consent of the Mortgagor to the entry upon and taking possession of the Premises by the Mortgagee pursuant to such grant, whether foreclosure has been instituted or not and without applying for a receiver. Until the occurrence of an Event of Default the Mortgagor shall be entitled to collect and receive said rents, issues and profits. The Mortgagor agrees to use said rents, issues and profits in payment of principal and interest becoming due on this Mortgage and in payment of taxes, assessments, water rates, sewer rents and carrying charges becoming due against the Premises. Such right of the Mortgagor to collect and receive said rents, issues and profits may be revoked by the Mortgagee upon the occurrence of an Event of Default by giving not less than five (5) days' written notice of such revocation, served personally upon or sent by registered or certified mail to the record owner of the Premises.

Section 1.21. Indemnity. The Mortgagor will indemnify and hold the Mortgagee harmless against any loss or liability, cost or expense, including, without limitation, any judgments, attorney's fees, costs of appeal bonds and printing costs, arising out of or relating to any proceeding instituted by any claimant alleging a violation by the Mortgagor or the Mortgagee of any section of Article 3-A of the Lien Law of the State of New York (if the Premises are located in the State of New York) or other applicable laws of other states.

~~**Section 1.22. Warrant of Mortgagee.** With respect to the lease more particularly described in Schedule A annexed hereto (the "Lease"), the Mortgagor hereby warrants and represents as follows: (i) it is in full force and effect, unmodified by any writing or otherwise, except as specifically set forth in Schedule B; (ii) all rent, additional rent and other charges reserved therein have been paid to the extent they are payable to the date hereof; (iii) the Mortgagor enjoys the quiet and peaceful possession of the property demised thereby; (iv) the Mortgagor is not in default under any of the terms thereof and, to the best of its knowledge, there are no circumstances which, with the passage of time or the giving of notice or both, would constitute an event of default thereunder; (v) to the best of its knowledge the landlord under the Lease is not in default under any of the terms or provisions thereof on the part of the landlord to be observed or performed.~~

(b) Further, with respect to the Lease, the Mortgagor covenants and agrees as follows: (i) to promptly and faithfully observe, perform and comply with all the terms, covenants and provisions thereof on its part to be observed, performed and complied with, at the times set forth therein, without any allowance for grace periods, if any; (ii) not to do, permit, suffer or refrain from doing anything, as a result of which, there could be a default under or breach of any of the terms thereof; (iii) not to cancel, surrender, modify, amend or in any way alter or permit the alteration of any of the terms thereof; (iv) to give the Mortgagee immediate notice of any default by anyone thereunder and to promptly deliver to the Mortgagee of each notice of default and all other notices, communications, plans, specifications and other similar instruments received or delivered by the Mortgagor in connection herewith; (v) to furnish to the Mortgagee copies such information and evidence as the Mortgagee may reasonably require concerning the Mortgagor's due observance, performance and compliance with the terms, covenants and provisions thereof; (vi) that any default of the tenant thereunder shall constitute a default under this Mortgage.

(c) In the event of any default by the Mortgagor in the performance of any of its obligations under the Lease, including, without limitation, any default in the payment of rent and other charges and impositions made payable by the tenant thereunder, then, in each and every case, the Mortgagee may, at its option and without notice, cause the default or defaults to be remedied and otherwise exercise any and all of the rights of the Mortgagor thereunder in the name of and on behalf of the Mortgagor. The Mortgagor shall, on demand, reimburse the Mortgagee for all advances made and expenses incurred by the Mortgagee in curing any such default (including, without limitation, reasonable attorneys' fees), together with interest thereon computed at the rate provided for in Section 1.11 hereof from the date that an advance is made or expense is incurred, to and including the date the same is paid.

(d) The Mortgagor shall give the Mortgagee notice of its intention to exercise each and every option to extend the term of the Lease, at least twenty (20) but not more than sixty (60) days prior to the expiration of the time to exercise such option under the terms thereof. If the Mortgagor intends to extend the term of the Lease, it shall deliver to the Mortgagee with the notice of such decision, a copy of the notice of extension delivered to the landlord thereunder. If the Mortgagor does not intend to extend the term of the Lease, the Mortgagee may, at its option, exercise the option to extend in the name and on behalf of the Mortgagor. In any event, the Mortgagor hereby appoints the Mortgagee its attorney-in-fact to execute and deliver, for and in the name of the Mortgagor, all instruments and agreements necessary under the Lease or otherwise to cause any extension of the term thereof. This power, being coupled with an interest, shall be irrevocable as long as the Indebtedness remains unpaid.

(e) It is hereby agreed that the fee title and the leasehold estate in the property demised by the Lease shall not merge but shall always be kept separate and distinct, notwithstanding the union of said estates in either the landlord thereunder, the Mortgagor or a third party, whether by purchase or otherwise. If the Mortgagor acquires the fee title or any other estate, title or interest in the property demised by the Lease, or any part thereof, the lien of this Mortgage shall attach to, cover and be a lien upon such acquired estate, title or interest and same shall thereupon be and become a part of the Mortgaged Property with the same force and effect as if specifically encumbered herein. The Mortgagor agrees to execute all instruments and documents which the Mortgagee may reasonably require to ratify, confirm and further evidence the Mortgagee's lien on the acquired estate, title or interest. Furthermore, the Mortgagor hereby appoints the Mortgagee its true and lawful attorney-in-fact to execute and deliver all such instruments and documents in the name and on behalf of the Mortgagor. This power, being coupled with an interest, shall be irrevocable as long as the Indebtedness remains unpaid.

(f) If the Lease is cancelled or terminated, and if the Mortgagee or its nominee shall acquire an interest in any new lease of the property demised thereby, the Mortgagor shall have no right, title or interest in or to the new lease or the leasehold estate created by such new lease.

(g) The Mortgagor shall use its best efforts to obtain and deliver to the Mortgagee within twenty (20) days after written demand by the Mortgagee, an estoppel certificate from the landlord under the Lease setting forth (i) the name of the tenant thereunder, (ii) ~~that the lease has not been modified or, if it has been modified, the date of such modification (together with copies of such~~

* Include Section 1.22 if the Mortgage encumbers a leasehold estate.
Delete Section 1.22 if the Mortgage does not encumber a leasehold estate.

under the Lease, and (v) whether there are any alleged defaults of the tenant under the Lease and, if there are, setting forth the nature thereof in reasonable detail.

(h) Notwithstanding anything to the contrary contained herein, this Mortgage shall not constitute an assignment of the Lease within the meaning of any provision thereof authorizing its assignment and the Mortgagee shall have no liability or obligation thereunder by reason of its acceptance of this Mortgage. The Mortgagee shall be liable for the obligations of the tenant arising under the Lease for only that period of time which the Mortgagee is in possession of the Premises or has acquired, by foreclosure or other-
~~wise, including all of the Mortgagee's rights, title and interest therein.~~

ARTICLE II
Default and Remedies

and is not cured within thirty (30) days after notice from Mortgagee.

Section 2.01. Events of Default. The following shall constitute Events of Default under this Mortgage: (a) default when and as the same shall become due and payable in payment of amounts required to be paid hereunder or a default in the payment of principal or interest on the Note whether by maturity or acceleration, which default has continued for a period of ten (10) days; or (b) default beyond any applicable grace period in the due observance or performance of any of the terms, covenants or conditions contained herein relating to other than the payment of money; or (c) should any representation made herein or any other document given in connection herewith prove to be untrue in any material respect; or (d) default beyond any applicable grace period under any obligation set forth in the Note other than for the payment of principal or interest; or (e) the further assignment or encumbrance by the Mortgagor of the leases or rents of the Premises or any part thereof without prior written consent of the Mortgagee; or (f) the lease by the Mortgagor of all or part of the Premises for purposes other than the actual occupancy by the lessee; or (g) the failure of the Mortgagor to pay, or cause to be paid, before any fine, penalty, interest or cost may be added thereto all franchise taxes and charges, and other governmental charges, general and special, ordinary and extraordinary, unforeseen as well as foreseen, of any kind and nature whatsoever, including, but not limited to, assessments for public improvements or benefits which are assessed, levied, confirmed, imposed or become a lien upon the Mortgaged Property or become payable during the term of the Note or this Mortgage or the Mortgagor enters into any agreement either written or oral, which has the effect of deferring the payment of any taxes or other charges which are or can be assessed, levied, confirmed, imposed or become a lien on the Mortgaged Property or become payable during the term of the Note or this Mortgage; or (h) the conveyance, assignment, sale or attempted sale, or other disposition of the Premises or the further mortgage, pledge or other encumbrance by the Mortgagor of the Mortgaged Property or any part thereof or any interest therein without the prior written consent of the Mortgagee; or (i) if a receiver, liquidator or trustee of the Mortgagor or any Guarantor or of any of its properties, shall be appointed or (j) if a petition in bankruptcy, an insolvency proceeding or a petition for reorganization shall have been filed against the Mortgagor or any Guarantor and same is not withdrawn, dismissed, cancelled or terminated within sixty (60) days; or (k) if the Mortgagor or any Guarantor is adjudicated bankrupt or insolvent or a petition for reorganization is granted (without regard for any grace period provided for herein); or (l) if there is an attachment or sequestration of any of the property of the Mortgagor or any Guarantor and same is not promptly discharged or bonded; or (m) if the Mortgagor or any Guarantor files or consents to the filing of any petition in bankruptcy or commences or consents to the commencement of any proceeding under the Federal Bankruptcy Act or any other law, now or hereafter in effect, relating to the reorganization of the Mortgagor or such Guarantor or the arrangement or readjustment of the debts of the Mortgagor or such Guarantor; or (n) if the Mortgagor or any Guarantor shall make an assignment for the benefit of its creditors or shall admit in writing the inability to pay its debts generally as they become due or shall consent to the appointment of a receiver, trustee or liquidator of the Mortgagor or such Guarantor or of all or any part of its or his property; or (o) if default shall occur under, or any attempted withdrawal, cancellation or disclaimer of liability under any guaranty which guarantees payment of the Indebtedness or under any agreement giving security for said guaranty shall occur; or (p) if the Mortgagor or any Guarantor shall cause or institute any proceeding for the dissolution or termination of the Mortgagor or such Guarantor; or (q) if the Mortgagor or any Guarantor ceases to do business or terminates its business as presently conducted for any reason whatsoever; or (r) if the Mortgagor or any Guarantor defaults under any other agreement that it has with the Mortgagee; or (s) if a default shall occur under any mortgage which is subordinate to the lien of this Mortgage or the mortgagee under any subordinate mortgage shall commence a foreclosure action in connection with said Mortgage, provided that this provision shall not be deemed to be a waiver of the provisions of Section 1.17 (h) or any other section of this Mortgage; or (t) failure of Joseph E. Bernstein or Ralph J. Bernstein to duly and punctually comply with their obligations under a

and not be claimed within sixty (60) days

Section 2.02. Remedies. (a) Upon the occurrence of any Event of Default, the Mortgagee may take such action, without notice or demand, as it deems advisable to protect and enforce its rights against the Mortgagor and in and to the Mortgaged Property, including, but not limited to, the following actions, each of which may be pursued concurrently or otherwise, at such time and in such order as the Mortgagee may determine, in its sole discretion, without impairing or otherwise affecting the other rights and remedies of the Mortgagee: (1) declare the entire unpaid Indebtedness to be immediately due and payable; or (2) enter into or upon the Premises, either personally or by its agents, nominees or attorneys and dispossess the Mortgagor and its agents and servants therefrom, and thereupon the Mortgagee may (i) use, operate, manage, control, insure, maintain, repair, restore and otherwise deal with all and every part of the Premises and conduct the business thereat; (ii) complete any construction on the Premises in such manner and form as the Mortgagee deems advisable; (iii) make alterations, additions, renewals, repairs and improvements to or on the Mortgaged Property; (iv) exercise all rights and powers of the Mortgagor with respect to the Premises, whether in the name of the Mortgagor or otherwise, including, without limitation, the right to make, cancel, enforce or modify leases, obtain and evict tenants, and demand, sue for, collect and receive all earnings, revenues, rents, issues, profits and other income of the Premises and every part thereof; and (v) apply the receipts from the Premises to the payment of the Indebtedness, after deducting therefrom all expenses (including reasonable attorneys' fees) incurred in connection with the aforesaid operations and all amounts necessary to pay the taxes, assessments, insurance and other charges in connection with the Mortgaged Property, as well as just and reasonable compensation for the services of the Mortgagee, its counsel, agents and employees; or (3) institute proceedings for the complete foreclosure of this Mortgage in which case the Mortgaged Property may be sold for cash or upon credit in one or more parcels; or (4) with or without entry, to the extent permitted and pursuant to the procedures provided by applicable law, institute proceedings for the partial foreclosure of this Mortgage for the portion of the Indebtedness then due and payable, subject to the continuing lien of this Mortgage for the balance of the Indebtedness not then due; or (5) sell for cash or upon credit the Mortgaged Property or any part thereof and all estate, claim, demand, right, title and interest of the Mortgagor therein and rights of redemption thereof, pursuant to power of sale or otherwise, at one or more sales, as an entity or in parcels, at such time and place, upon such terms and after such notice thereof as may be required or permitted by law, and in the event of a sale, by foreclosure or otherwise, of less than all of the Mortgaged Property, this Mortgage shall continue as a lien on the remaining portion of the Mortgaged Property; or (6) institute an action, suit or proceeding in equity for the specific performance of any covenant, condition or agreement contained herein or in the Note; or (7) recover judgment on the Note either before, during or after any proceedings for the enforcement of this Mortgage; or (8) apply for the appointment of a trustee, receiver, liquidator or conservator of the Mortgaged Property, without regard for the adequacy of the security for the Indebtedness and without regard for the solvency of the Mortgagor, any Guarantor or of any person, firm or other entity liable for the payment of the Indebtedness; or (9) pursue such other remedies as the Mortgagee may have under applicable law.

(b) The purchase money proceeds or avails of any sale made under or by virtue of this Article II, together with any other sums which then may be held by the Mortgagee under this Mortgage, whether under the provisions of this Article II or otherwise, shall be applied as follows:

Separate Asbestos Agreement or Asbestos Abatement and Indemnity Agreement executed and delivered by them to Mortgagee.

88324760

UNOFFICIAL COPY 60

First: To the payment of the costs and expenses of any such sale, including reasonable compensation to the Mortgagee, its agents and counsel, and of any judicial proceedings wherein the same may be made, and of all expenses, liabilities and advances made or incurred by the Mortgagee under this Mortgage, together with interest as provided herein on all advances made by the Mortgagee and all taxes or assessments, except any taxes, assessments or other charges subject to which the Mortgaged Property shall have been sold.

Second: To the payment of the whole amount then due, owing or unpaid upon the Note for principal, together with any and all applicable interest and late charges.

Third: To the payment of any other sums required to be paid by the Mortgagor pursuant to any provision of this Mortgage or of the Note.

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

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

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

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

(e) In the event of any sale made under or by virtue of this Article II (whether made under the power of sale herein granted or under or by virtue of judicial proceedings or of a judgment or decree of foreclosure and sale) the entire Indebtedness, if not previously due and payable, immediately thereupon shall, anything in the Note or in this Mortgage to the contrary notwithstanding, become due and payable.

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

(g) No recovery of any judgment by the Mortgagee and no levy of an execution under any judgment upon the Mortgaged Property or upon any other property of the Mortgagor shall affect in any manner or to any extent, the lien of this Mortgage upon the Mortgaged Property or any part thereof, or any liens, rights, powers or remedies of the Mortgagee hereunder, but such liens, rights, powers and remedies of the Mortgagee shall continue unimpaired as before.

Section 2.03. Payment of Indebtedness After Default. Upon the occurrence of any Event of Default and the acceleration of the maturity hereof, if, at any time prior to foreclosure sale, the Mortgagor or any other person tenders payment of the amount necessary to satisfy the Indebtedness, the same shall constitute an evasion of the payment terms hereof and shall be deemed to be a voluntary prepayment hereunder, in which case such payment must include the premium required under the prepayment provision, if any, contained herein or in the Note, or, if at that time there is no privilege of prepayment, then the payment will include a premium of five (5%) percent of the then unpaid Indebtedness. This provision shall be of no force or effect if at the time that such tender of payment is made the Mortgagor has the right under this Mortgage or the Note to prepay the Indebtedness without penalty or premium.

Section 2.04. Possession of the Premises. Upon the occurrence of any Event of Default hereunder, it is agreed that the then owner of the Premises, if it is the occupant of the Premises or any part thereof, shall immediately surrender possession of the Premises so occupied to the Mortgagee, and if such occupant is permitted to remain in possession, the possession shall be as tenant of the Mortgagee and, on demand, such occupant (a) shall pay to the Mortgagee monthly, in advance, a reasonable rental for the space so occupied and in default thereof, (b) may be dispossessed by the usual summary proceedings. The covenants herein contained may be enforced by a receiver of the Mortgaged Property or any part thereof. Nothing in this Section 2.04 shall be deemed to be a waiver of the provisions of this Mortgage prohibiting the sale or other disposition of the Premises without the Mortgagee's consent.

nor within any applicable grace period.

Section 2.05. Interest After Default. If any payment due hereunder or under the Note is not paid when due either as stated or accelerated maturity or pursuant to any of the terms hereof, then and in such event, the Mortgagor shall pay interest thereon from and after the date on which such payment first becomes due at the interest rate provided for in Section 1.11 hereof and such interest shall be due and payable, on demand, at such rate until the entire amount due is paid to the Mortgagee, whether or not any action shall have been taken or proceeding commenced to recover the same or to foreclosure this Mortgage. Nothing in this Section 2.05 or in any other provision of this Mortgage shall constitute an extension of the time of payment of the Indebtedness.

Section 2.06. Mortgagor's Actions After Default. After the happening of any Event of Default and immediately upon the commencement of any action, suit or other legal proceedings by the Mortgagee to obtain judgment for the Indebtedness, or of any other nature in aid of the enforcement of the Note or of this Mortgage, the Mortgagor will (a) waive the issuance and service of process and enter its voluntary appearance in such action, suit or proceeding, and (b) if required by the Mortgagee, consent to the appointment of a receiver or receivers of the Mortgaged Property and of all the earnings, revenues, rents, issues, profits and income thereof.

Section 2.07. Control by Mortgagee After Default. Notwithstanding the appointment of any receiver, liquidator or trustee of the Mortgagor, or of any of its property, or of the Mortgaged Property or any part thereof, the Mortgagee shall be entitled to retain possession and control of all property now and hereafter covered by this Mortgage.

88324760

UNOFFICIAL COPY

ARTICLE III Miscellaneous

Section 3.01. Credits Waived. The Mortgagor will not claim nor demand nor be entitled to any credit or credits against the indebtedness for so much of the taxes assessed against the Mortgaged Property or any part thereof as is equal to the tax rate applied to the amount due on this Mortgage or any part thereof, and no deductions shall otherwise be made or claimed from the taxable value of the Mortgaged Property or any part thereof by reason of this Mortgage or the indebtedness.

Section 3.02. No Release. The Mortgagor agrees, that in the event the Mortgaged Property is sold and the Mortgagee enters into any agreement with the then owner of the Mortgaged Property extending the time of payment of the indebtedness, or otherwise modifying the terms hereof, the Mortgagor shall continue to be liable to pay the indebtedness according to the tenor of any such agreement unless expressly released and discharged in writing by the Mortgagee.

four (4) days after being

Section 3.03. Notices. All notices hereunder shall be in writing and shall be deemed to have been sufficiently given or served for all purposes when delivered in person or sent by certified mail, return receipt requested, to any party hereto at its address above stated (in the case of the Mortgagee, to the attention of Manager—Real Estate Financing) or at such other address of which it shall have notified the party giving such notice in writing as aforesaid.

Section 3.04. Binding Obligations. The provisions and covenants of this Mortgage shall run with the land, shall be binding upon the Mortgagor, and shall inure to the benefit of the Mortgagee, subsequent holders of this Mortgage and their respective successors and assigns. For the purpose of this Mortgage, the term "Mortgagor" shall mean the Mortgagor named herein, any subsequent owner of the Mortgaged Property, and their respective heirs, executors, legal representatives, successors and assigns. If there is more than one Mortgagor, all their undertakings hereunder shall be deemed joint and several.

Section 3.05. Captions. The captions of the Sections of this Mortgage are for the purpose of convenience only and are not intended to be a part of this Mortgage and shall not be deemed to modify, explain, enlarge or restrict any of the provisions hereof.

Section 3.06. Further Assurances. The Mortgagor shall do, execute, acknowledge and deliver, at the sole cost and expense of the Mortgagor, all and every such further acts, deeds, conveyances, mortgages, assignments, estoppel certificates, notices of assignment, transfers and assurances as the Mortgagee may reasonably require from time to time in order to better assure, convey, assign, transfer and confirm unto the Mortgagee, the rights now or hereafter intended to be granted to the Mortgagee under this Mortgage, any other instrument executed in connection with this Mortgage or any other instrument under which the Mortgagor may be or may hereafter become bound to convey, mortgage or assign to the Mortgagee for carrying out the intention of facilitating the performance of the terms of this Mortgage. The Mortgagor hereby appoints the Mortgagee its attorney-in-fact to execute, acknowledge and deliver for and in the name of the Mortgagor any and all of the instruments mentioned in this Section 3.06 and this power, being coupled with an interest, shall be irrevocable as long as any part of the indebtedness remains unpaid.

Section 3.07. Severability. Any provision of this Mortgage which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof or affecting the validity or enforceability of such provisions in any other jurisdiction.

Section 3.08. General Conditions. (a) All covenants hereof shall be construed as affording to the Mortgagee rights additional to and not exclusive of the rights conferred under the provisions of Sections 254, 271, 272 of the Real Property Law of the State of New York (if the Premises are located in the State of New York), or any other applicable law of any other state.

(b) This Mortgage cannot be altered, amended, modified or discharged orally and no executory agreement shall be effective to modify or discharge it in whole or in part, unless it is in writing and signed by the party against whom enforcement of the modification, alteration, amendment or discharge is sought.

(c) No remedy herein conferred upon or reserved to the Mortgagee is intended to be exclusive of any other remedy or remedies, and each and every such remedy shall be cumulative, and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute. No delay or omission of the Mortgagee in exercising any right or power accruing upon any Event of Default shall impair any such right or power, or shall be construed to be a waiver of any such Event of Default, or any acquiescence therein. Acceptance of any payment after the occurrence of an Event of Default shall not be deemed to waive or cure such Event of Default; and every power and remedy given by this Mortgage to Mortgagee may be exercised from time to time as often as may be deemed expedient by the Mortgagee. Nothing in this Mortgage or in the Note shall affect the obligation of the Mortgagor to pay the indebtedness in the manner and at the time and place therein respectively expressed.

(d) No waiver by the Mortgagee will be effective unless it is in writing and then only to the extent specifically stated. Without limiting the generality of the foregoing, any payment made by the Mortgagee for insurance premiums, taxes, assessments, water rates, sewer rentals or any other charges affecting the Mortgaged Property, shall not constitute a waiver of the Mortgagor's default in making such payments and shall not obligate the Mortgagee to make any further payments.

(e) The Mortgagee shall have the right to appear in and defend any action or proceeding, in the name and on behalf of the Mortgagor which the Mortgagee, in its discretion, feels may adversely affect the Mortgaged Property or this Mortgage. The Mortgagee shall also have the right to institute any action or proceeding which the Mortgagee, in its discretion, feels should be brought to protect its interest in the Mortgaged Property or its rights hereunder. All costs and expenses incurred by the Mortgagee in connection with such actions or proceedings, including, without limitation, reasonable attorneys' fees and appellate attorneys' fees, shall be paid by the Mortgagor, on demand.

(f) In the event of the passage after the date of this Mortgage of any law of any governmental authority having jurisdiction, deducting from the value of land for the purpose of taxation, affecting any lien thereon or changing in any way the laws of the taxation or mortgages or debts secured by mortgages for federal, state or local purposes, or the manner of the collection of any such taxes, so as to affect this Mortgage, the Mortgagor shall promptly pay to the Mortgagee, on demand, all taxes, costs and charges for which the Mortgagee is or may be liable as a result thereof, provided said payment shall not be prohibited by law or render the Note usurious, in which event the Mortgagee may declare the indebtedness to be immediately due and payable.

(g) The Mortgagor hereby appoints the Mortgagee as its attorney-in-fact in connection with the personal property and fixtures covered by this Mortgage, where permitted by law, to file on its behalf any financing statements or other statements in connection therewith with the appropriate public office signed only by the Mortgagee, as secured party. This power, being coupled with an interest, shall be irrevocable so long as any part of the indebtedness remains unpaid.

(h) The information set forth on the cover hereof is hereby incorporated herein.

(i) The Mortgagor acknowledges that it has received a true copy of this Mortgage.

(j) For the purposes of this Mortgage, all defined terms contained herein shall be construed, whenever the context of this Mortgage so requires, so that the singular shall be construed as the plural and so that the masculine shall be construed as the feminine.

Section 3.09. Promotional Material. The Mortgagor authorizes the Mortgagee to issue press releases, advertisements and other promotional materials in connection with the Mortgagee's own business promotional and marketing activities, describing the loan referred to in this Mortgage and the matters giving rise to such loan.

Section 3.10. Legal Construction. The enforcement of this Mortgage shall be governed, construed and interpreted by the laws of the State of Illinois. Nothing in this Mortgage, the Note or in any other agreement between the Mortgagor and the Mortgagee shall require the Mortgagor to pay, or the Mortgagee to accept, interest in an amount which would subject the Mortgagee to any penalty under applicable law. In the event that the payment of any interest due hereunder or under the Note or any such other agreement would subject the Mortgagee to any penalty under applicable law, then *ipso facto* the obligations of the Mortgagor to make such payment shall be referred to the highest rate authorized under applicable law.

Section 3.11. Indemnification. Mortgagor hereby indemnifies and holds harmless Mortgagee against, and agrees to pay on demand, any brokerage commission or finder's fee claimed by any broker or other party in connection with the loan transaction contemplated by this Mortgage and the Note retained or alleged to have been retained by or on behalf of Mortgagor.

Section 3.12. Additional Default. Subject to the provisions of Section 3.20, it shall be an Event of Default hereunder, without the requirement of notice, if, without the prior written consent of Mortgagee, there is any voluntary or involuntary actual or attempted installment contract with respect to, or conveyance, pledge, hypothecation or other actual or collateral transfer of, all or any portion of (i) general partnership interests in the Mortgagor, (ii) corporate stock in any corporate general partner of Mortgagor, or (iii) the Premises.

Transfers by virtue of the death or legal incompetence of an affected person to such person's heirs, legatees or legal representatives shall not constitute a violation of this Section 3.12.

Section 3.13. Additional Remedies. Without limiting the provisions of Section 2.01 hereof but in addition thereto and in amplification thereof, it is agreed as follows:

(a) When the Indebtedness, or any part thereof, shall become due, whether by acceleration or otherwise, and shall not be paid, the Mortgagee shall have the right to foreclose the lien hereof for such Indebtedness or part thereof. In any suit or proceeding 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 the 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 title, as the Mortgagee may deem reasonably necessary either to prosecute such suit or to evidence to bidders at sales which may be had pursuant to such decree, the true conditions of the title to or the value of the Premises. All expenditures and expenses of the nature in this subsection mentioned, and such expenses and fees as may be incurred in the protection of said premises and the maintenance of the lien of this Mortgage, including the fees of any attorney employed by the Mortgagee in any litigation or proceedings affecting this Mortgage, the Note or the Premises, including probate and bankruptcy proceedings, or in the preparation for the commencement or defense of any proceeding or threatened suit or proceeding, shall be immediately due and payable by the Mortgagee, with accrued interest thereon at the Default Rate.

(b) Upon, or at any time after, the filing of a complaint to foreclose this Mortgage, the court in which such complaint is filed may appoint a receiver of the Premises. Such appointment may be made either before or after sale, without notice, without regard to solvency or insolvency of the Mortgagor at the time of application for such receiver, and without regard to the then value of the Premises or whether the same shall be then occupied as a homestead or not; and the Mortgagee hereunder or any holder of the Note may be appointed as such receiver. Such receiver shall have the power to collect the rents, issues and profits of the Premises during the pendency of such foreclosure suit and, in case of a sale and a deficiency, during the full statutory period of redemption, if any, whether there be a redemption or not, as well as during any further times when the Mortgagor, except for the intervention of such receiver, would be entitled to collection of such rents, issues and

profits and all other powers which may be necessary or are usual in such cases for the protection, possession, control, management and operation of the Premises during the whole of said period. The court may, from time to time, authorize the receiver to apply the net income from the Premises in his hands in payment in whole or in part of:

(i) The Indebtedness, or the indebtedness secured 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 the foreclosure sale; or

(ii) The deficiency in case of a sale and deficiency.

Section 3.14. Waiver. The Mortgagor hereby expressly waives any and all rights of redemption from sale 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 redemption of the Mortgagor and of all other persons, are and shall be deemed to be hereby waived to the full extent permitted by the provisions of applicable law.

Section 3.15. Environmental Matters. (a) The Mortgagor represents and covenants that (i) the Mortgagor has not caused or suffered to occur and the Mortgagor will not hereafter cause or suffer to occur, a discharge, spillage, uncontrolled loss, seepage or filtration of oil or petroleum or chemical liquids or solids, liquid or gaseous products or hazardous waste (a "spill"), or hazardous substance as those terms are used in applicable state or local statutes, ordinances, laws or regulations or the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as the same may be amended from time to time (collectively the "Act"), at, upon, under or within the Premises or any contiguous real estate which has been included in the property description of the Premises within the preceding three (3) years; (ii) neither the Mortgagor nor, to the knowledge of Mortgagor, any other party is or has been involved in operations at or near the Premises which could lead to the imposition of a lien on the Premises, under the Act or under any similar applicable laws or regulations; and (iii) the Mortgagor has not permitted and will not permit any tenant or occupant of the Premises to engage in any activity that could lead to the imposition of liability on such tenant or occupant, the Mortgagor or any other owner of any of the Premises, or the creation of a lien on the Premises, under the Act or any similar applicable laws or regulations.

(b) The Mortgagor shall comply strictly and in all respects with the requirements of the Act and related regulations and with all similar applicable laws and regulations and shall notify the Mortgagee promptly in the event of any spill or hazardous substance upon the Premises, and shall promptly forward to the Mortgagee copies of all orders, notices, permits, applications or other communications and reports in connection with any such spill or any other matters relating to the Act or related regulations or any similar applicable laws or regulations as they may affect the Premises.

(c) The Mortgagor, promptly upon the written request of the Mortgagee from time to time, (but, in the absence of a situation deemed by Mortgagee, in its sole discretion, to be an emergency or involving the security or financial stability of the Premises, not more than once during each consecutive twelve (12) month period) shall provide the Mortgagee with an environmental site assessment or environmental audit report, or an update of such an assessment or report, all in scope, form and content satisfactory to the Mortgagee.

(d) The Mortgagor shall indemnify the Mortgagee and hold the Mortgagee harmless from and against all loss, liability, damage and expense, including attorneys' fees, suffered or incurred by the Mortgagee, whether as holder of this Mortgage, as Mortgagee in possession or as successor in interest to the Mortgagor as owner of the Premises by virtue of foreclosure or acceptance of a deed in lieu of foreclosure (i) under or on account of the Act or related regulations or any similar applicable laws or regulations, including the assertion of any lien thereunder; (ii) with respect to any spill or hazardous substance affecting the Premises whether or not the same originates or emanates from the Premises or any such contiguous real estate, including any loss of value of the Premises as a result of a spill or hazardous substance; and (iii) with respect to any other matter affecting the Premises within the jurisdiction of the Environmental Protection Authority or the Department of Environmental Protection, it being understood that in the event a separate indemnification document is executed in connection herewith, and to the extent of a conflict with this Mortgage, the terms of such separate indemnity shall govern.

(e) In the event of any spill or hazardous substance affecting the Premises, whether or not the same originates or emanates from the Premises or any such contiguous real estate, and/or if the Mortgagor shall fail to comply with any of the requirements of the Act or related regulations or any other environmental law or regulation, the Mortgagee may at its election, but without the obligation so to do, give such notices and/or cause such work to be performed at the Premises and/or take any and all other actions as the Mortgagee shall deem necessary or advisable in order to remedy said spill or hazardous substance or cure said failure of compliance and any amounts paid as a result thereof, together with interest thereon at the Default Interest Rate from the date of payment by the Mortgagee, shall be immediately due and payable by the Mortgagor to the Mortgagee and until paid shall be added to and become a part of the Indebtedness and shall have the benefit of the lien hereby created as a part thereof.

Section 3.16. Letter of Credit. As additional security for payment of the indebtedness secured by this Mortgage, the Mortgagor shall deliver to the Mortgagee a letter of credit in the amount of One Million Dollars (\$1,000,000.00) (the "GECC Letter of Credit").

The Mortgagee shall have the right to draw upon the GECC Letter of Credit or any renewal or extension thereof, in whole or in part, upon the occurrence of an Event of Default under this Mortgage or upon the occurrence of any one or more of the following events, each of which shall be deemed an additional Event of Default under this Mortgage, without notice or period of grace:

(a) The Mortgagor's failure to deliver to the Mortgagee, not less than thirty (30) days prior to the expiration date of the GECC Letter of Credit or any renewal or extension thereof, and/or either renewal or extension for a period of not less than one (1) year; or

(b) Any action by the Mortgagor or the bank issuing the GECC Letter of Credit which, in Mortgagee's discretion, reasonably exercised, may jeopardize the right of Mortgagee to draw upon the GECC Letter of Credit.

All letters of credit, including renewals thereof, are subject to Mortgagee's approval as to form, content and the issuing bank. A letter of credit shall not be deemed as having been delivered to Mortgagee until it has been approved as aforesaid.

The proceeds of any draw upon the GECC Letter of Credit may be applied by the Mortgagee to the payment of accrued interest (including any accrued interest the payment of which was otherwise deferred), late charges, principal (including any prepayment penalty occasioned by a principal payment), or any other obligation arising out of the Mortgagor's obligations to the Mortgagee under this Mortgage or the Note, in such manner as the Mortgagee, in its sole discretion, seems appropriate.

Mortgagee shall release its rights in the GECC Letter of Credit and surrender the GECC Letter of Credit to the issuer upon the payment in full of all sums due under the Note and this Mortgage. Additionally, on the first (1st) day of each calendar quarter commencing October 1, 1988, Mortgagor shall qualify for a reduction ("Qualified Reduction") in the GECC Letter of Credit provided that there shall be strict compliance with the following conditions precedent:

(a) There shall be no Event of Default under this Mortgage nor any fact or circumstance which, with the giving of notice or passage of a grace period, shall constitute an Event of Default.

(b) The amount of the Qualified Reduction shall be determined by Mortgagee, in its sole and absolute discretion, and shall be based upon the status of completion of and payment for the capital improvements ("Capital Improvements") described in Exhibit C attached hereto. The Qualified Reduction shall be on a dollar for dollar basis as the Capital Improvements are completed. The maximum reduction available for the completion of any line item on Exhibit C shall be equal to the estimate of the cost of completing said line item as specified on Exhibit C. Mortgagee may, but shall not be obligated to, rely upon the opinion of its independent engineer for its determination of the amount of the Qualified Reduction.

(c) Mortgagor, at its sole cost and expense, shall deliver to Mortgagee a current date endorsement to the policy ("Title Policy") of title insurance issued to Mortgagee as of the date of the Initial Disbursement insuring Mortgagee (a) against lien claims directly or indirectly arising as a result of the Capital Improvements to the extent of (i) the cost of the Capital Improvements in excess of One Million Dollars

(\$1,000,000.00) and (ii) the amount of the Qualified Reduction, and (b) that, except for the lien of real estate taxes for which a bill has not been issued and such matters other than real estate taxes appearing on the Title Policy, there are no exceptions to title.

(d) Mortgagor shall have reimbursed Mortgagee for all costs and expenses incurred in connection with such inspection, which amount shall be paid to Mortgagee within fifteen (15) days after notice of the amount due.

Section 3.17. Financial Statements. The Mortgagor shall furnish to the Mortgagee the following financial statements, at Mortgagor's sole cost and expense:

(a) Within ninety (90) days after the end of each calendar year (i) an annual operating statement of the Mortgaged Property, including income from all sources, and (ii) an annual financial statement of the Mortgagor and any guarantors of all or any portion of the Note ("Guarantors"), containing information consistent with that reported for federal income tax purposes on Mortgagor's or Guarantors' federal income tax return. The financial statements shall be in scope and detail satisfactory to Mortgagee. The statements as to the Mortgagor and Guarantors shall be prepared and certified by a certified public accountant acceptable to Mortgagee; the remaining statements shall be certified by the president or any vice president of NYL Properties, Inc.

(b) Within thirty (30) days after the end of each calendar quarter, an operating statement of the Mortgaged Property for the immediately preceding calendar quarter, including income from all sources. The financial statements shall be in scope and detail satisfactory to Mortgagee, and shall be prepared and certified by a certified public accountant acceptable to Mortgagee.

(c) Such other reports as to the operation of the Mortgaged Property as GECC shall request from time to time.

Section 3.18. Leases. Mortgagor covenants and agrees that all present and future leases and rental arrangements with tenants of the Mortgaged Property shall be approved as to form and content and, once approved, shall not be modified without Mortgagee's further approval.

Section 3.19. Contest of Liens. Notwithstanding anything to the contrary herein contained, Mortgagor shall have the right to contest by appropriate legal proceedings diligently prosecuted any real estate taxes and assessments imposed or assessed upon the Premises or which may be or become a lien thereon and any mechanics', materialmen's or other liens or claims for lien upon the Premises (all herein called "Contested Liens"), and no Contested Lien shall constitute an Event of Default hereunder, if, but only if:

(a) Mortgagor shall forthwith give notice of any Contested Lien to Mortgagee at the time the same shall be asserted;

(b) Mortgagor shall deposit with Mortgagee the full amount (herein called the "Lien Amount") of such Contested Lien or which may be secured thereby, together with such amount as Mortgagee may reasonably estimate as interest or penalties which might arise during the period of contest; provided that in lieu of such payment Mortgagor may furnish to Mortgagee a bond or title indemnity in such amount and form, and issued by a bond or title insuring company, as may be satisfactory to Mortgagee;

(c) Mortgagor shall diligently prosecute the contest of any Contested Lien by appropriate legal proceedings having the effect of staying the foreclosure or forfeiture of the Premises, and shall permit Mortgagee to be represented in any such contest and shall pay all expenses incurred by Mortgagee in so doing, including fees and expenses of Mortgagee's counsel (all of which shall constitute so much additional indebtedness hereby secured bearing interest at the Default Rate until paid, and payable upon demand; provided, that no interest shall be payable if the amount claimed by Mortgagee to be due is paid within fifteen (15) days after notice to Mortgagor of the amount due);

(d) Mortgagor shall pay such Contested Lien and all Lien Amounts together with interest and penalties thereon (i) if and to the extent that any such Contested Lien shall be determined adverse to Mortgagor, or (ii) forthwith upon demand by Mortgagee if, in the opinion of Mortgagee, and notwithstanding any such contest, the Premises shall be in jeopardy or in danger of being forfeited or foreclosed; provided that if Mortgagor shall fail so to do, Mortgagee may, but shall not be required to, pay

all such Contested Liens and Lien Amounts and interest and penalties thereon and such other sums as may be necessary in the judgment of the Mortgagee to obtain the release and discharge of such liens; and any amount expended by Mortgagee in so doing shall be so much additional Indebtedness Hereby Secured bearing interest at the Default Rate until paid, and payable upon demand; and provided further that Mortgagee may in such case use and apply for the purpose monies deposited as provided in Subsection 3.19(b) above and may demand payment upon any bond or title indemnity furnished as aforesaid.

Section 3.20. Restriction on Transfer. It shall be an immediate Event of Default hereunder, without notice or period of grace, if, unless Mortgagee shall consent thereto in writing, there shall be a sale, conveyance or assignment of (i) any partnership interest in Mortgagor, or (ii) any stock in a corporate partner of Mortgagor.

Notwithstanding the provisions of this Section, and of Sections 1.17 and 3.12, all transfers by sale, gift or otherwise of corporate stock, partnership interests and the Mortgaged Property shall be permitted without Mortgagee's consent provided that, immediately following such transfer, the following ownership standards are maintained.

(a) Not less than Twenty-Five Percent (25%) of the Mortgaged Property shall be owned by the Bernstein Group; and

(b) Not less than Twenty-Five Percent (25%) of the Mortgaged Property shall be owned by the Lee Group.

(c) NYL Properties, Inc. shall be and remain the managing general partner of Mortgagor, and the Bernstein Group shall own not less than Fifty and One-Half Percent (50.5%) of the issued and outstanding voting stock in NYL Properties, Inc.

Mortgagor agrees to notify Mortgagee as to the identity of each and every transfer permitted under this Mortgage within fifteen (15) days after possession of the affected interest is assumed by the transferee.

For purposes of this Section the following definitions shall be applicable:

(a) The Bernstein Group shall be defined as any combination of the following:

(i) Joseph E. Bernstein, Ralph J. Bernstein, their respective spouses and lineal descendants (collectively referred to as the "Bernstein Family");

(ii) Trusts (the "Bernstein Trusts") created and existing exclusively for the benefit of all or any portion of the Bernstein Family;

(iii) Entities (the "Bernstein Entities") of which the Bernstein Family and/or Bernstein Trusts own all the issued and outstanding corporate stock or partnership interests, as the case may be; and/or

(iv) Corporations owned exclusively by Bernstein Entities.

(b) The Lee Group shall be defined as any combination of the following:

(i) Edward Lee, Alan Lee, Arnold Lee, their respective spouses, lineal descendants, siblings and ancestors (collectively referred to as the "Lee Family");

(ii) Trusts (the "Lee Trusts") created and existing exclusively for the benefit of all or any portion of the Lee Family;

(iii) Entities (the "Lee Entities") of which the Lee Family and/or Lee Trusts own all the issued and outstanding corporate stock or partnership interests, as the case may be; and/or

(iv) Corporations owned exclusively by Lee Entities.

(c) Ownership of the Mortgaged Property shall include, but shall not be limited to, ownership of the corporate voting stock in a corporate general partner of Mortgagor or ownership of a partnership interest in Mortgagor.

Section 3.21. Force Majeure. Subject to the provisions of the next succeeding paragraph of this Section 3.21, if Mortgagor shall fail to duly and punctually comply

UNOFFICIAL COPY

with its obligations hereunder Mortgagor shall not be in default hereunder if Mortgagor shall commence to comply within any applicable grace period (or within five (5) days after notice from Mortgagee if there is no grace period) and Mortgagor thereafter, in the sole determination of Mortgagee, shall diligently proceed to a successful conclusion.

The foregoing paragraph of this Section 3.21 shall not be applicable to (i) Mortgagor's failure to timely pay money due hereunder or under the Note; (ii) Mortgagor's failure to timely provide insurance; (iii) circumstances from which, in Mortgagee's sole determination, Mortgagee shall conclude that the security of the Mortgaged Property is in jeopardy; or (iv) a breach of the restrictive covenants under Section 1.17 or Section 3.20 of this Mortgage.

Section 3.22. Additional Advances. Mortgagee shall notify Mortgagor of all additional advances made by Mortgagee pursuant to the terms of this Mortgage, provided that notice is not required as a condition to such advance.

Section 3.23. Limitation on Mortgagor's Indemnity. If and to the extent the Mortgagor is obligated to indemnify, hold harmless and defend the Mortgagee, it is understood and agreed that such obligations shall not extend to instances of Mortgagee's gross negligence or willful and wanton misconduct.

Section 3.24. Copies of Notices. A copy of all notices to Mortgagor shall be directed as follows:

Randolph Tower Partners
551 Madison Avenue
16th Floor
New York, New York 10022

Attention: Joseph E. Bernstein

and

Joseph Jackson
Bernstein & Carter
551 Madison Avenue
New York, New York 10022

Section 3.25. Maximum Indebtedness. The maximum amount secured by this Mortgage is One Hundred Million Dollars (\$100,000,000.00).

Section 3.26. Limitation of Liability. Notwithstanding anything contained herein to the contrary, neither Mortgagor nor any partner of Mortgagor shall be personally liable for the repayment of any of the principal of or interest due under the Note or for any deficiency judgment which Mortgagee may obtain after foreclosure on its collateral after default by Mortgagor, provided, however, that Mortgagor and its partners shall not be exonerated or exculpated for any deficiency, loss or damage suffered by Mortgagee as a result of the failure by Mortgagor to comply with any of the terms or conditions of this Mortgage or any of the Other Security Documents as defined in the Note (other than the provisions relating to the payment of principal, interest or late charges), including but not limited to losses resulting from: (i) Mortgagor's failure to perform its obligations to properly account to Mortgagee for any proceeds of insurance or condemnation proceeds as required by this Mortgage; (ii) Mortgagor's failure to comply with provisions of this Mortgage prohibiting the sale or further voluntary encumbering of the collateral, partnership interests in Mortgagor, or shares of stock in any corporate partner of Mortgagor; (iii) Mortgagor's attempt to interfere with Mortgagee's rights under the assignment of rents or letter of credit, if any, issued in connection with the loan; (iv) Mortgagor's failure to apply proceeds of rents and other income of the collateral toward the costs of maintenance and operation of the Mortgaged Property and to the payment of taxes, lien claims, insurance premiums and debt service and other indebtedness to the extent that the Mortgagor or Other Security Documents require such rents and income to be so applied; (v) Mortgagor's entering into or modifying leases in violation of the provisions of this Mortgage; (vi) Mortgagor's collection of rentals for periods of more than one (1) month in advance under leases of the Mortgaged Property; (vii) damage or destruction to the Mortgaged Property by, at the direction of, or with the acquiescence of Mortgagor, including its electrical, plumbing, heating or air conditioning systems or its elevators (provided, however, this subsection shall not impose liability on account of Mortgagor's negligence); (viii) the receipt by Mortgagor of monies other than rent in connection with the modification of any existing or future

UNOFFICIAL COPY

lease or the entering into of a new lease, in violation of the applicable provisions of this Mortgage; (ix) Mortgagor's failure to pay for any loss, liability, damage, cost or expense (including attorney's fees) incurred by Mortgagee in connection with any order, consent decree, settlement, judgment or verdict arising from the deposit, storage, disposal, burial, dumping, injecting, spilling, leaking, or other placement or release in, on or from the Mortgaged Property of asbestos or a "hazardous substance" as defined in 42 U.S.C. 9601, et seq., as amended from time to time, or any other toxic or hazardous waste or waste products; or (x) the Mortgagor's failure to pay for any loss, liability or expense (including attorney's fees) incurred by Mortgagee arising out of any claim or allegation made by Mortgagor, that the Note or the transactions contemplated hereby establish a joint venture or partnership arrangement between Mortgagor and Mortgagee; and provided further, that the foregoing limitations on Mortgagor's personal liability with respect to principal and interest shall not impair the validity of the indebtedness secured by Mortgagee's collateral or the lien on or security interest in the collateral or the right of Mortgagee as secured party to foreclose and/or enforce the collateral after default by Mortgagor. In the event any person shall have guaranteed all or part of the loan by separate written guaranty, none of the foregoing limitations on Mortgagor's personal liability for payment of principal and interest shall modify, diminish or discharge the personal liability of any such guarantor as set forth in any such written guaranty. None of the foregoing limitations on Mortgagor's personal liability shall modify, diminish or discharge the personal liability of Mortgagor or any individual under the Indemnity Agreement of even date herewith or under any indemnification provisions of this Mortgage or any of the Other Security Documents. Nothing herein shall be deemed to be a waiver of any right which Mortgagee may have under Section 506(a), 506(b), 1111(b) or any other provision of the Bankruptcy Reform Act of 1978 to file a claim for the full amount of the debt owing to Mortgagee by Mortgagor or to require that all collateral shall continue to secure all of the indebtedness owing to Mortgagee in accordance with the Note, this Mortgage and the Other Security Documents.

IN WITNESS WHEREOF, Mortgagor has caused these presents to be duly executed and delivered as of the day, month and year first above written.

RANDOLPH TOWER PARTNERS, an Illinois general partnership

By: NYL PROPERTIES, INC., a Delaware corporation, duly authorized general partner

By: _____

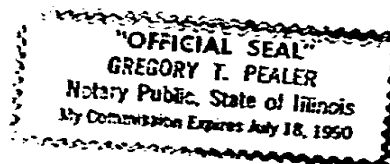
STATE OF ILLINOIS)
) ss
 COUNTY OF COOK)

I, Gregory T. Pealer, a Notary Public in and for the county and state aforesaid, do hereby certify that Joseph E. Bernstein personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 26 day of July, 1988.

Gregory T. Pealer
 Notary Public

My Commission Expires:



UNOFFICIAL COPY

R&S 161700-178
WP:MKB 36-458
Doc. #13
07/20/88-8

PROMISSORY NOTE

\$18,200,000.00

July 11, 1988

For Value Received, RANDOLPH TOWER PARTNERS, an Illinois general partnership ("Borrower"), promises to pay to the order of GENERAL ELECTRIC CAPITAL CORPORATION ("GECC"), without the right of deduction, offset or counterclaim, the sum of Eighteen Million Two Hundred Thousand Dollars (\$18,200,000.00), or so much thereof as shall be advanced by GECC from time to time, with interest on the unpaid balance of such amount from the date of the initial disbursement (the "Initial Disbursement") of the loan (the "Loan") evidenced hereby, at the rate or rates of interest specified herein. This Note is secured by a mortgage (the "Mortgage") of even date herewith on certain property particularly described therein (the "Mortgaged Property") and by other security given or to be given to GECC as collateral for the Loan (collectively, the "Other Security Documents"). The terms, provisions and conditions of the Mortgage and Other Security Documents are incorporated herein by reference as fully and with the same force and effect as if set forth herein at length.

On the date of the Initial Disbursement Borrower shall pay interest from and commencing with said date through July 31, 1988. Hereafter, interest only on the outstanding balance of principal on this Note shall be payable monthly on the first day of each month beginning September 1, 1988, to and including July 1, 1993 and a final payment of the Maturity Obligations (as herein after defined) shall be payable on July 31, 1993 (the "Maturity Date"). Interest at the Contract Index Rate (as hereinafter defined) shall be computed on the basis of a fraction, the denominator of which is three hundred and sixty (360) and the numerator of which is the actual number of days elapsed from the date of the Initial Disbursement or the date of the preceding interest installment due date, as the case may be, to the date of the next interest installment due date.

As used herein, "Maturity Obligations" shall mean the entire outstanding principal amount of this Note, together with all accrued but unpaid interest thereon, including all Deferred Interest (as hereinafter defined), and all other sums due and unpaid hereunder, under the Mortgage and under the Other Security Documents.

As used herein, "Contract Index Rate" shall mean the rate of interest equal to one and one-half percent (1.50%) per annum in excess of the higher of either the "Prime Rate" or the "Commercial Paper Rate", as hereinafter defined.

As used herein, "Prime Rate" shall mean the highest prime rate (or base rate) reported in the Money Rates column or section of The Wall Street Journal published on the second business day of the month preceding the month in which a payment of interest and/or principal is due on the Loan, as having been the rate in effect for corporate loans at large U.S. money center commercial banks (whether or not such rate has actually been charged by any such bank) as of

EXHIBIT A

88324760

the first calendar day of such month for which such rate is published. In the event The Wall Street Journal ceases publication of the Prime Rate, the "Prime Rate" shall mean the prime rate (or base rate) announced by Bankers Trust Company, New York, New York (whether or not such rate has actually been charged by such bank). In the event such bank discontinues the practice of announcing the Prime Rate, the "Prime Rate" shall mean the highest rate charged by such bank on short term, unsecured loans to its most creditworthy large corporate borrowers.

As used herein, "Commercial Paper Rate" shall mean the highest discount rate reported in the Money Rates column of section of The Wall Street Journal (the "Published Rate"), published on the second business day of the month preceding the month in which a payment of interest and/or principal is due on the Loan, as having been the rate in effect for "high-grade unsecured notes having 90-day maturities, sold through dealers by major corporations in multiples of One Thousand Dollars (\$1,000)" (whether or not such notes have actually been sold by such dealers at such rates) as of the first calendar day of each month, for which such rate is published, adjusted to a per annum rate by applying the following formula:

$$\left(\frac{\text{(Published Rate)}}{4} \right) \text{ times } 1000 = X$$

$$\left(\frac{X}{1000 - X} \right) \text{ times } 4 = \text{"Commercial Paper Rate"}$$

In the event The Wall Street Journal (i) publishes more than any one Prime Rate or Published Rate, the higher or highest of such rates shall apply, or (ii) publishes a retraction or correction of any such rate, the rate reported in such retraction or correction shall apply.

For the Loan Years (as hereinafter defined) indicated, the Contract Index Rate shall not be less than the rate set forth in Column "A" (the "Floor") and shall not exceed the rate set forth in Column "B" (the "Ceiling"):

<u>Loan Year</u>	<u>"A" Floor</u>	<u>"B" Ceiling</u>
Year 1	8.0%	12.75%
Year 2	8.0%	13.0%
Year 3	8.0%	13.5%

There shall be no Floor or Ceiling on the Contract Index Rate during the fourth and fifth Loan Years.

As used herein, "Loan Year" shall mean the period between the date of the Initial Disbursement hereof and July 31, 1989 for the first Loan Year and the period between each succeeding August 1 and July 31 until the Maturity Date.

However, so long as Borrower is making all payments when due under this Note, the Mortgage and the Other Security Documents (without giving effect to grace periods) and is otherwise not in default under this Note, the Mortgage or any of the Other Security Documents, Borrower shall be entitled to defer payment, in any month, of interest in excess of interest computed at the "Applicable

Base Percentage Rate" (as hereinafter defined), so long as the total interest deferred under this Note does not exceed the lesser of ten percent (10%) of the outstanding principal amount of the Loan (excluding capitalized deferred interest) or One Million Eight Hundred Twenty Thousand Dollars (\$1,820,000.00). Such deferred interest (the "Deferred Interest"), including any previously capitalized deferred interest, shall be due and payable, as provided below, if in any subsequent month the Contract Index Rate is less than the Applicable Base Percentage Rate. In such case Borrower shall reduce the outstanding balance of Deferred Interest as of the interest installment due date for such month by an amount equal to the difference between (a) the monthly installment of interest on the then outstanding balance of principal on this Note calculated at the Applicable Base Percentage Rate and (b) the monthly installment of interest on the then outstanding balance of principal on this Note calculated at the Contract Index Rate. The balance of such Deferred Interest shall be due and payable from Net Cash Flow as provided below or upon maturity of the Loan whether by lapse of time, prepayment or acceleration.

The "Applicable Base Percentage Rate" shall mean the following per annum rates of interest, for the Loan Years indicated:

<u>Loan Year</u>	<u>Applicable Base Percentage Rate</u>
Year 1	9.5%
Year 2	9.5%
Year 3	10.0%
Year 4	10.5%
Year 5	10.5%

The remaining balance of Deferred Interest in any month shall automatically be added to the outstanding principal balance of the Loan to accrue interest thereafter at the Contract Index Rate, and to be secured by the Mortgage and the Other Security Documents, and interest shall be payable on such Deferred Interest at the same time and the same rate as other amounts of principal indebtedness as provided herein unless Borrower gives GECC at least ten (10) days written notice prior to the expiration of that month of Borrower's intent to pay any Deferred Interest for that month in full. Notwithstanding anything to the contrary contained herein, Borrower may prepay, in whole or in part, capitalized Deferred Interest at any time and without prepayment premium, provided that such prepayment is made in accordance with the terms of this Note governing prepayments of principal.

In addition to all other obligations of Borrower for the payment of Deferred Interest, on or before January 31, 1989 and January 31 of each succeeding calendar year, Borrower agrees to pay Deferred Interest in an amount equal to the lesser of (i) the amount of Deferred Interest then unpaid, whether or not capitalized, or (ii) fifty percent (50%) of the Net Cash Flow from the Mortgaged Property for the immediately preceding calendar year provided, however, that for calendar year 1988 only Net Cash Flow from and after the date of the Initial Disbursement shall be included. Reference to "Net Cash Flow" shall mean the excess of Operating Revenues over Operating Expenses. The terms

"Operating Revenues" and "Operating Expenses" shall have the following meanings:

(a) "Operating Revenues" shall mean for any specified period the total revenues received by or on behalf of the Borrower or their agents during such period on account of rents (including rent prorations received at the closing) or other cash receipts from any and every source and however derived, arising out of or with respect to the Mortgaged Property; provided that security deposits not applied in satisfaction of a tenant's lease obligations, sales proceeds, insurance proceeds, the proceeds of judgments and/or settlements from litigation except for such of the foregoing arising out of claims for rent, loans, and capital contributions to the Borrower by its partners shall not constitute Operating Revenues.

(b) "Operating Expenses" shall mean the sum of (i) all normal, customary and required expenses (excluding prepaid expenses) incurred and actually paid in connection with the operation and repair of the Mortgaged Property and for which Borrower has not received nor is entitled to receive reimbursement or advance payment from any party; (ii) the payment of interest hereunder at the Applicable Percentage Rate, (iii) bona fide leasing commissions paid to a party not directly or indirectly affiliated with, controlled by or controlling Borrower, its partners or shareholders of said partners; (iv) capital improvements and tenant finish work approved by GECC as an allowable expense, and (v) the payment of Deferred Interest other than on account of the obligation to pay Deferred Interest from Net Cash Flow. The term "Operating Expenses" shall not in any event include (i) depreciation or other non-cash charges, (ii) the refund of security deposits (iii) payment of debt service obligations other than as specified above, (iv) capital expenditures other than as described above, (v) the payment of any expense as to which Borrower received a proration credit upon acquisition of the Mortgaged Property, provided that such proration credit has not been included as Operating Revenue, (vi) repairs for which Borrower obtained a judgment or settlement unless the proceeds thereof are included as Operating Revenues, or (vii) income tax obligations or other taxes not directly incurred in the operation of the Mortgaged Property.

The Net Cash Flow shall be determined by GECC in its sole and absolute discretion at Borrower's expense through an income and expense audit of the Mortgaged Property. The cost of such audit shall be paid to GECC within fifteen (15) days after Borrower shall be notified of the amount due.

All payments due under this Note are payable at GECC's office at P.O. Box 2108, Stamford, Connecticut 06904 or at such other place as GECC or other holder hereof shall notify Borrower in writing.

All payments received by GECC on this Note shall be applied by GECC as follows: first, to the payment of delinquency, or "late" charges, if any; second, to accrued and unpaid interest at the Applicable Base Percentage Rate; third, to accrued and unpaid Deferred Interest; and fourth,

to the reduction of principal, including capitalized Deferred Interest.

This Note may not be prepaid prior to the expiration of the first Loan Year. Thereafter, upon ten (10) days prior written notice to GECC, Borrower may prepay this Note in whole but not in part on any regularly scheduled interest payment due date hereof, by paying GECC the Maturity Obligations, but there shall be no premium or penalty. GECC reserves the right to require any payment on this Note, whether such payment is of a regular installment or represents a prepayment or final payment, to be by wired federal funds or other immediately available funds.

In the event Borrower fails to pay any installment of interest or any principal on this Note for ten (10) days after the same shall become due, whether by acceleration or otherwise, GECC may, at its option, impose a delinquency or late charge on Borrower, payable upon demand, equal to the greater of:

(a) Five percent (5%) per annum in excess of the Contract Index Rate of Interest (exclusive of any Applicable Base Percentage Rate, interest rate ceiling, deferred interest or accrual provision) (the "Delinquency Rate") that would have been applicable to a then current installment as provided for elsewhere in this Note, as if such installment had been made when due, computed from the date such payment was due and payable to the date of receipt of such installment by GECC in good and immediately available funds, or

(b) Five percent (5%) of the amount of such past due payment, notwithstanding the date on which such payment is actually paid to GECC;

provided, however, that if any such late charge under subsections (a) or (b) hereof is not recognized as liquidated damages for such delinquency (as contemplated by Borrower and GECC), and is deemed to be interest in excess of the amount permitted to be charged to Borrower under applicable law, GECC shall be entitled to collect a late charge only at the highest rate permitted by law, and any interest actually collected by GECC in excess of such lawful amount shall be deemed a payment in reduction of the principal amount then outstanding under this Note or accrued and outstanding as Deferred Interest, as provided above, and shall be so applied.

In the event of any conflict between the provisions of this Note and those of the Mortgage, the Other Security Documents or any other agreement relating to the Loan, the provisions of this Note shall govern.

In the event Borrower fails to pay any installment of interest or any principal on this Note for ten (10) days after the same shall become due or upon the happening of any "Event of Default" as defined in the Mortgage or any of the Other Security Documents, then in any such event GECC may at its option declare the entire unpaid balance of this Note, together with interest accrued hereon, to be immediately due and payable and GECC may proceed to exercise any rights or remedies that it may have under the Mortgage, under the Other Security Documents, under this Note or under any other

UNOFFICIAL COPY

agreement relating to the loan or such other rights and remedies which GECC may have at law, equity or otherwise. In the event of such acceleration, Borrower may discharge its obligations to GECC by paying the Maturity Obligations, with interest at the Delinquency Rate accruing from the date such acceleration is declared, plus any applicable prepayment premium, or if no prepayment is then permitted, a prepayment premium equal to five percent (5%) of the unpaid balance of the Loan.

In the event this Note is turned over to an attorney at law for collection after default, in addition to the Maturity Obligations, GECC shall be entitled to collect all costs of collection, including but not limited to reasonable attorneys' fees incurred in connection with protection of or realization of collateral or in connection with any of GECC's collection efforts, whether or not suit on this Note or any foreclosure proceeding is filed, and all such costs and expenses shall be payable on demand and shall also be secured by the Mortgage and the Other Security Documents.

No failure on the part of GECC or other holder hereof to exercise any right or remedy hereunder, whether before or after the happening of a default shall constitute waiver of any further default or of any other default. No failure to accelerate the debt evidenced hereby by reason of default hereunder, or acceptance of a past due installment, or indulgence granted from time to time shall be construed to be a waiver of the right to insist upon prompt payment thereafter or to impose late charges retroactively or prospectively, or shall be deemed to be a novation of this Note or as a reinstatement of the debt evidenced hereby or as a waiver of such right or acceleration or any other right, or be construed so as to preclude the exercise of any right which GECC may have, whether by the laws of the State governing the interpretation of this Note, by agreement or otherwise; and Borrower and each endorser or guarantor hereby expressly waives the benefit of any statute or rule of law or equity which would produce a result contrary to or in conflict with the foregoing. This Note may not be changed orally, but only by an agreement in writing signed by the party against whom such agreement is sought to be enforced.

Borrower, for itself, its heirs, successors and assigns, and each endorser and guarantor of this Note, for its heirs, successors and assigns, hereby waives presentment, protest, demand, diligence, notice of dishonor and of nonpayment, and waives and renounces all rights to the benefits of any statute of limitations and any moratorium, appraisal, exemption and homestead now provided or which may hereafter be provided by any federal or state statute, including but not limited to exemptions provided by or allowed under the Bankruptcy Reform Act of 1978, both as to themselves personally and as to all of its or their property, whether real or personal, against the enforcement and collection of the obligations evidenced by this Note and any and all extensions, renewals and modifications hereof.

It is the intention of the parties to conform strictly to applicable usury laws from time to time in force, and all agreements between Borrower and GECC, whether now existing or hereafter arising and whether oral or

written, are hereby expressly limited so that in no contingency or event whatsoever, whether by acceleration of maturity hereof or otherwise, shall the amount paid or agreed to be paid to GECC or the holder hereof, or collected by GECC or such holder, for the use, forbearance or detention of the money to be loaned hereunder or otherwise, or for the payment or performance of any covenant or obligation contained herein or in the Mortgage or in any Other Security Documents, or in any other document evidencing, securing or pertaining to the indebtedness evidenced hereby, exceed the maximum amount permissible under applicable usury laws. If under any circumstances whatsoever fulfillment of any provision hereof or of the Mortgage or any Other Security Documents, at the time performance of such provision shall be due, shall involve transcending the limit of validity prescribed by law, then ipso facto, the obligation to be fulfilled shall be reduced to the limit of such validity; and if under any circumstances GECC or other holder hereof shall ever receive an amount deemed interest, by applicable law, which would exceed the highest lawful rate, such amount that would be excessive interest under applicable usury laws shall be applied to the reduction of the principal amount owing hereunder or to other indebtedness secured by the Mortgage and not to the payment of interest, or if such excessive interest exceeds the unpaid balance of principal and other indebtedness, the excess shall be deemed to have been a payment made by mistake and shall be refunded to Borrower or to any other person making such payment on Borrower's behalf. All sums paid or agreed to be paid to the holder hereof for the use, forbearance or detention of the indebtedness of Borrower evidenced hereby, outstanding from time to time shall, to the extent permitted by applicable law, be amortized, pro-rated, allocated and spread from the date of disbursement of the proceeds of this Note until payment in full of such indebtedness so that the actual rate of interest on account of such indebtedness is uniform through the term hereof. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between GECC and Borrower and any endorser or guarantor of this Note.

Notwithstanding anything contained herein to the contrary, neither Borrower nor any partner of Borrower, shall be personally liable for the repayment of any of the principal of or interest due under this Note or for any deficiency judgment which GECC may obtain after foreclosure on its collateral after default by Borrower, provided, however, that Borrower and its partners shall not be exonerated or exculpated for any deficiency, loss or damage suffered by GECC as a result of the failure by Borrower to comply with any of the terms or conditions of the Mortgage or any of the Other Security Documents (other than the provisions relating to the payment of principal, interest or late charges), including but not limited to losses resulting from: (i) Borrower's failure to perform its obligations to properly account to GECC as mortgagee for any proceeds of insurance or condemnation proceeds as required by the Mortgage; (ii) Borrower's failure to comply with provisions of the Mortgage prohibiting the sale or further voluntary encumbering of the collateral, partnership interests in Borrower, or shares of stock in any corporate partner of Borrower; (iii) Borrower's attempt to interfere with GECC's rights under the assignment of rents or letters of credit, if any, issued in connection with the loan; (iv) Borrower's

failure to apply proceeds of rents and other income of the collateral toward the costs of maintenance and operation of the Mortgaged Property and to the payment of taxes, lien claims, insurance premiums and debt service and other indebtedness to the extent that the Mortgage or Other Security Documents require such rents and income to be so applied; (v) Borrower's entering into or modifying leases in violation of the provisions of the Mortgage; (vi) Borrower's collection of rentals for periods of more than one month in advance under leases of the Mortgaged Property; (vii) damage or destruction to the Mortgaged Property by, at the direction of, or with the acquiescence of Borrower, including its electrical, plumbing, heating or air conditioning systems or its elevators (provided, however, this subsection shall not impose liability on account of Borrower's negligence); (viii) the receipt by Borrower of monies other than rent in connection with the modification of any existing or future lease or the entering into of a new lease, in violation of the applicable provisions of the Mortgage; (ix) Borrower's failure to pay for any loss, liability, damage, cost or expense (including attorney's fees) incurred by GECC in connection with any order, consent decree, settlement, judgment or verdict arising from the deposit, storage, disposal, burial, dumping, injecting, spilling, leaking, or other placement or release in, on or from the Mortgaged Property of asbestos or a "hazardous substance" as defined in 42 U.S.C. 9601 et seq, as amended from time to time, or any other toxic or hazardous waste or waste products; or (x) the Borrower's failure to pay for any loss, liability or expense (including attorney's fees) incurred by GECC arising out of any claim or allegation made by Borrower, its successors or assigns, or any creditor of Borrower, that this Note or the transactions contemplated hereby establish a joint venture or partnership arrangement between Borrower and GECC; and provided further, that the foregoing limitations on Borrower's personal liability with respect to principal and interest shall not impair the validity of the indebtedness secured by GECC's collateral or the lien on or security interest in the collateral or the right of GECC as mortgagee or secured party to foreclose and/or enforce the collateral after default by Borrower. In the event any person shall have guaranteed all or part of the Loan by separate written guaranty, none of the foregoing limitations on Borrower's personal liability for payment of principal and interest shall modify, diminish or discharge the personal liability of any such guarantor as set forth in any such written guaranty. None of the foregoing limitations on Borrower's personal liability shall modify, diminish or discharge the personal liability of Borrower or any individual under the Indemnity Agreement of even date herewith or under any indemnification provisions of the Mortgage or any of the Other Security Documents. Nothing herein shall be deemed to be a waiver of any right which GECC may have under Sections 506(a), 506(b), 1111(b) or any other provision of the Bankruptcy Reform Act of 1978 to file a claim for the full amount of the debt owing to GECC by Borrower or to require that all collateral shall continue to secure all of the indebtedness owing to GECC in accordance with this Note, the Mortgage and the Other Security Documents.

This Note shall be governed by and construed under the laws of the State of Illinois. Borrower hereby submits to personal jurisdiction in the State of Illinois for the

UNOFFICIAL COPY

enforcement of Borrower's obligations hereunder and under the Mortgage, and waives any and all personal rights under the law of any other state to object to jurisdiction within the State of Illinois for the purposes of litigation to enforce such obligation of Borrower. In the event such litigation is commenced, Borrower agrees that service of process may be made and personal jurisdiction over Borrower obtained, by service of a copy of the summons, litigation upon Borrower's appointed Agent for Service of Process in the State of Illinois, which Agent Borrower hereby designates to be:

Albert Ritchie
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603

IN WITNESS WHEREOF, Borrower intending to be legally bound hereby, has caused this Note to be duly executed under seal the day and year first above written.

RANDOLPH TOWER PARTNERS, an
Illinois general partnership

By: NYL PROPERTIES, INC., a
Delaware corporation, duly
authorized general partner

By: _____

Property of Cook County Clerk's Office

R&S 161700-178
MKB 11/01
07/11/88

UNOFFICIAL COPY 3 2 4 7 6 9

Lot 5 in Block 33 in Original Town of Chicago Section 9,
Township 39 North, Range 14 East of the Third Principal
Meridian, in Cook County, Illinois.

Address of Property: 188 West Randolph Street
Chicago, Illinois

Permanent Index No.: 17-09-433-001-0000

Property of Cook County Clerk's Office

EXHIBIT B

88324760

UNOFFICIAL COPY

1. Repair Wells Street vaulted sidewalk	\$ 45,000
2. Repair Boiler at 21st floor mechanical room	50,000
3. Repair hot water storage tanks	40,000
4. Modernize elevator system	100,000
5. Repair roofs	50,000
6. Upgrade life safety system	115,000
7. Repair terra-cotta and paint windows	125,000
8. Vent the boiler boiler area	5,000
9. Provide battery-powered emergency generator	40,000
10. Provide jockey pump and control panel	10,000
11. Repair pool skylight	11,000
12. Boiler repairs	50,000
13. Repair heating condensate storage tank	40,000
14. Replace perimeter radiation traps allow 30%	30,000
15. Replace domestic water lines allow 30%	36,000
16. New Electric Service	<u>30,000</u>
Subtotal	\$777,000
17. Air Conditioning Modifications at the 26th floor	\$100,000
18. Balance of Life and Safety System upgrade	100,000
19. Common area renovation	240,000
20. Balance of repairing perimeter radiation as spaces become available	80,000
21. Balance of replacing domestic water lines as spaces become available	100,000
22. Miscellaneous items	<u>30,000</u>
Subtotal	\$650,000
TOTAL	\$1,427,000

EXHIBIT C

88324760