

Property Located at: 100 W. Ontario  
Chicago, IL 60610

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**LEASEHOLD MORTGAGE, ASSIGNMENT OF SUBLEASES  
AND RENTS AND SECURITY AGREEMENT**

**THIS MORTGAGE, ASSIGNMENT OF LEASES AND RENTS AND SECURITY AGREEMENT ("Mortgage")** is made as of the 29th day of December, 1997, by **PORTILLO'S HOT DOGS, INC.**, a Delaware corporation, with its principal place of business at 1415 West 22nd Street, Suite 1250, Oak Brook, Illinois ("Mortgagor"), to and for the benefit of **FINOVA CAPITAL CORPORATION**, a Delaware corporation (in its individual capacity, "**FINOVA**"), in its capacity as collateral agent ("**Collateral Agent**") for the Lenders (as such term is defined in Section 1.1 below), with an office at 1850 North Central Avenue, Phoenix, Arizona 85002.

**RECITALS:**

- A. Mortgagor is the lessee of the Premises (this and all other capitalized terms used but not elsewhere defined herein are defined in Section 1.1) and the Improvements.
- B. Pursuant to the terms of the Loan Agreement, FINOVA has agreed to make a \$25,000,000 term loan to Mortgagor and the other Borrowers.
- C. Pursuant to the terms of the Merrill Lynch Loan Agreement, Merrill Lynch has agreed to make a \$5,000,000 adjustable rate revolving loan to Mortgagor and the other Borrowers.
- D. One of the conditions precedent to the obligation of FINOVA to enter into the Loan Instruments and Merrill Lynch to enter into the Merrill Lynch Loan Instruments is the execution and delivery by Mortgagor of this Mortgage.

**ARTICLE I - DEFINITIONS AND DETERMINATIONS**

**1.1 Definitions.** Capitalized terms used but not elsewhere defined in this Mortgage shall have the meanings ascribed thereto in the Loan Agreement. When used in this Mortgage, the following terms shall have the following meanings:

**Borrowers:** collectively, Mortgagor, Barney's Bar-B-Q Inc., Portillo's Food Service, Inc., Key Wester Fish & Pasta House of Illinois, Inc., each an Illinois corporation, and Key Wester Fish & Pasta House, Inc., a Florida corporation.

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**Construction Contracts:** any contracts executed by Mortgagor with any provider of goods or services in connection with any construction undertaken on, or services performed in connection with, the Premises or the Improvements.

**Default Rate:** a per annum rate of interest equal to \_\_\_\_%.

**Deposits:** all deposits (i) received by Mortgagor from third parties (including all earnest money sales deposits) or (ii) deposited by Mortgagor with Collateral Agent or third parties, including deposits pertaining to utility services, real estate taxes, special assessments and payment of insurance premiums.

**Documents:** any mortgage, deed of trust, assignment of leases, assignment of rents, note, indemnification agreement, security agreement, financing statement, affidavit, assignment of insurance, loss payee endorsement, mortgage title insurance policy, opinion letter, waiver letter, estoppel letter, consent letter, insurance certificate and any other similar documents.

**Equipment:** all apparatus, machinery, equipment, furniture, fixtures, fittings, goods, materials, supplies and chattels of any and every kind and nature whatsoever now or hereafter used, attached to, installed or located in or on the Premises and/or the Improvements, including any item used to supply heat, gas, air conditioning, water, light, electricity, power, plumbing, refrigeration, sprinkling, ventilation, mobility, communication, incineration, recreation, laundry service or any other related services.

**Event of Default:** any Event of Default under the Loan Agreement and any default under the Merrill Lynch Loan Agreement.

**Future Advances:** all advances made by any Lender under the Loan Agreement or the Merrill Lynch Loan Agreement after the Closing Date to or on behalf of Mortgagor.

**Imposts:** any disbursements made in accordance with the terms hereof for the payment of taxes, levies or insurance on the Premises.

**Improvements:** the buildings and improvements now or hereafter located on the Premises, all tenements, easements, rights-of-way, hereditaments and appurtenances now and/or at any time hereafter situated on such real estate and all roads, alleys, streets, passages and other public ways abutting such real estate, whether before or after vacation thereof and whether in existence as of the date hereof or created after the date hereof.

**Lease:** that certain Lease dated as of August 1, 1994 between Mortgagor, as lessee thereunder, and Jefferson State Bank, not personally but as Trustee u/t/a dated December 4, 1993 a/k/a Trust No. 1899, as lessor thereunder, as the same may be extended, renewed, amended, modified, replaced or supplemented from time to time, together with all options to renew, extend or purchase (including rights of first refusal) now or hereafter contained therein.

**Lenders:** collectively, FINOVA and Merrill Lynch.

**Loan Agreement:** that certain Loan Agreement dated as of December 29, 1997 among Borrowers and FINOVA, as the same may be amended, modified or supplemented after the date hereof.

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Merrill Lynch: Merrill Lynch Business Financial Services Inc.

Merrill Lynch Loan Agreement: that certain WCMA Note and Loan Agreement dated as of December 29, 1997 among Borrowers and Merrill Lynch, as the same may be amended, modified or supplemented after the date hereof.

Mortgaged Property: collectively, all of Mortgagor's present and future estate, right, title, and interest in and to the following: (a) the Premises; (b) the Improvements; (c) the Rents; (d) the Lease; (e) all Plans; (f) all Deposits; (g) all Permits; (h) all Equipment; (i) all Construction Contracts; (j) all present and future judgments, awards of damages and settlements made as a result or in lieu of any taking of all or any part of the Premises, Improvements, Equipment and/or Subleases under the power of eminent domain, or for any damage thereto as a result of any such taking; (k) all insurance policies in force or effect insuring the Premises, the Improvements, the Rents, the Subleases or the Equipment; (l) rights arising out of Mortgagor's interest in the Premises and the improvements to (i) the payment of money, (ii) accounts and accounts receivable, (iii) reserves, (iv) deferred payments, (v) refunds, (vi) cost savings, (vii) bank accounts, (viii) deposit accounts, (ix) working capital accounts, and (x) contract rights; (m) all development and use rights with respect to the Premises, the Improvements and/or the Subleases; (n) all chattel paper, instruments, documents, notes, drafts and letters of credit, other than letters of credit in favor of Mortgagee, which arise from or relate to (i) construction on the Premises or (ii) the Premises and Improvements generally; (o) all causes of action and proceeds thereof for any damage or injury to the Premises or the Improvements or any other portion of the Mortgaged Property described above, in addition to those described in clause (j) above, or breach of warranty in connection with the construction of all or any portion of the improvements; (p) all proceeds (including condemnation and insurance proceeds) of, additions to, substitutions for, and changes in each and every one of the foregoing; and (q) the Subleases.

Mortgage Lien: the Lien in favor of Collateral Agent represented by this Mortgage.

Mortgagor's Obligations: (i) any and all indebtedness due or to become due, now existing or howsoever arising of Mortgagor to Mortgagee pursuant to the terms of the Loan Instruments and the Merrill Lynch Loan Instruments, including, without limitation, all (A) advances made in accordance with the terms hereof to protect and preserve the value of the Mortgaged Property and the priority of the Mortgage Lien and (B) Future Advances and (ii) the performance of the covenants of Mortgagor contained in the Loan Instruments and the Merrill Lynch Loan Instruments.

Permits: all permits, certificates, approvals, management contracts, licenses, applications and authorizations used in the operation of the Premises, Improvements and/or the Subleases.

Plans: all plans and specifications, designs, surveys, drawings, soil reports and other matters prepared for any construction on the Premises.

Premises: the real estate legally described in Exhibit A.

Rents: all present and future rents, royalties, issues, avails, profits and proceeds of or from the Premises, the Improvements, the Subleases and/or the Equipment.

Subleases: collectively, all (i) present and future subleases, agreements, subtenancies, licenses, occupancy agreements, concessions and franchises of Mortgagor's present and future right, title, and interest in and to the Premises and/or the Improvements, (ii) deposits of money as advance

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rent or for security under any of the Subleases and (iii) guaranties of performance under the items described in clauses (i) and (ii) preceding.

## ARTICLE II - CONVEYANCE

2.1 **Mortgaged Property.** To secure the payment and performance of Mortgagor's Obligations, subject to the terms, covenants and provisions contained herein, Mortgagor hereby irrevocably MORTGAGES, GRANTS, BARGAINS, CONFIRMS, WARRANTS, GIVES, ASSIGNS, SETS OVER, TRANSFERS, REMISES, RELEASES, ALIENATES, SELLS, CONVEYS AND GRANTS A SECURITY INTEREST IN, the Mortgaged Property to Collateral Agent, for the benefit of Lenders, its successors and/or assigns hereunder forever. Collateral Agent, its successors and assigns, subject to the terms of this Mortgage, are to have and to hold all such Mortgaged Property forever for the benefit of Collateral Agent for the purposes and uses set forth in this Mortgage.

2.2 **Security Agreement and Fixture Filing.** This Mortgage constitutes a security agreement with respect to the portion of the Mortgaged Property which consists of personal property and a financing statement filed as a fixture filing under the Uniform Commercial Code of the State in which the Premises are located, covering any property which now is or later may become a fixture attached to the Premises or the Improvements.

2.3 **Absolute Assignment.** This Mortgage is a present and absolute assignment with respect to the Subleases and the Rents.

## ARTICLE III - FUTURE ADVANCES, LIMITATION ON AMOUNT SECURED

3.1 **Future Advances.** This Mortgage is given to, and shall, secure not only Mortgagor's Obligations which exist as of the Closing Date, but also the payment of any and all Future Advances, whether such Future Advances are obligatory or are to be made at the option of Mortgagee.

3.2 **Limitation on Amount Secured.** The total amount of Indebtedness secured by this Mortgage may decrease or increase from time to time, but the total unpaid balance so secured at one time shall not exceed the sum of (i) \$45,000,000 plus (ii) interest thereon, plus (iii) any Imposts, plus (iv) any amounts paid by Collateral Agent pursuant to Section 10.2 hereof, plus (v) all costs and expenses incurred by Collateral Agent in enforcing its rights and remedies under this Mortgage, plus (vi) interest on the disbursements described in clauses (iii), (iv) and (v) preceding, which interest shall be calculated at the Default Rate.

## ARTICLE IV - REPRESENTATIONS AND WARRANTIES

Mortgagor represents and warrants to Collateral Agent as follows:

4.1 **Title.** Mortgagor is the holder of a valid leasehold interest in the Premises under the Lease, free and clear of all Liens except (i) Permitted Liens, (ii) general real estate taxes not yet due and payable and (iii) any other exceptions to title set forth in the title insurance policy issued to Collateral Agent insuring the Lien of this Mortgage.

4.2 **Construction and Completion of Improvements.** The Improvements have been completed and the Equipment has been installed in a good and workmanlike manner in compliance with all applicable laws, rules, ordinances and regulations, including, but not limited to, building and zoning laws. There are no contracts or agreements of any kind, either oral or in writing, now in existence covering labor or materials

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heretofore furnished or to be furnished in connection with the Premises, the Improvements and the Equipment which are incomplete nor is any Indebtedness outstanding for labor or materials in connection with the Premises, the Improvements or the Equipment.

**4.3 Flood Plain.** The Premises are not located in an area designated as a flood plain, or, if the Premises are so located, Mortgagor has obtained Federal flood plain insurance coverage and delivered a certificate of such coverage to Mortgagor.

**4.4 Location and Use of Premises, Improvements and Equipment.** The location and use of the Premises, the Improvements and the Equipment are in material compliance with all applicable laws, rules, ordinances and regulations, including, but not limited to, building and zoning laws, and all covenants and restrictions of record. No notice of violation of such laws, rules and/or ordinances has been issued and received by Mortgagor which remains uncorrected. The Mortgaged Property is used solely for the operation of a restaurant.

**4.5 No Agricultural Purposes; No Homestead; Business Loan.** No part of the Mortgaged Property is used principally or primarily for agricultural or farm purposes or as a residential homestead. The Loans constitute business loan transactions and the proceeds of the Loans are to be utilized solely for the purpose of carrying on the business of Mortgagor and the other Borrowers.

## ARTICLE V - AFFIRMATIVE COVENANTS

Until Mortgagor's Obligations are paid and performed in full, Mortgagor agrees it shall:

**5.1 Payment and Performance of Mortgagor's Obligations.** Promptly pay and perform, or cause to be paid and performed, when due all of Mortgagor's Obligations.

**5.2 Maintenance of Rights.** Maintain the standing, right, power and lawful authority to do the following: (i) own good title to the Mortgaged Property, (ii) carry on the business of and operate the restaurant at the Mortgaged Property, (iii) enter into, execute and deliver this Mortgage, (iv) convey and assign the interests of Mortgagor in the Mortgaged Property to Collateral Agent, (v) encumber the Mortgaged Property to Collateral Agent as provided herein and (vi) consummate all of the transactions described in or contemplated by this Mortgage to be consummated by Mortgagor.

**5.3 Maintenance of Permits.** Obtain and maintain all Permits except where the failure to obtain and/or maintain any such Permit could not have a Material Adverse Effect.

**5.4 Peaceful Possession.** Remain in peaceful possession of the Mortgaged Property and take all actions necessary to maintain and preserve the Mortgage Lien.

**5.5 Payment of Liens.** Promptly (i) pay or cause to be paid, as and when due and payable or when declared due and payable, or (ii) contest diligently and in good faith by appropriate proceedings, provided Mortgagor has set aside reserves on its books which are satisfactory to Collateral Agent in its reasonable discretion, any Indebtedness which may become or be secured by any Lien on any Mortgaged Property and, immediately upon request by Collateral Agent, deliver to Collateral Agent evidence satisfactory to Collateral Agent of the payment and discharge thereof.

**5.6 Repairs.** Make all necessary repairs, replacements and renewals (including the maintenance in good working order of and, if necessary, the replacement of, items of Equipment) to the Mortgaged Property so that the value thereof shall not be impaired, including, without limitation, repairing, restoring

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or rebuilding any building or improvement now or hereafter on the Premises which may become damaged or destroyed, and if any portion of the Mortgaged Property becomes damaged or destroyed, Mortgagor shall permit Collateral Agent, and its agents, upon prior notice and demand, access to the Mortgaged Property for the purpose of inspection thereof.

**5.7 Buildings and Improvements.** Pay for and complete, within a reasonable time, any building or improvement at any time in the process of being constructed upon the Premises, in a good and workmanlike manner in compliance with all applicable laws, rules, ordinances and regulations, including, but not limited to, building and zoning laws the failure to comply with which could have a Material Adverse Effect.

**5.8 Execution of Documents.** Immediately upon request by Collateral Agent, at Mortgagor's sole expense, make, execute and deliver and/or cause to be made, executed and delivered to Collateral Agent, in form and substance acceptable to Collateral Agent, all Documents that Collateral Agent deems necessary to evidence, document and/or conclude the transactions described in and/or contemplated by this Mortgage, or reasonably required to perfect or continue perfected the Mortgage Lien.

**5.9 Stamp Tax: Effect of Change in Laws Regarding Taxation.**

**5.9.1 Payment of Stamp Tax.** If, by the laws of the United States of America or of any state or subdivision thereof having jurisdiction over Mortgagor, any tax is due or becomes due in respect of Mortgagor's Obligations or the recording of this Mortgage and unless such laws prohibit Mortgagor from paying such tax, (i) pay such tax in the manner required by any such law and (ii) reimburse Collateral Agent for any sums which Collateral Agent may expend by reason of the imposition of any such tax.

**5.9.2 Payment of Taxes Imposed on Collateral Agent.** In the event of the enactment, after this date, of any law, statute, rule or regulation of the United States of America or of the State in which the Premises are located or any other state or subdivision thereof imposing upon Collateral Agent the payment of the whole or any part of the taxes, assessments or Liens herein required to be paid by Mortgagor, or changing in any way the laws relating to the taxation of mortgages or debts secured by mortgages or Collateral Agent's interest in the Premises or any other portion of the Mortgaged Property, or the manner of collection of taxes, so as to affect this Mortgage or Mortgagor's Obligations or the holder thereof, then, and in any such event, upon demand by Collateral Agent, pay such taxes or assessments or reimburse Collateral Agent therefor.

**5.10 Payment and Performance of Lease.** Promptly (i) pay and perform, or cause to be paid and performed, when due all of Mortgagor's obligations under the Lease and (ii) enforce the all of the lessor's obligations under the Lease.

**5.11 Further Covenants.** Mortgagor further covenants with and represents and warrants to Mortgagee as follows:

**5.11.1** If at any time Mortgagor, anyone claiming by, through or under Mortgagor, or a trustee in bankruptcy shall have the right to reject the Lease pursuant to Section 365(a) of Title 11 of the United States Code ("Bankruptcy Code"), 11 U.S.C. Sec. 365(a), or a successor statute, then Mortgagee shall have the exclusive right to exercise said right and Mortgagor hereby assigns said right to Mortgagee. If at any time the lessor under the Lease ("Lessor"), anyone holding by, through or under Lessor under the Lease, or a trustee in bankruptcy shall elect to reject the Lease pursuant to Section 365(h)(1) of the Bankruptcy Code, 11 U.S.C. Sec. 365(h)(1), or successor statute, thereby

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giving Mortgagor the right to elect to treat the Lease as terminated pursuant to Section 365(h)(1) of the Bankruptcy Code, 11 U.S.C. Sec. 365(h)(1), or successor statute, then Mortgagee shall have the exclusive right to exercise said right and Mortgagor hereby assigns said right to Mortgagee. If the assignments provided for in this Section are held to be unenforceable, then Mortgagor, anyone claiming by, through or under Mortgagor, or a trustee in bankruptcy shall not exercise rights purportedly assigned to Mortgagee hereunder without the prior consent of Mortgagee, which consent shall not be unreasonably withheld, and if Mortgagee shall give such consent, then Mortgagor, anyone claiming by, through or under Mortgagor, or a trustee in bankruptcy shall promptly exercise any of said rights.

**5.11.2** Notwithstanding any provision herein contained to the contrary, if the holder of the tenancy estate under the Lease acquires fee title to the real estate covered by the Lease, the fee title and tenancy estate shall not merge but rather shall remain separate and distinct estates.

**5.11.3** There does not exist nor will Mortgagor suffer to occur any default under the Lease which has not been waived by the Lessor.

**5.11.4** Mortgagor knows of no reason why the Lease is not valid, binding and enforceable against Lessor, no notice of default or termination by Lessor has been given which remains uncured, and the Lease is in full force and effect as of the date hereof. All of the covenants and obligations to be performed by the tenant under the Lease have been fully and promptly performed as of the date hereof.

**5.11.5** This Mortgage and the other Loan Instruments have been lawfully executed and delivered in full conformity with the Lease.

**5.11.6** Mortgagee does not hereby assume any of Mortgagor's obligations under the Lease and nothing contained herein or in the other Loan Instruments shall require Mortgagee to perform any such obligations of Mortgagor.

**5.11.7** Mortgagor promptly will (a) notify Mortgagee in writing of the receipt by Mortgagor of any notice from Lessor noting or claiming any default by Mortgagor in the performance or observance of any of the terms, covenants, obligations, and/or conditions on the part of Mortgagor to be performed or observed under the Lease; (b) notify Mortgagee in writing of the receipt by Mortgagor of any notice from Lessor to Mortgagor of termination of the Lease or of Mortgagor's right to possession of the Mortgaged Property; and (c) cause a copy of each such notice received by Mortgagor from Lessor to be delivered to Mortgagee.

**5.11.8** Mortgagor promptly will notify Mortgagee in writing of any request made by either party to the Lease for arbitration proceedings pursuant to or in connection with the Lease and of the institution of any arbitration proceedings, as well as of all proceedings thereunder, will not enter into or agree to any such arbitration procedure (unless required by law) without Mortgagor's prior written consent, and will promptly deliver to Mortgagee a copy of the determination of the arbitrators in each such arbitration proceeding.

**5.11.9** Mortgagor irrevocably, hereby designates, makes, constitutes and appoints Mortgagee (and all persons designated by Mortgagee) as Mortgagor's true and lawful attorney and agent-in-fact, with power upon the occurrence of an Event of Default under this Mortgage or default under the Lease, without notice to Mortgagor, and at such time or times thereafter as Mortgagee, at its sole election, may determine, in the name of Mortgagor, Mortgagee or in both names: (i) to

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exercise all of Mortgagor's rights, interests and remedies in and under the Lease, including, without limitation, Mortgagor's right to renew or extend the original term of the Lease or any renewal or extended terms thereof; (ii) to acquire the land and other property subject to the Lease; (iii) to initiate such legal proceedings and to settle, adjust or compromise any legal proceedings deemed necessary by Mortgagee in its sole discretion in order to enforce the provisions of the Lease or prevent the termination thereof; (iv) to commence or institute arbitration proceedings, or to participate in any arbitration proceedings commenced or instituted, pursuant to the Lease deemed necessary to Mortgagee in its sole discretion; (v) to approve all arbitration determinations, awards or findings made pursuant to the provisions of the Lease; (vi) to do any and all things necessary, in Mortgagee's sole opinion, to preserve and keep unimpaired Mortgagee's rights under this Mortgage and the Lease; and (vii) to do all acts and things necessary, in Mortgagee's sole discretion, to carry out any or all of the foregoing.

5.11.10 Mortgagor shall execute and deliver, upon request of Mortgagee, such instruments as Mortgagee may deem useful or required to permit Mortgagee to cure any default under the Lease or permit Mortgagee to take such other actions as Mortgagee considers desirable to cure or remedy any matter in default and preserve the interest of Mortgagee in the Mortgaged Property.

5.11.11 So long as any of Mortgagor's Obligations shall remain unpaid, unless Mortgagee shall otherwise consent in writing, the fee title to and the leasehold estate in the Mortgaged Property, or any portion thereof shall not merge, but shall always be kept separate and distinct, notwithstanding the union of such estates either in the landlord or the tenant under the Lease, or in a third party, by purchase or otherwise.

5.11.12 If the Lease shall be terminated prior to the natural expiration of its term due to default by Mortgagor or any other lessee or tenant thereunder, and if, pursuant to any provision of the Lease or other document, Mortgagor or Mortgagee shall acquire from Lessor a replacement lease, Mortgagor shall immediately grant a security interest in the replacement or new lease to Collateral Agent for the benefit of Lenders.

5.11.13 Intentionally Omitted.

5.11.14 Intentionally Omitted.

5.11.15 The generality of the provisions of this Section relating to the Lease shall not be limited by other provisions of this Mortgage setting forth particular obligations of Mortgagor which are also required to be performed by Mortgagor as the tenant of the Lease.

## ARTICLE VI - NEGATIVE COVENANTS

Until Mortgagor's Obligations are paid and performed in full, Mortgagor agrees it will not:

6.1 Additional Limitations. Execute, file or record any notice limiting the maximum principal amount that may be secured by this Mortgage.

6.2 Sale or Transfer. Sell, transfer, exchange, convey, remove or otherwise dispose of all or any portion of the Mortgaged Property or legal or equitable interest therein, except to the extent permitted by the Loan Agreement.

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6.3 **Liens.** Permit any Liens to exist on the Mortgaged Property except (i) Permitted Liens, (ii) general real estate taxes not yet due and payable, (iii) Liens which are being contested diligently and in good faith by appropriate proceedings, and as to which Mortgagor has set aside reserves on its books which are satisfactory to Collateral Agent in its reasonable discretion, and (iv) other exceptions to title set forth in the title insurance policy issued to Collateral Agent insuring the Lien of this Mortgage.

6.4 **Use of Mortgaged Property.** Substantially or materially change the use or character of any portion of the Mortgaged Property or use the Property for any purpose other than the operation of a restaurant, initiate or acquiesce in any zoning variation or reclassification of any portion of the Mortgaged Property or commit or suffer any waste to exist on any portion of the Mortgaged Property.

6.5 **Insurance.** Purchase any separate insurance concurrent in form or contributing in the event of loss with that required to be maintained under the Loan Instruments or the Merrill Lynch Loan Instruments unless (i) Collateral Agent receives prompt notice thereof and is included thereon under a standard non-contributory mortgagee clause acceptable to Collateral Agent, (ii) such separate insurance otherwise complies with all of the requirements of the Loan Instruments and the Merrill Lynch Loan Instruments and (iii) Mortgagor delivers to Collateral Agent promptly the original policy or policies of such insurance.

6.6 **Amendment of Lease.** Terminate, amend, supplement, modify or surrender or suffer, tolerate or permit any termination, amendment, supplement, modification, or surrender of the Lease or consent to any waiver or cancellation of any provision thereunder, or close and purchase the land and other property subject to the Lease by any agreement to purchase contained in the Lease or otherwise, without the prior written consent of Collateral Agent, which consent shall not be unreasonably withheld.

## ARTICLE VII - INSURANCE

7.1 **Adjustment of Losses; Collection of Proceeds.** In case of loss or damage by fire or other insured casualty to all or any portion of the Mortgaged Property, Collateral Agent is authorized and empowered to (i) make or file proofs of loss, and settle and adjust any claim under insurance policies which insure against such risks, or (ii) direct Mortgagor to agree with each insurance company on the amount to be paid as a result of such loss. The proceeds of any insurance shall be adjusted, collected, distributed and applied as provided in the Loan Agreement.

7.2 **Application of Proceeds.** Insurance proceeds received by Collateral Agent (i) if any Event of Default exists may be applied, if Collateral Agent so elects, to the payment of Mortgagor's Obligations, whether or not then due, or (ii) if no Event of Default exists shall be made available by Collateral Agent to Mortgagor (after the payment of all expenses incurred by Collateral Agent in connection with the collection of such insurance proceeds, including, without limitation, attorneys' fees) for repair, restoration or rebuilding of the Mortgaged Property, in such manner and under such conditions as Collateral Agent may require. In the event that Collateral Agent has permitted the insurance proceeds to be used to restore the Mortgaged Property, Mortgagor shall (x) pay the amount of any deficiency in such insurance proceeds in order to restore the Mortgaged Property fully to its condition immediately prior to the loss or damage to which such insurance proceeds relate and (y) deliver to Collateral Agent any surplus which may remain out of such proceeds after payment of the cost of restoration to be applied to the payment of Mortgagor's Obligations.

7.3 **Failure to Collect Proceeds.** Collateral Agent shall not be held responsible for (i) any failure to collect any insurance proceeds due under the terms of any policy, regardless of the cause of such failure, (ii) the amount of any such proceeds ultimately paid, regardless of any negotiation by Collateral

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Agent of such amount, or (iii) any use by Mortgagor of such proceeds as Collateral Agent may pay over to Mortgagor.

## ARTICLE VIII - CONDEMNATION

**8.1 Notice: Assignment of Proceeds.** Mortgagor shall notify Collateral Agent immediately of the institution or threat of institution of any proceeding pertaining to the condemnation of any portion of the Mortgaged Property. After the occurrence of an Event of Default, Collateral Agent is authorized to settle all claims for damages to any portion of the Mortgaged Property which relate to, and collect any proceeds of any award which may be the result of, any eminent domain or condemnation proceeding.

**8.2 Application of Proceeds.** So long as no Event of Default exists, in the event of any partial taking of the Mortgaged Property or any interest in the Mortgaged Property which, in the judgment of Collateral Agent, leaves the Mortgaged Property as a complete economic unit having equivalent value to the Mortgaged Property as it existed prior to the taking, Collateral Agent shall, after the payment of all expenses incurred by Collateral Agent in connection with the collection of such proceeds, make the proceeds of the award or claim available to Mortgagor to be applied to the cost of restoring and rebuilding the Mortgaged Property in accordance with plans, specifications and procedures approved in advance by Collateral Agent. Notwithstanding the foregoing, in lieu of delivering such proceeds to Mortgagor, at the option of the Lenders, Collateral Agent shall retain such proceeds for the purpose of making disbursement thereof jointly to Mortgagor and any contractors, subcontractors and materialmen to whom payment is owed in connection with such restoration. If an Event of Default exists at the time such proceeds are received, or in the event of any taking of the Mortgaged Property or any interest in the Mortgaged Property which, in the judgment of Collateral Agent, does not leave the Mortgaged Property as a complete economic unit having equivalent value to the Mortgaged Property as it existed prior to the taking, Collateral Agent may elect (i) to apply the proceeds of the award or claim received by Collateral Agent described in Section 8.1 to the payment of Mortgagor's Obligations in accordance with the provisions of the Loan Agreement, whether due or not, or (ii) after the payment of all expenses incurred by Collateral Agent in connection with the collection of such proceeds, including, without limitation, attorneys' fees, to make such proceeds available to Mortgagor for replacement of the condemned portion of the Mortgaged Property, in such manner and under such conditions as Collateral Agent may require. In the event that Collateral Agent has permitted the proceeds of the award or claim to be used by Mortgagor to replace the condemned portion of the Mortgaged Property or to restore or rebuild the balance of the Mortgaged Property, Mortgagor shall (x) pay the amount of any deficiency in such proceeds in order to complete such replacement and (y) deliver to Collateral Agent any surplus which may remain out of such proceeds after payment of the cost of replacement to be applied to the payment of Mortgagor's Obligations.

**8.3 Failure to Collect Proceeds.** Collateral Agent shall not be held responsible for (i) any failure to collect any condemnation proceeds, regardless of the cause of such failure, (ii) the amount of any such proceeds ultimately paid, regardless of any negotiation by Collateral Agent of such amount, or (iii) any use by Mortgagor of such proceeds as Collateral Agent may pay over to Mortgagor.

## ARTICLE IX - SUBLEASES AND RENTS

**9.1 License to Collect.** Subject to Collateral Agent's rights under Section 11, Collateral Agent hereby confers upon Mortgagor a non-exclusive license to collect and retain the Rents as they become due and payable.

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9.2 **Rent Roll Copies of Subleases.** Upon Collateral Agent's request, Mortgagor shall deliver to Collateral Agent (i) a rent roll pertaining to all Subleases, (ii) copies of all Subleases and (iii) such other matters and information relating to any Sublease as Collateral Agent may request.

## **ARTICLE X - CERTAIN RIGHTS OF COLLATERAL AGENT**

10.1 **Documents.** In case Mortgagor fails to execute or obtain any Documents required by Collateral Agent for the perfection or continuation of the Mortgage Lien, Mortgagor hereby appoints Collateral Agent as its true and lawful attorney-in-fact to execute or obtain any such Documents on its behalf.

10.2 **Maintenance of Mortgaged Property.** If Mortgagor, within thirty (30) days after receipt of written demand from Collateral Agent (except in cases of emergency, when no demand shall be required), shall neglect or refuse to (i) keep the Mortgaged Property in good operating condition and repair, (ii) replace or maintain the same as herein agreed, (iii) pay the premiums for the insurance which is required to be maintained hereunder, (iv) pay and discharge all Liens as herein agreed or (v) otherwise perform Mortgagor's Obligations within the time periods specified therefor (including any applicable cure periods), Collateral Agent, at its option and sole election, may cause such repairs or replacements to be made, obtain such insurance, pay such Liens or perform such Mortgagor's Obligations. Any amounts paid by Collateral Agent in taking such action, together with interest thereon at the Applicable Interest Rate for the first ten (10) days from the date of such payment or advancement and thereafter at the Default Rate until repaid by Mortgagor to Collateral Agent, shall be due and payable by Mortgagor to Collateral Agent upon demand, and, until paid, shall constitute a part of Mortgagor's Obligations secured by this Mortgage. Collateral Agent shall not be liable to Mortgagor for failure or refusal to exercise any such right. In making any payments pursuant to the exercise of any such right, Collateral Agent may rely upon any bills delivered to it by Mortgagor or any such payee.

## **ARTICLE XI - DEFAULT AND REMEDIES**

Upon the occurrence of an Event of Default, Collateral Agent, in its sole discretion and at its sole election, without notice of such election, and without further demand, may exercise any one or more of the following rights and remedies:

11.1 **Acceleration.** Collateral Agent, at the direction of Lenders, may declare all of Mortgagor's Obligations immediately due and payable, whereupon Mortgagor's Obligations immediately shall mature and become due and payable.

11.2 **Other Remedies.** To the extent permitted by applicable law, Collateral Agent may exercise any one or more of the following remedies, whether or not Mortgagor's Obligations have been accelerated:

11.2.1 **Taking of Possession.** Collateral Agent, by itself or by such officers or agents as it may appoint, may enter and take exclusive possession of all or any part of the Mortgaged Property, including all books, papers and accounts of Mortgagor relating to the business of Mortgagor conducted at such Mortgaged Property, and may expel, remove and exclude Mortgagor, its agents and employees and any persons, goods and chattels occupying the Mortgaged Property. If Mortgagor for any reason fails to surrender or deliver the Mortgaged Property or any part thereof after such demand by Collateral Agent, Collateral Agent may obtain a judgment or decree conferring on Collateral Agent the right to immediate possession or requiring the delivery to Collateral Agent of the Mortgaged Property. Upon every such taking of possession, Collateral Agent may (i) hold, store, use, operate, manage and control the Mortgaged Property and conduct the business of

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Mortgagor thereon, (ii) perform all necessary and proper maintenance and make all necessary and proper repairs, renewals, replacements, additions, betterments and improvements thereto and thereon and purchase or otherwise acquire additional fixtures, personalty and other Property, (iii) keep the Mortgaged Property insured, (iv) manage and operate the Mortgaged Property and exercise all of the rights and powers of Mortgagor to the same extent as Mortgagor could in its own name, (v) enter into any agreements with respect to the exercise by others of any of the powers granted to Collateral Agent herein, in such manner as Collateral Agent shall elect, (vi) collect and receive all of the Rents, including those past due as well as those accruing after the occurrence of any such Event of Default and (vii) after deducting (A) all expenses of taking, holding, managing and operating the Mortgaged 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 and purchases and acquisitions, (C) the cost of such insurance, (D) such taxes, assessments and other similar charges as Collateral Agent may determine to pay, (E) other proper charges upon the Mortgaged Property or any part thereof and (F) the compensation, expenses and disbursements of the attorneys and agents of Collateral Agent, apply the remainder of the monies and proceeds so received by Collateral Agent as described in Section 11.8 hereof.

**11.2.2 Deposits for Taxes and Insurance.** Collateral Agent may require Mortgagor to deposit with Collateral Agent, commencing 10 days following such request and on the first day of each month thereafter, a sum equal to the amount of all insurance premiums next due in respect of the insurance policies required to be maintained under the Loan Instruments and the Merrill Lynch Loan Instruments and all general and special real estate taxes and assessments next due upon or for the Mortgaged Property (the amount of such insurance premiums, taxes and assessments next due to be based upon Collateral Agent's reasonable estimate, but shall include all taxes or assessments not levied, charged, assessed or imposed separately upon the Mortgaged Property), reduced by the amount, if any, then on deposit with Collateral Agent for such purpose, divided by the number of months to elapse before one month prior to the date when such insurance premiums, taxes and assessments will become due and payable. If such Deposits are insufficient to pay any such insurance premiums, taxes or assessments when the same become due and payable, Mortgagor, within 10 days after receipt of demand therefor from Collateral Agent, shall deposit such additional funds as may be necessary to pay such insurance premiums in full. If such Deposits exceed the amount required to pay such insurance premiums, taxes or assessments for any year, the excess shall be credited against the next succeeding deposit or deposits to be made by Mortgagor. Such Deposits need not be kept separate and apart from any other funds of Collateral Agent, shall be held without any allowance of interest to Mortgagor and shall be used for the payment of insurance premiums, taxes and assessments on the Mortgaged Property next due and payable when they become due; provided that Collateral Agent shall not be liable for any failure to apply such Deposits to the payment of such insurance premiums, taxes and assessments unless Collateral Agent shall have received from Mortgagor a request for payment accompanied by the bills for such insurance premiums, taxes and assessments not less than thirty days prior to the date due.

**11.2.3 Subleases and Rents.** Collateral Agent may, with or without taking possession of the Mortgaged Property, as attorney and agent-in-fact for Mortgagor constituted and appointed by Mortgagor with full power of substitution (which power is coupled with an interest and is irrevocable), in the name of Mortgagor, Collateral Agent, or both:

(a) demand, collect, settle, adjust, compromise, and enforce, by legal proceedings or otherwise, payment of the Rents, endorse the name of Mortgagor upon any payments or proceeds of the Rents and deposit the same for the account of Collateral Agent

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and do all other acts and things necessary, in Collateral Agent's sole discretion, to obtain control and use of the Rents;

(b) terminate the license granted to Mortgagor hereunder to collect the Rents and thereafter Collateral Agent shall have all right, title and interest in and to the Subleases and the Rents by virtue of the present assignment thereof granted to Collateral Agent hereunder;

(c) require Mortgagor to deliver to Collateral Agent the originals of the Subleases, with appropriate endorsement and/or other specific evidence of assignment thereto to Collateral Agent, which endorsement and/or assignment shall be in form and substance acceptable to Collateral Agent;

(d) notify any of the obligors under the Subleases that the Subleases have been assigned to Collateral Agent and direct such obligors thereafter to make all payments due from them under the Subleases directly to Collateral Agent; and

(e) require Mortgagor to direct all obligors of the Subleases to make all payments due from them under the Subleases directly to Collateral Agent.

Notwithstanding anything in this subsection 11.2.3 to the contrary, under no circumstances shall Collateral Agent have any duty to produce Rents from the Mortgaged Property. Regardless of whether or not Collateral Agent, in person or by agent, takes actual possession of the Premises and Improvements, Collateral Agent is not and shall not be deemed to be (i) a "mortgagee in possession" for any purpose; (ii) responsible for performing any of the obligations of the sublessor under any Sublease, except as to such obligations which arise after such time as Assignee shall have assumed full ownership and control of the Mortgaged Property; (iii) responsible for any waste committed by lessees or any other parties, any dangerous or defective condition of the Mortgaged Property, or any negligence in the management, upkeep, repair or control of the Mortgaged Property; or (iv) liable in any manner for the Mortgaged Property or the use, occupancy, enjoyment or operation of all or any part thereof.

**11.2.4 Appointment of Receiver.** Upon application to a court of competent jurisdiction, Collateral Agent may appoint a receiver to take possession of and to operate the Mortgaged Property and to collect and apply the Rents, without notice and without regard to the occupancy or value of any security for Mortgagor's Obligations or the solvency of Mortgagor. The receiver shall have all rights and powers necessary or usual for the protection, possession, control, management and operation of the Mortgaged Property during the period of receivership, to the fullest extent permitted by law.

**11.2.5 Other Remedies.** Collateral Agent may exercise any other rights and remedies then available to Collateral Agent under this Mortgage, the Lease, the Note, the other Loan Instruments, the Merrill Lynch Loan Instruments and any applicable laws.

**11.3 Remedies Upon Acceleration.** If Mortgagor's Obligations have been accelerated pursuant to Section 11.1, in addition to Collateral Agent's rights under Section 11.2, Collateral Agent may exercise any one or more of the following remedies:

**11.3.1 Commence Foreclosure Proceedings.** Collateral Agent may commence a civil action to foreclose the Mortgage Lien for payment of Mortgagor's Obligations, or any part thereof,

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and obtain an order or judgment of foreclosure and sale of the Mortgaged Property. In any civil action to foreclose the Mortgage Lien or otherwise enforce Collateral Agent's rights, there shall be allowed and included as part of Mortgagor's Obligations in the order or judgment for foreclosure and sale (or other order), all expenditures and expenses which may be paid or incurred by or on behalf of Collateral Agent for attorneys' fees, costs and expenses, appraiser's fees, engineer's fees, out-lays for documentary and expert evidence, receiver's fees, stenographers' charges, publication costs, and costs (which may be estimates as to items to be expended after entry of such order or judgment) of procuring all such abstracts of title, title searches and examinations, title insurance policies and similar data and assurances with respect to the title of the Mortgaged Property as Collateral Agent may deem necessary either to prosecute such civil action or to evidence to bidders at any sale which may be had pursuant to such order or judgment the true condition of the title to, or the value of, the Mortgaged Property.

**11.3.2 Bid at Foreclosure Sale.** Collateral Agent may bid for and purchase the Mortgaged Property at any foreclosure sale and apply all or any part of Mortgagor's Obligations as a credit to the purchase price in lieu of paying cash therefor.

**11.3.3 Rights Under Uniform Commercial Code.** Collateral Agent may exercise all of the rights and remedies of a secured party under the Uniform Commercial Code of the State in which the Premises are located with respect to the Collateral. Pursuant to Section 9-501(4) of such Uniform Commercial Code, Collateral Agent shall have an option to proceed with respect to both the real property portion of the Mortgaged Property and the Collateral, in accordance with its rights, powers and remedies with respect to the real property, in which event the remedy and enforcement provisions of this Mortgage in lieu of the remedy and enforcement provisions of such Uniform Commercial Code shall apply. Such Section 9-501(4) also permits Collateral Agent to proceed separately against the Collateral in accordance with the remedy and enforcement provisions of such Uniform Commercial Code. If Collateral Agent shall elect to proceed against the Collateral separately from any proceeding with respect to the real property, Mortgagor agrees that 10 days notice of the sale of the Collateral shall be reasonable notice.

**11.3.4 State Statutes.** Collateral Agent may exercise all rights and remedies under the statutes in the State where the Premises are located, subject to the following:

(a) if any provision in this Mortgage is inconsistent with any applicable statute in the State where the Premises are located, such statute shall take precedence over the provisions of this Mortgage, but shall not invalidate or render unenforceable any other provision of this Mortgage that can be construed in a manner consistent with such statute; and

(b) if any provision of this Mortgage shall grant to Collateral Agent any rights or remedies upon default of Mortgagor which are more limited than the rights that otherwise would be vested in Collateral Agent under such statute in the absence of such provision, Collateral Agent shall be vested with the rights granted in such statute to the full extent permitted by law.

Without limiting the generality of the foregoing, all expenses incurred by Collateral Agent to the extent reimbursable under such statute, whether incurred before or after any decree or judgment of foreclosure, and whether or not provided for elsewhere in this Mortgage, shall be added to Mortgagor's Obligations or to the judgment of foreclosure, as described more fully in Section 11.4.

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11.4 **Additions to Mortgagor's Obligations.** Upon the occurrence of an Event of Default, there will be added to and included as part of Mortgagor's Obligations (and allowed in any sale or decree for sale of the Mortgaged Property or in any judgment rendered upon this Mortgage, the Note, the other Loan Instruments or the Merrill Lynch Loan Instruments) all of the costs and expenses incurred by Collateral Agent in exercising its rights and remedies under this Mortgage. All of such costs and expenses, including attorneys' fees, shall (i) be secured by this Mortgage, (ii) be payable upon demand and (iii) bear interest at the Default Rate from the date incurred by Collateral Agent until paid.

11.5 **Proceedings Discontinued.** In case Collateral Agent shall have proceeded to enforce any right under this Mortgage by foreclosure, entry or otherwise and such proceedings shall have been discontinued or abandoned for any reason, or shall have been determined adversely to Collateral Agent, then, except as otherwise determined in such proceeding, Mortgagor and Collateral Agent shall be restored to their former positions and rights hereunder with respect to the Mortgaged Property, and all rights, remedies, and powers of Collateral Agent shall continue as though no such proceedings had been commenced.

## 11.6 **Deficiency.**

11.6.1 **Sale and Foreclosure.** If the Mortgaged Property (or any part thereof which remains subject to this Mortgage) is sold pursuant to foreclosure proceedings, and if the net proceeds of any such sale are not sufficient to pay all of Mortgagor's Obligations then outstanding and any other amounts provided for in any decree or judgment of foreclosure or provided for by applicable law (the amount of such deficiency and the deficiency described in subsection 11.6.2 hereinafter collectively referred to as the "Balance Owed"), then the Indebtedness evidenced by the Note, the other Loan Instruments and the Merrill Lynch Loan Instruments shall not be satisfied to the extent of the Balance Owed, but such Indebtedness shall continue in existence and shall continue to be evidenced by the Note, the other Loan Instruments and the Merrill Lynch Loan Instruments and shall continue to be secured by all of the other Loan Instruments and the Merrill Lynch Loan Instruments which were in existence prior to any such decree or judgment of foreclosure, except this Mortgage. Subject to the requirements of applicable law, if Collateral Agent shall acquire the Mortgaged Property as a result of any such foreclosure sale (whether by bidding all or any of Mortgagor's Obligations or otherwise), the proceeds of such sale shall not be deemed to include (and Mortgagor shall not be entitled to any benefit or credit on account of) proceeds of any subsequent sale of the Mortgaged Property by Collateral Agent.

11.6.2 **Foreclosure of Other Loan Instruments or Merrill Lynch Loan Instruments.** Notwithstanding the provisions of subsection 11.6.1, Mortgagor further agrees that if any other portion of the Collateral is foreclosed judicially and such Collateral is sold pursuant to foreclosure proceedings, and if the proceeds of such sale (after application of such proceeds as provided for herein and after deducting all accrued and general and special taxes and assessments) are not sufficient to pay Mortgagor's Obligations and any other amounts provided for in the decree or judgment of foreclosure or provided for by applicable law, then Mortgagor's Obligations then outstanding shall not be satisfied to the extent of such Balance Owed, but such Indebtedness shall continue in existence and continue to be evidenced by the Note, the other Loan Instruments and the Merrill Lynch Loan Instruments and shall continue to be secured by this Mortgage and all of the other Loan Instruments, which were in existence immediately prior to any such decree or judgment of foreclosure, except each such Loan Instrument which pertains to the portion of the Collateral which was the subject of any such foreclosure sale.

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11.8 Application of Proceeds. The proceeds of any foreclosure sale of the Mortgaged Property or any other proceeds received hereunder shall be applied in accordance with the provisions of Section 8.4 of the Loan Agreement.

## ARTICLE XII - RECONVEYANCE

Collateral Agent shall release the Mortgaged Property, or such portion thereof as previously shall not have been sold pursuant to the terms of this Mortgage, by proper instrument upon payment and discharge of all of Mortgagor's Obligations.

## ARTICLE XIII - MISCELLANEOUS

13.1 Notices. All notices and communications under this Mortgage shall be delivered in the manner prescribed under the Loan Agreement.

13.2 Covenants Run With Land. All the covenants contained in this Mortgage shall run with the land. Time is of the essence for the performance by Mortgagor of its obligations under this Mortgage.

13.3 GOVERNING LAW. THIS MORTGAGE SHALL BE CONSTRUED IN ACCORDANCE WITH AND GOVERNED AS TO VALIDITY, INTERPRETATION, CONSTRUCTION, EFFECT AND IN ALL OTHER RESPECTS BY THE LAWS AND DECISIONS OF THE STATE OF ARIZONA, EXCEPT TO THE EXTENT THAT IT IS MANDATORY THAT THE LAWS OF THE STATE WHERE THE PREMISES ARE LOCATED APPLY TO THE CREATION, PRIORITY, PERFECTION AND MAINTENANCE OF THE MORTGAGE LIEN AND TO THE ENFORCEMENT OF THE REMEDIES OF COLLATERAL AGENT HEREUNDER AND ANY OF ITS SUCCESSORS AND ASSIGNS.

13.4 JURISDICTION AND VENUE. SUBJECT TO THE PROVISIONS OF ANY APPLICABLE STATUTE IN THE STATE WHERE THE PREMISES ARE LOCATED, MORTGAGOR AGREES THAT ALL ACTIONS OR PROCEEDINGS INITIATED BY MORTGAGOR AND ARISING DIRECTLY OR INDIRECTLY OUT OF THE LOAN INSTRUMENTS SHALL BE LITIGATED IN THE SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY DIVISION, OR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA OR, IF COLLATERAL AGENT INITIATES SUCH ACTION, IN ADDITION TO THE FOREGOING COURTS, ANY OTHER COURT WHICH HAS JURISDICTION AS A RESULT OF THE MORTGAGOR OR MORTGAGED PROPERTY BEING LOCATED IN SUCH JURISDICTION, TO THE EXTENT SUCH COURT OTHERWISE HAS JURISDICTION. MORTGAGOR HEREBY EXPRESSLY SUBMITS AND CONSENTS IN ADVANCE TO SUCH JURISDICTION IN ANY ACTION OR PROCEEDING COMMENCED BY COLLATERAL AGENT IN OR REMOVED BY COLLATERAL AGENT TO ANY OF SUCH COURTS, AND HEREBY WAIVES PERSONAL SERVICE OF THE SUMMONS AND COMPLAINT, OR OTHER PROCESS OR PAPERS ISSUED THEREIN, AND AGREES THAT SERVICE OF SUCH SUMMONS AND COMPLAINT OR OTHER PROCESS OR PAPERS MAY BE MADE BY REGISTERED OR CERTIFIED MAIL ADDRESSED TO MORTGAGOR AT THE ADDRESS TO WHICH NOTICES ARE TO BE SENT PURSUANT TO SECTION 13.1 ABOVE. MORTGAGOR WAIVES ANY CLAIM THAT PHOENIX, ARIZONA, MARICOPA COUNTY, ARIZONA OR THE DISTRICT OF ARIZONA IS AN INCONVENIENT FORUM OR AN IMPROPER FORUM BASED ON LACK OF VENUE. SHOULD MORTGAGOR, AFTER BEING SO SERVED, FAIL TO APPEAR OR ANSWER TO ANY SUMMONS, COMPLAINT, PROCESS OR PAPERS SO SERVED WITHIN THE NUMBER DAYS PRESCRIBED BY LAW AFTER THE

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MAILING THEREOF, MORTGAGOR SHALL BE DEEMED IN DEFAULT AND AN ORDER AND/OR JUDGMENT MAY BE ENTERED BY COLLATERAL AGENT AGAINST MORTGAGOR AS DEMANDED OR PRAYED FOR IN SUCH SUMMONS, COMPLAINT, PROCESS OR PAPERS. THE EXCLUSIVE CHOICE OF FORUM FOR MORTGAGOR SET FORTH IN THIS SECTION 13.4 SHALL NOT BE DEEMED TO PRECLUDE THE ENFORCEMENT, BY COLLATERAL AGENT, OF ANY JUDGMENT OBTAINED IN ANY OTHER FORUM OR THE TAKING, BY COLLATERAL AGENT, OF ANY ACTION TO ENFORCE THE SAME IN ANY OTHER APPROPRIATE JURISDICTION AND MORTGAGOR HEREBY WAIVES THE RIGHT TO ATTACK ANY SUCH JUDGMENT OR ACTION COLLATERALLY.

**13.5 WAIVER OF JURY TRIAL.** MORTGAGOR ACKNOWLEDGES AND AGREES THAT (I) ANY CONTROVERSY WHICH MAY ARISE UNDER THIS MORTGAGE OR WITH RESPECT TO THE TRANSACTIONS CONTEMPLATED HEREUNDER WOULD BE BASED ON DIFFICULT AND COMPLEX ISSUES AND (II) ANY COURT PROCEEDING ARISING OUT OF ANY SUCH CONTROVERSY WILL BE TRIED IN A COURT OF COMPETENT JURISDICTION BY A JUDGE SITTING WITHOUT A JURY.

**13.6 Successors and Assigns.** This Mortgage will be binding upon and inure to the benefit of the successors and assigns of each of Mortgagee and Collateral Agent.

**13.7 Severability.** Any provision of this Mortgage that is unenforceable in any state in which this Mortgage may be filed or recorded or is invalid or contrary to the law of such state, shall be of no effect, and in such case all the remaining terms and provisions of this Mortgage shall continue to be fully effective in accordance with the terms and provisions of this Mortgage, all as though no such invalid portion ever had been included herein.

**13.8 Remedies Cumulative.** All rights and remedies of Collateral Agent under this Mortgage and any of the other Loan Instruments and the Merrill Lynch Loan Instruments are cumulative and concurrent and may be exercised singularly, successively or concurrently and Collateral Agent shall have all rights, remedies and recourse available at law or equity.

**13.9 Subrogation.** To the extent that any of Mortgagee's Obligations represent funds utilized to satisfy any outstanding Indebtedness secured by Liens against all or any part of the Mortgaged Property, to the extent permitted thereby and by applicable law, Collateral Agent shall be subrogated to any and all Liens owned or claimed by the holder of any such outstanding Indebtedness so satisfied, regardless of whether such Liens are assigned to Collateral Agent or released by the holder(s) thereof.

**13.10 Indemnification.** Mortgagee will save and hold Collateral Agent harmless of and from any and all damage, loss, cost and expense, including, but not limited to, attorneys' fees, costs and expenses, incurred by reason of or arising from or on account of or in connection with any suit or proceeding threatened, filed and/or pending brought by anyone other than Collateral Agent, in or to which Collateral Agent is or may become a party by reason of or arising from Mortgagee's Obligations, this Mortgage, the other Loan Instruments or the Merrill Lynch Loan Instruments.

**13.11 Conflicts.** In the event of any conflict or inconsistency between the terms of this Mortgage and the terms of the Loan Agreement, the terms of the Loan Agreement shall prevail.

**13.12 No Partner, Joint Venturer.** Mortgagee and Collateral Agent agree that in no event shall Collateral Agent be deemed to be a partner or a joint venturer with Mortgagee. Without limiting the foregoing, Collateral Agent shall not be deemed to be such a partner or joint venturer on account of

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becoming a mortgagee in possession or exercising any rights pursuant to this Mortgage or pursuant to any other instrument or document evidencing or securing any of Mortgagor's Obligations.

**13.13 Waivers.** Mortgagor, on behalf of itself, its successors and assigns, to the extent permitted by law, hereby (i) waives any and all rights of appraisal, valuation, stay, reinstatement, extension and (to the extent permitted by law) redemption from sale under any order or decree of foreclosure of this Mortgage, (ii) waives any equitable, statutory or other right available to it, pertaining to marshalling of assets hereunder, so as to require the separate sales of interests in the Mortgaged Property before proceeding against any other interest in the Mortgaged Property, (iii) consents to and authorizes, at the option of Collateral Agent, the sale, either separately or together, of any and all interests in the Mortgaged Property, (iv) agrees that in no event shall Collateral Agent be required to allocate any proceeds received by Collateral Agent from foreclosure sale or otherwise, to any particular interest in the Mortgaged Property and (v) agrees that when a sale is consummated under any decree of foreclosure of this Mortgage, upon confirmation of such sale, the master in chancery, the sheriff or other Person making such sale, or his successor in office, shall be and is authorized immediately to execute and deliver to the purchaser at such sale a deed conveying the Mortgaged Property, showing the amount paid therefor, or if purchased by the Person in whose favor the order or decree is entered, the amount of his bid therefor.

**13.14 Remedies Not Exclusive.** No right or remedy of Collateral Agent hereunder is exclusive of any other right or remedy hereunder or now or hereafter existing at law or in equity or under the Note, the other Loan Instruments or the Merrill Lynch Loan Instruments, but is cumulative and in addition thereto and Collateral Agent may recover judgment thereon, issue execution therefor, and resort to every other right or remedy available at law or in equity or under the Note, the other Loan Instruments or the Merrill Lynch Loan Instruments, without first exhausting or affecting or impairing the security or any right or remedy afforded this Mortgage. No delay in exercising, or omission to exercise, any such right or remedy will impair any such right or remedy or will be construed to be a waiver of any default by Mortgagor hereunder, or acquiescence therein, and such waiver will not affect any subsequent default hereunder by Mortgagor of the same or different nature. Every such right or remedy may be exercised independently or concurrently, and when and so often as may be deemed expedient by Collateral Agent. No term or condition contained in this Mortgage may be waived, altered or changed except as evidenced in writing signed by Mortgagor and Collateral Agent.

**13.15 No Waiver by Collateral Agent.** Any failure of Collateral Agent to insist upon the strict performance by Mortgagor of any of the terms and provisions of this Mortgage shall not be deemed to be a waiver of any such terms and provisions, and Collateral Agent, notwithstanding any such failure, shall have the right at any time thereafter to insist upon the strict performance by Mortgagor of any and all of the terms and provisions hereof.

**13.16 No Release.** Except as may be provided otherwise by applicable law, neither Mortgagor, nor any other Person now or hereafter obligated for the payment of the whole or any part of Mortgagor's Obligations, shall be relieved of such obligation by reason of (i) the sale, conveyance or other transfer of the Mortgaged Property, (ii) the failure of Collateral Agent to comply with any request of Mortgagor, or of any other Person, to take action to foreclose this Mortgage or otherwise enforce any of the provisions of this Mortgage, the Note, the other Loan Instruments or the Merrill Lynch Loan Instruments, (iii) the release, regardless of consideration, of the whole or any part of the Collateral, or (iv) any agreement or stipulation between any subsequent owner of the Mortgaged Property and Collateral Agent extending the time of payment under or modifying the terms of the Note, the other Loan Instruments, the Merrill Lynch Loan Instruments or this Mortgage without first having obtained the consent of Mortgagor or such other Person. If Collateral Agent shall enter into any agreement described in clause (iv) hereof, then, notwithstanding any such agreement, Mortgagor and all such other Persons shall continue to be liable on account of Mortgagor's

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Obligations and shall continue to make such payments according to the terms of any such agreement of extension or modification unless expressly released and discharged in writing by Collateral Agent.

13.17 **Release of Security.** Collateral Agent, without notice, may release, regardless of consideration, any part of the Collateral, without impairing or affecting the Mortgage Lien of or the priority of such Mortgage Lien over any subordinate Lien.

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## EXHIBIT A

### LEGAL DESCRIPTION

LOTS 1, 2 AND 3 IN BLOCK 22 IN WOLCOTT'S ADDITION TO CHICAGO, ALSO LOT 5 IN A.J. MCBEAN'S SUBDIVISION OF LOTS 14 AND 15 AND 16 IN BLOCK 22 IN WOLCOTT'S ADDITION TO CHICAGO, ALL IN NORTH PART OF THE EAST 1/2 OF THE NORTHEAST 1/4 OF SECTION 9, TOWNSHIP 39 NORTH, RANGE 14 EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS.

Common Address of Premises: 100 W. Ontario, Chicago, IL 60610

Tax Identification Number: 17-09-225-023, 17-09-225-014

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