

UNOFFICIAL COPY

91358803

\$43

OPEN-END MORTGAGE, ASSIGNMENT OF RENTS AND SECURITY AGREEMENT
Maximum Principal Amount: \$12,000,000

THIS OPEN-END MORTGAGE, ASSIGNMENT OF RENTS AND SECURITY AGREEMENT (hereinafter referred to as the "Mortgage") made and entered into as of July 17, 1991, from WILSHIRE PARTNERS (hereinafter referred to as "Borrower"), an Ohio general partnership whose address is 2750 Terminal Tower, Cleveland, Ohio 44113 to SOCIETY NATIONAL BANK, a national banking association (hereinafter referred to as "Bank"), whose address is 800 Superior Avenue, Cleveland, Ohio 44114;

WITNESSETH THAT:

WHEREAS, Borrower and Bank, are parties to a certain Credit Facility and Security Agreement dated on or about July 17, 1991 (which, as the same may be amended, supplemented or modified from time to time is hereinafter referred to as the "Loan Agreement") the terms of which are incorporated herein by reference as if fully set forth at length; and

WHEREAS, Bank has conditioned its extension of credit to Borrower under the terms of the Loan Agreement upon the grant by Borrower of a mortgage lien on and security interest in certain Property (as defined below), as herein provided, for the purpose of securing all debts, liabilities, and obligations of Borrower to Bank under the Loan Agreement and all interest, fees, charges, and expenses which at any time may be payable by Borrower to Bank pursuant to the Loan Documents (as defined in the Loan Agreement) (collectively the "Obligations"). This Mortgage, the Loan Agreement and all notes, instruments, documents and agreements executed pursuant thereto in each case as amended, supplemented or modified, from time to time, are herein collectively referred to as the "Loan Documents".

NOW, THEREFORE, for and in consideration of the premises, the sum of Ten and No/100 Dollars (\$10.00) and other good and valuable consideration, the receipt and sufficiency whereof are hereby acknowledged, and in order to secure the Obligations, Borrower does hereby grant, bargain, sell, convey, mortgage, assign, transfer, pledge and set over unto Bank and the successors and assigns of Bank all of the following (hereinafter collectively referred to as the "Property"):

(a) All that tract or parcel of land more particularly described in Exhibit A, attached hereto and incorporated herein by this reference (hereinafter referred to as the "Land"), together with all proceeds from the sale thereof and any other real property exchanged therefor;

Box 333

91358803

73-11-117-01

UNOFFICIAL COPY

91358803

(b) All buildings, structures, additions and improvements, and all fixtures, fittings, machinery, apparatus, installations, equipment and other property, real, personal or mixed, which are used or adopted for use in the operations thereof and owned by Borrower, including without limitation, all gas and electric fixtures, radiators, pipes, heaters, furnaces, engines and machinery, escalators, boilers, ranges, elevators, motors, plumbing and heating fixtures, carpeting and other floor coverings, fire extinguishers and any other safety equipment required by governmental regulation or law, water heaters, air conditioning apparatus (including, without limitation humidity control equipment), refrigeration plants, refrigerators, cooking apparatus and appurtenances, window screens, awnings, and storm sashes, alarm devices of any type, automatic sprinkler systems, carpet, cabinets and shelving, partitions, paneling, and wall covering, and windows of every type, which are or shall be attached to the Land or said buildings, structures, or improvements and all other fixtures, machinery, equipment, furniture, furnishings, appliances, building supplies and materials (other than property which may be or deemed to be toxic or Hazardous Materials, as defined herein) now or hereafter owned by Borrower and located in, on, or about, and used or intended to be used with or in connection with the use, operation, or enjoyment of the Property, including all extensions, additions, improvements, betterments, after-acquired property, renewals, replacements and substitutions or proceeds from a sale of any of the foregoing;

(c) All easements, rights-of-way, strips and gores of land, vaults, streets, ways, alleys, passages, sewer rights, waters, water courses, water rights and powers, shrubs, crops, trees, timber and other emblements now or hereafter located on the Land or under or above the same or any part or parcel thereof, and all estates, rights, titles, interests, minerals, royalties, easements, privileges, liberties, tenements, hereditaments and appurtenances, reversions and remainders whatsoever, in any way belonging, relating or appertaining to the Property or any part thereof, or which hereafter shall in any way belong, relate or be appurtenant thereto, whether now owned or hereafter acquired by Borrower; and

(d) All present and future income, rents, issues, profits and revenues of the Property from time to time accruing (including, without limitation, all payments under leases or tenancies, unearned premiums on any insurance policy carried by Borrower for the benefit of Bank and/or the Property, tenant security deposits, escrow funds and all awards or payments, including interest thereon and the right to receive same, growing out of or as a result of any exercise of the right of eminent domain, including the taking of any part or all of the Property or payment for alteration of the grade of any street upon which the Property abuts, or any other injury to, taking of or decrease in the value of the Property to the extent of all amounts which may be owing on the Obligations at the date of receipt of any such award or payment by Borrower, and

the reasonable attorneys' fees, costs and disbursements incurred by Bank in connection with the collection of such award or payment), and all the estate, right, title, interest, property, possession, claim and demand whatsoever at law or in equity, of Borrower of, in and to the same; reserving only the right to Borrower to collect the same as long as no default or event of default as defined in Paragraph 2.01 shall have occurred;

TO HAVE AND TO HOLD the Property and all parts, rights, members and appurtenances thereof, for the use, benefit and behoof of Bank and the successors and assigns of Bank, IN FEE SIMPLE forever; and Borrower covenants that Borrower is lawfully seized and possessed of the Property as aforesaid, and has good right to convey and mortgage the same, that the same are unencumbered except as to those matters expressly set forth in Exhibit B, attached hereto and incorporated herein by this reference (hereinafter referred to as the "Permitted Exceptions") and the liens and security interests created or otherwise permitted under the Loan Agreement, and that Borrower does warrant and will forever defend the title thereto against the claims of all persons whomsoever, except as to the Permitted Exceptions and the liens and security interests created or otherwise permitted under the Loan Agreement.

Borrower hereby further covenants and agrees with Bank as follows:

ARTICLE I

1.01 Payment of Obligations, Covenants and Warranties:

(a) Borrower will pay the Obligations according to the terms thereof and will pay all other sums now or hereafter secured hereby, including, without limitation, all future advances, at the time and in the manner provided under the Loan Documents or otherwise as mutually agreed. Borrower will otherwise perform, comply with and abide by each and every of the material stipulations, agreements, conditions and covenants contained in the Loan Documents and any lease or other agreement with respect to the Property to which Borrower is a party.

(b) Borrower shall protect, indemnify and hold Bank harmless from and against all liabilities, obligations, claims, damages, penalties, causes of action, costs, and expenses (including, without limitation, reasonable attorneys' fees and court costs) imposed upon or incurred by Bank by reason of this Mortgage or in exercising, performing, enforcing, or protecting its rights, title, or interests set forth herein, and any claim or demand whatsoever which may be asserted against Bank by reason of any alleged obligation or undertaking to be performed or discharged by Bank under this Mortgage. In addition, Borrower covenants and agrees that it shall:

UNOFFICIAL COPY

9 1 3 1 0 0 3

(i) not initiate, join in or consent to any change in any covenant, zoning ordinance, easement, or other public or private restriction, limiting or defining the uses which may be made of the Property, or any part thereof, without Bank's prior written consent;

(ii) not take any action or fail to take any action which will result in any imposition affecting the Property, this Mortgage or Bank's rights hereunder;

(iii) indemnify and hold Bank harmless from any and all costs, damages or liabilities resulting from, arising out of, or related to, the creation or existence of liens, impositions or encumbrances by or against Borrower or Borrower's predecessor in title, or the Property, which are not otherwise Permitted Exceptions hereunder; and

(iv) execute such additional documents as Bank may require to evidence and confirm this Mortgage.

(c) Borrower hereby represents, warrants, and agrees as follows:

(i) Borrower has neither done any act nor failed to do any act which might prevent Bank from, or limit Bank in, acting under any of the provisions of this Mortgage;

(ii) Neither the execution and delivery of this Mortgage, nor the performance of each and every covenant of Borrower under this Mortgage, nor the satisfaction of each and every condition contained in this Mortgage, conflicts with, or constitutes a breach or default under, any agreement, indenture, or other instrument to which Borrower is a party or is subject, or any law, ordinance, administrative regulation, or court decree which is applicable to Borrower;

(iii) No action has been brought or, to the best of Borrower's knowledge, is threatened, which would interfere in any way with the right of Borrower to execute this Mortgage and perform all of Borrower's obligations contained in this Mortgage; and

(iv) Except as relates to any Permitted Exceptions, Borrower is the sole owner of all right, title and interest in and to the Property and no such Property is subject to any lease or other like arrangement to which Borrower is a party, whether as lessee or lessor thereunder.

91358803

1.02 Taxes, Liens and Other Charges.

(a) In the event of the passage of any law, order, rule or regulation subsequent to the date hereof, in any manner changing or modifying the taxation of mortgages or security agreements or debts secured thereby or the manner of collecting taxes so as to affect Bank adversely, Borrower shall promptly pay any such tax on or before the due date thereof, except any income taxes imposed on the interest paid by Borrower on the Obligations. If Borrower fails to make such prompt payment or if, in the reasonable opinion of Bank, any such law, order, rule or regulation prohibits Borrower from making such payment or would penalize Bank if Borrower makes such payment or if, in the opinion of Bank, the making of such payment might result in the imposition of interest beyond the maximum amount permitted by applicable law, then the entire balance of the Obligations secured by this Mortgage and all accrued interest thereon shall, at the option of Bank, become immediately due and payable.

(b) Borrower shall pay, before the due date thereof, all taxes, levies, license fees, permit fees, liens, judgments, assessments and all other expenses, fees and charges (in each case whether general or special, ordinary or extraordinary, or foreseen or unforeseen) of every character whatsoever now or hereafter levied, assessed, confirmed or imposed on, or with respect to, or which may be a lien upon, the Property, or any part thereof, or any estate, right, or interest therein, or upon the rents, issues, income or profits thereof, or incurred in connection with the Note, the Obligations or any of the Loan Documents, and all premiums on policies of insurance covering, affecting, or relating to the Property, as required pursuant to Paragraph 1.03 hereof, and shall submit to Bank, upon request therefor, such evidence of the due and punctual payment of all such taxes, assessments, insurance premiums and other fees and charges as Bank may require; provided, however, that notwithstanding the provisions of this section, so long as an Event of Default shall not have occurred hereunder and be continuing, Borrower shall have the right to contest, in good faith, the amount or validity of any tax, lien, judgment or assessment, by appropriate legal proceedings, diligently pursued, so long as (i) Borrower notifies Bank of Borrower's intent to contest such tax, lien, judgment, or assessment; (ii) Borrower provides Bank with evidence reasonably satisfactory to Bank that such proceedings shall operate to prevent the sale of the Property or any portion thereof; (iii) Borrower shall have furnished Bank, if Bank so elects, with a bond or other assurances reasonably satisfactory to Bank sufficient to satisfy such tax, lien, judgment, or assessment; and (iv) upon any final determination of such contest which is not appealable or is not being appealed by Borrower, Borrower shall pay the amount of such tax, lien, judgment, or assessment then due.

91358603

UNOFFICIAL COPY

9 1 3 5 8 8 0 3

(c) Except as provided in subsection (b) above, Borrower, without the consent of Bank, shall not suffer any mechanic's, materialman's, laborer's, statutory or other similar lien to be filed of record or to remain outstanding upon all or any part of the Property.

1.03 Insurance.

(a) Borrower shall insure the Property against loss or damage by fire with extended coverage, theft, burglary, pilferage, loss in transit, and such other hazards as Bank shall reasonably specify, in amounts, under policies and by insurers reasonably acceptable to Bank. Borrower shall also maintain flood insurance, in the event of a designation of the area in which the Property is located as "flood prone" or a "flood risk area," as defined by the Flood Disaster Protection Act of 1973, in an amount to be reasonably determined by Bank, and shall comply with the additional requirements of the National Flood Insurance Program as set forth therein. Borrower shall cause Bank to be named in each such policy as mortgagee and loss payee or additional insured, in a manner acceptable to Bank. Each policy of insurance shall contain a clause or endorsement requiring the insurer to give not less than thirty (30) days' prior written notice to Bank in the event of cancellation of the policy for any reason whatsoever. All premiums for such insurance shall be paid by Borrower when due and photocopies of the policies shall be delivered to Bank. If Borrower fails to procure such insurance or to pay the premiums therefor when due, Bank may (but shall not be required to) do so and add the costs thereof to the Obligations.

(b) Borrower shall promptly notify Bank of any loss, damage, or destruction to the Property with an aggregate value of Seventy Five Thousand Dollars (\$75,000) or more, whether or not covered by insurance. Bank is hereby authorized to collect all insurance proceeds for losses over said \$75,000 amount directly. If after deducting from such proceeds the expenses, if any, incurred by Bank in the collection or handling thereof, the remaining insurance proceeds are less than Two Hundred Thousand Dollars (\$200,000) then if an Event of Default has not occurred and is not then continuing, Bank may apply such proceeds to restoration of the Property lost, damaged or destroyed, subject to Bank being reasonably satisfied that such proceeds, together with such other funds as Borrower shall deposit with Bank, shall be sufficient to pay the entire cost of restoring and/or rebuilding the Property to substantially the same condition that existed immediately prior to the casualty. Borrower shall use the proceeds, or any part thereof, to replace, repair, restore or rebuild the Property in a diligent and expeditious manner with materials and workmanship of substantially the same quality as existed before the loss, damage or destruction. Any portion of the proceeds not used as provided in the preceding sentence shall be applied by Bank to the reduction of the Obligations, in such order as Bank reasonably determines.

If (i) the remaining insurance proceeds equal or exceed Two Hundred Thousand Dollars (\$200,000) or (ii) an Event of Default has occurred and is then continuing, then Bank shall either apply such proceeds to the reduction of the Obligations, in such order as Bank determines, or, at Bank's option, may permit Borrower to use such money, or any part thereof, to replace, restore or rebuild the Property in a diligent and expeditious manner with materials and workmanship of substantially the same quality as existed before the loss, damage or destruction.

1.04 Condemnation. If all or any material portion of the Property shall be damaged or taken through condemnation (which term when used in this Mortgage shall include any damage or taking by any governmental or quasi-governmental authority and any transfer or grant by private sale made in anticipation of or in lieu thereof), either temporarily or permanently, then any award of damages or other compensation made in connection with such condemnation is hereby assigned and shall be paid to Bank who shall apply or release such award in the same manner as set forth above with respect to insurance proceeds received. Promptly upon learning of any proposed, contemplated or threatened institution of any condemnation proceeding affecting the Property, Borrower shall notify Bank of the pendency of such proceedings, and no settlement respecting awards in such proceedings shall be effected without the consent of Bank. Bank is hereby authorized at its option, to commence, appear in and prosecute, in its own or in the name of Borrower, any action or proceeding relating to any condemnation, and to settle or compromise any claim in connection therewith. Borrower agrees to execute such further assignment of any compensation, awards, damages, claims, rights of action and proceeds as Bank may require. If, prior to the receipt by Bank of such damages or other compensation, the Property shall have been sold on foreclosure of this Mortgage, or as a result of other legal action relating to this Mortgage or any of the other Loan Documents, Bank shall have the right to receive such award or proceeds to the extent of any unpaid Obligations following such sale, with legal interest thereon whether or not a deficiency judgment on this Mortgage or any of the Obligations shall have been sought or recovered, and Borrower shall indemnify Bank and hold Bank harmless from and against any and all loss, cost, damage, or expense, including attorney fees and litigation expenses incurred by Bank in connection with the collection of such award or proceeds.

1.05 Care of Property.

(a) Borrower shall keep all improvements of any kind now or hereafter erected on the Land or any part thereof in the same condition and repair as on the date hereof (ordinary wear and tear excepted), shall not commit or suffer any waste, and shall not do or suffer to be done anything which would or could increase the risk of fire or other hazard to the Property or any part thereof

or which would or could result in the cancellation of any insurance policy carried with respect to the Property.

(b) Borrower shall not remove, demolish or materially alter, enlarge or change any structure or other improvement located on the Land without Bank's consent, nor shall any new improvements be constructed on the Land without Bank's consent. Borrower shall not remove or permit to be removed from the Land any part of the Property, constituting a fixture or chattel, without the consent of Bank, except as otherwise permitted under the Loan Agreement or, where the same is obsolete or worn out, appropriate replacements are immediately made which are free of any lien, security interest or claim superior to that of this Mortgage and which have a value and utility at least equal to the value and utility of the fixture or chattel removed, which replacement shall, without further action, become subject to the lien of this Mortgage.

(c) Bank or its representative is hereby authorized to enter upon and inspect the Property at all reasonable times upon reasonable notice.

(d) Borrower will promptly perform and comply, in all material respects, with, and cause the Property to be maintained, used and operated in accordance with, any and all (i) present and future laws, ordinances, rules, regulations and requirements of every duly constituted governmental or quasi-governmental authority or agency applicable to Borrower or the Property, including without limitation, all applicable federal, state and local laws pertaining to air and water quality, hazardous waste, waste disposal, air emissions and other environmental matters, all zoning and other land use matters, and rules, regulations and ordinances of the United States Environmental Protection Agency and all other applicable federal, state and local agencies and bureaus; (ii) similarly applicable orders, rules and regulations of any regulatory, licensing, accrediting, insurance underwriting or rating organization or other body exercising similar functions; (iii) similarly applicable duties or obligations of any kind imposed under any Permitted Exception, or otherwise by law, covenant, condition, agreement or easement, public or private; and (iv) policies of insurance at any time in force with respect to the Property. If Borrower receives any notice that Borrower or the Property is in default under, or is not in compliance with, any of the foregoing, or notice of any proceeding initiated under or with respect to any of the foregoing, Borrower shall promptly furnish a copy of such notice to Bank.

1.06 Security Agreement.

(a) With respect to the fixtures, fittings, machinery, apparatus, installations, equipment and other property referred to or described in this Mortgage within the definition of the term

"Property" (other than any property which may be now or hereafter deemed to be toxic or Hazardous materials) whether now owned or hereafter from time to time acquired, together with all substitutions, replacements, additions, attachments, accessories and all of the rents, issues, income, revenues and profits derived from the Property (hereinafter collectively referred to as the "Collateral"), this Mortgage is hereby also made and declared to be a security agreement encumbering each and every item of such Property comprising a part of the Collateral, in compliance with the provisions of the Uniform Commercial Code as enacted in the State of Illinois (the "Code") and Borrower hereby grants to Bank a security interest in all such property. Upon request by Bank, at any time and from time to time, a financing statement or statements reciting this Mortgage to be a security agreement affecting all of such property shall be executed by Borrower and Bank and appropriately filed. The remedies for any violation of the covenants, terms and conditions of the security agreement contained in this Mortgage shall include, but not be limited to those (i) prescribed herein or in any of the other Loan Documents relating thereto, or (ii) prescribed by general law, or (iii) prescribed by the specific statutory consequences now or hereafter enacted and specified in the Code, all at Bank's sole election. Borrower and Bank agree that the filing of any such financing statement or statements in the records normally having to do with personal property shall not in any way affect the agreement of Borrower and Bank that everything used in connection with the operation of the Property or adapted for use therein or which is described or reflected in this Mortgage within the definition of "Property" is, and at all times and for all purposes and in all proceedings, both legal or equitable, shall be, regarded as part of the Land, regardless of whether any such item is physically attached thereto, serial numbers are used for the better identification of certain items capable of being thus identified in an exhibit to this Mortgage, or any such item is referred to or reflected in any such financing statement or statements so filed at any time. Similarly, the mention in any such financing statement or statements of the rights in and to (A) the proceeds of any insurance policy relating to such property, or (B) any award in eminent domain proceedings for a taking or for loss of value thereof, or (C) Borrower's interest as landlord in any present or future lease or sublease or rights to income growing out of the use and/or occupancy of such property, whether pursuant to a tenant lease of space in the Property or otherwise, shall not in any way alter any of the rights of Bank as determined by this Mortgage or affect the priority of Bank's security interest granted hereby or by any other recorded document, it being understood and agreed that such mention in such financing statement or statements is solely for the protection of Bank in the event any court shall at any time hold with respect to the foregoing clauses (A), (B), or (C) of this sentence, that notice of Bank's priority of interest, to be effective against a particular class of persons, must be filed in the Uniform Commercial Code records. The aforesaid security interest shall

UNOFFICIAL COPY

attach to the Collateral as soon as Borrower obtains any interest in any of the Collateral and before the Collateral becomes fixtures or before the Collateral is installed or affixed to other collateral for the benefit of Bank to secure the Obligations, and all other sums and charges which may become due hereunder or thereunder. The security interest held by Bank shall cover cash and non-cash proceeds of the Collateral, but nothing contained herein shall be construed as authorizing, either expressly or by implication, the sale or other disposition of the Collateral by Borrower, which sale or other disposition is hereby expressly prohibited without Bank's prior written consent, or as otherwise provided herein.

In the event of default under this Mortgage, Bank, pursuant to the Code, shall have the option of proceeding as to both real and personal property in accordance with its rights and remedies in respect of the real property, in which event the default provisions of the Code shall not apply. The parties agree that, in the event Bank elects to proceed with respect to the Collateral separately from the real property, the requirement of the Code as to reasonable notice of any proposed sale or disposition of the Collateral shall be met if such notice is mailed to the Borrower, as hereinafter provided, at least ten (10) days prior to the time of such sale or disposition.

(b) To the extent any of the items of Collateral described herein are goods that are or are to become fixtures related to the real estate described herein, it is intended that, as to those goods, this Mortgage shall be effective as a financing statement filed as a fixture filing from the date of its filing for record in the real estate records of the county in which the Land is located. Information concerning the security interest created by this instrument may be obtained from the Bank, as "Secured Party" or Borrower, as "Debtor," at their respective mailing addresses, set out in Paragraph 3.05 hereof.

(c) Borrower further covenants and agrees that all of the Collateral shall be owned by Borrower and shall not be the subject matter of any lease or other instrument, agreement or transaction whereby the ownership or beneficial interest thereof or therein shall be held by any person or entity other than Borrower, except to the extent Bank consents in writing to any lease of any of such property, which consent may be withheld or delayed in Bank's sole discretion; nor shall Borrower create or cause to be created any security interest covering any such property, other than (i) the security interest created herein in favor of Bank, (ii) the rights of tenants lawfully occupying the Property pursuant to leases approved by Bank, (iii) the Permitted Exceptions, and (iv) the liens and security interests created under the Loan Agreement.

1.07 Further Assurances: After-Acquired Property. At any time, and from time to time, at Borrower's expense and upon request by Bank, Borrower shall make, execute and deliver or cause to be made, executed and delivered, to Bank and, where appropriate, cause to be recorded and/or filed and from time to time thereafter to be re-recorded and/or refiled at such time and in such offices and places as shall be deemed desirable by Bank, any and all such other and further deeds to secure debt, mortgages, deeds of trust, security agreements, financing statements, continuation statements, instruments of further assurances, certificates and other documents as may, in the opinion of Bank, be necessary or desirable in order to effectuate, complete or perfect, or to continue and preserve, (i) the obligations of Borrower described in this Mortgage and (ii) the lien of this Mortgage as a first and prior lien upon and security interest in and to all of the Property, whether now owned or hereafter acquired by Borrower, subject only to the Permitted Exceptions and the liens and security interests created under the Loan Agreement. Upon any failure by Borrower so to do, Bank may make, execute, record, file, re-record and/or refile any and all such deeds to secure debt, mortgages, deeds of trust, security agreements, financing statements, continuation statements, instruments, certificates and documents for and in the name of Borrower, and Borrower hereby irrevocably appoints Bank the agent and attorney-in-fact of Borrower so to do. The lien and security interest hereof shall automatically attach without further act, to all after-acquired Property attached to, and/or used in the operation of the Property or any part thereof, to the extent permitted by law.

1.08 Expenses. Borrower shall (a) indemnify Bank and hold Bank harmless from and against, and (b) pay or reimburse Bank, upon demand therefor, for all reasonable attorneys' fees, costs and expenses incurred by Bank in any suit, action, legal proceeding or dispute of any kind in which Bank is made a party or appears as a party plaintiff or defendant, affecting the obligations, this Mortgage, or the interest created herein, or the Property, including, without limitation, any foreclosure proceedings, any condemnation action involving the Property, any federal bankruptcy proceeding or state insolvency proceeding involving the priorities or rights of creditors, any action to protect the security hereof, or any action or proceeding commenced by governmental authority with respect to the storage, disposal or clean-up of toxic or Hazardous Materials on, under or about the Property; and any such amounts paid by Bank shall be added to the Obligations secured by the lien of this Mortgage and shall bear interest from and after the date when paid at the default rate in effect under the Loan Agreement.

1.09 Subrogation. To the full extent of the Obligations, Bank is hereby subrogated to the liens, claims and demands, and to the rights of the owners and holders of each lien, claim, demand and other encumbrance on the Property which is paid or satisfied

in whole or in part, out of the proceeds of the Obligations, and the respective liens, claims, demands and other encumbrances shall be, and each of them, is hereby, preserved and shall pass to and be held by Bank as additional collateral and further security for the Obligations, to the same extent they would have been preserved and would have been passed to and held by Bank had they been duly and legally assigned, transferred, set over and delivered unto Bank by assignment, notwithstanding the fact that any instrument providing public notice of the same may be satisfied and cancelled of record.

1.10 Disposition of Property; Liens and Encumbrances. Borrower covenants and agrees with Bank, as part of the consideration for extending the Obligations, that without Bank's prior written consent, Borrower shall not, except as otherwise expressly permitted hereunder or under the Loan Agreement, voluntarily or by operation of law; sell, transfer, convey, assign or otherwise dispose of, all or any part of the Property or any interest therein nor, except as may relate to any Permitted Exception, cause or permit any encumbrance or lien to be placed on the Property.

1.11 Performance by Bank of Defaults by Borrower. Borrower covenants and agrees that, if it shall default in the payment of any tax, lien, assessment, or charge levied or assessed against the Property; in the payment of any utility charge, whether public or private; in the payment of any insurance premium; in the procurement of insurance coverage and the delivery of the insurance policies required hereunder; or in the performance or observance of any other covenant, condition or term of this Mortgage, then Bank, at its option, but without obligation and without notice, may, after the applicable cure period, if any, pay, perform or observe the same, and all payments made or costs incurred by Bank in connection therewith shall be secured hereby and shall be, without demand, immediately repaid by Borrower to Bank with interest thereon, from the date such payment is made or expense is incurred by Bank to the date Bank is reimbursed therefor, at the default rate provided in the Loan Agreement. Bank shall be the sole judge of the legality, validity and priority of any such tax, lien, assessment, charge, claim and premium, of the necessity for any such actions and of the amount necessary to be paid in satisfaction thereof. Bank is hereby empowered to enter and to authorize others to enter upon the Property or any part thereof for the purpose of performing or observing any such defaulted covenant, condition or term without thereby becoming liable to Borrower or any person in possession of any portion of the Property holding under Borrower. Borrower expressly acknowledges and agrees, however, that notwithstanding anything contained in this Paragraph 1.11 to the contrary, Bank shall not be obligated under this Paragraph 1.11 to incur any expense or to perform any act whatsoever. Borrower further acknowledges that no performance by Bank of Borrower's obligations shall cure Borrower's default or

release Borrower from those or any other obligations under this Mortgage. Borrower hereby indemnifies Bank against any and all costs, liabilities or damages, arising from or in any way related to the performance of Borrower's obligations by Bank.

1.12 Assignment of Leases and Rents.

(a) Without intending to derogate from any provision of this Mortgage prohibiting the lease of any of the Property without Bank's express written consent, it is agreed that, as additional collateral and to further secure the Obligations and other obligations of Borrower, Borrower does hereby absolutely, presently and irrevocably assign, grant, transfer, and convey to Bank, its successors and assigns, all of Borrower's right, title, and interest in, to, and under all leases, tenant contracts and other contracts, licenses and permits, whether written or oral, affecting the use or occupancy of all or any part of the Property which may be made hereafter, including any and all extensions, renewals, and modifications of the foregoing and guaranties of the performance or obligations of any tenants thereunder, and all other arrangements of any sort resulting in the payment of money to Borrower or in Borrower becoming entitled to the payment of money for the use of the Property or any part thereof whether such user or occupier is tenant, invitee, or licensee (all of the foregoing are hereinafter referred to collectively as the "Leases" and individually as a "Lease", and said tenants, invitees, and licensees are hereinafter referred to collectively as "Tenants" and individually as "Tenant" as the context requires), which Leases cover all or any portion of the Property; together with all of Borrower's right, title, and interest in and to all income, rents, issues, royalties, profits, rights and benefits and all Tenants' security and other similar deposits derived with respect to the Leases and with respect to the Property, including, without limitation, all basic and minimum rents, percentage rents, additional rents, payments in lieu of rent, expense contributions, and other similar such payments (hereinafter collectively referred to as "Income"), and the right to collect the same as they become due, it being the intention of the parties hereto to establish an absolute transfer and assignment of all of the Leases and the Income to Bank, and not just to create a security interest.

(b) As to each such Lease, if any, Borrower hereby covenants and agrees as follows:

(i) Borrower will be the sole holder of the landlord's interest under the Leases, will be entitled to receive the Income from the Leases and from the Property, and will have the full right to sell, assign, transfer, and set over the same and to grant to and confer upon Bank the rights, interests, powers, and authorities herein granted and conferred;

UNOFFICIAL COPY

(ii) Borrower has made no pledge or assignment of the Leases or Income, prior to the date hereof, and Borrower shall not, after the date hereof, make or permit any such pledge or assignment;

(iii) Each Lease will be valid, enforceable, and in full force and effect, and Borrower will deliver to Bank true, complete, and correct copies of all Leases with respect to the Property or any part thereof;

(iv) All Leases will provide for rental to be paid monthly, in advance, and Borrower will not accept or permit payment of rental or other Income under any of the Leases for more than one (1) month in advance of the due date thereof;

(v) No security deposit will be made by any Tenant under any Lease except as set forth in such Lease;

(vi) Neither this Mortgage nor the exercise of rights hereunder shall be deemed to make Bank a mortgagee in possession;

(vii) Borrower shall (A) fulfill, perform, and observe each and every material condition and covenant of landlord or lessor contained in each of the Leases; (B) give prompt notice to Bank of any claim of default under any of the Leases, whether given by a Tenant to Borrower, or given by Borrower to a Tenant, together with a complete copy of any such notice; (C) at no cost or expense to Bank, enforce, short of termination, the performance and observance of each and every covenant and condition of the Leases to be performed or observed by the Tenants thereunder; (D) diligently and in good faith enforce the Leases and all remedies available to Borrower against the Tenants in the event of default under any Lease by any Tenant; (E) diligently and in good faith appear in and defend any action arising out of, or in any manner connected with, any of the Leases, or the obligations or liabilities of Borrower as the landlord thereunder, or of the Tenant or any guarantors thereunder; and (F) execute such additional documents as Bank may require to evidence and confirm the Leases;

(viii) Borrower shall not, without the prior written consent of Bank, (A) modify, amend, or alter, or agree to the modification, amendment, or alteration of any of the Leases; (B) terminate the term, accept the surrender of, or otherwise cancel any of the Leases; (C) waive or release any Tenant from the performance or observance by such Tenant of any obligation or condition of any of the Leases; (D) discount any future accruing

rents under the Leases or other Income; (E) give any consent to any assignment or sublease by any Tenant under any of the Leases; or (G) grant any rental concessions in connection with any of the Leases. Any attempt to violate the provisions of this subparagraph (viii) shall be void;

(ix) Borrower shall provide Bank with a fully executed original counterpart of each amendment, modification or alteration thereto;

(x) Borrower shall take no action that will cause or permit the estate of any Tenant under any of the Leases to merge with the interests of Borrower in the Property or any portion thereof;

(xi) Borrower shall not do, or fail to do, any act if such action or failure would constitute a violation of any of the Leases or any guaranty of any Lease which would entitle the tenant or guarantor of any Lease to reduce payment of rent or to terminate its Lease or guaranty or otherwise affect or impair the benefits of this assignment nor shall Borrower commit any act or omission that may create in any Tenant a right to cease or reduce payment of rent or terminate its Lease or otherwise affect or impair the benefits of this Mortgage;

(xii) Borrower shall authorize and direct, and does hereby authorize and direct, each and every Tenant of the whole or any part of the Property to pay all rentals to Bank upon receipt of written demand from Bank to do so;

(xiii) Borrower shall provide to all of its Leases, and use reasonable efforts to require, that each Tenant under its Lease shall execute an estoppel certificate with Bank, in form and content to be supplied by Bank; and

(xiv) Borrower shall furnish to Bank, within ten (10) days after a request by Bank to do so, a written affidavit sworn to and signed by Borrower setting forth appropriate rent roll information as may be requested by Bank, and stating to Borrower's knowledge whether any defaults, offsets or defenses exist or are claimed under or in connection with any of the Leases. Any and all Leases affecting the Property shall provide for the giving by the tenants thereunder of certificates with respect to the status of the Leases and Borrower shall exercise Borrower's right to request such certificates within five (5) days of any demand therefor by Bank.

(c) Although this Mortgage constitutes an absolute, assignment of all Income, as long as no default or event of default as defined in Paragraph 2.01 below, on the part of Borrower, shall have occurred, Borrower shall have a license to collect, but not more than one (1) month prior to the due date thereof all such Income from the Property (including, without limitation, all rental payments under the Leases).

(d) Each Lease pertaining to the Property, or any part thereof, shall provide (or if such Lease does not so provide, shall be deemed to provide) that, in the event of the enforcement by Bank of the remedies provided by law or by this Mortgage, the Tenant thereunder will, upon request of Bank or any other person or entity succeeding to the interest of Bank as a result of such enforcement, automatically attorn to and become the tenant of Bank or said successor in interest, without change in the terms or other provisions of said Lease; provided, however, that (i) neither Bank nor any such successor in interest shall be bound by (A) any payment of rental, additional rental or other income for more than one (1) month in advance, or (B) any amendment or modification of said Lease, made without the express written consent of Bank or said successor in interest; (ii) neither Bank nor such successor in interest will be liable for (A) any act or omission or warranties of any prior landlord (including Borrower), or (B) the breach of any warranties or obligations relating to construction of Improvements on the Property or any Tenant finish work performed or to have been performed by any prior landlord (including Borrower), or (C) the return of any security deposit, and (iii) neither Bank nor such successor in interest shall be subject to any offsets or defenses which the Tenant might have against Borrower. Each Lease pertaining to the Property shall also provide (or if such Lease does not so provide, shall be deemed to provide) that, upon request by said successor in interest, the Tenant thereunder shall deliver an instrument confirming such attornment, and that such Tenant shall give Bank notice of any claim of Borrower's default and a reasonable opportunity to cure such default.

(e) Notwithstanding any other provisions of this Mortgage, Borrower shall not enter into any Lease without the prior written consent of Bank, and, even if Bank's consent is obtained, only upon the following conditions: (i) each such Lease shall contain a provision that the rights of the parties thereunder are expressly subordinate to all of the rights and title of Bank under this Mortgage; (ii) each such Lease shall contain a provision whereby the parties thereunder expressly recognize and agree that, notwithstanding such subordination, Bank may sell the Property in the manner provided herein, and thereby, at the option of Bank, sell the same subject to such Lease; and (iii) at or prior to the time of execution of any such Lease, Borrower shall, as a condition to such execution, procure from the other party or parties thereto an agreement in favor of Bank, in form and substance satisfactory to Bank, under which such party or parties agree to be bound by the

provisions hereof, regarding the manner in which Bank may foreclose under this Mortgage.

1.13 Estoppel Affidavits. Borrower, upon ten (10) days' prior written notice, shall furnish Bank a written affidavit, sworn to and signed by Borrower, setting forth (i) the unpaid principal of, and interest on, the Obligations, (ii) whether or not any offsets or defenses exist against such principal and interest, (iii) whether or not any "default" or "event of default" (or any fact or circumstance that, with lapse of time or notice, or both, would constitute a "default" or "event of default") exists under this Mortgage or any of the other Loan Documents, and (iv) the then state of facts relative to the condition of the Property.

1.14 Books and Records. Borrower shall keep and maintain or shall cause to be kept and maintained, at Borrower's cost and expense, proper and accurate books and records reflecting any services, equipment, or furnishings provided in connection with the operation of the Property. Bank and Bank's agents, accountants and attorneys shall have the right from time to time at all times during normal business hours to examine such books and records at the office of Borrower or such other person or entity maintaining such books or records and to make copies or extracts thereof as Bank shall desire, at such reasonable times as may be requested by Bank.

1.15 Hazardous Materials

(a) Borrower represents and warrants that no Hazardous Materials exist, or will exist, on or under the Property or have been transported to or from the Property or used, generated, manufactured, stored or disposed of on or, under the Property, except in compliance with applicable law, and the Property is not in violation in any material respect of any federal, state or local law, ordinance or regulation relating to industrial hygiene or the environmental conditions on or under the Property, including, without limitation, soil and groundwater conditions. Hazardous Materials shall include: (i) oil, flammable substances, explosives, radioactive materials, hazardous wastes or substances, toxic wastes or substances or any other materials or pollutants which pose a hazard to the Property or to persons on or about the Property, cause the Property to be in violation of any local, state or federal law or regulation, or are defined as or included in the definition of "hazardous substances" "hazardous wastes", "hazardous materials", or "toxic substances" or words of similar import under any applicable local, state or federal law or under the regulations adopted or publications promulgated pursuant thereto, including, but not limited to: (A) the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. §9601, et seq.; (B) the Hazardous Materials Transportation Act, as amended, 49 U.S.C. §1801, et seq.; (C) the Resource Conservation and Recovery Act, as amended, 42 U.S.C. §6901, et seq.; and (D)

regulations adopted and publications promulgated pursuant to the aforesaid laws; (ii) asbestos in any form which is or could become friable, urea formaldehyde foam insulation, transformers or other equipment which contain dielectric fluid containing levels of polychlorinated biphenyls in excess of fifty (50) parts per million; and (iii) any other chemical, material or substance, exposure to which is prohibited, limited or regulated by any governmental authority or may or could pose a hazard to the health and safety of the occupants of the Property or the owners and/or occupants of property adjacent to or surrounding the Property.

(b) Borrower shall, at its sole cost and expense, prevent the imposition of any lien against the Property for the cleanup of any Hazardous Material, and shall comply and cause (i) all Tenant's under any Lease or occupancy agreement affecting any portion of the Property, and (ii) any other person or entity on or occupying the Property, to comply with all federal, state and local laws, regulations, rules, ordinances and policies concerning the environment, health and safety and relating to the use, handling, production, disposal, discharge and storage of Hazardous Materials in or, on the Property. Without limiting the generality of the foregoing, Borrower represents, covenants and agrees that the Property does not and will not contain any Hazardous Materials. Borrower hereby grants to Bank, its agents, employees, consultants and contractors an irrevocable license to enter upon the Property and to perform such tests on the Property as are reasonably necessary to conduct an investigation and/or review; provided that such investigation or review and the results thereof shall have no effect on the representations, warranties, covenants and indemnifications made by Borrower hereunder.

(c) Borrower shall promptly take any and all necessary remedial action in response to the presence, storage, use, disposal, transportation or discharge of any Hazardous Materials on or, under the Property; provided, however, that Borrower shall not, without Bank's prior written consent, take any remedial action in response to the presence of any Hazardous Materials on or, under the Property, nor enter into any settlement agreement, consent decree, or other compromise in respect to any claims, proceedings, lawsuits or actions, contemplated or threatened pursuant to any Hazardous Materials laws or in connection with any third party, if such remedial action, settlement, consent or compromise might in Bank's sole determination, impair the value of Bank's security hereunder; Bank's prior consent shall not, however, be necessary in the event that the presence of Hazardous Materials on or, under the Property either (i) poses an immediate threat to the health, safety or welfare of any individual, or (ii) is of such a nature that an immediate remedial response is necessary and it is not possible to obtain Bank's consent prior to undertaking such action. In the event Borrower undertakes any remedial action with respect to any Hazardous Materials on or, under the Property, Borrower shall immediately notify Bank of any such remedial action, and

UNOFFICIAL COPY

shall conduct and complete such remedial action (A) in compliance with all applicable federal, state and local laws, regulations, rules, ordinances and policies, (B) to the satisfaction of Bank, and (C) in accordance with the orders and directives of all federal, state and local governmental authorities.

(d) Borrower shall protect, indemnify and hold Bank, its directors, officers, employees and agents, and any successors to Bank's interest in the Property, and any other person or entity who acquires any portion of the Property at a foreclosure sale, by the receipt of a deed in lieu of foreclosure, or otherwise through the exercise of Bank's rights and remedies under the Loan Documents, and any successors to any such other person or entity, and all directors, officers, employees and agents of all of the aforementioned indemnified parties, harmless from and against any and all claims, proceedings, lawsuits, liabilities, damages, losses, fines, penalties, judgments, awards, costs and expenses, (including, without limitation, attorney fees and costs and expenses of investigation) which arise out of or relate in any way to any use, handling, production, transportation, disposal or storage of any Hazardous Materials in, on or about the Property whether by Borrower or any Tenant or any other person or entity, including, without limitation: (i) all foreseeable and all unforeseeable consequential damages directly or indirectly arising out of (A) the use, generation, storage, discharge or disposal of Hazardous Materials by Borrower, any prior owner or operator of the Property, or any person or entity on or about the Property, or (B) any residual contamination affecting any natural resource or the environment, and (ii) the costs of any required or necessary repair, cleanup, or detoxification of the Property and the preparation of any closure or other required plans (all such costs, damages, and expenses referred to in this Paragraph 1.15(d) hereinafter referred to as "Expenses"). In addition, Borrower agrees that in the event any Hazardous Material is caused to be removed from the Property by Borrower, Bank, or any other person or entity, the number assigned by the Environmental Protection Agency to such Hazardous Material shall be solely in the name of Borrower and Borrower shall assume any and all liability for such removed Hazardous Material. In the event Bank pays any Expenses, such Expenses shall be additional Obligations secured hereby and shall become immediately due and payable without notice and with interest thereon at the default rate specified in the Note.

(e) In the event that Borrower shall fail to timely comply with the provisions of this Paragraph 1.15, Bank may either (i) declare that an event of default shall have occurred, and/or (ii) in addition to any rights granted to Bank hereunder, do or cause to be done whatever is necessary to cause the Property to comply with the applicable law, rule, regulation or order, and the cost thereof shall be additional Obligations secured hereby, and shall become immediately due and payable without notice and with interest thereon at the default rate specified in the Note.

Borrower shall give Bank and its agents and employees access to the Property for the purpose of effecting such compliance and hereby specifically grants to Bank an irrevocable license, effective (x) immediately if, in the opinion of Bank, irreparable harm to the environment, the Property, or persons or material amounts of property is imminent, or (y) otherwise, upon expiration of the applicable cure period, to do whatever is necessary to cause the Property to so comply, including, without limitation, to enter the Property and remove therefrom any Hazardous Materials. Borrower shall pay or reimburse Bank for any and all loss, cost, damage and expense (including, without limitation, attorney fees and costs incurred in the investigation, defense and settlement of claims) that Bank may incur as a result of or in connection with the assertion against Bank of any claims relating to the presence or removal of any Hazardous Material, or compliance with any federal, state or local laws, rules, regulations or order relating thereto, and the amount(s) thereof shall be additional Obligations secured hereby and shall become immediately due and payable without notice and with interest thereon at the default rate specified in the Note.

ARTICLE II

2.01 Events of Default.

(a) The terms "Default," "default," "Event of Default" or "event of default," wherever used in this Mortgage, shall mean any of the following events:

(i) Failure by Borrower to pay any Obligations secured by this Mortgage or any other sum that may be due and payable under any of the Loan Documents, on or before the date when due and payable (including cure periods provided in the Loan Documents), or;

(ii) An event shall occur which under the specific terms of Paragraph 1.02(a) shall give the Bank the option to accelerate the maturity of the Obligations;

(iii) Subject to expiration of any grace or cure period applicable thereto as provided in the Loan Agreement, failure by Borrower duly to observe or perform any other term, covenant, condition or agreement of this Mortgage or any of the other Loan Documents; or

(iv) The occurrence of any Event of Default under any of the Loan Documents.

2.02 Acceleration of Maturity. If an Event of Default shall have occurred, then the entire Obligations shall, at the option of Bank, become immediately due and payable without notice or demand, except as otherwise set forth in the Loan Agreement, which are hereby expressly waived, time being of the essence of this Mortgage; and no omission on the part of Bank to exercise such option when entitled to do so shall be construed as a waiver of such right.

2.03 Bank's Right to Enter and Take Possession, Operate and Apply Revenues.

(a) If an Event of Default shall have occurred, Borrower shall, in addition to any other rights or remedies of Bank under any of the other Loan Documents, upon demand of Bank, forthwith surrender to Bank the actual possession of the Property and if, and to the extent, permitted by law, Bank itself, or by such officers or agents as it may appoint, may enter and take possession of all the Property without the appointment of a receiver, or an application therefor, and may exclude Borrower and its respective agents and employees wholly therefrom, and may have joint access with Borrower to the books, papers and accounts of Borrower relating to the Property or any portion thereof.

(b) If Borrower shall for any reason fail to surrender or deliver the Property or any part thereof after such demand by Bank, Bank may obtain a judgment or decree conferring upon Bank the right to immediate possession or requiring Borrower to deliver immediate possession of the Property to Bank, to the entry of which judgment or decree Borrower hereby specifically consents. Borrower will pay to Bank, upon demand, all expenses of obtaining such judgment or decree, including reasonable compensation to Bank, its attorneys and agents; and all such expenses and compensation shall, until paid, be secured by the lien of this Mortgage.

(c) Upon every such entering upon or taking of possession, Bank may hold, store, use, operate, manage and control the Property and conduct the business thereof and, from time to time (i) make all necessary and proper maintenance, repairs, renewals, replacements, additions, betterments and improvements thereto and thereon and purchase or otherwise acquire additional fixtures, personalty and other property; (ii) insure or keep the Property insured; (iii) manage and operate the Property and exercise all the rights and powers of Borrower to the same extent as Borrower could in its own name or otherwise with respect to the same; (iv) enter into any and all agreements with respect to the exercise by others of any of the powers herein granted Bank, all as Bank from time to time may determine to be in its best interest, and (v) perform all acts required of Borrower as lessor under any lease of all or any part of the Property, all as Bank may from time to time determine to be to its best advantage. Bank may collect and receive all the income, rents, issues, profits and revenues from the Property,

including those past due as well as those accruing thereafter, and, after deducting (A) all expenses of taking, holding, managing and operating the Property (including compensation for the services of all persons employed for such purposes); (B) the cost of all such maintenance, repairs, renewals, replacements, additions, betterments, improvements, purchases and acquisitions; (C) the cost of such insurance; (D) such taxes, assessments and other similar charges as Bank may at its option pay; (E) other proper charges upon the Property or any part thereof; and (F) the compensation, expenses and disbursements of the attorneys and agents of Bank, Bank shall apply the remainder of the moneys and proceeds so received by Bank to the payment of principal and interest in whatever order or priority Bank may elect. Anything in this Paragraph 2.03 to the contrary notwithstanding, Bank shall not be obligated to discharge or perform the duties of a landlord to any tenant or incur any liability as the result of any exercise by Bank of its rights under this Mortgage, and Bank shall be liable to account only for the rents, incomes, issues, profits, and revenues actually received by Bank.

(d) For the purpose of carrying out the provisions of this Paragraph 2.03, Borrower hereby irrevocably constitutes and appoints Bank the true and lawful attorney-in-fact of Borrower to do and perform, from time to time, any and all actions necessary and incidental to such purpose, and Borrower does, by these presents, ratify and confirm any and all actions of said attorney-in-fact.

(e) In the event that all such interest, deposits and principal installments and other sums due under any of the terms, covenants, conditions and agreements of this Mortgage, shall have been paid and all Events of Default cured and satisfied, and as a result thereof, Bank surrenders possession of the Property to Borrower, the same right of taking possession shall exist if any subsequent Event of Default shall occur.

2.04 Receiver. If an Event of Default shall have occurred, Bank, upon application to a court of competent jurisdiction shall be entitled as a matter of strict right without notice and without regard to the sufficiency or value of any security for the Obligations or the solvency of any party bound for its payment to the appointment of a receiver to take possession of and to operate the Property and to collect and apply the income, rents, issues, profits, and revenues thereof. The receiver shall have all of the rights and powers permitted under the laws of the state within which the Land is located. Borrower shall pay to Bank upon demand all expenses, including receiver's fees, attorneys' fees, costs, and agent's compensation, incurred pursuant to the provisions of this Paragraph 2.04; and all such expenses shall be secured by this Mortgage.

2.05 Enforcement.

(a) If a Default shall have occurred, Bank, at its option, may institute legal proceedings for the foreclosure of this Mortgage.

(b) Bank shall have the right from time to time to enforce any legal or equitable remedy against Borrower, including, without limitation, suing for any sums, whether interest, principal or any installment of either or both, taxes, penalties or any other sums required to be paid under the terms of this Mortgage as the same become due, without regard to whether or not all of the Obligations shall then be due, and without prejudice to the right of Bank thereafter to enforce any other remedy, including, without limitation, an action of foreclosure, whether or not such other remedy be based upon a Default which existed at the time of commencement of an earlier or pending action, and whether or not such other remedy be based upon the same Default upon which an earlier or pending action is based.

2.06 Purchase by Bank. Upon any foreclosure sale, Bank may bid for and purchase the Property and shall be entitled to apply all or any part of the Obligations as a credit to the purchase price.

2.07 Application of Proceeds of Sale. In the event of a foreclosure sale of all or any portion of the Property, the proceeds of said sale shall be applied, in whatever order Bank in its sole discretion may decide, to the expenses of such sale and of all proceedings in connection therewith, including attorneys' fees, to insurance premiums, liens, assessments, taxes and charges, including utility charges, advanced by Bank, to payment of the outstanding principal balance of the Obligations, together with any prepayment premiums, fees or charges herein or in any of the other Loan Documents provided, or to the accrued interest on all of the foregoing, and finally the remainder, if any, shall be paid to Borrower.

2.08 Borrower as Tenant Holding Over. In the event of any such foreclosure sale by Bank, Borrower shall be deemed a tenant holding over and shall forthwith deliver possession to the purchaser or purchasers at such sale or be summarily dispossessed according to provisions of law applicable to tenants holding over.

2.09 Leases. Bank, at its option, is authorized to foreclose this Mortgage subject to the rights of any tenants of the Property, and the failure to make any such tenants parties to any such foreclosure proceedings and to foreclose their rights will not be, nor be asserted to be by Borrower, a defense to any proceedings instituted by Bank to collect the Obligations.

2.10 Discontinuance of Proceedings. In case Bank shall have proceeded to enforce any right, power or remedy under this Mortgage by foreclosure, entry or otherwise, and such proceeding shall have been withdrawn, discontinued or abandoned for any reason, or shall have been determined adversely to Bank, then in every such case (i) except as provided in paragraph 2.11 below, Borrower and Bank shall be restored to their former positions and rights, (ii) all rights, power and remedies of Bank shall continue as if no such proceeding had been taken, (iii) each and every Default (if not cured) declared or occurring prior or subsequent to such withdrawal, discontinuance or abandonment shall be deemed to be a continuing Default, and (iv) neither this Mortgage, nor the Obligations, nor any other of the Loan Documents shall be or shall be deemed to have been released or otherwise affected by such withdrawal, discontinuance or abandonment; and Borrower hereby expressly waives the benefit of any statute or rule of law now provided, or which may hereafter be provided, which would produce a result contrary to or in conflict with the above.

2.11 No Reinstatement. If a Default under Paragraph 2.01(a)(i) shall have occurred and Bank shall have proceeded to enforce any right, power or remedy permitted hereunder, then a tender of payment by Borrower or by anyone on behalf of Borrower of the amount necessary to satisfy all sums due hereunder made at any time prior to foreclosure, or the acceptance by Bank of any such payment so tendered, shall not constitute a reinstatement of any Obligations or this Mortgage.

2.12 Remedies Cumulative. No right, power or remedy conferred upon or reserved to Bank by this Mortgage or any other Loan Document is intended to be exclusive of any other right, power or remedy, but each and every such right, power and remedy shall be cumulative and concurrent and shall be in addition to any other right, power and remedy given hereunder or now or hereafter existing at law or in equity or by statute.

2.13 Suits to Protect the Property. Bank shall have the power (i) to institute and maintain such suits and proceedings as it may deem expedient to prevent any impairment of the Property by any acts which may be unlawful or in violation of this Mortgage, (ii) to preserve or protect its interest in the Property and in the income, rents, issues, profits and revenues arising therefrom, and (iii) to restrain the enforcement of or compliance with any legislation or other governmental enactment, rule or order that may be unconstitutional or otherwise invalid, if the enforcement of or compliance with such enactment, rule or order would impair the security hereunder or be prejudicial to the interest of Bank.

2.14 Bank May File Proofs of Claim. In the case of any receivership, insolvency, bankruptcy, reorganization, arrangement, adjustment, composition or other proceedings affecting Borrower, its creditors or its property, Bank, to the extent permitted by

law, shall be entitled to file such proofs of claim and other documents as may be necessary or advisable in order to have the claims of Bank allowed in such proceedings for the entire amount of the Obligations at the date of the institution of such proceedings and for any additional amount of the Obligations after such date.

2.15 Marshalling. At any foreclosure sale, the Property may, at Bank's option, be offered for sale for one total price, and the proceeds of such sale accounted for in one account without distinction between the items of security or without assigning to them any proportion of such proceeds, Borrower hereby waiving the application of any doctrine of marshalling; and in case Bank, in the exercise of the power of sale herein given, elects to sell the Property in parts or parcels, said sales may be held from time to time, and the power shall not be fully executed until all of the Property not previously sold shall have been sold.

2.16 Waiver of Appraisalment, Valuation, Etc. Borrower agrees, to the full extent permitted by law, that in case of a Default on the part of Borrower hereunder, neither Borrower nor anyone claiming through or under Borrower will set up, claim or seek to take advantage of any moratorium, reinstatement, forbearance, appraisalment, valuation, stay, extension, homestead right, entitlement or exemption, or redemption laws now or hereafter in force, in order to prevent or hinder the enforcement or foreclosure of this Mortgage or the absolute sale of the Property or the delivery of possession thereof immediately after such sale to the purchaser at such sale, and Borrower, for itself and all who may at any time claim through or under it, hereby waives to the full extent that it may lawfully so do, the benefit of all such laws, and any and all right to have the assets subject to the security interest of this Mortgage marshalled upon any foreclosure.

2.17 Waiver of Homestead. Borrower hereby waives and renounces all homestead right, entitlement, and exemption provided for by the Constitution and the laws of the United States of America and of any state, in and to the Property as against the collection of the Obligations, or any part hereof.

ARTICLE III

3.01 Successors and Assigns. This Mortgage shall inure to the benefit of and be binding upon Borrower and Bank and their respective legal representatives, successors, and assigns. Whenever a reference is made in this Mortgage to Borrower or Bank, such reference shall be deemed to include a reference to the heirs, devisees, legal representatives, successors, and assigns of Borrower or Bank, whether so expressed or not.

3.02 Terminology. All personal pronouns used in this Mortgage whether used in the masculine, feminine, or neuter gender, shall include all other genders; the singular shall include the plural, and vice versa. Titles of Articles are for convenience only and neither limit nor amplify the provisions of this Mortgage itself and all references herein to Articles, Paragraphs, or Subparagraphs shall refer to the corresponding Articles, Paragraphs, or Subparagraphs of this Mortgage.

3.03 Severability. If any provision of this Mortgage or the application thereof to any person or circumstance shall be invalid or unenforceable to any extent, the remainder of this Mortgage and the application of such provisions to other persons or circumstances shall not be affected thereby and shall be enforced to the greatest extent permitted by law.

3.04 Inconsistency with Loan Agreement; Applicable Law. In the event of any conflict between or inconsistency with the terms and provisions of this Mortgage and the Loan Agreement, the terms and provisions of the Loan Agreement shall control. This Mortgage shall, to the full extent permitted by local law, be interpreted and construed in accordance with the law of the State of Ohio.

3.05 Notices, Demands, and Requests. Any notice, demand or request required hereunder shall be in writing, and shall be deemed to have been validly served, given or delivered when personally delivered or when sent by first class mail, return receipt requested, with proper postage prepaid, and addressed to the party at the following addresses or to such other address as each party may designate for itself by like notice given in accordance with this Section 3.05.

BANK: Society National Bank
800 Superior Avenue
Cleveland, Ohio 44114
Attention: Christina M. Lucas

With a copy to: Arter & Hadden
1100 Huntington Building
Cleveland, Ohio 44115
Attention: Charles J. O'Toole

UNOFFICIAL COPY

9 1 3 5 8 8 0 3

BORROWER

Wilshire Partners
2750 Terminal Tower
Cleveland, Ohio 44113
Attn: William G. May

With a copy to:

Nicola, Gudbranson & Cooper
2750 Terminal Tower
Cleveland, Ohio 44113
Attention: Robert Gudbranson

3.06 Consents and Approvals. All approvals and consents hereunder shall be in writing and no approval or consent shall be deemed to have been given hereunder unless evidenced in a writing signed by the party from whom the approval or consent is sought.

3.07 Waiver.

(a) No delay or omission of Bank or of any holder of the Loan Documents to exercise any right, power or remedy accruing upon any default shall exhaust or impair any such right, power or remedy or shall be construed to be a waiver of any such default, or acquiescence therein; and every right, power and remedy given by this Mortgage to Bank may be exercised from time to time and as often as may be deemed expedient by Bank. No consent or waiver, express or implied, by Bank to or of any breach or default by Borrower in the performance of the obligations hereunder shall be deemed or construed to be a consent or waiver to or of any other breach or default in the performance of the same or any other obligations of Borrower hereunder. Failure on the part of Bank to complain of any act or failure to act or to declare an Event of Default, irrespective of how long such failure continues, shall not constitute a waiver by Bank of its rights hereunder or impair any rights, powers or remedies consequent on any breach or default by Borrower.

(b) If Bank (i) grants forbearance or an extension of time for the payment of any sums secured hereby; (ii) takes other or additional security for the payment of any sums secured hereby; (iii) waives or does not exercise any right granted herein or in the Loan Documents; (iv) releases any part of the Property from the lien of this Mortgage or otherwise changes any of the terms, covenants, conditions or agreements of the Loan Documents or this Mortgage; (v) consents to the filing of any map, plat or replat affecting the Property; or (vi) makes or consents to any agreement subordinating the lien hereof, any such act or omission shall not release, discharge, modify, change or affect the original liability under the Loan Documents, this Mortgage or any other obligation of Borrower or any subsequent purchaser of the Property or any part thereof, or any maker, co-signer, endorser, surety or guarantor; nor shall any such act or omission preclude Bank from exercising any right, power or privilege herein granted or intended to be granted in the event of any default then made or of any subsequent

default. In the event of the sale or transfer by operation of law or otherwise of all or any part of the Property, Bank, without notice, is hereby authorized and empowered to deal with any such vendee or transferee with reference to the Property or the Obligations, or with reference to any of the terms, covenants, conditions or agreements hereof as fully and to the same extent as it might deal with the original parties hereto and without in any way releasing or discharging any liabilities, obligations or undertakings of Borrower. In no event, however shall the provisions of this Paragraph 3.07(b) be construed in derogation of Paragraph 1.11 hereof.

3.08 Assignment. This Mortgage is assignable by Bank, and any assignment hereof by Bank shall operate to vest in the assignee all rights and powers herein conferred upon and granted to Bank.

3.09 Time of the Essence. TIME IS OF THE ESSENCE with respect to each and every covenant, agreement, and obligation of Borrower under this Mortgage and any and all other Loan Documents.

3.10 Attorneys' Fees. The meaning of the terms "legal fees" or "attorneys' fees" or any other reference to the fees of attorneys or counsel, wherever used in this Mortgage, shall be deemed to include fees of paralegals and, without limitation, all legal fees relating to litigation or appeals at any and all levels of courts and administrative tribunals.

3.11 Covenants Run With the Land. All of the grants, covenants, terms, provisions and conditions herein contained shall run with the land and shall apply to, bind and inure to the benefit of, the successors and assigns of Borrower and Bank.

3.12 Securing of Certain Obligations. This Mortgage shall secure all unpaid Obligations owed to Bank under the Loan Agreement, including without limitation, all unpaid Obligations for the payment of taxes, assessments, insurance premiums, or costs incurred for the protection of the Property.

3.13 Maximum Principal Amount. This Mortgage shall secure all future Advances made under the Loan Agreement and the payment of any amounts advanced from time to time by Bank to Borrower under the Loan Documents, or under another promissory note or other document stating that such advances are secured hereby, which advances may be made after this Mortgage has been delivered to the Cook County Recorder for recordation. Bank shall not be obligated to make any additional advances unless Bank has agreed to do so in writing. The maximum amount of unpaid loan indebtedness secured hereby shall be \$12,000,000 exclusive of interest thereon, unpaid balances of advances made with respect to the Property for the payment of taxes, assessments, and insurance premiums, costs incurred for the protection of the Property and other costs which

UNOFFICIAL COPY

91358803

Bank is authorized by this Mortgage to pay on Borrower's behalf, all of which shall also be secured by this Mortgage.

3.14 Variable Rate. The Obligations secured by this Mortgage shall accrue interest at a fluctuating rate of interest based upon the interest rate established from time to time as Bank's "Prime Rate."

3.15 Release and Satisfaction. Upon payment in full, as determined reasonably and in good faith by Bank, to Bank in good and sufficient funds satisfactory in all respects to Bank of all amounts due under each of the Loan Documents and the satisfaction, as determined solely by Bank, of all terms, covenants, and conditions of each of the Loan Documents, the estate hereby granted shall become void and Bank shall satisfy this Mortgage.

IN WITNESS WHEREOF, Borrower has executed, and delivered this Mortgage the day, month and year first above written.

BORROWER

Signed in the presence of:
(as to all signatures)

WILSHIRE PARTNERS, an Ohio
general partnership

Robert N. Grobman
Robert N. Grobman

By: William G. May
William G. May
Its: President

Richard Cooper
Richard Cooper

By: [Signature]
Its: [Signature]

Attest: [Signature]
Its: Secretary

"Borrower"

COOK COUNTY, ILLINOIS

1991 JUL 18 PM 2:21

91358803

91358803

UNOFFICIAL COPY

9 1 3 5 8 3 0 3

STATE OF OHIO)
)
COUNTY OF CUYAHOGA)

Before me, a Notary Public in and for said County and State, personally appeared the above-named Wilshire Partners, an Ohio general partnership, by William G. May, its President, and DAVID R. May, its Vice President, who acknowledged that they did sign the foregoing instrument and that the same is the free act and deed of said corporation and the free act and deed of each of them as such officers.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal, at Cleveland, Ohio, this 17 day of July, 1991.

BVP
Notary Public

BRYAN V. PERD, Attorney At Law
Notary Public - State of Ohio
My commission has no expiration date.
Section 147.03 R. C.

This Instrument Prepared by:
↓MAIL TO:
ARTER & HADDEN
1100 Huntington Building
Cleveland, Ohio 44115

NVP:rcb/01351
22417/18204
07/17/91

91358803

UNOFFICIAL COPY

EXHIBIT A

PARCEL NO. 1:

THAT PART OF LOT 8, IN TOLLWAY INDUSTRIAL PARK, BEING A SUBDIVISION OF PART OF THE EAST 1/2 OF SECTION 33, AND PART OF THE WEST 1/2 OF SECTION 34, TOWNSHIP 42 NORTH, RANGE 10 EAST OF THE THIRD PRINCIPAL MERIDIAN, IN PALATINE TOWNSHIP, DESCRIBED AS FOLLOWS: BEGINNING AT THE NORTH WEST CORNER OF SAID LOT 8; THENCE SOUTHWESTWARD, ALONG THE WESTERLY LINE OF SAID LOT 8, BEING THE EASTERLY LINE OF PALMER DRIVE, SOUTH 20 DEGREES 21 MINUTES 50 SECONDS WEST, A DISTANCE OF 325 FEET, TO A POINT OF CURVATURE; THENCE SOUTHWARD, ALONG A CURVED LINE, BEING THE EASTERLY LINE OF PALMER DRIVE, CONVEXED TO THE WEST LINE, 660.48 FEET IN RADIUS, FOR AN ARC LENGTH OF 40 FEET; THENCE SOUTH, 66 DEGREES 53 MINUTES 51 SECONDS EAST, A DISTANCE OF 433.47 FEET; THENCE NORTH, 21 DEGREES 40 MINUTES 34 SECONDS EAST, ALONG A LINE, PARALLEL WITH THE EASTERLY LINE OF SAID LOT 8, BEING THE WESTERLY LINE OF HAMMOND DRIVE, A DISTANCE OF 365.78 FEET, TO THE NORTHERLY LINE OF LOT 8; THENCE NORTH, 69 DEGREES 38 MINUTES 10 SECONDS WEST, ALONG THE NORTHERLY LINE OF SAID LOT 8, A DISTANCE OF 442.99 FEET, TO THE POINT OF BEGINNING, IN COOK COUNTY, ILLINOIS.

PARCEL NO. 2:

THE SOUTHERLY 390 FEET OF LOT 2, AS MEASURED ALONG THE WESTERLY AND EASTERLY LINES THEREOF, TOGETHER WITH THE SOUTHERLY 390 FEET OF THE WESTERLY 13.42 FEET OF LOT 3, AS MEASURED ALONG THE WESTERLY AND SOUTHERLY LINES RESPECTIVELY THEREOF IN TOLLWAY INDUSTRIAL PARK, BEING A SUBDIVISION OF PART OF THE EAST HALF OF SECTION 33 AND PART OF THE WEST HALF OF SECTION 34, ALL IN TOWNSHIP 42 NORTH, RANGE 10, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN PALATINE TOWNSHIP, COOK COUNTY, ILLINOIS. SAID PARCEL CONTAINS 173,597 SQ. FT. = 3.985 ACRES, MORE OR LESS.

Address of Property: 2401 N. PALMER DR.
Schaumburg IL.

PIN: 02-34-300-053
02-34-300-060
02-34-300-061

91358803

UNOFFICIAL COPY

9 1 3 2 8 3 0 3

EXHIBIT B

PERMITTED EXCEPTIONS

1. Real estate taxes not yet due and payable.
2. Zoning Ordinances, if any.

Property of Cook County Clerk's Office