

UNOFFICIAL COPY

93551294

3 of 7 288369

MORTGAGE, SECURITY AGREEMENT AND FINANCING STATEMENT

From

AMERICAN NATIONAL BANK
AND TRUST COMPANY OF CHICAGO,
AS TRUSTEE UNDER TRUST AGREEMENT
DATED MAY 22, 1991 AND KNOWN AS
TRUST NO. 113913-07

93551294

To

AMERICAN NATIONAL INSURANCE COMPANY

Dated as of
July 15, 1993

. DEPT-01 RECORDING \$77.00
. T40000 TRAN 2602 07/16/93 15:26:00
. 43112 *--93-551294
COOK COUNTY RECORDER

This instrument prepared
by and after recording
return to:

Steven N. Zaris
Chapman and Cutler
111 W. Monroe
Chicago, Illinois 60603

RETURN to: Box 15
N24-21603-14 N.H.C.

77⁰⁰
M

UNOFFICIAL COPY

any claim and interests, fees, charges or payments accruing on or received from or to be received on any of the foregoing in any way relating to the Mortgaged Property, or the ownership, enjoyment or operation of the Mortgaged Property together with all proceeds of the foregoing described in this Section 1.2.

Section 1.3. The term "*Mortgaged Premises*" shall mean and include (a) the real property situated in the County of Cook, State of Illinois, described in *Exhibit "A"* which is attached hereto and incorporated herein for all purposes; together with all buildings and improvements of every kind and description now or hereafter erected or placed thereon and all materials now or hereafter placed thereon intended for construction, reconstruction, alteration and repairs of such buildings and improvements, all of which materials shall be deemed to be included as a part of said real property immediately upon the delivery thereof to said real property; (b) all fixtures now or hereafter owned by Maker and attached to, contained in or used in connection with said real property, and all renewals and replacements thereof, including but not limited to (i) all equipment, apparatus, machinery, motors, elevators, fittings and radiators, (ii) all plumbing, heating, lighting, ventilating, refrigerating, incinerating, air-conditioning and sprinkler equipment; (iii) all awnings, storm windows and doors, mantels, cabinets, rugs, carpeting, linoleum, stoves, shades, draperies, blinds and water heaters; (iv) such other goods and chattels and personal property as are usually furnished by landlord in letting an unfurnished building, or which shall be attached to said buildings and improvements by nails, screws, bolts, pipe connections, masonry or in any other manner; and (v) all built-in equipment as may be shown by plans and specifications.

Section 1.4. The term "*Mortgaged Property*" shall mean the Mortgaged Premises and Collateral.

Section 1.5. The term "*Note*" shall mean that certain First Mortgage Note of even date herewith in the principal sum of Five Million and 00/100 Dollars (\$5,000,000) payable to the order of Noteholder, payable with interest in installments as stipulated therein and providing for the right to declare the unpaid principal balance due and payable upon the occurrence of an Event of Default and otherwise as provided therein and providing for the payment of attorneys' fees, and all notes given in renewal, extension and/or modification of said First Mortgage Note or any portion thereof.

SECTION II. GRANTING CLAUSE

In consideration of Ten Dollars (\$10.00) cash in hand paid, of Noteholder's advancing or extending to Maker the funds or credit constituting a part of the Indebtedness, and the mutual covenants contained herein, the receipt and sufficiency of which are hereby acknowledged, Maker hereby conveys, mortgages, assigns, and pledges to Noteholder the above-described Mortgaged Property for the purpose of securing the Indebtedness, and the full and complete performance of each and every obligation, covenant, duty and agreement of Maker contained herein or in the Note or any other instrument executed by Maker pertaining to the Note or as security therefor; TO HAVE AND TO HOLD the Mortgaged Property, together with the rights, privileges and appurtenances thereto belonging unto the

UNOFFICIAL COPY

MORTGAGE, SECURITY AGREEMENT AND FINANCING STATEMENT

This Mortgage, Security Agreement and Financing Statement (hereinafter termed "Agreement") is entered into as of July 15, 1993 between AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, not personally but solely as Trustee under Trust Agreement dated May 22, 1991 and known as Trust No. 113913-07 whose mailing address is c/o First American Management, 3436 North Kennicott, Suite 250, Arlington Heights, Illinois 60004-1439 (hereinafter termed "Maker"), and AMERICAN NATIONAL INSURANCE COMPANY, whose mailing address is One Moody Plaza, Galveston, Texas 77550, Attn: Mortgage and Real Estate Investment Department (hereinafter termed "Noteholder").

SECTION I. DEFINITIONS

Section 1.1. The term "Indebtedness" shall mean and include:

- (1) Any and all sums becoming due and payable pursuant to the Note, as hereinafter defined;
- (2) Any and all other sums becoming due and payable by Maker to Noteholder including such as may hereafter be borrowed by Maker from Noteholder, and including, but not limited to, advancements made by Noteholder pursuant to the terms and conditions of this Agreement or any other instrument securing, executed in connection with or otherwise relating to the Note; and
- (3) All renewals, extensions, modifications, increases, consolidations and rearrangements of any or all of the obligations of Maker defined herein under the term Indebtedness.

The maximum aggregate amount of principal and interest under the Note and other Indebtedness (now owed or hereafter owed) secured by this Agreement is Ten Million and 00/100 Dollars (\$10,000,000).

Section 1.2. The term "Collateral" shall mean and include (a) all of the goods, accounts, general intangibles, instruments, documents, equipment and/or fixtures of every kind and nature whatever (including without limitation, the items described in subsections (b) - (d) below) now or hereafter owned by Maker, in or hereafter placed in, or used or which may become used, in connection with or in the operation of the Mortgaged Premises, together with all additions thereto, replacements thereof, substitutions therefor and all proceeds thereof; (b) all rents, revenues, profits and incomes and, to the extent now or hereafter owned by Maker, insurance policies, plans and specifications, contract rights, accounts, and general intangibles in any way relating to the Mortgaged Property or used or useful in the use, enjoyment, ownership or operation of the Mortgaged Property; (c) all names, trade names, signs, marks, and trademarks now or hereafter owned by Maker under which the Mortgaged Property, or any part thereof, is known or operated; and (d) all deposits, escrowed monies, insurance proceeds, condemnation awards to which Maker has

93061234

UNOFFICIAL COPY

Noteholder and its successors and assigns forever, and Maker is hereby bound to warrant and forever defend the Mortgaged Property unto the Noteholder, its successors and assigns, against the claims of all persons claiming any interest in the Mortgaged Property or any part thereof save and except only these items identified on *Exhibit "B"* attached hereto and incorporated herein for all purposes (the "*Permitted Exceptions*").

SECTION III. ADDITIONAL SECURITY

As further security for the Indebtedness and the full and complete performance of each and every obligation, covenant, agreement and duty of Maker contained herein or contained in any other instrument executed by Maker pertaining to the Note or the security therefor:

A. *Security Interest.* Maker hereby grants and conveys to Noteholder a security interest in and lien on all of the Collateral. This Agreement shall serve as a Security Agreement created pursuant to the Uniform Commercial Code of the State of Illinois, and Noteholder shall have and may exercise all rights, remedies and powers of a secured party under the Uniform Commercial Code of the State of Illinois. Maker hereby represents, warrants and covenants that (1) Maker and the beneficiaries of Maker are the owners and holders of the Collateral free and clear of any adverse claim, security interest or encumbrance, except those created herein and those which are Permitted Exceptions, subject to recorded agreements of subordination of any lien securing the payment of indebtedness or any leases of the Mortgaged Premises in form and substance acceptable to Noteholder; (2) it will defend the Collateral, and the priority of the security interest created herein, as a valid first security interest against all claims and demands of any person at any time claiming the same or any interest therein; (3) there are no financing statements executed by the Maker or any of the beneficiaries of Maker, as debtor, now on file in any public office except those financing statements which are being released contemporaneously with the delivery of this transaction or which have been authorized by Noteholder; (4) it will deliver to Noteholder such other and further agreements, financing statements and assignments as Noteholder may request and authorizes Noteholder to file or record such statements in such offices and at such times as it is deemed by Noteholder to be necessary or desirable.

B. *Assignment of Condemnation Awards.* To the extent of the full amount of the Indebtedness secured hereby and of the cost and expenses (including reasonable attorneys' fees) incurred by Noteholder in the collection of any award or payment, Maker hereby assigns to Noteholder any and all awards or payments, including all interest thereon, together with the right to receive the same, which may be made to Maker with respect to the Mortgaged Property as a result of (a) the exercise of the right of eminent domain, (b) the alteration of the grade or of any street, or (c) any other injury to or decreased value in the Mortgaged Property, as well as the right, but not the obligation, to, at Maker's expense, participate in and make decisions concerning the progress of any proceeding involving any such award or payment. Maker shall give Noteholder written notice of any such action or proceeding

UNOFFICIAL COPY

immediately upon Maker's becoming aware of same. All such damages, condemnation proceeds and consideration shall be paid directly and solely to Noteholder whether or not an Event of Default has at such time occurred, and after first applying said sums to the payment of all costs and expenses (including reasonable attorneys' fees) incurred by Noteholder in obtaining such sums. Noteholder may, at its option, apply the balance on the Indebtedness, in any order and whether or not then due or to the restoration of the Mortgaged Property, or release the balance to Maker. Said application or release shall not cure or waive any default.

SECTION IV. ABSOLUTE ASSIGNMENT OF RENTS

In further consideration for the indebtedness evidenced by the Note, Maker hereby absolutely and unconditionally assigns to Noteholder all rents, revenues, profits and incomes from the Mortgaged Property or any portion thereof. Provided, however, so long as no Event of Default has occurred, Maker is hereby granted a license to collect and retain the currently accruing rents, income and profits from the Mortgaged Property, but in no event for more than one (1) month in advance of such collection. If an Event of Default shall occur, however, thereupon, and at any time thereafter such default is continuing, Noteholder may terminate such license and may, without any liability to Maker, take possession and control of the Mortgaged Property and/or receive and collect all rents, revenues, profits and income, accrued or accruing thereafter so long as any of the Indebtedness remains unpaid, applying so much thereof as may be collected first to the expenses incident to taking possession and/or the collection thereof, and second to the payment of the Indebtedness other than the Note and then to the amount of the Note then remaining unpaid, at Noteholder's discretion, either principal or interest, in any order, and whether then matured or not, paying the balance, if any, to the Maker. It is intended by Maker and Noteholder that this assignment of rents constitutes an absolute assignment and not an assignment for additional security only and that Noteholder shall be entitled to exercise its rights hereunder whether or not Noteholder is in possession of the Mortgaged Premises at such time. Maker agrees to fulfill or perform each and every covenant of any and all leases of the Mortgaged Property so as to keep them at all times in full force and effect, and not to make any modification, consent to any modification of, or cancel any lease of all or any part of the Mortgaged Property after the lease has been executed by Maker and lessee, without the prior written consent of Noteholder; the failure to fulfill or perform any such covenant or the making of or consent to any such modification or cancellation shall be an Event of Default.

SECTION V. MAKER'S REPRESENTATIONS AND WARRANTIES

In order to induce Noteholder to lend the funds evidenced by the Note, Maker represents and warrants that:

A. *Accurate Loan Information.* All information and financial statements furnished or to be furnished to Noteholder by or on behalf of Maker in connection with the Indebtedness secured by this Agreement is or at the time of delivery will be complete and accurate in all respects.

UNOFFICIAL COPY

B. *Valid Title.* Maker or the beneficiaries of Maker are the lawful owners of the Mortgaged Property and have good right and lawful authority to mortgage and pledge the same.

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

D. *Maintenance of Lien Priority.* Maker shall take and cause its beneficiaries to take all steps necessary to preserve and protect the validity and priority of the liens on the Mortgaged Property created hereby. Maker shall execute, acknowledge and deliver and cause its beneficiaries to execute, acknowledge and deliver such additional instruments as Noteholder may deem necessary in order to preserve, protect, continue or maintain the liens and security interests created hereby as first liens on the Mortgaged Property. All costs and expenses incurred in connection with the protection, preservation, continuation or maintaining of the security interest and the liens herein created as valid first and subsisting liens shall be paid by Maker.

E. *Value of the Mortgaged Property.* The value of the Mortgaged Property, as established by an appraisal submitted to Maker, is substantially in excess of the Indebtedness secured hereby. Maker acknowledges but for the Mortgaged Property having a value in excess of the amount of the Indebtedness, Noteholder would not make the loan evidenced by the Note and advance the funds hereunder. Maker agrees that Noteholder shall at all times have the benefit of the Mortgaged Property as the security for the Indebtedness even though the value thereof may now or in the future exceed the amount of the Indebtedness secured hereby.

F. *Representations, Warranties and Covenants of Maker as an Illinois Land Trust.* Maker hereby represents, warrants and covenants that:

(1) It is, and shall continue to be, (a) duly organized and existing under the laws of the United States of America, (b) duly qualified to transact business in each State where the conduct of its business requires it to be qualified, and (c) duly authorized to execute and deliver the written instruments comprising the Indebtedness in this instrument and to observe and perform its duties thereunder and hereunder.

(2) Its officers executing the instruments comprising part or all of the Indebtedness are the legally appointed, qualified and acting officers of the Maker and have been expressly authorized to execute this instrument by resolution of the Maker's Board of Directors.

(3) It shall not, without Noteholder's prior written consent, amend or terminate the Land Trust Agreement under which Maker is Trustee.

UNOFFICIAL COPY

(4) The only beneficiaries of Maker are: FAI II, Inc., an Illinois corporation, and Rob Roy Commercial Joint Venture Limited Partnership, an Illinois limited partnership.

(5) Maker will not permit any interest of any beneficiary to be sold, transferred, conveyed, encumbered or otherwise the subject of any Transaction, as defined below.

G. *Construction and Materials.* Maker hereby warrants, represents and covenants that all persons and entities who have provided labor or materials to or for the benefit of the Mortgaged Property by, through or under Maker or otherwise at Maker's direction or request at any time prior to the date of this Agreement have been paid in full for labor or materials provided prior to the date hereof and, if requested by Noteholder, have provided Maker with lien waivers or subordination agreements in form and content acceptable to Noteholder.

H. *Hazardous Waste.* Maker hereby represents and warrants, to its knowledge, that the Mortgaged Property is not in violation of, and Maker covenants and agrees not to use or permit the use of the Mortgaged Property for any purpose which would be in violation of, any federal, state or local law, ordinance or regulation relating to Hazardous Materials, as defined below, industrial hygiene or to the environmental conditions on, under or about the Mortgaged Property, including, but not limited to, soil and groundwater condition. Maker further represents and warrants that, Maker is not aware of any facts or circumstances which may give rise to any litigation, proceedings, investigations, citations or notices of violations resulting from the presence, use, generation, manufacture, storage or disposition of, on, under or about the Mortgaged Property or the transport to or from the Mortgaged Property of any Hazardous Materials, as defined below. The foregoing representations and warranties shall survive the payment of the Indebtedness and/or foreclosure under this Agreement and shall constitute continuing representations and warranties to Noteholder, its successors and assigns. The term Hazardous Materials, as used in this Agreement, shall include but not be limited to:

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

UNOFFICIAL COPY

toxic or radioactive substances, contaminants or pollutants and any of the preceding which are defined as or included in the definition of "Hazardous Substance," "Hazardous Waste," "Hazardous Material" or "Toxic Substance" or other similar terms under any applicable local, state or federal law, ordinance, regulation or publication including but not limited to:

(1) Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.*

(2) Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*

(3) Clean Air Act, 42 U.S.C. Sections 7401 *et seq.*

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

(5) Hazardous Materials Transportation Act, 49 U.S.C. Sections 1801 *et seq.*

(6) Illinois Environmental Protection Act (415 ILCS 5/1 *et seq.*)

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

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

The foregoing representations and warranties shall survive the recordation of this Agreement and shall constitute continuing representations and warranties to Noteholder, its successors and assigns. Maker hereby agrees to indemnify and hold Noteholder, its directors, officers, employees, and agents, and any successors to Noteholder's interest in the chain of title to the Mortgaged Property, their directors, officers, employees, and agents (the "Indemnitees"), from and against any and all liability (i) including all foreseeable and all unforeseeable consequential damages, directly or indirectly arising out of the use, generation, storage, transportation or disposal of Hazardous Materials by Maker, its present or future tenants, any prior owner, operator or tenant of the Mortgaged Property, or any third party, at any time prior to the first to occur of (x) a Transaction consented to by Noteholder or a Permitted Transaction under Section VI.H hereinbelow, (y) foreclosure by Noteholder or (z) transfer of the Mortgaged Property in lieu of foreclosure

93551231

UNOFFICIAL COPY

hereunder to Noteholder or its nominee and (ii) including, without limitation, the cost of any required or necessary repair, cleanup or detoxification, claimed, threatened or asserted against any such Indemnitee arising out of the use, generation, storage, transportation or disposal of Hazardous Materials on or about the Mortgaged Property by Maker, its present tenants or any future tenants, any prior owner, operator or tenant of the Mortgaged Property, or any third party at any time prior to the first to occur of (x) a Transaction consented to by Noteholder or a Permitted Transaction under Section VI.H hereinbelow, (y) foreclosure by Noteholder or (z) transfer of the Mortgaged Property in lieu of foreclosure hereunder to Noteholder or its nominee. Maker acknowledges and agrees that as a condition precedent to making the loan to Maker evidenced by the Note secured by this Agreement, Noteholder has required that Maker provide to the Indemnitees the indemnity set forth herein and that Noteholder would not consummate the loan without this indemnity and that the indemnity contained herein is a material inducement for Noteholder's agreement to make the loan.

If Noteholder takes title to or possession of the Mortgaged Property, whether by foreclosure hereunder or deed in lieu thereof, or if a Transaction consented to by Noteholder or a Permitted Transaction under Section VI.H hereof occurs, the indemnity set forth in the preceding paragraph shall not apply to any loss or cost incurred thereafter by Noteholder that is the result of a release of Hazardous Substances occurring after any such transfer of the Mortgaged Property; *provided however*, that in the event any liability with respect to the indemnity set forth in the preceding paragraph arises as a result of activities occurring both prior to and after any such transfer of the Mortgaged Property as is described in this paragraph, Maker shall continue to be liable with respect to the indemnity set forth in the preceding paragraph, but only to the extent such liability is attributable to activities occurring prior to any such transfer.

1. *Illinois Responsible Property Transfer Act.* Maker hereby represents and warrants, to the best of its knowledge, after due and diligent inquiry, including, without limitation, review of all environmental reports regarding the Mortgaged Property of which Maker is aware and consultation with legal counsel, that the execution and delivery of this Agreement do not require the delivery and recordation of a Disclosure Document under and as defined in the Illinois Responsible Property Transfer Act (765 ILCS 90/1 *et seq.*).

SECTION VI. ADDITIONAL COVENANTS OF MAKER

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

A. *Payment of Indebtedness.* Maker will pay the Indebtedness promptly when due and payable.

UNOFFICIAL COPY

B. *Payment of Taxes and Other Assessments.* Maker will pay all taxes, assessments and other governmental, municipal or other public dues, charges, fines, or impositions imposed or levied upon the Mortgaged Property or on the interest created by this Agreement, or any tax or excise on rents or other tax, however described, assessed or levied by any state, federal or local taxing authority as a substitute, in whole or in part, for taxes assessed or imposed on the Mortgaged Property or on the interest created by this Agreement, and at least ten (10) days before said taxes, assessments and other governmental charges are due and will exhibit receipts therefor to Noteholder. If any tax or assessment is levied, assessed or imposed on Noteholder as a legal holder of the Note or any interest in the documents securing the Note by any governmental authority, then unless all such taxes are paid by Maker as they become due and payable and in the opinion of General Counsel of Noteholder, such payment by Maker is lawful and does not place Noteholder in violation of any law, Noteholder may, at its option, declare the Indebtedness immediately due and payable.

C. *Insurance.* Maker shall keep the Mortgaged Property insured against loss or damage by fire, windstorm, extended coverage perils, flood (in the event any of the Mortgaged Premises is within a 100-year flood plain and flood insurance is available pursuant to the United States Flood Disaster Protection Act of 1973), vandalism, malicious mischief and such other hazards, casualties or other contingencies and in such amounts (but in no event less than the greater of the amount of the Indebtedness from time to time secured hereby or the full replacement value thereof) as from time to time may be required by Noteholder, and maintain rents or rental value insurance coverage, in an amount at least adequate to cover twelve (12) months' principal and interest installments on the Note and together with twelve (12) months' property taxes and insurance premiums, with respect to the Mortgaged Property covering the risk of loss due to the occurrence of any of the foregoing hazards, in each case and in such amounts, in such manner and in such companies as the Noteholder may approve, and all such policies shall contain a waiver of subrogation and provide that any losses payable thereunder shall (pursuant to standard mortgagee clauses without contribution, including one providing that such insurance as to the interest of Noteholder shall not be invalidated by any act or omission or neglect of Maker, to be attached to each policy) be payable to Noteholder. Maker shall cause duplicate originals of any and all such insurance policies to be deposited with Noteholder. Maker will also carry public liability insurance, in such form, amounts and with such companies as Noteholder may from time to time reasonably require, with Noteholder included thereon as a named insured under a standard non-contributory mortgagee endorsement. Any or all of such policies may be provided under a blanket policy or policies provided such blanket policies allocate the amount of insurance required hereunder to the Mortgaged Property. Maker shall cause duplicate originals of any and all such insurance policies to be deposited with Noteholder, or certificates of the insurers under such policies evidencing same. At least ten (10) days prior to the date the premiums on each such policy or policies shall become due and payable, Maker shall furnish to Noteholder evidence of the payment of such premiums. Each of such policies shall contain an agreement by the insurer that the same shall not be cancelled or materially modified without at least thirty (30) days' prior written notice to

93551201

UNOFFICIAL COPY

Noteholder. In the event of loss under any such policy, Maker shall give immediate written notice to the insurance carrier and to Noteholder. With respect to all insurance policies except public liability insurance, Noteholder is hereby authorized, but not required, on behalf of and at the expense of Maker, whether or not an Event of Default has then occurred, to make proof of loss, to collect for, adjust or compromise any losses under any insurance policy on the Mortgaged Property, to appear in and prosecute any action arising from any of such insurance policies, and to apply, at Noteholder's option, the loss proceeds (less expenses of collection) on the Indebtedness, in any order and whether due or not, or to the restoration of the Mortgaged Property, or to be released to Maker, but any such application or release shall not cure or waive any default. In case of a sale pursuant to the foreclosure provision hereunder, or any conveyance of all or any part of the Mortgaged Property in extinguishment of the Indebtedness, complete title to all insurance policies on or related to the Mortgaged Property, and the unearned premiums of same shall pass to and vest in the purchaser or grantee of the Mortgaged Property.

D. *Escrow for Taxes and Insurance.* Maker shall pay, in addition to the installments payable under the Note, on the same day as such installments are due and payable, a sum equal to 1/12th of the estimated annual taxes, hazard and rental insurance premiums, and special assessments, if any, next due on the Mortgaged Property. If the amount so paid is not sufficient to pay such taxes, insurance premiums and assessments when due, then Maker will immediately deposit with Noteholder amounts sufficient to pay the same. Funds deposited by Maker pursuant to this provision shall be used to pay such taxes, insurance premiums and assessments when due, provided that Maker has furnished Noteholder with all tax statements, premium notices and other such notices at least thirty (30) days prior to the date that any such taxes, premiums and assessments may be due. If there is a default under the provisions of the Note or of this Agreement or of any other document executed and delivered in connection herewith, Noteholder may elect at any time after default, to apply the funds accumulated under this provision against the Indebtedness in any manner or order. No interest shall accrue or be allowed on any payments under the provisions of this paragraph. Noteholder shall not be required to deposit or hold monies in an account special or separate from its general funds. Maker expressly releases Noteholder from any liability to Maker arising out of the maintenance by Noteholder of an escrow as provided herein or for payment of any sums out of such escrow except for any willful misapplication of such sums by Noteholder. Maker further indemnifies Noteholder against claims arising out of payment of taxes or insurance premiums where Maker has failed to provide Noteholder with tax statements and premium notices as required hereby. The maintenance by Noteholder of an escrow for taxes and insurance shall not relieve Maker of its obligations under this Agreement respecting taxes and insurance on the Mortgaged Property.

E. *Waste, Demolition, Alteration or Replacement.* Maker will cause the Mortgaged Property and every part thereof to be maintained, preserved and kept in safe and good repair, working order and condition, will not commit or permit waste thereon, will not remove, demolish or alter the design or structural character of any

UNOFFICIAL COPY

building now or hereafter erected on the Mortgaged Premises, without the prior written consent of Noteholder, and will comply with all laws and regulations of any governmental authority with reference to the Mortgaged Property and the manner and use of the same, including, without limitation, the Americans with Disabilities Act, and will from time to time make all necessary and proper repairs, renewals, additions and restorations thereto so that the value and efficient use thereof shall be fully preserved and maintained. Maker agrees not to remove any of the fixtures or personal property included in the Mortgaged Property without the prior written consent of Noteholder and unless immediately replaced with like property of at least equal value. Maker shall act as necessary to continue or cause the continuance of such income producing activity as is presently conducted upon or contemplated for the Mortgaged Property.

F. *Inventory of Personal Property.* Upon request of Noteholder, Maker shall deliver to Noteholder an inventory describing and showing the make, model, serial number and location of all fixtures and personal property from time to time used in the management, maintenance and operation of the Mortgaged Property (other than inventory or property, if any, expressly excluded from the operation of this Agreement by separate written agreement or owned by a tenant of any part of the Mortgaged Premises) with a certification by Maker that said inventory is a true and complete schedule of such fixtures and personal property used in the management, maintenance and operation of the Mortgaged Property and that such items specified in the inventory constitute all of the fixtures and personal property required in the management, maintenance and operation of the Mortgaged Property and that such items are owned by Maker free and clear of security interests, liens, conditional sales contracts or title retention arrangements. Maker hereby grants to Noteholder a security interest in all such items of fixtures and personal property under the terms and conditions of this Agreement.

G. *Financial Statement.* Maker will furnish to Noteholder within one hundred twenty (120) days after the first day of each and every January (the "Financial Statement Due Date") until the Indebtedness secured hereby has been fully paid, the annual audited financial statements of Maker covering the operation of the Mortgaged Property and the annual audited financial statements of the beneficiaries of Maker, each such statement prepared in accordance with generally accepted accounting principles and each such statement prepared and signed by an independent certified public accountant approved by and acceptable to Noteholder. The financial statements shall contain the Maker's certification that, during the period of time covered by the particular statement, (i) to its knowledge, no activity has been conducted upon the Mortgaged Property in violation of any state, federal or local law, ordinance or regulation pertaining to Hazardous Materials, industrial hygiene or environmental conditions, and (ii) to the best of its knowledge, the Mortgaged Property complies with the Americans with Disabilities Act or, if the Mortgaged Property does not so comply, a detailed description of any such failure to comply and of Maker's plans for causing the Mortgaged Property to comply therewith.

UNOFFICIAL COPY

Maker agrees to use its best efforts to amend the current lease of the Mortgaged Property so as to include therein, and further agrees to include in any future lease of all or part of the Mortgaged Property, a covenant by the lessee thereunder to furnish to the Maker as lessor and to the Noteholder on or before the Financial Statement Due Date, until the Indebtedness secured hereby has been fully paid, the annual audited financial statements of such tenant, each such statement prepared in accordance with generally accepted accounting principles and each such statement prepared and signed by an independent certified public accountant approved by and acceptable to Noteholder.

If Maker does not deliver or cause to be delivered the financial statements as and when required by this Subsection G, there shall be added to the Indebtedness and Maker agrees to pay upon demand Two Hundred Dollars (\$200.00) for each calendar month or part thereof following the Financial Statement Due Date until the required financial statements are delivered to Noteholder.

H. *Restrictions upon Sale, Transfer or Mortgaging the Mortgaged Property or any Interest in Maker.* Maker acknowledges that Noteholder is relying on the creditworthiness and skill of the beneficiaries of Maker in advancing sums secured hereby. Except for a natural person's transfer by will or applicable state intestacy laws or a "Permitted Transaction" as defined below: (i) if the Maker should sell, trade, transfer, assign, exchange, convey, mortgage, pledge or encumber all or any part of the Mortgaged Property, or any interest of Maker therein, absolutely or as security for a debt or other obligation, whether done in a direct or indirect method or on a voluntary or involuntary basis or enter into any contractual arrangements to do so, or (ii) if a beneficiary of Maker should sell, trade, convey, mortgage, transfer, assign, exchange, pledge or encumber all or any part of its beneficial interest in the Maker, or (iii) if Maker or any beneficiary of Maker shall in any way, voluntarily or involuntarily be divested of title or of any interest in the Mortgaged Property or its beneficial interest in the Maker, respectively, then the Noteholder, at its option, may elect to accelerate the maturity of the Note and declare the entire amount of the Indebtedness immediately due and payable whereupon Maker shall have thirty (30) days to pay the full sum of the Indebtedness including, without limitation, principal and interest, whether or not any sale, trade, mortgage, assignment, exchange, pledge, transfer, conveyance or encumbrance might diminish the value of the security for the Indebtedness or increase the likelihood of an Event of Default or increase the likelihood of the Noteholder having to resort to any other security for the Indebtedness after default or add or remove liability of any part for payment or performance of the Indebtedness. Maker further agrees that the foregoing restriction shall be effective and remain in full force and effect throughout the term of this Agreement and shall be applicable to Maker, each beneficiary and their respective successors and assigns. The consent by the Noteholder to any one sale, trade, transfer, mortgage, conveyance, assignment, exchange, conveyance or encumbrance (one or more of the preceding a "Transaction") shall not waive or forfeit the right of Noteholder to elect to accelerate the Indebtedness to maturity as to any other Transaction. Maker further covenants and agrees to give written notice to Noteholder

935512004

UNOFFICIAL COPY

in the event there occurs any Transaction which would violate the terms and conditions of this provision. The term "Transaction" shall include any voluntary or involuntary act or omission of Maker. Nothing herein contained shall prevent Noteholder from accelerating the Note at any time in the event Maker or any beneficiary of Maker enters into such a Transaction and does not notify Noteholder of same. The payment due from an acceleration under this paragraph shall be deemed to be a prepayment, and shall result in a prepayment premium in the amount provided for in the Note, or, if at that time there shall be no privilege of prepayment under the terms of the Note, a premium of eight percent (8%) of the then outstanding principal balance under the Note shall be immediately due. The Maker may request Noteholder to waive the right to declare the entire amount of the Indebtedness immediately due and payable and Noteholder may, in its absolute discretion, consent or refuse to consent to any Transaction other than a Permitted Transaction. As a condition of consenting to any such Transaction, Noteholder may, in its absolute discretion, make one or more of the following requirements:

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

A "Permitted Transaction" shall be (i) any Transaction in which the grantee is (A) any partnership, corporation, joint venture or other entity that is controlled by, controls or is under common control with either or both of the beneficiaries of Maker or any of the partnerships, corporations and/or individuals which own such beneficiaries as of the date hereof; (B) any partner or shareholder of any of the beneficiaries of Maker or any partner or shareholder of any of the partnerships or corporations which own such beneficiaries or any entity controlled by, controlling or under common control with any of such partners or shareholders as of the date hereof; or (C) any spouse, children, grandchildren or spouse of such children or grandchildren (or any trusts established or existing for the benefit of such persons) of any partner or shareholder of (1) any of the beneficiaries of Maker as of the date hereof, or (2) any partner or shareholder of a partner of any beneficiary of Maker as of the date hereof, or (3) any partner or shareholder of any partnership or corporation which is a partner or shareholder of a partner of any beneficiary of Maker as of the date hereof or (ii) a single Transaction in which the grantee is other than a grantee under a Permitted Transaction under clause (i) immediately above upon (w) Noteholder's prior approval, which shall not be unreasonably withheld, (x) the payment to Noteholder of a

UNOFFICIAL COPY

transfer fee equal to one percent (1%) of the then outstanding principal balance under the Note, (y) the substitution for (1) the indemnity furnished to Noteholder with respect to the obligations of Landlord under the Lease of the Mortgaged Premises accruing prior to the exercise of possessory rights or remedies by the Noteholder with respect to the Mortgaged Premises by (2) an identical indemnity from one or more parties as may be reasonably acceptable to Noteholder, and (z) delivery of a Certificate and Indemnity Regarding Hazardous Substances with respect to liability arising from and after the date of transfer to the grantee of the Mortgaged Property in such a Permitted Transaction in the form of such Certificate furnished to Noteholder as of the date hereof from an indemnitor reasonably acceptable to Noteholder; *provided, however*, if a Permitted Transaction under clause (ii) immediately above occurs, the grantee thereunder and its successors shall have no right to enter into a Permitted Transaction hereunder.

No Transaction pursuant to the foregoing provisions of this Subsection H or described in Section 8.1(5) below shall in any way release Maker or any other party liable on any of the Indebtedness or liable under any instrument securing or executed and delivered in connection with the Indebtedness from any such liability.

SECTION VII. RELEASE OF AGREEMENT

If Maker shall well and truly pay, or cause to be paid, all of the Indebtedness and does keep and perform each and every covenant, duty, condition, and stipulation herein imposed on Maker, in the Note contained, or in any other instrument securing, evidencing or related to the Indebtedness, then this Agreement and the grants and conveyances contained herein shall become null and void, and the Mortgaged Property shall revert to Maker and the entire estate, right, title and interest of the Noteholder will thereupon cease; and the Noteholder in such case shall, upon the request of Maker and at Maker's cost and expense, deliver to Maker proper instruments acknowledging satisfaction and release of this instrument; otherwise, this Agreement shall remain in full force and effect.

SECTION VIII. EVENTS OF DEFAULT

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

(1) Maker fails to make when due any payment of principal or interest under the Indebtedness, or otherwise breaches any of the provisions contained in the Note.

(2) Maker fails to keep or perform any of the other covenants, conditions or stipulations contained in this Agreement or in any instruments securing, evidencing or related to the Indebtedness, and such failure is not cured within thirty (30) days after Maker receives notice thereof.

UNOFFICIAL COPY

(3) Any warranty or representation made in this Agreement by Maker is determined by Noteholder to be untrue in any material respect, *provided, however*, that if Noteholder, in its sole and absolute discretion, determines that neither its rights under this Agreement, the Note or any other instrument executed and delivered in connection with the Note or the Security for the Indebtedness would be adversely affected thereby, Maker shall be afforded a reasonable period not to exceed thirty (30) days after Maker receives notice of such materially untrue warranty or representation to cause such warranty or any representation to be true and correct.

(4) Any person, corporation, or other entity that (a) owns all or any part of the Mortgaged Property, (b) is liable for the payment of all or any part of the Indebtedness or for the performance of any obligation or for any representation under the Note or any instrument securing or executed and delivered in connection with the Note, or (c) is a guarantor of all or any part of the Indebtedness (i) admits in writing its inability to pay its debts generally as they become due, (ii) files a petition or answer in bankruptcy as a debtor or seeking reorganization or an arrangement or otherwise to take advantage of any State or Federal bankruptcy or insolvency law, (iii) makes an assignment for the benefit of creditors, (iv) files a petition for or consents to the appointment of a receiver for its assets or any part thereof, or (v) without its consent has a petition filed in any bankruptcy or insolvency proceeding or an order, decree or judgment entered by a court of competent jurisdiction appointing a receiver of the Mortgaged Property or approving a petition filed against it seeking reorganization or an arrangement of it or its assets or debts under any bankruptcy or insolvency law and such petition, order, decree or judgment is not dismissed, vacated, set aside or stayed within sixty (60) days from the date of entry.

(5) Maker sells, trades, conveys, transfers, encumbers, mortgages, assigns, exchanges, pledges or encumbers (including, without limiting the provisions hereof or any similar references in Article VI(H) above, the granting of a security interest in) the Mortgaged Property or any portion thereof or interest therein, except for any transfer expressly permitted by Article VI(H) above, or Maker or any beneficiary of Maker sells, trades, conveys, transfers, mortgages, assigns, exchanges, pledges or encumbers (including, without limiting any of the provisions of this subparagraph, the granting of a security interest in) any part of its interest in Maker, except for any transfer expressly permitted by Article VI(H) above, or any such event occurs involuntarily to Maker or such beneficiary of Maker, all without the prior written consent of Noteholder.

(6) FAI II, Inc., an Illinois corporation, or Rob Roy Commercial Joint Venture Limited Partnership, an Illinois limited partnership, ceases to be a beneficiary of Maker.

(7) Maker's or any beneficiary's existence as a legal entity for any reason, by operation of law or otherwise, is materially modified or terminates.

93554231

UNOFFICIAL COPY

SECTION IX. RIGHTS OF NOTEHOLDER UPON DEFAULT

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

Section 9.2. Operation of Property by Noteholder. Upon the occurrence of an Event of Default, or at any time thereafter, in addition to all other rights herein conferred on the Noteholder, the Noteholder (or any person, firm or corporation designated by the Noteholder) may, but will not be obligated to, enter upon and take possession of any or all of the Mortgaged Property, exclude Maker therefrom, and hold, use, administer, manage and operate the same to the extent that Maker could do so. If the Mortgaged Property includes any type of business enterprise, the Noteholder may operate and manage such business without any liability of Noteholder to Maker resulting therefrom (excepting failure to use ordinary care in the operation and management of the Mortgaged Property); and the Noteholder or Noteholder's designee may collect, receive and receipt for all proceeds accruing from such operation and management, and, at Maker's expense, make repairs and purchase needed additional property, and exercise every power, right and privilege of Maker with respect to the Mortgaged Property. When and if the expenses of such operation and management have been paid and the Indebtedness has been paid, the Mortgaged Property shall be returned to Maker (providing there has been no foreclosure sale). This provision is a right created by this Agreement and cumulative of, and is not in any way to affect, the right of the Noteholder to the appointment of a receiver given the Noteholder by law.

Section 9.3. Judicial Proceedings. Upon the occurrence of an Event of Default, or at any time thereafter, or upon the breach of any covenant, term or condition herein contained, Noteholder may proceed by suit for a foreclosure of its lien on the Mortgaged Property, or to sue Maker for damages on, arising out of said default or breach, or for specific performance of any provision contained herein, or to enforce any other appropriate legal or equitable right.

Section 9.4. Uniform Commercial Code. On the happening of any Event of Default or at any time thereafter, Noteholder shall have and may exercise with respect to the Collateral all rights, remedies and powers of a Secured Party under the Uniform Commercial Code of the State of Illinois with reference to the Collateral or any other items in which a security interest has been granted herein, including without limitation the right and power to sell at public or private sale or sales or otherwise dispose of, lease or utilize the Collateral and any part or parts thereof in any manner to the fullest extent authorized or permitted under the Uniform Commercial Code of the State of Illinois after default by

93554204

UNOFFICIAL COPY

Maker without regard to preservation of the Collateral or its value and without the necessity of a court order, and apply the proceeds thereof first toward the payment of all costs and expenses and attorneys' fees incurred by Noteholder, and the balance toward the payment of the Indebtedness whether or not then due, and in such order or manner as Noteholder may elect. In the Event of Default, Noteholder shall have, among other rights, the right to take possession of the Collateral and to enter upon any premises where the same may be situated for the purpose of repossessing the same, without being guilty of trespass and without liability for damages occasioned thereby, and to take any action deemed appropriate or desirable by Noteholder, at its option and its sole discretion, to repair, restore or otherwise prepare the Collateral for sale or lease or other use or disposition as authorized herein. To the extent permitted by law, Maker expressly waives any notice of sale or any other disposition of the Collateral and any rights or remedies of Maker or the formalities subscribed by law relative to the sale or disposition of the Collateral or to the exercise of any other right or remedy of Noteholder existing after default. To the extent that such notice is required and cannot be waived, Maker agrees that if such notice is mailed postage prepaid to Maker at the address shown herein at least ten (10) days before the time of the sale or disposition, such notice shall be deemed reasonable and shall fully satisfy any requirement for giving said notice.

Maker agrees that Noteholder may proceed to sell or dispose of both the real and personal property covered herein in accordance with the rights and remedies granted under this Agreement with respect to the real property covered hereby. Maker hereby grants Noteholder the right, at its option, after default by Maker to transfer at any time to itself or its nominee the Collateral or any part thereof and to receive the monies, income, proceeds and benefits attributable to the same and to hold the same as Collateral or to apply it on the Indebtedness, whether or not then due, and in such order and manner as Noteholder may elect. Maker covenants and agrees that all recitals and any instrument transferring, assigning, leasing or making other disposition of the Collateral or any part thereof shall be full proof of the matters stated therein and no other proof shall be required to establish the legal propriety of the sale or other action taken by Noteholder and that all prerequisites of sale shall be presumed conclusively to have been performed or to have occurred. All rights to a marshalling of the assets of Maker, including such rights with respect to the Collateral and the Mortgaged Premises, are hereby waived.

Section 9.5. Appointment of Receiver. The Noteholder shall, as a matter of right, without notice and without giving bond to Maker or anyone claiming by, under or through it, and without regard to the solvency or insolvency of the Maker or the then value of the Mortgaged Premises, be entitled to have a receiver appointed for all or any part of the Mortgaged Premises and the rents, issues and profits thereof, with such power as the court making such appointment shall confer, and the Maker hereby consents to the appointment of such receiver and shall not oppose any such appointment. Any such receiver may, to the extent permitted under applicable law, without notice, enter upon and take possession of the Mortgaged Premises or any part thereof by force, summary proceedings, ejectment or otherwise, and may remove the Maker or other persons and any and all property therefrom, and may hold, operate and manage the same and receive all earnings, income, rents, issues and proceeds accruing with respect thereto or any part thereof, whether during the pendency

UNOFFICIAL COPY

of any foreclosure or until any right of redemption, without limitation of any waiver thereof, shall expire or otherwise.

Section 9.6. General Provisions Regarding Noteholder's Exercise of Remedies.

(1) *Application of Proceeds.* The proceeds of any and all foreclosure sales or any sales under Section 9.4 hereof of the Mortgaged Property or any part thereof shall be applied as follows: (i) to the payment of all necessary actions and expenses incident to the execution of said sale or sales, (ii) to the payment of the Indebtedness in such order as determined by Noteholder, to the amount of the accrued interest and principal legally due thereon and all other sums secured hereby, and to the payment of attorneys' fees as in the Note provided, and (iii) the remainder, if any, shall be paid to Maker or such other person or persons entitled thereto by law.

(2) *Multiple Sales.* Upon the occurrence of any Event of Default or at any time thereafter, the Noteholder shall have the option to proceed with foreclosure and/or all other remedies available to it in satisfaction of said Event of Default, but without declaring the whole Indebtedness due, and provided that if any sale is made because of such Event of Default, such sale may be made subject to the unmatured part of the Note and Indebtedness secured by this Agreement, and such sale, if so made, shall not in any manner affect the unmatured part of the Indebtedness secured by this Agreement, but as to such unmatured part of the Indebtedness this Agreement shall remain in full force and effect as though no sale had been made under the provisions of this paragraph. Several sales may be made under the provisions of this paragraph without exhausting the right of sale for any remaining part of the Indebtedness whether then matured or unmatured, the purpose hereof to provide for a foreclosure and sale of the Mortgaged Property for any matured part of the Indebtedness without exhausting any power of foreclosure and the power to sell the Mortgaged Property for any other part of the Indebtedness, whether matured at the time or subsequently maturing.

(3) *Waiver of Appraisement Laws.* Maker waives the benefit of all laws now existing or hereafter enacted providing for (i) any appraisement before sale of any portion of the Mortgaged Property (commonly known as Appraisement Laws) or (ii) any extension of time for the enforcement of the collection of the Indebtedness or any creation or extension of a period of redemption or reinstatement from any foreclosure (commonly known as Stay Laws and Redemption Laws) including, without limitation, under Section 15-1601(b) of the Act, as hereinafter defined.

(4) *Prerequisites of Sales.* In case of any foreclosure sale of the Mortgaged Property, all prerequisites to the sale shall be presumed to have been performed, and in any conveyance given hereunder, all statements of facts, or other recitals therein made as to the nonpayment of money secured or as to any other preliminary fact or thing, shall be taken in all courts of law or equity as prima facie evidence that the facts so stated or recited are true.

(5) *Business Loan; No Agricultural or Residential Real Estate.* Maker acknowledges that the transaction of which this Agreement is a part is a business loan within the purview of 815 ILCS 205/4 *et seq.*, as amended, and is a transaction which does not

93554234

UNOFFICIAL COPY

include either agricultural real estate (as defined in Section 15-1201 of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1101 *et seq.*) (herein called the "Act")) or residential real estate (as defined in Section 15-1219 of the Act).

(6) *Costs and Expenses of Foreclosure.* 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 the Noteholder for attorney's fees, appraiser's fees, outlays for documentary and expert evidence, stenographic charges, publication costs and costs (which may be estimated as the items to be expended after the entry of the decree to the extent permitted by applicable law) of procuring all such abstracts of title, title searches and examination, guarantee policies, and similar data and assurances with respect to title as the Noteholder may deem to be reasonably necessary either to prosecute any foreclosure action or to evidence to the bidder at any sale pursuant thereto the true condition of the title to or the value of the Mortgaged Premises, all of which expenditures shall become so much additional Indebtedness hereby secured which the Maker agrees to pay and all of such expenditures shall be immediately due and payable with interest thereon from the date of expenditure until paid at a rate equal to the then applicable Default Rate determined in accordance with the Note.

(7) *Noteholder's Remedies Cumulative — No Waiver.* No remedy or right of the Noteholder shall be exclusive of but shall be cumulative and in addition to every other remedy or right now or hereafter existing at law or in equity or by statute or otherwise. No delay in the exercise or omission to exercise any remedy or right accruing on any default shall impair any such remedy or right or be construed to be a waiver of any such default or acquiescence therein, nor shall it affect any subsequent default of the same or a different nature. Every such remedy or right may be exercised concurrently or independently, and when and as often as may be deemed expedient by the Noteholder.

(8) *Noteholder Party to Suits.* If the Noteholder shall be made a party to or shall intervene in any action or proceeding affecting the Mortgaged Premises or the title thereto or the interest of the Noteholder under this Agreement (including probate and bankruptcy proceedings), or if the Noteholder employs an attorney to collect any or all of the Indebtedness or to enforce any of the terms hereof or realize hereupon or to protect the lien hereof, or if the Noteholder shall incur any costs or expenses in preparation for the commencement of any foreclosure proceedings or for the defense of any threatened suit or proceeding which might affect the Mortgaged Premises or the security hereof, whether or not any such foreclosure or other suit or proceeding shall be actually commenced, then in any such case, Maker agrees to pay to the Noteholder, immediately and without demand, all costs, charges, expenses and attorney's fees incurred by the Noteholder in any such case, and the same shall constitute so much additional Indebtedness hereby secured payable upon demand with interest thereon at a rate equal to the then applicable Default Rate determined in accordance with the Note.

(9) *Compliance with Illinois Mortgage Foreclosure Law.* (a) In the event that any provision in this Agreement shall be inconsistent with any provision of the Act, the provisions of the Act shall take precedence over the provisions of this Agreement, but shall

UNOFFICIAL COPY

not invalidate or render unenforceable any other provision of this Agreement that can be construed in a manner consistent with the Act.

(b) If any provision of this Agreement shall grant to the Noteholder any rights or remedies upon default of the Maker which are more limited than the rights that would otherwise be vested in the Noteholder under the Act in the absence of said provision, the Noteholder shall be vested with the rights granted in the Act to the full extent permitted by law.

(c) Without limiting the generality of the foregoing, all expenses incurred by the Noteholder to the extent reimbursable under Section 15-1510 and 15-1512 of the Act, whether incurred before or after any decree or judgment of foreclosure, and whether enumerated in this Agreement, shall be added to the Indebtedness or by the judgment of foreclosure.

SECTION X. SPECIAL CONDITIONS

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

Section 10.1. Waiver and Election. The exercise of any option given under the terms of this Agreement shall not be considered as a waiver of the right to exercise any other option given herein, nor shall any acceptance by Noteholder of Maker's partial payment or partial performance of obligations under the Note or hereunder, nor shall any failure or delay by Noteholder in exercising any of its rights hereunder as to any Event of Default which may occur, operate as a waiver by Noteholder of its rights hereunder with respect to the occurrence of any other or further Event of Default or to the recurrence of the same Event of Default. The filing of the necessary notices for foreclosure, as provided in this Agreement, shall not preclude the exercise by Noteholder of any other remedy hereunder, including the prosecution of a later suit thereon.

Section 10.2. Landlord-Tenant Relationship. Any sale of the Mortgaged Property under this Agreement shall, without further notice, create the relationship of landlord and tenant at sufferance between the purchaser and Maker and any person or entity claiming an interest in the Mortgaged Property through Maker or otherwise occupying any of the Mortgaged Property, upon failure to surrender possession thereof, Maker and all such persons and entities may be removed by a writ of possession upon suit by the purchaser.

Section 10.3. Usury. Notwithstanding any provision in this Agreement to the contrary, it is expressly provided that in no case or event should the aggregate amounts, which by applicable law are deemed to be interest with respect to this Agreement, the Note or any document securing the Note ever exceed the "Maximum Nonusurious Rate" or the "Maximum Lawful Rate" (as defined in the Note). In this connection, it is expressly stipulated and agreed that it is the intention of Noteholder and the Maker to contract in strict compliance with applicable usury laws of the State of Illinois and/or of the United States (whichever permits the higher rate of interest) from time to time in effect. Nothing in this Agreement, the Note or any document securing the Note shall ever be construed to create a

9351201

UNOFFICIAL COPY

contract to pay, as consideration for the use, forbearance or detention of money, interest at a rate in excess of the Maximum Nonusurious Rate. If under any circumstances the aggregate amounts contracted for, charged or paid with respect to the Note which by applicable law are deemed to be interest, would produce an interest rate greater than the Maximum Nonusurious Rate, the Maker and any other person obligated to pay the Note, stipulates that the amounts will be deemed to have been paid, charged or contracted for as a result of an error on the part of Maker, any other person obligated for the payment of the Note and the Noteholder and upon discovery of the error or upon notice thereof from the Maker or the party making such payment, the Noteholder or the party receiving such excess payment shall, at its option, refund the amount of such excess payment or credit the excess payment against any other amount due under the Note. In addition, all sums paid or agreed to be paid to the holder of the Note for the use, forbearance or detention of monies shall be, to the extent permitted by applicable law, amortized, prorated, allocated and spread through the term of the Note.

Section 10.4. Enforceability. If any provision hereof is presently or at any time becomes invalid or unenforceable, the other provisions hereof shall remain in full force and effect, and the remaining provisions hereof shall be construed in favor of the Noteholder to effectuate the provisions hereof.

Section 10.5. Application of Payments. If the lien or liens created by this Agreement are invalid or unenforceable as to any part of the Indebtedness or if such lien or liens are invalid or unenforceable as to any part of the Mortgaged Property, the unsecured or partially unsecured portion of the Indebtedness shall be completely paid prior to the payment of the remaining and secured or partially secured portion of the Indebtedness and all payments made on the Indebtedness, whether voluntary or under foreclosure or other enforcement action or procedures, shall be considered to have been first paid on and applied to the full payment of that portion of the Indebtedness which is not secured or not fully secured by the lien or liens created herein.

Section 10.6. Meaning of Particular Terms. Whenever used, the singular number shall include the plural, the plural the singular and the use of any gender shall include all genders. The words "Maker" and "Noteholder" shall include their heirs, executors, administrators, successors and assigns.

Section 10.7. Advances by Noteholder. If Maker shall fail to comply with the provisions with respect to the securing of insurance, payment of taxes, assessments, and other charges, the keeping of the Mortgaged Property in repair, or any other term or covenant herein contained, Noteholder may, but shall not be obligated to, incur such expenses as deemed necessary by Noteholder, and make advances to perform such provisions, terms or covenants, and where necessary enter the Mortgaged Property for the purpose of performing any such term or covenant. Noteholder is further empowered, but not obligated, to make advances for any expenditure deemed advisable by Noteholder for the preservation of the Mortgaged Property or for the continuation of the operation thereof. Maker agrees to repay all sums so advanced or expended, and all expenses incurred by Noteholder in connection with the exercise of any of its rights under this Agreement, upon

UNOFFICIAL COPY

demand, with interest from the date such advances or expenditures are made, determined on the same basis as matured principal in the Note and all sums so advanced or expended, with interest, shall be secured hereby.

Section 10.8. Release or Extension by Noteholder. Noteholder, without notice, may release any part of the Mortgaged Property or any person liable for the Indebtedness without in any way affecting the liens hereof on any part of the Mortgaged Property not expressly released and may agree in writing with any party with an interest in the Mortgaged Property to extend the time for payment of all or any part of the Indebtedness or to waive the prompt and full performance of any term, condition or covenant of any instrument evidencing or securing the Indebtedness.

Section 10.9. Partial Payments. Acceptance by Noteholder of any payment of less than the amount due on the Indebtedness shall be deemed acceptance on account only and the failure to pay the entire amount then due shall be and continue to be a default; and at any time thereafter and until the entire amount due on the Indebtedness has been paid, Noteholder shall be entitled to exercise all rights conferred on it by the terms of this Agreement upon the occurrence of an Event of Default.

Section 10.10. Titles not to be Considered. All section, subsection, paragraph or other titles contained in this Agreement are for reference purposes only and this Agreement shall be construed without reference to said titles.

Section 10.11. Construction of Agreement. This Agreement may be construed as a mortgage, deed of trust, chattel mortgage, conveyance, assignment, security agreement, pledge, financing statement, hypothecation or contract, or any one or more of them, in order fully to effectuate the lien hereof and the purposes and agreements herein set forth.

Section 10.12. Additional Taxes. Maker agrees that if any state, federal or municipal government, or any of its subdivisions having jurisdiction, shall levy, assess or charge any tax, assessment or imposition upon this Agreement or the credit or Indebtedness secured hereby or the Note or the interest of Noteholder in the Mortgaged Premises or upon Noteholder by reason of any of the foregoing (excepting therefrom any income tax on interest payments on the principal portion of the Indebtedness secured hereby), then, Maker shall pay all such taxes to or for Noteholder as they become due and payable, and provided further that in the event of passage of any law or regulation permitting, authorizing or requiring the tax, assessment or imposition to be levied, assessed or charged, which law or regulation prohibits Maker from paying the tax, assessment or imposition, to or for Noteholder, then all sums hereby secured shall become immediately due and payable at the option of the Noteholder. Maker agrees to exhibit to Noteholder at any time upon request, official receipts showing payment of all taxes, assessments and charges which Maker is required or elects to pay hereunder. Maker agrees that if the United States Government or any department or bureau thereof shall at any time require revenue stamps to be affixed to the Note or this Agreement, Maker will upon demand pay for stamps in the required amount and deliver them to Noteholder and Maker agrees to indemnify Noteholder against liability

33551201

UNOFFICIAL COPY

on account of such revenue stamps, whether such liability arises before or after payment of the Note and whether or not this Agreement shall have been released.

Section 10.13. Indemnification. Maker agrees to indemnify Noteholder from all loss, damage and expense, including attorneys' fees, incurred in connection with any suit or proceeding in or to which Noteholder may be made a party for the purpose of protecting the lien of this Agreement.

Section 10.14. Additional Documents. Maker agrees that upon request of Noteholder it will from time to time execute, acknowledge and deliver all such additional instruments and further assurances of title and will do or cause to be done all such further acts and things as may be reasonably necessary fully to effectuate the intent of this Agreement. The Maker within ten (10) days upon request in person or by mail will furnish a duly acknowledged written statement setting forth the amount of the debt secured by this Agreement, the date to which interest has been paid and stating either that no offsets or defenses exist against the debt secured hereby, or, if such offsets or defenses are alleged to exist, the nature thereof.

Section 10.15. Disclosure. Maker agrees to disclose to Noteholder upon request, the then ownership of the beneficial interest in any trust which then holds legal title to the Mortgaged Property and shall cause the owner(s) of such beneficial interest to furnish sufficient evidence to Noteholder for it to determine the identity of all of the parties which compose such owner(s).

Section 10.16. Subrogation. In the event the Note is given for money advanced in the full or partial payment of a sum owing upon another note or indebtedness, Maker hereby acknowledges that it has and does hereby request Noteholder to advance the money necessary to satisfy the present owner of said other note or indebtedness in full or in part, as applicable, whether or not a release or transfer of said other note or indebtedness be executed by such owner, and Maker hereby contracts and agrees that Noteholder and Noteholder's assigns be and they hereby are, subrogated to all the rights, liens, remedies, equities, superior title and benefits, if any, held, owned, possessed or enjoyed at any time by any owner or holder of said other note or indebtedness, to secure payment to Noteholder of the Note hereby secured and said other note or indebtedness, and all liens securing same are hereby extended to the maturity date of the Note hereby secured to additionally secure such Note.

Section 10.17. Time. Time is of the essence of this Agreement.

SECTION XI. LIMITATION OF LIABILITY

Reference is hereby made to the Note for any limitations of the liability of any obligor on the Note.

This Agreement is executed by Maker, not personally but as Trustee as aforesaid, in the exercise of the power and authority conferred upon and vested in it as such Trustee. Maker hereby warrants that (i) American National Bank and Trust Company of Chicago is a

UNOFFICIAL COPY

duly organized, validly existing national banking corporation in good standing under the laws of the State of Illinois, and (ii) it possesses the authority to execute this Agreement. It is expressly understood, anything herein to the contrary notwithstanding, that each and all of the representations, covenants, undertakings, warranties and agreements herein made on the part of the Maker while in form purporting to be the representations, covenants, undertakings, warranties and agreements of said Trustee are nevertheless each and every one of them made and intended not as personal representations, covenants, undertakings, warranties and agreements by the Trustee or for the purpose or with the intention of binding Trustee personally but are made and intended for the purpose of binding only the trust property, and this Agreement is executed and delivered by said Trustee not in its own right but solely in the exercise of the power conferred upon it as said Trustee; and that no personal liability or personal responsibility is assumed by or shall at any time be asserted or enforceable against said Trustee on account of this Agreement or on account of any representations, covenants, undertakings, warranties or agreements of Maker in this Agreement contained either express or implied, all such personal liability, if any, being expressly waived and released.

PROPERTY of Cook County Clerk's Office

93551294

UNOFFICIAL COPY

EXECUTED this 15th day of July, 1993.

AMERICAN NATIONAL BANK AND TRUST
COMPANY OF CHICAGO, NOT PERSONALLY
BUT SOLELY AS TRUSTEE UNDER TRUST
AGREEMENT DATED MAY 22, 1991 AND
KNOWN AS TRUST NO. 113913-07

Attest
Its ASST SGT

By [Signature]
Its 2ND VP

Property of Cook County Clerk's Office

93551231

UNOFFICIAL COPY

(ACKNOWLEDGMENT)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

L. M. SOVIENSKI

I, L. M. SOVIENSKI a Notary Public in and for said County in the State aforesaid, do hereby certify that P. JOHANSEN of AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, and Gregory S. Kasprzyk of said Bank, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument as such Second Vice President and ASSISTANT SECRETARY, respectively, appeared before me this day in person and acknowledged that they signed and delivered the same instrument as their own free and voluntary act and as the free and voluntary act of said Bank, for the uses and purposes therein set forth.

Given under my hand and notarial seal, this 15th day of July, 1993.



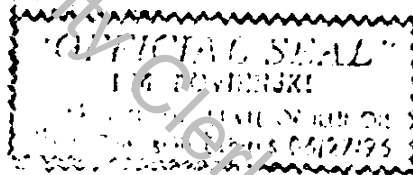
Notary Public

L. M. SOVIENSKI

(Type or Print Name)

(SEAL)

Commission expires:



93551231

UNOFFICIAL COPY

EXHIBIT "A"
(to Mortgage, Security Agreement
and Financing Statement)

LEGAL DESCRIPTION OF PROPERTY

PARCEL 1:

Lot 1 in Hawthorne Center for Industry being a Subdivision of part of the Northwest fractional 1/4 of Section 19, Township 40 North, Range 12 East of the Third Principal Meridian, according to the plat thereof recorded April 11, 1974 as Document Number 22682660 in Cook County, Illinois.

PARCEL 2:

Easements for the benefit of Parcel 1 as created by Maintenance Agreement and Grant of Easements dated December 21, 1978 and recorded December 26, 1978 as Document Number 24778114, over, across and upon Lot 5 in Hawthorne Center for Industry, being a Subdivision of part of the Northwest 1/4 of Section 19, Township 40 North, Range 12 East of the Third Principal Meridian, according to the plat thereof recorded April 11, 1974 as Document Number 22682660 all in Cook County, Illinois.

Address for Identification:

1010-1050 Sesame Street
Bensenville, Illinois

Permanent Tax Index Number: 12-19-100-089

93551204

UNOFFICIAL COPY

EXHIBIT "B"
(to Mortgage, Security Agreement
and Financing Statement)

PERMITTED EXCEPTIONS

1. General Real Estate Taxes not yet due and payable.
2. A 25 foot building line established by the Plat of Subdivision.
Location: Affects Northerly 25 feet and West 30 feet of Parcel 1
Recorded: April 11, 1974
Document: 22682660
3. An easement for public utilities and drainage as disclosed by the Plat of Subdivision.
Recorded: April 11, 1974
Document: 22682660
Affects: West 26 feet of Parcel 1
4. An easement for communications and electric service as disclosed by the Plat of Subdivision.
Recorded: April 11, 1974
Document: 22682660
Affects: West 26 feet of Parcel 1
5. An easement in favor of Northern Illinois Gas Company for the installation, relocation, renewal and removal of gas mains and appurtenances.
Recorded: March 24, 1965
Document: 19775840
Affects: approximately West 9 feet of Parcel 1
6. Rights of the following party in possession under unrecorded lease as specified below:

Lease dated February 15, 1993 with Houston Foods Co., subject to Subordination, Attornment and Non-Disturbance Agreement dated July 15, 1993 to the Insured.
7. Terms, conditions, provisions and limitations of the Trust Agreement under which the grantor under the insured Mortgage holds title as Trustee of the estate or interest described in Schedule A.
8. Mortgage and Assignment of Rents and Leases and related financing statements to LaSalle National Bank securing an original principal indebtedness not to exceed \$550,000, subject to Subordination Agreement dated as of July 15, 1993 to the Insured.

03551201