

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

county, district, municipal, city or otherwise) whether now or hereafter in existence.

(f) Guarantor (individually and/or collectively, as the context may require): Evanston Galleria Limited Partnership pursuant to that certain Beneficiary's Guaranty of even date herewith (the "Beneficiary's Guaranty") and Arthur Slaven and Laurence Ashkin pursuant to that certain Debt Service Guaranty of even date herewith (the "Debt Service Guaranty").

(g) Guaranty (individually and/or collectively, as the context may require): the Beneficiary's Guaranty and the Debt Service Guaranty.

(h) Impositions: All real estate and personal property taxes, water, gas, sewer, electricity and other utility rates and charges, charges for any easement, license or agreement maintained for the benefit of the Mortgaged Property, and all other taxes, charges and assessments and any interest, costs or penalties with respect thereto, of any kind and nature whatsoever which at any time prior to or after the execution hereof may be assessed, levied or imposed upon the Mortgaged Property or the Rents (as defined in Paragraph 1.1(s) hereinbelow) or the ownership, use, occupancy or enjoyment thereof.

(i) Indebtedness: The principal of, interest on and all other amounts, payments and premiums due under or secured by the Note and the other Security Documents (as defined in Paragraph 1.1(t) hereinbelow) together with and including all other direct and indirect indebtedness now or at any time in the future owing or to be owing by Mortgagor to Mortgagee, regardless of how evidenced or incurred, it being understood that it is contemplated that Mortgagor will become further indebted to Mortgagee in the future; provided, however, in no event shall the total amount of the Indebtedness hereby secured exceed \$16,500,000.00.

(j) Land: The real estate or interest therein described in Exhibit A attached hereto and all rights, titles and interests appurtenant thereto. The property address of the Land is 1700 Sherman Avenue, Evanston, Illinois, and the Permanent Real Estate Tax Number is 11-18-126-013.

(k) Leases: Any and all leases, subleases, licenses, concessions or other agreements (written or verbal, now or hereafter in effect) which grant a possessory interest in and to, or the right to use, the Mortgaged Property, save and except any and all leases, subleases or other agreements pursuant to which Mortgagor is granted a possessory interest in the Land.

(l) Legal Requirements: (i) Any and all present and future judicial decisions, statutes, rulings, rules, regulations, permits, certificates or ordinances of any Governmental Authority in any way applicable to Mortgagor, any Guarantor or the Mortgaged Property, including the ownership, use, occupancy, operation, maintenance, repair or reconstruction thereof, (ii) Mortgagor's or any Guarantor's presently or subsequently effective Bylaws and Articles of Incorporation, Partnership, Limited Partnership, Joint Venture, Trust or other forms of business association (if either, both or all be any of same), (iii) any and all Leases, and (iv) any and all leases and other contracts (written or oral) of any nature to which Mortgagor or any Guarantor may be bound.

(m) Mortgaged Property: The Land, Buildings, Fixtures, Personalty (as defined in Paragraph 1.1(r) hereinbelow) and Rents (as defined in Paragraph 1.1(s) hereinbelow), together with:

89154856

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

(i) all rights, privileges, tenements, hereditaments, rights-of-way, easements, appendages and appurtenances in anywise appertaining thereto, and all right, title and interest of Mortgagor in and to any streets, ways, alleys, strips or gores of land adjoining the Land or any part thereof; and

(ii) all additions, appurtenances, substitutions, replacements and revisions thereof and thereto and all reversions and remainders therein; and

(iii) all of Mortgagor's right, title and interest in and to any award, awards, remuneration, settlements or compensation heretofore made or hereafter to be made by any Governmental Authority to the present or any subsequent owner of the Land, Buildings, Fixtures or Personalty, including those for any vacation of, or change of grade in, any streets affecting the Land or the Buildings;

(iv) all water rights; and

(v) any and all other security and collateral of any nature whatsoever, now or hereafter given for the repayment of the Indebtedness or the performance and discharge of the Obligations.

As used in this Mortgage and Security Agreement, the term "Mortgaged Property" shall be expressly defined as meaning all, or where the context permits or requires, any portion of the above and all or, where the context permits or requires, any interest therein.

(n) Mortgagor: The above defined Mortgagor and any and all subsequent owners of the Mortgaged Property (as defined in Paragraph 1.1(m) above).

(o) Note: The promissory note of even date herewith, executed by Mortgagor, payable to the order of Mortgagee in the amount of EIGHT MILLION TWO HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS (\$8,250,000.00), due on May 1, 1996, and secured, in part, by this Mortgage and Security Agreement.

(p) Obligations: Any and all of the covenants, warranties, representations and other obligations (other than to repay the Indebtedness) made or undertaken by Mortgagor, Guarantor or others to Mortgagee or others as set forth in the Security Documents or any lease, sublease or other agreement pursuant to which Mortgagor is granted a possessory interest in the Land.

(q) Permitted Encumbrances: The outstanding liens, easements, building lines, restrictions, security interests and other matters (if any) as reflected on Exhibit B attached hereto and the lien and security interests created by the Security Documents.

(r) Personalty: All of the right, title and interest of Mortgagor in and to all furniture, furnishings, equipment, machinery, goods, general intangibles, money, accounts [including, without limitation, the "Escrow Deposit" (as defined in that one certain Escrow Agreement (Tenant Finish Out) of even date herewith by and between Mortgagor, Mortgagee and Chicago Title & Trust Company)], contract rights, inventory and all other personal property (other than the Fixtures) of any kind or character as defined in and subject to the provisions of the Uniform Commercial Code of the state in which the Land is located, now or hereafter located upon, within or about the Land

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

and/or the Buildings, together with all accessories, replacements and substitutions thereto or therefor and the proceeds thereof.

(s) Rents: All of the rents, revenues, income, proceeds, profits and other benefits paid or payable by parties to the Leases other than Mortgagor for using, leasing, licensing, possessing, operating from, residing in, selling or otherwise enjoying the Mortgaged Property.

(t) Security Documents: The Note, this Mortgage and Security Agreement, the Guaranty and any and all other documents now or hereafter executed by Mortgagor, Guarantor or any other person or party to evidence or secure the payment of the Indebtedness or the performance and discharge of the Obligations.

ARTICLE 2 GRANT

2.1 Grant: To secure the full and timely payment of the Indebtedness and the full and timely performance and discharge of the Obligations, Mortgagor by these presents does mortgage, grant, remise, alien, convey and warrant unto Mortgagee, its successors and assigns, the Mortgaged Property, subject, however, to the Permitted Encumbrances.

ARTICLE 3 WARRANTIES AND REPRESENTATIONS

Mortgagor hereby unconditionally warrants and represents to Mortgagee as follows:

3.1 Validity of Loan Instruments: The execution, delivery and performance by Mortgagor of the Security Documents (other than the Guaranty) and the borrowing evidenced by the Note, (a) if Mortgagor is a corporation, are within Mortgagor's corporate powers and have been duly authorized by Mortgagor's Board of Directors, shareholders and all other requisite corporate action, (b) have received all (if any) requisite prior governmental approval in order to be legally binding and enforceable in accordance with the terms thereof, and (c) will not violate, be in conflict with, result in a breach or constitute (with due notice or lapse of time, or both) a default under, any Legal Requirement or result in the creation or imposition of any lien, charge or encumbrance of any nature whatsoever upon any of Mortgagor's or Guarantor's property or assets, except as contemplated by the provisions of the Security Documents. The Security Documents constitute the legal, valid and binding obligations of Mortgagor, Guarantor and others obligated under the terms of the Security Documents, in accordance with their respective terms.

3.2 Title to Mortgaged Property and Lien of This Instrument: Mortgagor has good and marketable title to the Land and is well seized of the Land (in fee simple, if the lien created hereunder be on the fee, or a first and prior leasehold estate, if it be created on the leasehold estate) and Buildings, and good and marketable title to the Fixtures and Personalty, free and clear of any liens, charges, encumbrances, security interests and adverse claims whatsoever except the Permitted Encumbrances. This Mortgage and Security Agreement constitutes a valid, subsisting, first lien mortgage on the Land, the Buildings and the Fixtures and a valid, subsisting, first security interest in and to the Personalty, Leases and Rents, all in accordance with the terms hereof.

89154856

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

ARTICLE 4 AFFIRMATIVE COVENANTS

Mortgagor hereby unconditionally covenants and agrees with Mortgagee as follows:

4.1 Payment and Performance: Mortgagor will pay the Indebtedness, as and when called for in the Security Documents and on or before the due dates thereof, and will perform all of the Obligations, in full and on or before the dates same are to be performed.

4.2 Compliance with Legal Requirements: Mortgagor will promptly and faithfully comply with, conform to and obey all present and future Legal Requirements.

4.3 Payment of Impositions: Mortgagor will duly pay and discharge or cause to be paid and discharged, the Impositions not later than the due date thereof, or the day any fine, penalty, interest or cost may be added thereto or imposed, or the day any lien may be filed, for the non-payment thereof (if such day is used to determine the due date of the respective item); provided, however, that Mortgagor may, if permitted by law and if such installment payment would not create or permit the filing of a lien against the Mortgaged Property, pay the Impositions in installments whether or not interest shall accrue on the unpaid balance of such Impositions.

4.4 Repair: Mortgagor will keep the Mortgaged Property in first class order and condition and will make all repairs, replacements, additions, improvements and alterations thereof and thereto, interior and exterior, structural and non-structural, which are necessary or reasonably appropriate to keep same in such order and condition.

4.5 Insurance: Mortgagor will obtain and maintain insurance upon and relating to the Mortgaged Property insuring against personal injury and death, loss by fire and such other hazards, casualties and contingencies (including business interruption insurance covering loss of Rents) as are normally and usually covered by extended coverage policies in effect where the Land is located and such other risks as may be specified by Mortgagee, from time to time, all in such amounts and with such insurers of recognized responsibility as are acceptable to Mortgagee. Each insurance policy issued in connection therewith shall provide by way of endorsements, riders or otherwise that (a) proceeds will be payable to Mortgagee as its interest may appear, it being agreed by Mortgagor and Mortgagee that such payments shall be applied (i) if there be no Event of Default existing or which would exist but for due notice or lapse of time, or both, to the restoration, repair or replacement of the Mortgaged Property, or (ii) if there be an Event of Default existing, or which would exist but for due notice or lapse of time, or both, at the option of the Mortgagee, either for the above stated purpose or toward the payment of the Indebtedness; (b) the coverage of Mortgagee shall not be terminated, reduced or affected in any manner regardless of any breach or violation by Mortgagor of any warranties, declarations or conditions in such policy; (c) no such insurance policy shall be cancelled, endorsed, altered or reinsured to effect a change in coverage for any reason and to any extent whatsoever unless such insurer shall have first given Mortgagee thirty (30) days' prior written notice thereof; and (d) Mortgagee may, but shall not be obligated to, make premium payments to prevent any cancellation, endorsement, alteration or reissuance and such payments shall be accepted by the insurer to prevent same. Mortgagee shall be furnished with the original of each such initial policy coincident with the

89154856

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

execution of this Mortgage and Security Agreement and the original of each renewal policy not less than thirty (30) days prior to the expiration of the initial or each preceding renewal policy together with receipts or other evidence that the premiums thereon have been paid.

Mortgagor agrees to secure and maintain rental insurance covering the gross rental of the Mortgaged Property for such period of time which Mortgagee may require during which any part of the Mortgaged Property hereby covered is not tenantable as result of damage insured against under the fire and extended coverage insurance. Such rental insurance shall be initially for a period of twelve (12) months in the amount of \$83,333.33 per month.

All policies to be maintained under this Mortgage are to be issued by companies acceptable to Mortgagee, having a Best's Insurance Guide Rating of A, Class XII or higher and are to contain an acceptable form of mortgage clause payable to the holder of the Indebtedness hereby secured. Mortgagor shall maintain insurance in an amount sufficient to prevent Mortgagee from becoming a co-insurer under any policy required hereunder.

If any portion of the Mortgaged Property is situated in an area or subsequently designated as having flood hazards, as defined by the Flood Disaster Act of 1973, as amended from time to time, Mortgagee may require Flood Insurance in an amount equal to the replacement cost of the Buildings or the maximum amount of flood insurance available, whichever is the lesser.

4.6 Restoration Following Casualty: If any act or occurrence of any kind or nature (including any casualty for which insurance was not obtained or obtainable) shall result in damage to or loss or destruction of the Mortgaged Property, Mortgagor will give notice thereof to Mortgagee and, if so instructed by Mortgagee, will promptly, at Mortgagor's sole cost and expense and regardless of whether the insurance proceeds (if any) shall be sufficient for the purpose, commence and continue diligently to completion to restore, repair, replace and rebuild the Mortgaged Property as nearly as possible to its value, condition and character immediately prior to such damage, loss or destruction.

4.7 Performance of Leases: Mortgagor will (a) duly and punctually perform and comply with any and all representations, warranties, covenants and agreements expressed as binding upon it under each of the Leases, (b) not voluntarily terminate, cancel or waive its rights or the obligations of any other party under any of the Leases, (c) use all reasonable efforts to maintain each of the Leases in force and effect during the full term thereof; and (d) appear in and defend any action or proceeding arising under or in any manner connected with any of the Leases or the representations, warranties, covenants and agreements of it or the other party or parties thereto.

4.8 Inspection: Mortgagor will permit Mortgagee and its agents, representatives and employees, to inspect the Mortgaged Property at all reasonable times.

4.9 Hold Harmless: Mortgagor will defend, at its own cost and expense, and hold Mortgagee harmless from, any action, proceeding or claim affecting the Mortgaged Property or the Security Documents, and all costs and expenses incurred by Mortgagee in protecting its interests hereunder in such an event (including all court costs and attorneys' fees, appellate, as well as trial level) shall be borne by Mortgagor.

89154855

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

4.10 Books and Records: Beneficiary will maintain full and accurate books of account and other records reflecting the results of its operations, and will furnish or cause to be furnished to Mortgagee, within one hundred twenty (120) days after the end of Beneficiary's fiscal year, annual financial statements, including an operating statement, balance sheet, and rent roll prepared by a certified public accountant selected by Beneficiary but acceptable to Mortgagee and certified by an officer of Beneficiary, stating in reasonable detail the income and expenses of the operation of the Mortgaged Property, and listing the tenants in occupancy, their leased area, lease term, annual rental, and annual sales, if applicable. At any time and from time to time Beneficiary shall deliver to Mortgagee such other financial data as Mortgagee shall reasonably request with respect to the ownership, maintenance, use and operation of the Mortgaged Property, and Mortgagee shall have the right, at reasonable times and upon reasonable notice, to audit Beneficiary's books of account and records relating to the Mortgaged Property, all of which shall be maintained and made available to Mortgagee and Mortgagee's representatives for such purpose on the Mortgaged Property or at such other location as Mortgagee may approve.

Notwithstanding the foregoing, until the earlier to occur of (i) an Event of Default hereunder or (ii) such time as Mortgagee shall give notice to the contrary to Mortgagor, any financial statements or other financial information described in this Paragraph 4.10 need not be audited and may be prepared and certified to be true and correct by the general partner of Beneficiary, rather than by a certified public accountant.

ARTICLE 5 NEGATIVE COVENANTS

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

5.1 Use Violations: Mortgagor will not use, maintain, operate or occupy, or allow the use, maintenance, operation or occupancy of, the Mortgaged Property in any manner which (a) violates any Legal Requirement, (b) may be dangerous unless safeguarded as required by law, (c) constitutes a public or private nuisance or (d) makes void, voidable or cancellable, or increases the premium of, any insurance then in force with respect thereto.

5.2 Alterations: Mortgagor will not commit or permit any waste of the Mortgaged Property and will not (subject to the provisions of Paragraphs 4.4 and 4.6 hereinabove) without the prior written consent of Mortgagee make or permit to be made any alterations or additions to the Mortgaged Property of a material nature.

5.3 Replacement of Fixtures and Personalty: Mortgagor will not, without the prior written consent of Mortgagee, permit any of the Fixtures or Personalty to be removed at any time from the Land or Buildings unless the removed item is removed temporarily for maintenance and repair or, if removed permanently, is replaced by an article of equal suitability and value, owned by Mortgagor, free and clear of any lien or security interest except such as may be first approved in writing by Mortgagee.

5.4 No Further Encumbrances: Except for a "Subordinated Second Lien Note" and the "Junior Indebtedness" (as such quoted

89154856

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

terms are hereinafter defined), to the extent permitted by law, Mortgagor or Beneficiary will not, without the prior written consent of Mortgagee, create, place or permit to be created or placed, or through any act or failure to act, acquiesce in the placing of, or allow to remain, any mortgage, pledge, lien (statutory, constitutional or contractual), security interest, encumbrance or charge, or conditional sale or other title retention agreement, regardless of whether same are expressly subordinate to the liens of the Security Documents, with respect to the Mortgaged Property, the Leases or the Rents, other than the Permitted Encumbrances.

Notwithstanding the foregoing paragraph, so long as (i) no Event of Default exists hereunder or under the Security Documents or circumstances which, with the passage of time or giving of notice or both, would constitute an Event of Default, and (ii) Evanston Galleria Limited Partnership (not any successor to Evanston Galleria Limited Partnership) owns one hundred percent (100%) of the legal and beneficial title to the Mortgaged Property, Mortgagee shall not arbitrarily or without cause withhold consent to a request by Mortgagor or Beneficiary to encumber the Mortgaged Property to secure a promissory note conforming to the requirements set forth herein (a "Subordinated Second Lien Note"), subject to and upon the following terms and conditions:

- (1) Not less than thirty (30) days prior to the date that Mortgagor or Beneficiary anticipate executing such Subordinated Second Lien Note, Mortgagor or Beneficiary shall make written request for Mortgagee's approval thereof, which request shall be accompanied by true and correct copies of the proposed Subordinated Second Lien Note, deed of trust and all other documents relating to such proposed Subordinated Second Lien Note the payee, terms and forms of which shall be subject to approval by Mortgagee prior to execution thereof by Mortgagor or Beneficiary;
- (2) The original principal balance of the Subordinated Second Lien Note shall not exceed \$250,000.00;
- (3) The holder of the Subordinated Second Lien Note shall execute and deliver to Mortgagee a subordination agreement fully and unconditionally subordinating the liens securing payment thereof to the liens of this Mortgage and Security Agreement and to the leases which are collaterally assigned to Mortgagee pursuant to that certain Assignment of Lessor's Interest in Leases of even date herewith from Beneficiary to Mortgagee, the form and substance of such subordination agreement to be satisfactory to Mortgagee; and
- (4) Mortgagor or Beneficiary shall pay all costs and expenses incurred by Mortgagee in connection with such Subordinated Second Lien Note, including, without limitation, reasonable attorneys' fees.

For purposes hereof, the phrase "Junior Indebtedness" shall refer to that certain mortgage note dated December 10, 1986 in the original principal amount of \$6,223,000.00, which Junior Indebtedness is more particularly described in that certain Consent to Junior Liens and Subordination Agreement of even date herewith by and among Mortgagor, Mortgagee and Republic Savings Bank, F.S.B. (the "Subordination Agreement") which Junior Indebtedness is secured by the "Junior Liens" (as defined in the Subordination Agreement).

89154856

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

5.5 No Sales, Leases or Other Transfers: Mortgagor expressly agrees that in the event that Mortgagor, without the prior written consent of Mortgagee, sells, exchanges, assigns or otherwise disposes of all or any portion of the Mortgaged Property or contracts to sell, exchange, assign or otherwise dispose of all or any portion of the Mortgaged Property or (except with respect to "Non-Credit Leases," as hereinafter defined) rents or leases any of the Mortgaged Property for any period in excess of one (1) year, Mortgagee, to the extent permitted by law, shall have the right and option to declare the entire amount of the Indebtedness immediately due and payable. Any sale, transfer, pledge, or other disposition of the beneficial interest in Mortgagor or any sale, transfer, pledge or other disposition of any of the stock of Beneficiary (if Beneficiary is a corporation), or any sale, transfer, pledge or other disposition of any of the partnership or joint venture interests in the Beneficiary (if Beneficiary is a partnership or joint venture), shall be deemed to be within the prohibition contained within this paragraph and shall require the prior written consent of Mortgagee. The right and option granted hereunder, to the extent permitted by law, shall be absolute, irrespective of whether or not the sale, exchange, assignment or transfer would or might (i) diminish the value of the security for the Indebtedness, (ii) result in an Event of Default hereunder, (iii) compel the holder hereof to seek any remedies available to it, whether at law or in equity, or (iv) add or remove the liability of any person or entity for payment or performance of the Indebtedness or any covenant or obligation under this Mortgage and Security Agreement.

In order to exercise such right and option, Mortgagee shall give written notice to the Mortgagor or Beneficiary, as the case may be, and to the party to whom such property was conveyed that the maturity of the Indebtedness has been accelerated and demand full payment thereof. Mortgagee's right and option hereunder may be exercised at any time for a period of one year following the later to occur of (x) the date the prohibited event shall have occurred or (y) the date actual notice thereof is given to Mortgagee. Mortgagor's failure to pay the Indebtedness within thirty (30) days after the giving of such notice of acceleration to Mortgagor shall constitute an Event of Default under this Mortgage and Security Agreement.

If Mortgagor or Beneficiary requests Mortgagee's consent to a proposed transfer, conveyance or further hypothecation hereof, Mortgagee shall have the right (in addition to its absolute right to refuse to consent to any such transaction, to the extent permitted by law) to condition its consent upon satisfaction of any one or more of the following:

- (a) That the interest rate on the note secured by this Mortgage and Security Agreement be increased to a rate acceptable to Mortgagee, provided said interest rate does not exceed the maximum lawful rate permitted by applicable usury laws;
- (b) That Mortgagor or Beneficiary pay a transfer fee, in an amount determined by Mortgagee in its sole discretion;
- (c) That Mortgagor make a principal reduction, in an amount to be determined by Mortgagee, upon the note hereby secured;
- (d) That Mortgagor, Beneficiary, and each proposed transferee execute any and all instruments as Mortgagee shall require.

89154856

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

- (e) That the party to whom such property is conveyed assume personal liability upon the obligations hereby secured.

The foregoing provisions of this Paragraph 5.5 (including, without limitation, items (a) through (e) set forth above) are for the purpose of:

- (1) Protecting Mortgagee's security, both of repayment of the Indebtedness and value of the Mortgaged Property;
- (2) Giving the Mortgagee the full benefit of its bargain with Mortgagor; and
- (3) Keeping the Mortgaged Property and beneficial interest in Mortgagor free of subordinate financing or security interests.

Notwithstanding any provision to the contrary contained in this Mortgage, so long as there is no Event of Default existing under the Security Documents (or circumstances which, with the giving of notice or passage of time, or both, would constitute such an Event of Default), upon at least thirty (30) days' prior written notice to Mortgagee accompanied by the terms and conditions of the proposed transfer(s), Mortgagee will not arbitrarily or without cause withhold consent to proposed transfer(s) of any beneficial interests in Beneficiary to the members of the immediate families of Arthur Slaven or Laurence Ashkin (meaning the spouses, children, siblings and parents of either such parties) provided that:

- (a) Mortgagor, Beneficiary, and such transferee(s) shall execute any and all documents Mortgagee may require in connection with such transfer(s);
- (b) In connection with any such proposed transfer(s), Mortgagee shall not have the right to alter or amend the terms of the repayment of the Indebtedness; however, such proposed transferee(s) shall execute any such instruments as Mortgagee may reasonably require to evidence such transaction (so long as, as aforesaid, the terms of repayment of the Indebtedness are not altered or amended thereby); and
- (c) Mortgagor or Beneficiary shall pay all costs and expenses incurred by Mortgagee in connection with such transfer(s), including, without limitation, reasonable attorney's fees and a reasonable transfer fee to defray the internal costs of Mortgagee in connection with any such transfer(s).

Additionally, notwithstanding any provision to the contrary contained in this Mortgage, provided that (i) there is no Event of Default hereunder or circumstances which, with the passing of time, giving of notice, or both, would constitute such an Event of Default, and (ii) Mortgagor or Beneficiary shall have delivered, or caused to be delivered to Mortgagee within thirty (30) days following any such transfer a current certificate identifying the names and addresses of all limited partners of Beneficiary, the transfer of up to an aggregate of twenty-five percent (25%) of the limited partnership interests in Beneficiary shall not constitute a sale or transfer of the Mortgaged Property for purposes of this Paragraph 5.5.

Finally, notwithstanding any provision to the contrary contained in this Mortgage, provided that (i) there is no Event

89154855

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

of Default hereunder or circumstances which, with the passing of time, giving of notice, or both, would constitute such an Event of Default, (ii) First Dearborn Evanston Associates Limited Partnership is controlled directly by Bruce Block and/or Robert Ross, and (ii) Mortgagor or Beneficiary shall have delivered, or caused to be delivered to Mortgagee within thirty (30) days following any such transfer a current certificate identifying the names and addresses of all limited partners of First Dearborn Evanston Associates Limited Partnership, the transfer of limited partnership interests in First Dearborn Evanston Associates Limited Partnership shall not constitute a sale or transfer of the Mortgaged Property for purposes of this Paragraph 5.5. The term "controlled by," as used in this Paragraph 5.5, shall mean that Bruce Block and/or Robert Ross shall own sufficient beneficial interests of such entity to direct the policies, procedures and operations of such entity pursuant to its organizational documents and applicable law.

Notwithstanding the foregoing, Mortgagor may, without Mortgagee's prior consent, enter into "Non-Credit Leases" (as hereinafter defined) and, having entered into any such Non-Credit Lease, may thereafter modify, alter, amend, terminate or otherwise deal with the Non-Credit Lease and the lessee thereunder in the ordinary course of business and in accordance with prudent management practices without Mortgagee's prior consent. For purposes hereof the phrase "Non-Credit Lease" shall refer to leases covering all or any portion of the Buildings which are (i) on a form of lease previously approved in writing by Mortgagee, (ii) for a term (including renewal options) of less than three (3) years, (iii) cover an area (including expansion options) of less than three thousand (3,000) square feet of floor area), and (iv) provide for a rental rate of no less than \$20.00 per square foot.

5.6 No Change in Occupancy: Mortgagor will not suffer or permit any change in the general nature of occupancy of the Mortgaged Property without Mortgagee's prior written consent.

5.7 No Zoning Changes: Mortgagor shall not initiate or acquiesce in any zoning reclassification or variance without the Mortgagee's prior written consent.

ARTICLE 6 EVENTS OF DEFAULT

The term "Event of Default", as used in the Security Documents, shall mean the occurrence or happening, at any time and from time to time of any one or more of the following:

6.1 Payment of Indebtedness: If Mortgagor shall fail, refuse or neglect to pay, in full, any installment or portion of the Indebtedness as and when the same shall become due and payable, whether at the due date thereof stipulated in the Security Documents, or at a date fixed for prepayment or by acceleration or otherwise.

6.2 Performance of Obligations: If Mortgagor shall fail, refuse or neglect to perform and discharge fully and timely any of the Obligations as and when called for and such failure, refusal or neglect shall either be uncurable or, if curable, shall remain uncured for a period of fifteen (15) days after written notice thereof from Mortgagee to Mortgagor; provided, however, that if such default is curable but requires work to be performed, acts to be done or conditions to be remedied which, by their nature, cannot be performed, done or remedied, as the case may be, within such fifteen (15) day period, no Event of Default

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

shall be deemed to have occurred if Mortgagor commences same within such fifteen (15) day period and thereafter diligently and continuously prosecutes the same to completion within one hundred twenty (120) days after such notice.

6.3 False Representation: If any representation or warranty made by Mortgagor, Guarantor or others in, under or pursuant to the Security Documents shall be false or misleading in any material respect.

6.4 Voluntary Bankruptcy: If Mortgagor, Beneficiary or any Guarantor shall (a) voluntarily be adjudicated a bankrupt or insolvent, (b) seek, consent to or not contest the appointment of a receiver or trustee for itself or himself or for all or any part of its or his property, (c) file a petition seeking relief under the bankruptcy, arrangement, reorganization or other debtor relief laws of the United States or any state or any other competent jurisdiction, (d) make a general assignment for the benefit of its or his creditors, or (e) admit in writing its or his inability to pay its or his debts as they mature.

6.5 Involuntary Bankruptcy: If (a) a petition is filed against Mortgagor, Beneficiary or any Guarantor seeking relief under the bankruptcy, arrangement, reorganization or other debtor relief laws of the United States or any state or other competent jurisdiction, or (b) a court of competent jurisdiction enters an order, judgment or decree appointing, without the consent of Mortgagor, Beneficiary or any Guarantor, a receiver or trustee for it or him, or for all or any part of its or his property, and such petition, order, judgment or decree shall not be and remain discharged or stayed within a period of sixty (60) days after its entry.

6.6 Dissolution or Change of Ownership (Applicable to Corporate Mortgagor or Beneficiary): If Mortgagor or Beneficiary shall dissolve or liquidate, or merge with or be consolidated into any other corporation, or shall attempt to do any of the same.

6.7 Destruction of Improvements: If the Mortgaged Property is so demolished, destroyed or substantially damaged so that (in Mortgagee's judgment) it cannot be restored or rebuilt with available funds to a profitable condition within a reasonable period of time.

6.8 Foreclosure of Other Liens: If the holder of any lien or security interest on the Mortgaged Property (without hereby implying Mortgagee's consent to the existence, placing, creating or permitting of any such lien or security interest) institutes foreclosure or other proceedings for the enforcement of its remedies thereunder.

6.9 Release of Junior Liens: If the Junior Liens are not released and discharged as provided in Paragraph 10.26, below, on or before ninety (90) days from the date hereof.

ARTICLE 7 DEFAULT AND FORECLOSURE

7.1 Remedies: If an Event of Default shall occur, Mortgagee may, at Mortgagee's election, exercise any or all of the following rights, remedies and recourses:

(a) Acceleration: Declare the Principal Balance (defined hereby as meaning the then unpaid principal balance on the Note), the accrued interest and any other accrued but unpaid

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

portion of the Indebtedness to be immediately due and payable, without further notice, presentment, protest, demand or action of any nature whatsoever (each of which hereby is expressly waived by Mortgagor), whereupon the same shall become immediately due and payable.

(b) Entry on Mortgaged Property: Enter upon the Mortgaged Property and take exclusive possession thereof and of all books, records and accounts relating thereto. If Mortgagor or any Beneficiary remains in possession of all or any part of the Mortgaged Property after an Event of Default and without Mortgagee's prior written consent thereto, Mortgagee may invoke any and all legal remedies to dispossess Mortgagor and Beneficiary, including specifically one or more actions for forcible entry and detainer, trespass to try title and writ of restitution. Nothing contained in the foregoing sentence shall, however, be construed to impose any greater obligation or any prerequisites to acquiring possession of the Mortgaged Property after an Event of Default than would have existed in the absence of such sentence.

(c) Operation of Mortgaged Property: Hold, lease, manage, operate or otherwise use or permit the use of the Mortgaged Property either itself or by other persons, firms or entities, in such manner, for such time and upon such other terms as Mortgagee may deem to be prudent and reasonable under the circumstances (making such repairs, alterations, additions and improvements thereto and taking any and all other action with reference thereto, from time to time, as Mortgagee shall deem necessary or desirable), and apply all Rents and other amounts collected by Mortgagee in connection therewith in accordance with the provisions of Paragraph 7.7 hereinbelow.

(d) Foreclosure and Sale: Foreclose the lien hereof for the Indebtedness or the part thereof that is due and payable. In any suit to foreclose the lien hereof, there shall be allowed and included as additional indebtedness in the decree for sale all expenditures and expenses which may be paid or incurred by or on behalf of Mortgagee for attorneys' fees, appraiser's fees, outlays for documentary and expert evidence, stenographers' charges, publication cost 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, torrens' certificates and similar data and assurances with respect to the title as Mortgagee may deem necessary either to prosecute such suit or to evidence to bidders at any sale which may be had pursuant to such decree the true condition of the title to or the value of the Mortgaged Property. All expenditures and expenses of the nature in this paragraph mentioned and such expenses and fees as may be incurred in the protection of the Mortgaged Property and the maintenance of the lien of this Mortgage and Security Agreement, including the fees of any attorneys employed by Mortgagee in any litigation or proceeding affecting this Mortgage and Security Agreement, the Note or the Mortgaged Property, including appellate, 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 Mortgagor, with interest thereon at the default rate of interest as set forth in the Note and shall be secured by this Mortgage and Security Agreement.

(e) Appointment of a Receiver: Upon, or at any time after, the filing of a complaint to foreclose this Mortgage and Security Agreement, the court in which such complaint is filed may appoint a receiver of the Mortgaged Property. Such appointment may be made either before or after sale, without notice,

89154855

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

without regard to the solvency or insolvency of Mortgagor at the time of application for such receiver and without regard to the then value of the Mortgaged Property whether the same shall be then occupied as a homestead or not, and 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 Mortgaged Property during the pendency of such foreclosure suit, and in the case of a sale and deficiency during the full statutory period of redemption, whether there by redemption or not, as well as during any further times that Mortgagor, except for the intervention of such receiver, would be entitled to collect 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 Mortgaged Property during the whole of said period.

(f) Other: Exercise any and all other rights, remedies and recourses granted under the Security Documents or now or hereafter existing in equity, at law, by virtue of statute or otherwise.

7.2 Prepayment: In the event the Mortgagee shall:

- (a) At any time during the period beginning upon the date hereof and ending on the last day of the fifth (5th) Loan Year (as defined in the Note hereby secured and described in this Mortgage and Security Agreement), come into possession of any proceeds resulting from an acceleration of the Indebtedness secured hereby, such tender shall be deemed to be a voluntary payment under the Note and consequently there shall be added to the outstanding unpaid principal sum of the Note hereby secured a prepayment fee equal to the lesser of (x) the maximum nonusurious rate that may be charged by applicable laws from time to time in effect taking into account all other sums received, charged or contracted for by Mortgagee which are interest or are deemed interest by applicable laws or (y) four percent (4%) of the prepayment, as additional indebtedness immediately due and payable thereunder and secured by this Mortgage and Security Agreement and other instruments given as security for the Indebtedness evidenced hereby.
- (b) At any time during the period beginning upon the first day of the sixth (6th) Loan Year and ending at the end of the seventh (7th) Loan Year come into possession of any proceeds resulting from an acceleration of the Indebtedness secured hereby or from a foreclosure of the Mortgaged Property pursuant to this Mortgage and Security Agreement, such tender shall be deemed to be a voluntary payment under the Note and consequently there shall be added to the outstanding unpaid principal sum of the Note hereby secured a prepayment fee equal to the lesser of (x) the maximum nonusurious rate that may be charged by applicable laws from time to time in effect taking into account all other sums received, charged or contracted for by Mortgagee which are interest or deemed interest by applicable laws or (y) 2% of the prepayment if paid during the the sixth (6th) Loan Year, 1% of the prepayment if paid during the first 275 days of the 7th Loan Year, with no prepayment due and payable if paid during the last 90 days of the 7th Loan Year.

Each such prepayment fee or premium referred to in this Paragraph 7.2 shall be applicable in the event of any payment of the unpaid principal sum prior to the stated

89154855

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

maturity thereof, whether resulting from a permissible voluntary prepayment (partial or in full), acceleration of maturity, application of insurance or condemnation proceeds, tender prior to foreclosure, foreclosure, or otherwise.

7.3 Remedies Cumulative, Concurrent and Non-Exclusive: Mortgagee shall have all rights, remedies and recourses granted in the Security Documents and available at law or equity (including specifically those granted by the Uniform Commercial Code in effect and applicable to the Mortgaged Property, or any portion thereof), and same (a) shall be cumulative and concurrent, (b) may be pursued separately, successively or concurrently against Mortgagor, any Guarantor or others obligated under the Note, or against the Mortgaged Property, or against any one or more of them, at the sole discretion of Mortgagee, (c) may be exercised as often as occasion therefor shall arise, it being agreed by Mortgagor that the exercise or failure to exercise any of same shall in no event be construed as a waiver or release thereof or of any other right, remedy or recourse, and (d) are intended to be, and shall be, non-exclusive.

7.4 Release of and Resort to Collateral: Mortgagee may release, regardless of consideration, any part of the Mortgaged Property without, as to the remainder, in any way impairing, affecting, subordinating or releasing the lien or security interests created in or evidenced by the Security Documents or their stature as a first and prior lien and security interest in and to the Mortgaged Property. For payment of the Indebtedness, Mortgagee may resort to any other security therefor held by Mortgagee in such order and manner as Mortgagee may elect.

7.5 Waiver of Redemption, Notice and Marshalling of Assets: To the fullest extent permitted by law, Mortgagor hereby irrevocably and unconditionally waives and releases (a) all benefits that might accrue to Mortgagor by virtue of any present or future law exempting the Mortgaged Property from attachment, levy or sale on execution or providing for any appraisal, valuation, stay of execution, exemption from civil process, redemption or extension of time for payment, (b) all notices of any Event of Default (except as may be provided for in Paragraph 6.2 hereinabove) or of Mortgagee's election to exercise or its actual exercise of any right, remedy or recourse provided for under the Security Documents, and (c) any right to a marshalling of assets or a sale in inverse order of alienation. Mortgagor does hereby expressly waive any and all rights of redemption from sale under any order or decree of foreclosure of this Mortgage and Security Agreement on behalf of Mortgagor, the trust estate and all persons beneficially interested therein and each and every person acquiring any interest in or title to the Mortgaged Property subsequent to the date of this Mortgage and Security Agreement.

7.6 Discontinuance of Proceedings: In case Mortgagee shall have proceeded to invoke any right, remedy or recourse permitted under the Security Documents and shall thereafter elect to discontinue or abandon same for any reason, Mortgagee shall have the unqualified right so to do and, in such an event, Mortgagor and Mortgagee shall be restored to their former positions with respect to the Indebtedness, the Obligations, the Security Documents, the Mortgaged Property and otherwise, and the rights, remedies, recourses and powers of Mortgagee shall continue as if same had never been invoked.

7.7 Application of Proceeds: The proceeds of any sale of, and the Rents and other amounts generated by the holding, leasing, operation or other use of, the Mortgaged Property shall be applied by Mortgagee (or the receiver, if one is appointed) to

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

the extent that funds are so available therefrom in the following orders of priority:

(a) first, to the payment of the costs and expenses of taking possession of the Mortgaged Property and of holding, using, leasing, repairing, improving and selling the same, including, without limitation, (i) trustees' and receivers' fees, (ii) court costs, (iii) attorneys' fees (appellate, as well as trial level) and accountants' fees, (iv) costs of advertisement, and (v) the payment of any and all Impositions, liens, security interests or other rights, title or interests equal or superior to the lien and security interest of this Mortgage and Security Agreement (except those to which the Mortgaged Property has been sold subject to and without in any way implying Mortgagee's prior consent to the creation thereof);

(b) second, to the payment of all amounts, other than the Principal Balance and accrued but unpaid interest, which may be due to Mortgagee under the Security Documents, together with interest thereon as provided therein;

(c) third, to the payment of all accrued but unpaid interest due on the Note;

(d) fourth, to the payment of the Principal Balance;

(e) fifth, to the extent funds are available therefor out of the sale proceeds or the Rents and, to the extent known by Mortgagee, to the payment of any indebtedness or obligation secured by a subordinate deed of trust or mortgage on or security interest in the Mortgage Property; and

(f) sixth, to Mortgagor.

ARTICLE 8 CONDEMNATION

8.1 General: Immediately upon its obtaining knowledge of the institution of any proceeding for the condemnation of the Mortgaged Property, Mortgagor shall notify Mortgagee of such fact. Mortgagor shall then, if requested by Mortgagee, file or defend its claim thereunder and prosecute same with due diligence to its final disposition and shall cause any awards or settlements to be paid over to Mortgagee for disposition pursuant to the terms of this Mortgage and Security Agreement. Mortgagor may be the nominal party in such proceeding but Mortgagee shall be entitled to participate in and to control same and to be represented therein by counsel of its own choice, and Mortgagor will deliver, or cause to be delivered, to Mortgagee such instruments as may be requested by it from time to time to permit such participation. If the Mortgaged Property is taken or diminished in value, or if a consent settlement is entered, by or under threat of such proceeding, the award or settlement payable to Mortgagor by virtue of its interest in the Mortgaged Property shall be, and by these presents is, assigned, transferred and set over unto Mortgagee to be held by it, in trust, subject to the lien and security interest of this Mortgage and Security Agreement, and disbursed as follows:

(a) if (i) all of the Mortgaged Property is taken, (ii) so much of the Mortgaged Property is taken, or the Mortgaged Property is so diminished in value, that the remainder thereof cannot (in Mortgagee's judgment) continue to be operated profitably for the purpose it was being used immediately prior to such taking or diminution, (iii) an Event of Default shall have occurred, or (iv) the Mortgaged Property is partially taken or

89154856

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

diminished in value and (in Mortgagee's judgment) need not be rebuilt, restored or repaired in any manner, then in any such event the entirety of the sums so paid to Mortgagee shall be applied by it in the order recited in Paragraph 8.2 hereinbelow; or

(b) if (i) only a portion of the Mortgaged Property is taken and the portion remaining can (in Mortgagee's judgment), with rebuilding, restoration or repair, be profitably operated for the purpose referred to in Paragraph 8.1(a)(ii) hereinabove, (ii) none of the other facts recited in Paragraph 8.1(a) hereinabove exists, (iii) Mortgagor shall deliver to Mortgagee plans and specifications for such rebuilding, restoration or repair acceptable to Mortgagee, and (iv) Mortgagor shall thereafter commence the rebuilding, restoration or repair and complete same, all in accordance with the plans and specifications and within three (3) months after the date of the taking or diminution in value, then such sums shall be paid to Mortgagor to reimburse Mortgagor for money spent in the rebuilding, restoration or repair; otherwise same shall be applied by Mortgagee in the order recited in Paragraph 8.2 hereinbelow.

8.2 Application of Proceeds: All proceeds received by Mortgagee with respect to a taking or a diminution in value of the Mortgaged Property shall be applied in the following order of priority:

(a) first, to reimburse Mortgagee for all costs and expenses, including reasonable attorneys' fees, incurred in connection with collection of the said proceeds;

(b) thereafter, if there shall be any balance, to the order of priority recited in Paragraph 7.7(b) through (f) hereinabove; subject, however, to the provisions of Paragraph 8.1(b) hereinabove requiring (under the circumstances therein specified) that such proceeds be applied to the rebuilding, restoration or repair of the Mortgaged Property.

ARTICLE 9 SECURITY AGREEMENT

9.1 Security Interest: This Mortgage and Security Agreement shall be construed as a mortgage lien on real property and it shall also constitute and serve as a "Security Agreement" on personal property within the meaning of, and shall constitute until the grant of this Mortgage and Security Agreement shall terminate as provided in Article 2 hereinabove a first and prior security interest under, the Uniform Commercial Code of the state in which the Land is located with respect to the Personalty, Fixtures, Leases and Rents. To this end, Mortgagor has Granted, Bargained, Conveyed, Assigned, Transferred and Set Over, and by these presents does Grant, Bargain, Convey, Assign, Transfer and Set Over, unto Mortgagee a first and prior security interest in all of Mortgagor's right, title and interest in, to and under the Personalty, Fixtures, Leases and Rents, to secure the full and timely payment of the Indebtedness and the full and timely performance and discharge of the Obligations.

9.2 Financing Statements: Mortgagor hereby agrees with Mortgagee to execute and deliver to Mortgagee, in form and substance satisfactory to Mortgagee, such "Financing Statements" and such further assurances as Mortgagee may, from time to time consider reasonably necessary to create, perfect, and preserve Mortgagee's security interest herein granted, and Mortgagee may cause such statements and assurances to be recorded and filed, at

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

such times and places as may be required or permitted by law to so create, perfect and preserve such security interest.

9.3 Uniform Commercial Code Remedies: Mortgagee shall have all the rights, remedies and recourses with respect to the Personalty, Fixtures, Leases and Rents afforded a Secured Party by the aforesaid Uniform Commercial Code in addition to, and not in limitation of, the other rights, remedies and recourses afforded Mortgagee by the Security Documents. Upon the occurrence of an Event of Default, Mortgagee, pursuant to the appropriate provisions of the Illinois Uniform Commercial Code, shall have the option of proceeding with respect to the Personalty and Fixtures in accordance with its rights and remedies with respect to real property, in which event the default provisions of the Illinois Uniform Commercial Code shall not apply. The parties agree that, in the event that Mortgagee shall elect to proceed with respect to the Personalty and Fixtures separately from the real property, five (5) days' notice of the sale of the Personalty and Fixtures shall be reasonable notice.

9.4 No Obligation of Mortgagee: The assignment and security interest herein granted shall not be deemed or construed to constitute Mortgagee as a trustee in possession of the Mortgaged Property, to obligate Mortgagee to lease the Mortgaged Property or attempt to do same, or to take any action, incur any expenses or perform or discharge any obligation, duty or liability whatsoever under any of the Leases or otherwise.

9.5 Payment of Rents to Mortgagor Until Default: Unless and until an Event of Default occurs, Mortgagor shall be entitled to collect the Rents as and when, but not before, they become due and payable. Mortgagor hereby agrees with Mortgagee that the other parties under the Leases may, upon notice from Mortgagee of the occurrence of an Event of Default, thereafter pay direct to Mortgagee the Rents due and to become due under the Leases and atorn all other obligations thereunder direct to Mortgagee without any obligation on their part to determine whether an Event of Default does in fact exist.

ARTICLE 10 MISCELLANEOUS

10.1 Survival of Obligations: Each and all of the Obligations shall survive the execution and delivery of the Security Documents, and the consummation of the loan called for therein, and shall continue in full force and effect until the Indebtedness shall have been paid in full.

10.2 Further Assurances: Mortgagor, upon the request of Mortgagee, will execute, acknowledge, deliver and record and/or file such further instruments, certificates, and documents and do such further acts as may be necessary, desirable or proper to carry out more effectively the purposes of the Security Documents and to subject to the liens and security interests thereof any property intended by the terms thereof to be covered thereby, including specifically, but without limitation, any renewals, additions, substitutions, replacements, or appurtenances to the then Mortgaged Property.

10.3 Recording and Filing: Mortgagor will cause the Security Documents and all amendments and supplements thereto and substitutions therefor to be recorded, filed, re-recorded and re-filed in such manner and in such places as Mortgagee shall reasonably request, and will pay all such recording, filing, re-recording and re-filing taxes, fees and other charges.

69154856

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

10.4 Notices: All notices or other communications required or permitted to be given pursuant to this Mortgage and Security Agreement shall be in writing and shall be considered as properly given if mailed by first class United States mail, postage prepaid, registered or certified with return receipt requested, or by delivering same in person to the intended addressee or by prepaid telegram. Notice so mailed shall be effective upon the expiration of three (3) business days after its deposit. Notice given in any other manner shall be effective only if and when received by the addressee. For purposes of notice, the addresses of the parties shall be as set forth in the opening recital hereinabove; provided, however, that either party shall have the right to change its address for notice hereunder to any other location within the continental United States by the giving of thirty (30) days' notice to the other party in the manner set forth hereinabove. A copy of any notice sent to Mortgagor shall be sent to Horwood, Marcus and Braun, Attention: Charles H. Braun, 333 West Wacker Drive, Suite 2800, Chicago, Illinois 60601. Failure of or delay in delivery of any copy of a notice to Mortgagor to be sent in accordance with the preceding sentence shall not impair the effectiveness of a notice properly given to Mortgagor.

10.5 No Waiver: Any failure by Mortgagee to insist, or any election by Mortgagee not to insist, upon strict performance by Mortgagor of any of the terms, provisions or conditions of the Security Documents shall not be deemed to be a waiver of same or of any other term, provision or condition thereof, and Mortgagee shall have the right at any time or times thereafter to insist upon strict performance by Mortgagor of any and all of such terms, provisions and conditions.

10.6 Mortgagee's Right to Perform the Obligations: If Mortgagor shall fail, refuse or neglect to make any payment or perform any act required by the Security Documents, then at any time thereafter, and without notice to or demand upon Mortgagor and without waiving or releasing any other right, remedy or recourse Mortgagee may have because of same, Mortgagee may (but shall not be obligated to) make such payment or perform such act for the account of and at the expense of Mortgagor, and shall have the right to enter the Land and Buildings for such purpose and to take all such action thereon and with respect to the Mortgaged Property as it may deem necessary or appropriate. Mortgagor shall indemnify Mortgagee for all losses, expenses, damage, claims and causes of action, including reasonable attorneys' fees (appellate, as well as trial level), incurred or accruing by reason of any acts performed by Mortgagee pursuant to the provisions of this Paragraph 10.6 or by reason of any other provision in the Security Documents. All sums paid by Mortgagee pursuant to this Paragraph 10.6 and all other sums expended by Mortgagee to which it shall be entitled to be indemnified, together with interest thereon at the rate of 18% per annum from the date of such payment or expenditure, shall constitute additions to the Indebtedness, shall be secured by the Security Documents and shall be paid by Mortgagor to Mortgagee upon demand.

10.7 Covenants Running with the Land: All Obligations contained in the Security Documents are intended by the parties to be, and shall be construed as, covenants running with the Mortgaged Property.

10.8 Successors and Assigns: All of the terms of the Security Documents shall apply to, be binding upon and inure to the benefit of the parties thereto, their respective successors, assigns, (either voluntarily by act of the parties or

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

involuntarily by the operation of law) heirs and legal representatives, and all other persons claiming by, through or under them.

10.9 Severability: The Security Documents are intended to be performed in accordance with, and only to the extent permitted by, all applicable Legal Requirements. If any provision of any of the Security Documents or the application thereof to any person or circumstance shall, for any reason and to any extent, be invalid or unenforceable, neither the remainder of the instrument in which such provision is contained nor the application of such provision to other persons or circumstances nor the other instruments referred to hereinabove shall be affected thereby, but rather shall be enforced to the greatest extent permitted by law. It is hereby expressly stipulated and agreed to be the intent of Mortgagor and Mortgagee at all times to comply with the usury, and all other, laws relating to the Security Documents. If, at any time, the applicable Legal Requirements render usurious any amount called for in any Security Document, then it is Mortgagor's and Mortgagee's express intent that such document be immediately deemed reformed and the amounts collectible reduced, without the necessity of the execution of any new document, so as to comply with the then applicable law but so as to permit the recovery of the fullest amount otherwise called for in such Security Documents.

10.10 Entire Agreement and Modification: The Security Documents contain the entire agreements between the parties relating to the subject matter hereof and thereof and all prior agreements relative thereto which are not contained herein or therein are terminated. The Security Documents may be amended, revised, waived, discharged, released or terminated only by a written instrument or instruments executed by the party against which enforcement of the amendment, revision, waiver, discharge, release or termination is asserted. Any alleged amendment, revision, waiver, discharge, release or termination which is not so documented shall not be effective as to any party.

10.11 Counterparts: This Mortgage and Security Agreement may be executed in any number of counterparts, each of which shall be an original but all of which together shall constitute but one instrument.

10.12 Applicable Law: The Security Documents shall be governed by and construed according to the laws of the State where the Land is situated.

10.13 Subrogation: If any or all of the proceeds of the Note have been used to extinguish, extend or renew any indebtedness heretofore existing against the Mortgaged Property, then to the extent of such funds so used, the Indebtedness and this Mortgage and Security Agreement shall be subrogated to all of the rights, claims, liens, titles and interests heretofore existing against the Mortgaged Property to secure the indebtedness so extinguished, extended or renewed and the former rights, claims, liens, titles and interests, if any, are not waived but rather are continued in full force and effect in favor of Mortgagee and are merged with the lien and security interest created herein as cumulative security for the repayment of the Indebtedness and the satisfaction of the Obligations.

10.14 Applicable to Leasehold Mortgages: If this Mortgage and Security Agreement grants a mortgage or creates a lien on a leasehold estate, then the following provisions shall apply in addition to those set forth hereinabove:

89154856

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

(a) Mortgagor hereby agrees with Mortgagee (i) at all times fully to perform and comply with all covenants, warranties, representations and other obligations imposed upon or assumed by it as tenant, lessee, sublessee or otherwise under any lease, sublease or similar agreement pursuant to which it has been granted a possessory interest in the Land and (ii) that, upon Mortgagor's failure or alleged failure (notwithstanding that the alleged failure may be contested by Mortgagor) so to do, the provisions of Paragraph 10.6 hereinabove shall obtain. In this regard, Mortgagor hereby grants to Mortgagee the absolute and immediate right to enter upon the Land to such extent and as often as Mortgagee, in its opinion, deems necessary or desirable in order to prevent or to cure any such failures by Mortgagor;

(b) Mortgagor hereby agrees with Mortgagee that it will not, without Mortgagee's prior written consent thereto, (i) terminate, cancel, modify or amend the lease, sublease or similar agreement in any respect, or (ii) permit the fee title to the Land demised by such lease, sublease or agreement (if fee title be so demised) and the leasehold estate so created to merge, but rather the said fee title and the said leasehold estate shall always be separate and distinct; and

(c) Mortgagor does hereby warrant and represent unto Mortgagee that a true and correct copy of the instrument more fully described in Exhibit A attached hereto, with all amendments (if any) thereto, has heretofore been delivered by Mortgagor to Mortgagee.

10.15 Headings: The Article, Paragraph and Subparagraph entitlements hereof are inserted for convenience of reference only and shall in no way alter, modify or define, or be used in construing, the text of such Articles, Paragraphs or Subparagraphs.

10.16 Tax and Insurance Escrow: In order to implement the provisions of Paragraphs 4.3 and 4.5 hereinabove, Mortgagor shall pay to Mortgagee, as and when directed by Mortgagee, and as escrowed sums, an amount equal to the sum of (a) the annual Impositions (estimated whenever necessary) to become due for the tax year during which such payment is so directed and (b) the insurance premiums for the same year for those insurance policies as are required hereunder. If Mortgagee determines that any amounts theretofore paid by Mortgagor are insufficient for the payment in full of such Impositions and insurance premiums, Mortgagee shall notify Mortgagor of the increased amounts required to provide a sufficient fund, whereupon Mortgagor shall pay to Mortgagee within thirty (30) days thereafter the additional amount as stated in Mortgagee's notice. The escrowed sums may be held by Mortgagee in noninterest-bearing accounts and may be commingled with Mortgagee's other funds. Upon assignment of this Mortgage and Security Agreement, Mortgagee shall have the right to pay over the balance of the escrowed sums then in its possession to its assignee whereupon the Mortgagee shall then become completely released from all liability with respect thereto. Upon full payment of the Indebtedness, or at such earlier time as Mortgagee may elect, the balance of the escrowed sums in its possession shall be paid over to Mortgagor and no other party shall have any right or claim thereto. If no Event of Default shall have occurred and be continuing hereunder, the escrowed sums shall, at the option of Mortgagee, be repaid to Mortgagor in sufficient time to allow Mortgagor to satisfy Mortgagor's obligations under the Security Documents to pay the Impositions and the required insurance premiums or be paid directly to the Governmental Authority and the insurance company entitled thereto. If an Event of Default shall have occurred and be continuing hereunder, however, Mortgagee shall have the additional option of

89154856

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

crediting the full amount of the escrowed sums against the Indebtedness. Notwithstanding anything to the contrary contained in this Paragraph 10.16 or elsewhere in this Mortgage and Security Agreement, Mortgagee hereby reserves the right to waive the payment by Mortgagor to Mortgagee of the escrowed sums, and, in the event Mortgagee does so waive such payment, it shall be without prejudice to Mortgagee's right to insist, at any subsequent time or times that such payments be made in accordance herewith.

10.17 Fixture Filing: Portions of the Mortgaged Property are or are to become fixtures relating to the above described real estate, and the Mortgagor herein expressly covenants and agrees that the filing of this Mortgage and Security Agreement in the Real Estate Records in the county where the Mortgaged Property is located shall also operate from the time of filing therein as a financing statement filed as a fixture filing in accordance with the Uniform Commercial Code of the state in which the Land is located.

10.18 Estoppel Certificate: Mortgagor acknowledges that the Indebtedness hereby secured and/or the lien hereby created may from time to time, be assigned by Mortgagee, and Mortgagor agrees to execute and cause to be executed estoppel affidavits certifying as to certain matters (which are true) with respect to the Indebtedness hereby secured, this Mortgage and Security Agreement and the Mortgaged Property and other similar documentation as may be necessary or required to effectuate such assignment or assignments. Such documents shall be executed and returned to Mortgagee within ten (10) days after their delivery to Mortgagor.

10.19 Stamp Tax: If, by the laws of the United States of America, or of any state having jurisdiction over the Mortgagor, any tax is due or becomes due in respect of the issuance of the Note, the Mortgagor covenants and agrees to pay such tax in the manner required by any such law. The Mortgagor further covenants to reimburse the Mortgagee for any sums which Mortgagee may expend by reason of the imposition of any tax on the issuance of the Note.

10.20 Foreclosure Subject to Leases: Mortgagee shall have the right and option to commence a civil action to foreclose this Mortgage and to obtain a Decree of Foreclosure and Sale subject to the rights of any tenant or tenants of the Mortgaged Property. The failure to join any such tenant or tenants as party defendant or defendants in any such civil action or the failure of any Decree of Foreclosure and Sale to foreclose their rights shall not be asserted by the Mortgagor as a defense in any civil action instituted to collect the Indebtedness, or any part thereof, or any deficiency remaining unpaid after foreclosure and sale of the Mortgaged Property, any statute or rule of law at any time existing to the contrary notwithstanding.

10.21 Subordination to Leases: At the option of the Mortgagee, this Mortgage and Security Agreement shall become subject and subordinate, in whole or in part (but not with respect to priority of entitlement to insurance proceeds or any award in condemnation) to any and all leases of all or any part of the Mortgaged property upon the execution by Mortgagee and recording or registration thereof, at any time hereafter, in the Office of the Recorder of Deeds or Registrar of Titles in and for the county wherein the Mortgaged Property is situated, of a unilateral declaration to that effect.

10.22 Reliance on Other Property: Mortgagor shall not by act or omission permit any building or other improvement on any premises not subject to the lien of this Mortgage and Security

89154855

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

Agreement to rely on the Mortgaged Property or any part thereof or any interest therein to fulfill any municipal or governmental requirement, and Mortgagor hereby assigns to Mortgagee any and all rights to give consent for all or any portion of the Mortgaged Property or any interest therein to be so used. Similarly, no building or other improvement on the Mortgaged Property shall rely on any premises not subject to the lien of this Mortgage and Security Agreement or any interest therein to fulfill any governmental or municipal requirement. Mortgagor shall not by act or omission impair the integrity of the Mortgaged Property as a single zoning lot separate and apart from all other premises. Any act or omission by Grantor which would result in a violation of any of the provisions of this paragraph shall be void.

10.23 Effect of Changes in Laws Regarding Taxation: In the event of the enactment after this date of any law of the state in which the Mortgaged Property is located deducting from the value of the Land for the purpose of taxation any lien thereon, or imposing upon the Mortgagee the payment of the whole or any part of the taxes or assessments or charges or liens herein required to be paid by Mortgagor, or changing in any way the laws relating to the taxation of mortgages or debts secured by mortgages or the Mortgagee's interest in the Mortgaged Property, or the manner of collection of taxes, so as to affect this Mortgage and Security Agreement or the debt secured hereby or the holders thereof, then, and in any such event, the Mortgagor, upon demand by the Mortgagee, shall pay such taxes or assessments, or reimburse the Mortgagee therefor; provided, however, that if in the opinion of counsel for the Mortgagee: (a) it might be unlawful to require Mortgagor to make such payment; or (b) the making of such payment might result in the imposition of interest beyond the maximum amount permitted by law, then and in such event, the Mortgagee may elect, by notice in writing given to the Mortgagor, to declare all of the Indebtedness to be and become due and payable sixty (60) days from the giving of such notice.

10.24 Waiver of Defense: No action for the enforcement of the lien or of any provision hereof shall be subject to any defense which would not be good and available to the party interposing same in an action at law upon the Note.

10.25 Exculpation of Mortgagor: This Mortgage and Security Agreement is executed by Mortgagor, not personally but as Trustee as aforesaid in the exercise of the power and authority conferred upon and vested in it as such Trustee (and said Mortgagor hereby warrants that it possesses full power and authority to execute this instrument), and it is expressly understood and agreed that nothing herein or in said Note contained shall be construed as creating any liability on Mortgagor or Beneficiary personally to pay the Note or any interest that may accrue thereon, or any Indebtedness accruing hereunder, or to perform any covenant, either express or implied herein contained, all such liability, if any, being expressly waived by Mortgagee and by every person now or hereafter claiming any right or security hereunder, and that so far as Mortgagor personally is concerned the legal holder or holders of said Note and the owner or owners of any Indebtedness accruing hereunder shall look to any or all of the following for the payment thereof: (a) to the Mortgaged Property hereby conveyed by the enforcement of the lien hereby created, in the manner herein and in said Note provided; (b) to any other security given to secure the payment of said Note; and (c) to the personal liability of each Guarantor under any Guaranty.

10.26 Release of Junior Liens: On or before ninety (90) days from the date hereof, Mortgagor shall cause the Junior Liens to be released and discharged of record such that the Mortgaged

89154855

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

Property of Cook County Clerk's Office

TRACT I:

LOTS 7, 8, 9, 10, 11, 12 AND 13 IN THE RESUBDIVISION OF BLOCK 17 IN EVANSTON IN THE NORTH WEST 1/4 OF SECTION 18, TOWNSHIP 41 NORTH, RANGE 14 EAST OF THE THIRD PRINCIPAL MERIDIAN, (EXCEPTING THEREFROM), THAT PORTION OF LOTS SEVEN TO ELEVEN AFORESAID, (TAKEN AS ONE TRACT) IN THE RESUBDIVISION OF BLOCK SEVENTEEN IN EVANSTON, DESCRIBED AS FOLLOWS TO WIT:

BEGINNING AT THE NORTHEAST CORNER OF SAID LOT SEVEN THENCE RUNNING SOUTH ALONG THE EAST LINE OF SAID LOT SEVEN, A DISTANCE OF EIGHTY FEET; THENCE RUNNING WEST ALONG A LINE PARALLEL WITH THE NORTH LINE OF SAID LOT SEVEN A DISTANCE OF THIRTY-FIVE FEET; THENCE SOUTH ALONG A LINE PARALLEL WITH THE EAST LINE OF SAID LOT SEVEN, A DISTANCE OF FIVE FEET; THENCE RUNNING WEST ALONG A LINE PARALLEL WITH THE NORTH LINE OF SAID LOTS SEVEN TO ELEVEN, A DISTANCE OF ONE HUNDRED EIGHTY-FIVE FEET; THENCE RUNNING NORTH ALONG A LINE PARALLEL WITH THE EAST LINE OF SAID LOT SEVEN, A DISTANCE OF EIGHTY-FIVE FEET TO A POINT IN THE NORTH LINE OF SAID LOT ELEVEN, BEING TWO HUNDRED TWENTY FEET FROM THE NORTH EAST CORNER OF SAID LOT SEVEN; THENCE EAST ALONG THE NORTH LINE OF SAID LOTS SEVEN TO ELEVEN TO THE PLACE OF BEGINNING), IN COOK COUNTY, ILLINOIS.

PERPETUAL, NON-EXCLUSIVE EASEMENT FOR THE BENEFIT OF PARCEL 1 AS CREATED BY GRANT OF EASEMENT DATED AUGUST 4, 1975 AND RECORDED AUGUST 14, 1975 AS DOCUMENT NUMBER 23187121 AND BY GRANT OF EASEMENT DATED APRIL 6TH, 1989 AND RECORDED APRIL 10, 1989 AS DOCUMENT NUMBER 89154855 FOR INGRESS AND EGRESS OF PERSONS AND VEHICLES AND FOR THE LOADING AND UNLOADING OF TRUCKS AND OTHER CARRIERS OVER THE WEST 28.5 FEET OF THAT PART OF LOTS 7 TO 11, INCLUSIVE, IN THE RESUBDIVISION OF BLOCK 17 IN EVANSTON IN THE NORTHWEST 1/4 OF SECTION 18, TOWNSHIP 41 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS, DESCRIBED AS FOLLOWS, TO WIT:

BEGINNING AT THE NORTHEAST CORNER OF SAID LOT 7, THENCE RUNNING SOUTH ALONG AND UPON THE EAST LINE OF SAID LOT 7 A DISTANCE OF 80 FEET; THENCE RUNNING WEST ALONG AND UPON A LINE PARALLEL WITH THE NORTH LINE OF SAID LOT 7 A DISTANCE OF 35 FEET; THENCE SOUTH ALONG AND UPON A LINE PARALLEL WITH THE EAST LINE OF SAID LOT 7 A DISTANCE OF 5 FEET; THENCE RUNNING WEST ALONG AND UPON A LINE PARALLEL WITH THE NORTH LINE OF SAID LOTS 7 TO 11 A DISTANCE OF 185 FEET; THENCE RUNNING NORTH ALONG AND UPON A LINE PARALLEL WITH THE EAST LINE OF SAID LOT 7 A DISTANCE OF 85 FEET TO A POINT ON THE NORTH LINE OF SAID LOT 11, 220 FEET FROM THE NORTHEAST CORNER OF SAID LOT 7, THENCE ALONG AND UPON THE NORTH LINE OF SAID LOTS 11 TO 7, INCLUSIVE, TO THE POINT OF BEGINNING

TRACT III:

NON-EXCLUSIVE EASEMENT FOR THE BENEFIT OF PARCEL 1 AS CREATED UNDER SECTION 4 OF THAT CERTAIN INDENTURE MADE THE 12TH DAY OF JANUARY, 1926 AS DOCUMENT NUMBER 9157485 FOR PASSAGEWAY AND PRIVATE ALLEY PURPOSES

OVER THE SOUTH 5 FEET OF THE FOLLOWING DESCRIBED PREMISES AND FOR LIGHT AND AIR ABOVE THE HEIGHT OF SIXTY FEET OR FOUR STORIES, OVER THE FOLLOWING DESCRIBED LAND:

THAT PORTION OF LOTS SEVEN (7) TO ELEVEN (11) INCLUSIVE, IN THE RESUBDIVISION OF BLOCK SEVENTEEN (17) IN EVANSTON, COOK COUNTY, ILLINOIS, DESCRIBED AS FOLLOWS, TO WIT:

BEGINNING AT THE NORTHEAST CORNER OF SAID LOT SEVEN (7) IN THE SAID RESUBDIVISION OF SAID BLOCK SEVENTEEN (17) IN EVANSTON, COOK COUNTY, ILLINOIS, THENCE RUNNING SOUTH ALONG AND UPON THE EAST LINE OF SAID LOT SEVEN (7), A DISTANCE OF EIGHTY (80) FEET; THENCE RUNNING WEST ALONG AND UPON A LINE PARALLEL WITH THE NORTH LINE OF SAID LOT SEVEN (7) A DISTANCE OF THIRTY-FIVE (35) FEET, THENCE SOUTH ALONG AND UPON A LINE PARALLEL WITH THE EAST LINE OF SAID LOT SEVEN (7), A DISTANCE OF FIVE (5) FEET; THENCE RUNNING WEST ALONG AND UPON A LINE PARALLEL WITH THE NORTH LINE OF SAID LOTS SEVEN (7) TO ELEVEN (11) A DISTANCE OF ONE HUNDRED AND EIGHTY-FIVE (185) FEET; THENCE RUNNING NORTH ALONG AND UPON A LINE PARALLEL WITH THE EAST LINE OF SAID LOT SEVEN (7) A DISTANCE OF EIGHTY-FIVE (85) FEET TO A POINT IN THE NORTH LINE OF SAID LOT ELEVEN (11), TWO HUNDRED AND TWENTY (220) FEET FROM THE NORTH EAST CORNER OF SAID LOT SEVEN (7), THENCE ALONG AND UPON THE NORTH LINE OF SAID LOT ELEVEN (11) AND THE NORTH LINE OF SAID LOTS (10) TO SEVEN (7) (INCLUSIVE) TO THE POINT OF BEGINNING.

11-18-126-013
1700 S. WEXMAN
EVANSTON ILL.

89154855

UNOFFICIAL COPY

EXHIBIT "B"

Permitted Encumbrances

Evanston Galleria Limited Partnership

Page 1 of 1

- 1) Encroachment of main stone face of building 0.12 feet south at the southwest corner thereof.
- 2) Encroachment of two (2) metal canopies over the south property line.
- 3) Encroachment of metal canopy located along the east building wall, being approximately 30 feet north of the southeast corner thereof, over and onto the sidewalk east and adjoining.
- 4) Encroachment of fire escape located on the building north and adjoining, and over onto the land.

JKC17c

89154856