

UNOFFICIAL COPY

0 3 5 1 9 8 7 8
3619878

AMENDED AND RESTATED MORTGAGE, ASSIGNMENT OF RENTS
AND LEASES AND SECURITY AGREEMENT

THIS AMENDED AND RESTATED MORTGAGE, ASSIGNMENT OF RENTS AND LEASES AND SECURITY AGREEMENT ("Mortgage") is made as of May 22, 1987 by and between CHICAGO TITLE AND TRUST COMPANY,* not personally but as Trustee under Trust Agreement dated May 24, 1978, and known as Trust No. 4866398-3 ("Mortgagor"), whose address is 111 West Washington Street, Chicago, Illinois 60602, ORVAL KENT FOOD COMPANY, INC., a Delaware corporation (the "Company") sole beneficiary of Mortgagor, THE FIRST NATIONAL BANK OF CHICAGO ("First Chicago"), a national banking association whose address is One First National Plaza, Chicago, Illinois 60670, as agent for itself, SECURITY PACIFIC NATIONAL BANK ("Security Pacific") and PITTSBURGH NATIONAL BANK ("Pittsburgh National") (First Chicago, as agent for itself, Security Pacific and Pittsburgh National is hereinafter referred to as the "Mortgagee").

RECITALS

WHEREAS, the Company and First Chicago previously entered into an Amended and Restated Revolving Credit and Term Loan Agreement dated October 21, 1986 ("Original Loan Agreement");

WHEREAS, pursuant to the terms of the Original Loan Agreement, Mortgagor and the Company executed and delivered to First Chicago: (a) a Term Note dated October 24, 1986 ("Original Term Note"), payable to the order of First Chicago in the principal amount of \$16,500,000, (b) a Revolving Credit Note dated October 24, 1986 ("Original Revolving Credit Note"), payable to the order of First Chicago in the principal amount of \$5,000,000 and (c) a Mortgage, Assignment of Rents and Leases and Security Agreement dated October 24, 1986 ("Original Mortgage") on certain property in Wheeling, Cook County, Illinois filed with the Cook County, Illinois, Registrar of Titles ("Registrar") on November 25, 1986, as document number 3570218;

WHEREAS, the Company and First Chicago entered into a second Amended and Restated Revolving Credit and Term Loan Agreement dated December 31, 1986 ("Second Loan Agreement"), which increased the aggregate maximum principal amount of the loans to be made thereunder to \$44,000,000;

WHEREAS, pursuant to the terms of the Second Loan Agreement, Mortgagor and the Company executed and delivered to

* AS SUCCESSOR TRUSTEE TO CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO

Cancel notes (2/1987) to New notes identified

Description reflects copy created by gdc # 202200 from copy of 1001972

52202

3619878

UNOFFICIAL COPY

0 3 6 | 9 8 7 8

EXHIBIT A Legal Description

THE SOUTH 528.66 FEET OF THE WEST 600 FEET OF THE FOLLOWING DESCRIBED PARCEL:

THAT PART OF THE EAST 3/4 OF THE EAST 1/2 OF THE SOUTH WEST 1/4 AND OF THE WEST 1/2 OF THE SOUTH EAST 1/4 OF SECTION 14, TOWNSHIP 42 NORTH, RANGE 11 EAST OF THE THIRD PRINCIPAL MERIDIAN (TAKEN AS A TRACT) LYING WESTERLY OF THE WESTERLY LINE OF RAILROAD RIGHT OF WAY LINE OF THE CHICAGO AND WISCONSIN RAILROAD, EXCEPTING FROM SAID TRACT OF LAND THAT PART THEREOF LYING NORTHERLY AND EASTERLY OF THE FOLLOWING DESCRIBED LINE:

BEGINNING AT A POINT ON THE WEST LINE OF THE EAST 3/4 OF THE SOUTH EAST 1/4 OF THE SOUTH WEST 1/4 OF SECTION 14 AFORESAID, 200 FEET SOUTH OF THE NORTH WEST CORNER OF SAID EAST 3/4 OF THE SOUTH EAST 1/4 OF THE SOUTH WEST 1/4 OF SAID SECTION 14; THENCE EAST ALONG A LINE 200 FEET SOUTH OF MEASURED AT RIGHT ANGLES TO AND PARALLEL WITH SAID NORTH LINE OF THE EAST 3/4 OF THE SOUTH EAST 1/4 OF THE SOUTH WEST 1/4 A DISTANCE OF 685.89 FEET; THENCE SOUTHEASTERLY ALONG A DIAGONAL LINE A DISTANCE OF 500 FEET TO A POINT IN A LINE WHICH IS 140 FEET SOUTHWESTERLY OF MEASURED AT RIGHT ANGLES TO AND PARALLEL WITH THE WESTERLY RIGHT OF WAY LINE OF SAID RAILROAD; THENCE SOUTHEASTERLY ALONG SAID PARALLEL LINE A DISTANCE OF 826.27 FEET TO THE INTERSECTION OF SAID PARALLEL LINE WITH THE SOUTH LINE OF SAID SOUTH WEST 1/4 OF THE SOUTH EAST 1/4 OF SECTION 14; AND EXCEPTING FROM SAID TRACT OF LAND THOSE PARTS THEREOF DESCRIBED IN DEEDS TO THE COUNTY OF COOK REGISTERED IN THE OFFICE OF THE REGISTRAR OF TITLE OF COOK COUNTY AS DOCUMENT 1982200 and 1982201, IN COOK COUNTY, ILLINOIS.

#03-14-301-015-0000

*Description affects only created by OAR
#303800 from of # 164792*

5-27-81

3619575

Office

First Chicago: (a) a Term Note (the "Second Term Note") in the principal amount of \$38,000,000, to replace the Original Term Note, (b) a Revolving Credit Note (the "Second Revolving Credit Note") in the principal amount of \$6,000,000 to replace the Original Revolving Credit Note, and (c) a First Amendment to Mortgage, Assignment of Rents and Leases and Security Agreement dated December 31, 1986;

WHEREAS, each of Security Pacific and Pittsburgh National have purchased from First Chicago an interest in the Second Loan Agreement as evidenced by that certain Loan Assignment and Assumption Agreement dated May 22, 1987;

WHEREAS, Mortgagor, Mortgagee and the Company are contemporaneously herewith entering into a certain Amended and Restated Revolving Credit and Term Loan Agreement dated as of May __, 1987 (the "Loan Agreement").

WHEREAS, the Loan Agreement provides for a term loan and revolving credit totaling FORTY-FOUR MILLION AND NO/100 DOLLARS (\$44,000,000) (the "Credit");

WHEREAS, pursuant to the terms of the Loan Agreement, THIRTY-EIGHT MILLION AND NO/100 DOLLARS (\$38,000,000) of the Credit take the form of a term loan and is evidenced by three notes (which replace the Second Term Note) of even date herewith (the "Term Notes") made by Mortgagor and the Company payable to the order of First Chicago, Security Pacific and Pittsburgh National respectively (all as more specifically described in the Loan Agreement), Mortgagee, in and by which Term Notes Mortgagor and the Company promise to pay the said aggregate principal sum or so much thereof as may have been advanced and is outstanding from time to time and interest at the rate and in the manner set forth in the Term Notes, with a final payment of the balance due on December 31, 1994. All of said principal and interest are payable at such place as Mortgagee may from time to time designate in writing to Mortgagor and in the absence of such designation at the office of Mortgagee in Chicago, Illinois;

WHEREAS, pursuant to the terms of the Loan Agreement Mortgagee shall provide a revolving credit account to Mortgagor (the "Account") under which, subject to the provisions of the Loan Agreement, the Company may borrow from Mortgagee up to SIX MILLION AND NO/100 (\$6,000,000) DOLLARS. The Account is evidenced by three notes (which replace the Second Revolving Credit Note) of even date herewith made by Mortgagor and the Company payable to the order of First Chicago, Security Pacific and Pittsburgh National respectively (all as more specifically described in the Loan Agreement) ("Revolving Notes") through

3619578

UNOFFICIAL COPY

0 3 6 1 9 8 7 8

and by which Revolving Notes Mortgagor and the Company promise to pay to Mortgagee all sums drawn under the Account at the interest rate and in the manner set forth in the Loan Agreement, with the availability of the Account to terminate on termination of the Loan Agreement, and with all sums borrowed under the Account and all interest and all other sums payable under the Revolving Notes to be paid in full on December 31, 1994. All of said principal and interest are payable at such place as Mortgagee may from time to time designate in writing to Mortgagor and in the absence of such designation at the office of Mortgagee in Chicago, Illinois;

WHEREAS, the face amount of the Term Notes and Revolving Notes aggregate the total amount of the Credit described hereinabove; and

WHEREAS, the terms of the Loan Agreement require the execution, delivery and recording of this Mortgage to secure the Term Notes, the Revolving Notes, and Mortgagor's covenants, agreements and obligations under the Loan Agreement;

NOW, THEREFORE, (x) for and in consideration of: (i) the making and extension of the Credit by Mortgagee, (ii) other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and (iii) the recitals set forth above (such recitals being incorporated herein and made a part hereof by this reference), and (y) to secure the Credit and all other debt presently or in the future owed by Mortgagor to Mortgagee under the Original Loan Agreement and related documents, Second Loan Agreement and related documents, the Loan Agreement, Term Notes and Revolving Notes, and also to secure the performance by Mortgagor of all of its other covenants, agreements and obligations under this Mortgage, the Loan Agreement, Term Notes, Revolving Notes or any other document or instrument evidencing, securing or relating to the Credit, Mortgagor does by these presents GRANT, REMISE, RELEASE, ALIEN AND CONVEY unto Mortgagee, its successors and assigns, the real estate described in Exhibit A attached hereto and made a part hereof and all of its estate, right, title and interest therein, situate, lying and being in the County of Cook and the State of Illinois which, with the property hereinafter described, is hereinafter referred to as the "Premises,"

TOGETHER with all Mortgagor's right, title and interest in all improvements, tenements, easements, fixtures, and appurtenances thereto pertaining or belonging whether now held or hereafter acquired, and all rents, issues and profits thereof for so long and during all such times as Mortgagor may be entitled thereto (which are pledged primarily and on a

3619878

UNOFFICIAL COPY

0 3 6 1 9 8 7 8

parity with said real estate and not secondarily), including but not limited to all fixtures, apparatus, equipment or articles now or hereafter therein or thereon used to supply heat, gas, air cooling, air conditioning, water, light, power, sanitation, sprinkler protection, waste removal, refrigeration (whether single units or centrally controlled), and ventilation, all other fixtures, apparatus, equipment, furniture, furnishings, and articles used or useful in connection with the operation of the Premises and related facilities now or hereafter located upon said Premises, all shades, awnings, venetian blinds, screens, screen doors, storm doors and windows, stoves and ranges, curtain fixtures, partitions, and attached floor coverings, now or hereafter therein or thereon whether now held or hereafter acquired -- excluding, however, (x) the Company's Inventory and Farm Products and (y) the Company's Equipment used in the manufacturing process at the Premises, such Inventory, Farm Products and Equipment being covered separately by a Security Agreement from the Company to Mortgagee as secured party -- it being understood that the enumeration of any specific articles of property shall in no way result in or be held to exclude any items of property not specifically mentioned.

TOGETHER with all estates, interests, rights, titles, claims or demands, including claims or demands with respect to the proceeds of insurance in effect with respect thereto, which Mortgagor now has or may hereinafter acquire in the Premises, as more specifically set forth in this Mortgage, and any and all awards made for the taking by eminent domain, or by any proceedings or purchase in lieu thereof, as more specifically set forth in this Mortgage.

All of the land, estate and property hereinabove described, real, personal and mixed, whether affixed or annexed or not (except where otherwise hereinabove specified) and all rights hereby conveyed and mortgaged are intended so to be as a unit and are hereby understood, agreed and declared to form a part and parcel of the real estate and to be appropriated to the use of the real estate, and shall for the purposes of this Mortgage be deemed to be real estate and conveyed and mortgaged hereby. As to any of the property aforesaid which (notwithstanding the aforesaid declaration and agreement) does not so form a part and parcel of the real estate, this Mortgage is hereby deemed to be, as well, a Security Agreement under the Uniform Commercial Code in effect in the jurisdiction in which the Premises are located ("UCC") for the purpose of creating hereby a security interest in such property, which Mortgagor hereby grants to Mortgagee as Secured Party (as said term is defined in the UCC), securing said indebtedness and obligations and Mortgagee shall have in addition to its rights and remedies

3619878

UNOFFICIAL COPY

0 3 6 1 9 8 7 8

hereunder all rights and remedies of a Secured Party under the UCC. As to above personal property which the UCC classifies as fixtures, this instrument shall constitute a fixture filing and financing statement under the UCC.

Mortgagor covenants (i) that it is lawfully seized of the Premises, (ii) that the same are unencumbered, except for the liens, encumbrances, conditions, restrictions, easements, leases, and other matters, rights or interests disclosed in Schedule B (or the equivalent section or portion) of the ALTA Loan Policy delivered to and accepted by Mortgagee contemporaneously with the execution and delivery of this Mortgage (herein called "Permitted Encumbrances") and (iii) that Mortgagor has good right, full power and lawful authority to convey and mortgage the same; and further, Mortgagor shall forever defend the Premises and the quiet and peaceful possession of the same against the lawful claims of all persons whomsoever.

TO HAVE AND TO HOLD the Premises unto the said Mortgagee, its successors and assigns, forever, for the purposes and uses herein set forth.

IT IS FURTHER UNDERSTOOD AND AGREED THAT:

Obligations Secured

1. This Mortgage is to secure:

(a) all indebtedness evidenced by the Term Notes, including any future advances, the aggregate principal amount of which shall not exceed THIRTY-EIGHT MILLION AND NO/100 DOLLARS (\$38,000,000), plus all interest accruing thereon, and fees due and payable in connection therewith, and all other amounts due hereunder and otherwise secured hereby under law;

(b) any and all indebtedness evidenced by the Revolving Notes the aggregate principal amount of which shall not exceed at any given time SIX MILLION AND NO/100 DOLLARS (\$6,000,000), plus all interest accruing thereon, and all fees due and payable in connection therewith, and all other amounts due hereunder and otherwise secured hereby under law;

(c) all other sums advanced pursuant to the provisions of the Loan Agreement, this Mortgage, Term Notes, Revolving Notes, and any other documents evidencing and securing the Credit (collectively, the "Loan Documents");

(d) the performance by Mortgagor of all other covenants, agreements and obligations on its part contained in

3619878

the Loan Agreement, this Mortgage, the Term Notes, the Revolving Notes and other Loan Documents; and

(e) any renewals, extensions, amendments or modifications hereto or of the Term Notes, Revolving Notes, Loan Agreement and other Loan Documents, including but not limited to any increase in the amount of the Credit and the principal amount of the indebtedness secured hereby to a maximum of Seventy-Five Million Dollars (\$75,000,000) in the aggregate, which may hereafter be agreed to by the Company and Mortgagee.

The foregoing items set forth in subsections (a) through (e) of Section 1 of this Mortgage are hereinafter collectively referred to as the "Obligations."

Maintenance, Repair and Restoration of Improvements, Payment of Liens, Etc.

2. (a) Except as otherwise provided or permitted in the Loan Agreement, Mortgagee shall (i) promptly repair, restore or rebuild any buildings or improvements now or hereafter on the Premises which may become damaged or be destroyed; (ii) keep the Premises in good condition and repair, without waste, and free from mechanics' liens or other liens or claims for lien of any kind or nature whatsoever except Permitted Exceptions (collectively "Liens"); (iii) pay when due any indebtedness which may be secured by a mortgage on the Premises, whether senior or junior to this Mortgage and whether permitted by the terms hereof or otherwise, and comply with all requirements of all loan documents evidencing or securing such indebtedness, and upon request, exhibit satisfactory evidence of the discharge of any such lien to Mortgagee; (iv) complete within a reasonable time any building or buildings or any improvements at any time in the process of erection upon the Premises; (v) comply with all requirements of law, municipal ordinances, or restrictions of record with respect to the Premises and the use thereof, the noncompliance with which would materially impair the use, occupancy or value of the Premises; (vi) make no material alterations in the Premises, except as required by law or municipal ordinance; (vii) suffer or permit no change in the general nature of the occupancy or use of the Premises; (viii) initiate or acquiesce in no zoning variation or reclassification without Mortgagee's prior written consent; and (ix) pay each item of indebtedness secured by this Mortgage when due according to the terms hereof, and pay, perform, satisfy and discharge each of the Obligations when required to do so under the terms of this Mortgage, the Loan Agreement, Term Notes, Revolving Notes and other Loan Documents.

3619878

UNOFFICIAL COPY

0 3 6 1 9 8 7 8

(b) Anything in Section 2(a)(ii) and 2(a)(iii) of this Mortgage notwithstanding, Mortgagor may, in good faith and with reasonable diligence, contest the validity or amount of any Lien, and defer payment and discharge thereof during the pendency of such contest, provided: (i) that such contest shall have the effect of preventing the sale or forfeiture of the Premises or any part thereof, or any interest therein, to satisfy such Lien; (ii) that, within ten (10) days after Mortgagor has first learned of the assertion of such Lien, Mortgagor shall have notified Mortgagee in writing of Mortgagor's intention to contest such Lien; (iii) that such contest shall not have a materially adverse consequence on Mortgagor's financial condition, in Mortgagee's sole opinion; and (iv) that Mortgagor shall have deposited with Mortgagee at such place as Mortgagee may from time to time in writing appoint, a sum of money which shall be sufficient in the judgment of Mortgagee to pay in full such Lien and all interest which might become due thereon, and shall keep on deposit an amount so sufficient at all times, increasing such amount to cover additional interest whenever, in the judgment of Mortgagee, such increase is advisable. If Mortgagor shall: (x) fail to prosecute such contest with reasonable diligence, or (y) fail to pay the amount of the Lien plus any interest finally determined to be due upon the conclusion of such contest, over and above any amount which Mortgagee is to pay as provided below, or (z) fail to maintain sufficient funds on deposit as hereinabove provided, then Mortgagee may, at its option, apply the money so deposited in payment of or on account of such Lien, or that part thereof then unpaid, together with all interest thereon. If the amount of money so deposited shall be insufficient for the payment in full of such Lien, together with all interest thereon, Mortgagor shall forthwith, upon demand, deposit with Mortgagee a sum which, when added to the funds then on deposit, shall be sufficient to make such payment in full. Mortgagee shall, upon the final disposition of such contest, apply the money so deposited in full payment of such Lien or that part thereof then unpaid, together with all interest thereon (provided Mortgagor is not then in default hereunder) when so requested in writing by Mortgagor and when furnished by Mortgagor with sufficient funds to make such payment in full and with evidence satisfactory to Mortgagee of the amount of payment to be made. Notwithstanding the foregoing, if in connection with a contest of a Lien on the Premises Mortgagor deposits cash with the "First Mortgagee" in accordance with the terms of the "First Mortgage" (as such terms are defined in Section 40 below), Mortgagor shall not be required to deposit money with Mortgagee under this Section 2(b) so long as Mortgagor maintains such cash deposit with First Mortgagee and otherwise complies with the requirements of the First Mortgage. In lieu of the cash deposit described

3619878

above, Mortgagor may deliver to Mortgagee either an amendment to or endorsement of the ALTA Loan Policy provided to Mortgagee at the time this Mortgage is executed or a payment bond from a bonding company satisfactory to Mortgagee; provided that such amendment, endorsement or bond shall insure over, or indemnify Mortgagee against, the Lien which Mortgagor is contesting as aforesaid, and shall otherwise be in form and substance satisfactory to Mortgagee.

Payment of Taxes

3. (a) Mortgagor shall pay, before the due date thereof, all general real estate taxes, special taxes, special assessments, water charges, sewer service charges, and other charges against the Premises, and shall, upon written request, promptly furnish to Mortgagee duplicate receipts evidencing such payment.

(b) Mortgagor may, in good faith and with reasonable diligence, contest the validity or amount of any such taxes or assessments provided: (i) that such contest shall have the effect of preventing the collection of the tax or assessment so contested and the sale or forfeiture of the Premises or any part thereof, or any interest therein, to satisfy the same; (ii) that such contest shall not have a materially adverse effect on Mortgagor's financial condition, in Mortgagee's sole opinion; and (iii) that Mortgagor shall deposit with Mortgagee a sum of money deemed adequate by Mortgagee to pay such taxes and any penalty and interest thereon, increasing such deposit, as Mortgagee may from time to time require in its sole judgment. Mortgagee shall, upon the final disposition of such contest, apply the money so deposited in full payment of such taxes or that part thereof then unpaid, together with all interest thereon (provided Mortgagor is not then in default hereunder) when so requested in writing by Mortgagor and when furnished by Mortgagor with sufficient funds to make such payment in full and with evidence satisfactory to Mortgagee of the amount of payment to be made. Notwithstanding the foregoing, if in connection with a contest of taxes on the Premises Mortgagor deposits cash with the "First Mortgagee" in accordance with the terms of the "First Mortgage" (as such terms are defined in Section 40 below), Mortgagor shall not be required to deposit money with Mortgagee under this Section 3(b), so long as Mortgagor maintains such cash deposit with First Mortgagee and otherwise complies with the requirements of the First Mortgage. In lieu of the cash deposit described above, Mortgagor may deliver to Mortgagee either an amendment to or endorsement of the ALTA Loan Policy provided to Mortgagee at the time this Mortgage is executed or a payment bond from a bonding company satisfactory to Mortgagee; provided that such

UNOFFICIAL COPY

0 3 6 1 9 8 7 8

amendment, endorsement or bond shall insure over, or indemnify Mortgagee against, the taxes which Mortgagor is contesting as aforesaid, and shall otherwise be in form and substance satisfactory to Mortgagee.

Insurance

4. Mortgagor shall keep all buildings and improvements now or hereafter situated on the Premises insured for a minimum of Ninety percent (90%) of their replacement cost against loss or damage by fire, tornado, windstorm and extended coverage perils and such other hazards as may be reasonably required by Mortgagee, including, without limitation, rent loss insurance whenever in the reasonable opinion of Mortgagee such protection is necessary, war damage insurance whenever in the reasonable opinion of Mortgagee such protection is necessary and is available from an agency of the United States of America, and flood insurance if the Premises are located in a flood hazard area. Mortgagor shall also provide liability insurance with such limits for personal injury and death and property damage as Mortgagee may require naming Mortgagee as an additional insured party by specific endorsement. All policies of insurance to be furnished hereunder shall be in forms, companies and amounts satisfactory to Mortgagee, with mortgagee clauses attached to all casualty policies in favor of and in form satisfactory to Mortgagee naming Mortgagee as loss payee, and all policies shall include a provision requiring that the coverage evidenced thereby shall not be terminated or modified without thirty (30) days prior written notice to Mortgagee. Mortgagor shall deliver copies of all policies and duplicate original certificates evidencing such insurance, including copies of additional and renewal policies and duplicate original certificates, together with evidence of payment of premiums thereon, to Mortgagee, and, in the case of insurance about to expire, shall deliver duplicate original certificates and copies of each renewal policy not less than thirty (30) days prior to their respective dates of expiration. Mortgagor will not permit any condition to exist which would wholly or partially invalidate any insurance thereon. Mortgagor shall not take out separate insurance concurrent in form or contributing in the event of loss with that required to be maintained hereunder unless Mortgagee is included thereon under a standard mortgage clause acceptable to Mortgagee. Mortgagor shall immediately notify Mortgagee whenever any such separate insurance is taken out and shall promptly deliver to Mortgagee the policy or policies of such insurance.

3619878

Adjustment of Losses with Insurer and Application of Proceeds of Insurance

5. In case of fire or other casualty, Mortgagee (or after entry of decree of foreclosure, purchaser at the sale, or the decree creditor, as the case may be) shall have the sole right and discretion, subject to the rights of the First Mortgagee (defined hereinbelow in Section 40) to (i) settle and adjust any claim under such insurance policies or (ii) allow Mortgagor to agree with the Insurance company or companies on the amount to be paid upon the loss. In either case, Mortgagee is authorized to collect and receipt for any such insurance proceeds. Such insurance proceeds may, at the option of Mortgagee, be either (a) applied in payment, reduction or satisfaction of one or more of the Obligations whether due or not, in such order as Mortgagee may elect, or (b) held by Mortgagee and used to reimburse Mortgagor for the cost of the rebuilding or restoration of buildings or improvements on the Premises. If Mortgagee elects to allow such proceeds to restore or rebuild the Premises, Mortgagor shall promptly and expeditiously rebuild or restore the buildings and improvements to the equivalent of their condition immediately prior to the loss and in accordance with the original plans and specifications or to such other condition as Mortgagee shall approve in writing. If the proceeds are to be used to reimburse Mortgagor for the cost of rebuilding or restoration, such proceeds shall be made available, from time to time, upon Mortgagee's being furnished with satisfactory evidence of the estimated cost of completion thereof and with such architect's certificates, waivers of lien, contractors' sworn statements and other evidence of cost and of payments as Mortgagee may require and approve. Mortgagee shall also be furnished with all plans and specifications for such rebuilding or restoration as the Mortgagee may require and approve. No payment made prior to the final completion of the work shall exceed ninety percent (90%) of the value of the work performed, from time to time, and at all times the undisbursed balance of said proceeds remaining in Mortgagee's possession shall be at least sufficient to pay for the cost of completion of the work free and clear of liens.

In case of loss after a foreclosure by judicial proceeding has been instituted, the proceeds of any such insurance policy or policies, if not applied as aforesaid in rebuilding or restoring the buildings or improvements, shall be applied in payment or reduction of the indebtedness secured hereby or in payment or reduction of the amount due in accordance with any order of foreclosure that may be entered in any such proceeding, and the balance, if any, shall be paid to the owner of the equity of redemption if it shall then be

3619878

entitled to the same or as the court may direct. In case of the foreclosure of this Mortgage by judicial proceeding, the court in its order and upon notice to the insurer may provide that the mortgagee's clause attached to each of said insurance policies may be cancelled and that the purchaser at the foreclosure sale held in accordance with such judicial proceeding may cause a new loss clause to be attached to each of said policies making the loss thereunder payable to said purchaser; and any such foreclosure order may further provide that in case of one or more redemptions under said order, pursuant to the statute in such case made and provided, then, and in every such case, each successive redepton may cause the preceding loss clause attached to each insurance policy to be cancelled and a new loss clause to be attached thereto, making the loss thereunder payable to such redepton. In the event of foreclosure sale (with or without judicial proceedings), Mortgagee is hereby authorized, without the consent of Mortgagor, to assign any and all insurance policies to the purchaser at the sale, or to take such other steps as Mortgagee may deem advisable, to cause the interest of such purchaser to be protected by any of the said insurance policies.

Stamp Tax

6. If, by the laws of the United States of America, or of any state having jurisdiction over Mortgagor, any stamp tax or similar tax is due or becomes due in respect of any of the Obligations or the recording of this Mortgage, Mortgagor covenants and agrees to pay such tax in the manner required by any such law. Mortgagor further covenants to hold harmless and agrees to indemnify Mortgagee, its successors or assigns, against any liability incurred by reason of the imposition of any stamp tax or similar tax on the issuance of the Obligations or the recording of this Mortgage.

Prepayment Privilege

7. Mortgagor shall have the privilege of making prepayments on the principal of the Obligations (in addition to the required payments) in accordance with the terms and conditions set forth in the Loan Agreement, Term Notes or Revolving Notes applicable to the respective Obligations.

Effect of Extensions of Time

8. If the payment of the indebtedness evidenced by the Obligations or any part thereof be extended or varied or if any part of the security be released, all persons or entities now or at any time hereafter liable therefor, or interested in the Premises, shall be held to assent to such extension, variation

or release, and their liability and the lien and all provisions hereof shall continue in full force, the right of recourse against all such persons being expressly reserved by Mortgagee, notwithstanding such extension, variation or release.

Effect of Changes in Laws Regarding Taxation

9. In the event of the enactment after this date of any law of the state in which the Premises are located deducting from the value of land for the purpose of taxation any lien thereon, or imposing upon Mortgagee the payment of the whole or any part of the taxes or assessments or charges or liens herein required to be paid by Mortgagor, or changing in any way the laws relating to the taxation of mortgages or debts secured by mortgages or the mortgagee's interest in the property, or the manner of collection of taxes so as to affect this Mortgage or the indebtedness secured hereby, then, and in any such event, Mortgagor, upon demand by Mortgagee, shall pay such taxes or assessments, or reimburse Mortgagee therefor; provided, however, that if in the opinion of counsel for Mortgagee (a) it shall be unlawful to require Mortgagor to make such payment, or (b) the making of such payment shall result in the imposition of interest beyond the maximum amount permitted by law, then, and in such event, Mortgagee may elect, by notice in writing given to Mortgagor, to declare all of the Obligations to be and become due and payable sixty (60) days from the giving of such notice.

Mortgagee's Performance of Defaulted Acts; Subrogation

10. In case of default on the part of Mortgagor under this Mortgage and the failure of Mortgagor to cure such default within the applicable cure period, if any, Mortgagee may, but need not, make any payment or perform any act herein or in or with respect to any of the Obligations required of Mortgagor, in any form and manner deemed expedient, and may, but need not, make full or partial payments of principal or interest on prior encumbrances, if any, and purchase, discharge, compromise or settle any tax lien or other prior lien on title or claim thereof, or redeem from any tax sale or forfeiture affecting the Premises or contest any tax or assessment. Anything to the contrary notwithstanding, Mortgagee may immediately take action to cure any default in the payment of taxes or insurance premiums or any other defaults that create an emergency regarding the priority or validity of the lien of this Mortgage or the physical condition of the Premises without regard to the Mortgagor's cure rights. All moneys paid for any of the purposes herein authorized and all expenses paid or incurred in connection therewith, including but not limited to attorneys' fees and expenses, and any other moneys advanced by Mortgagee

3619878

UNOFFICIAL COPY

0 3 6 1 9 8 7 8

to protect the Premises and the lien hereof, shall be so much additional indebtedness secured hereby, and shall become immediately due and payable without notice and with interest thereon at the Default Rate as hereinafter defined in Section 26 below. Inaction of Mortgagee shall never be considered as a waiver of any right accruing to it on account of any default on the part of Mortgagor under this Mortgage. Should the proceeds of the Obligations or any part thereof, or any amount paid out or advanced hereunder by Mortgagee, be used directly or indirectly to pay off, discharge or satisfy, in whole or in part, any lien or encumbrance upon the Premises or any part thereof on a parity with or prior or superior to the lien hereof, then as additional security hereunder, the Mortgagee shall be subrogated to any and all rights, equal or superior titles, liens and equities, owned or claimed by any owner or holder of said outstanding liens, charges and indebtedness, however remote, regardless of whether said liens, charges and indebtedness are acquired by assignment or have been released of record by the holder thereof upon payment.

Mortgagee's Reliance on Tax Bills, Etc.

11. Mortgagee in making any payment hereby authorized: (a) relating to taxes and assessments, may do so according to any bill, statement or estimate procured from the appropriate public office without inquiry into the accuracy of such bill, statement or estimate or into the validity of any tax, assessment, sale, forfeiture, tax lien or title or claim thereof; or (b) for the purchase, discharge, compromise or settlement of any Lien, may do so without inquiry as to the validity or amount of such Lien or any claim for Lien which may be asserted.

Default

12. The following shall be a default ("Mortgage Default") hereunder: if (a) any payment of principal or interest due under or with respect to any of the Obligations, or any other payment due in accordance with the terms of this Mortgage, is not paid when due and such default continues for five (5) days after the due date for such payment; or (b) any other of the covenants, agreements or conditions, hereinbefore or hereinafter contained, required to be kept or performed or observed by Mortgagor in this Mortgage, are not observed or performed and such default is not remedied by Mortgagor within the lesser of ten (10) days after notice from Mortgagee to the Mortgagor or such shorter period of time for the curing of such default as may be allowed under the Loan Agreement, provided that all cure periods hereunder shall run concurrently with any cure period allowed with respect to any default under the Loan

3619878

Agreement; or (c) any representation or warranty made by Mortgagor contained in this Mortgage shall be false as of the date when made in any material respect; or (d) any default or event of default shall have occurred under the Loan Agreement and such default shall not have been cured within the applicable grace period provided therefor, if any ("Loan Agreement Default"); or (e) any default or event of default not otherwise described in this Section 12, shall have occurred under or with respect to any of the Obligations and such default shall not have been cured within the applicable grace period provided therefor, if any; or (f) Mortgagor shall file a petition in voluntary bankruptcy or insolvency or under any provision of the Federal Bankruptcy Act or any similar law, state or Federal, whether now or hereafter existing, or an answer admitting insolvency or inability to pay its debts, or fail to obtain a vacation or stay of involuntary proceedings within thirty (30) days, as hereinafter provided; or (g) Mortgagor shall be adjudicated a bankrupt, or a trustee or a receiver shall be appointed for the Mortgagor or for all of the property of Mortgagor or the major part thereof in any involuntary proceeding or any court shall have taken jurisdiction of the property of the Mortgagor or the major part thereof in any involuntary proceeding for the reorganization, dissolution, liquidation or winding up of the Mortgagor, and such trustee or receiver shall not be discharged or such jurisdiction relinquished or vacated or stayed on appeal or otherwise stayed within thirty (30) days; or (h) Mortgagor shall make an assignment for the benefit of creditors, or shall admit in writing its inability to pay its debts generally as they become due, or shall consent to the appointment of a receiver or trustee or liquidator of all of its property or the major part thereof.

Foreclosure; Expense of Litigation

13. When either (i) the indebtedness secured hereby or any part thereof shall become due, whether by lapse of time or otherwise, or (ii) a Mortgage Default shall have occurred, Mortgagee shall have the right to accelerate all the Obligations and to foreclose the lien hereof by judicial action. In any suit to foreclose the lien hereof or in any other action to enforce any other remedy of Mortgagee under this Mortgage or with respect to any of the other Obligations, there shall be allowed and included as additional indebtedness in the decree for sale or other judgment or decree all expenditures and expenses which may be paid or incurred by or on behalf of Mortgagee for attorneys' fees, appraiser's fees, outlays for documentary and expert evidence, stenographers' charges, publication costs, and costs (which may be estimated as to items to be expended after entry of the decree) of

UNOFFICIAL COPY

0 3 6 | 9 0 7 8

procuring all such abstracts of title, title searches and examinations, title insurance policies, and similar data and assurances with respect to title and value as Mortgagee may deem reasonably necessary either to prosecute such suit or to evidence to bidders at any sale pursuant to such decree the true condition of the title to or the value of the Premises. All expenditures and expenses of the nature in this Section mentioned and such expenses and fees as may be incurred in the protection of the Premises and the maintenance of the lien of this Mortgage, including but not limited to the fees of any attorney employed by Mortgagee in any litigation or proceeding affecting this Mortgage, the Obligations or the Premises, including bankruptcy proceedings, or in preparation for the commencement or defense of any proceeding or threatened suit or proceeding, shall be immediately due and payable by Mortgagor, with interest thereon at the Default Rate and shall be secured by this Mortgage.

Upon any sale made under or by virtue of this Section or by virtue of judicial proceedings or of a judgment or decree of foreclosure and sale, Mortgagee may bid for and acquire the Premises or any part thereof and in lieu of paying cash therefor may make settlement for the purchase price by crediting upon the indebtedness of Mortgagor secured by this Mortgage the sale price, after deducting therefrom the expenses of the sale and the cost of the action and any other sums which Mortgagor is required to pay or that Mortgagee is authorized to deduct under this Mortgage.

Mortgagor understands and agrees that in the event of a Mortgage Default, Mortgagee, to the extent this Mortgage constitutes a security agreement under the UCC, may take possession of any personal property covered by this Mortgage and dispose of the same by sale or otherwise; provided that at least ten (10) business days prior notice of such disposition must be given to the Mortgagor, all as provided for by the UCC, as hereafter amended, or by any similar or replacement statutes hereafter enacted, it being agreed that such ten (10) business days' notice shall constitute fair and reasonable notice to Mortgagor of such disposition.

Application of Proceeds of Foreclosure Sale

14. The proceeds of any foreclosure sale of the Premises [or the sale of property under the last paragraph (unnumbered) of Section 13] shall be distributed and applied in the following order of priority: first, on account of all costs and expenses incident to the foreclosure proceedings [or sale, as the case may be], including all such items as are mentioned in the preceding Section hereof; second, to the repayment of

3519878

the Obligations and all other items which under the terms hereof constitute secured indebtedness additional to that constituting the Obligations, with interest thereon as herein provided; and third, any overplus to Mortgagor, its successors or assigns, as their rights may appear.

Appointment of Receiver

15. Upon, or at any time after, the filing of a complaint to foreclose this Mortgage, the court in which such complaint is filed may appoint a receiver of the Premises. Such appointment may be made either before or after sale, without notice if permitted by law, without regard to the solvency or insolvency of Mortgagor at the time of application for such receiver and without regard to the then value of the Premises, and Mortgagee hereunder may be appointed as such receiver. Such receiver shall have power: (a) to collect the rents, issues and profits of the Premises during the pendency of such foreclosure suit and, in case of a sale and a deficiency, during the full statutory period of redemption, if any, whether there be redemption or not, as well as during any further times when Mortgagor, except for the intervention of such receiver, would be entitled to collect such rents, issues and profits; (b) to extend or modify any then existing leases and to make new leases, which extensions, modifications and new leases may provide for terms to expire, or for options to lessees to extend or renewal terms to expire, beyond the maturity date of the indebtedness hereunder and beyond the date of the issuance of a deed or deeds to a purchaser or purchasers at a foreclosure sale, it being understood and agreed that any such leases, and the options or other such provisions to be contained therein, shall be binding upon Mortgagor and all persons whose interests in the Premises are subject to the lien hereof and upon the purchaser or purchasers at any foreclosure sale, notwithstanding any redemption from sale, discharge of the mortgage indebtedness, satisfaction of any foreclosure decree, or issuance of any certificate of sale or deed to any purchaser; and (c) all other powers which may be necessary or are usual in such cases for the protection, possession, control, management and operation of the Premises during the whole of said period. The court from time to time may authorize the receiver to apply the net income in his hands in payment in whole or in part to: (x) the Obligations or any tax, special assessment or other lien which may be or become superior to the lien hereof or of such decree, provided such application is made prior to any foreclosure sale; and (y) the deficiency in case of a sale and deficiency.

3619875

Assignment of Rents and Leases

16. To further secure the Obligations, Mortgagor hereby sells, assigns and transfers unto Mortgagee all the rents, issues and profits now due and which may hereafter become due (whether before or after foreclosure or during the period of redemption) under or by virtue of any lease, whether written or verbal, or any letting of, or of any agreement for, the use or occupancy of the Premises or any part thereof, which may have been heretofore or may be hereafter made or agreed to or which may be made or agreed to by Mortgagee under the powers herein granted, it being the intention hereby to establish an absolute transfer and assignment of all such leases and agreements and all the avails thereunder to Mortgagee. Mortgagor hereby irrevocably appoints Mortgagee its true and lawful attorney in its name and stead (with or without taking possession of the Premises as provided in Section 17 hereof) to rent, lease or let all or any portion of the Premises to any party or parties at such rental and upon such terms as Mortgagee shall, in its discretion, determine and to collect all of said avails, rents, issues and profits arising from or accruing at any time hereafter, and all now due or that may hereafter become due under each and every of the leases and agreements, written or verbal, or other tenancy existing, or which may hereafter exist on the Premises, with the same rights and powers and subject to the same immunities, exonerations of liability and rights of recourse and indemnity as Mortgagee would have upon taking possession pursuant to the provisions of Section 17 hereof.

Mortgagor agrees that no rent will hereafter be paid by any person in possession of any portion of the Premises for more than one installment in advance, and Mortgagor further agrees that the payment of the rents to accrue for any portion of the Premises will not be waived, released, reduced, discounted or otherwise discharged or compromised by Mortgagor for any period of time after the occurrence of a Mortgage Default. Mortgagor waives any rights of set off against any person in possession of any portion of the Premises. Mortgagor agrees that hereafter it will not assign any of the rents or profits of the Premises, except to a purchaser or grantee of the Premises.

Nothing herein contained shall be construed as constituting Mortgagee a mortgagee in possession of the Premises in the absence of the taking of actual control of the Premises by Mortgagee pursuant to Section 17 hereof. In the exercise of the powers herein granted Mortgagee, no liability shall be asserted or enforced against Mortgagee, all such liability being expressly waived and released by Mortgagor.

3619878

UNOFFICIAL COPY

0 3 6 | 9 8 7 8

Mortgagor further agrees to assign and transfer to Mortgagee all future leases upon all or any part of the Premises and to execute and deliver, at the request of Mortgagee, all such further assurances and assignments in the Premises as Mortgagee shall from time to time require.

Although it is the intention of the parties that the assignment contained in this Section 16 shall be a present assignment, it is expressly understood and agreed, anything herein contained to the contrary notwithstanding, that Mortgagee shall not exercise any of the rights or powers conferred upon it by this Section until a Mortgage Default occurs and Mortgagor shall retain such rights and powers until such time. The rights of Mortgagee under this Section 16 shall continue and remain in full force and effect both before and after commencement of any action or proceeding to foreclose this Mortgage, after the foreclosure sale in connection with the foreclosure of this Mortgage, and until expiration of the period of redemption from any such foreclosure sale, whether or not any deficiency from the unpaid balance of the indebtedness secured hereby exists after such foreclosure sale.

Mortgagor covenants and agrees that if Mortgagor, as lessor therein, shall fail to perform and fulfill any material term, covenant, condition or provision in any lease or leases entered into by Mortgagor or the Company or to which the Premises is subject, on its part to be performed or fulfilled, at the times and in the manner in such lease or leases provided, or if Mortgagor shall suffer or permit to occur any material breach or default under the provisions of any such lease or leases, then, and in any such event, such material breach or default shall, if uncured for thirty (30) days after notice thereof from Mortgagee, constitute a Mortgage Default. The provisions of the last paragraph of this Section 17 shall not apply to the obligation of the lessee under the existing lease of the Premises to pay rent thereunder prior to such time, if any, as a Mortgage Default shall have occurred.

Mortgagee's Right of Possession in Case of Default

17. In any case in which under the provisions of this Mortgage, Mortgagee has a right to foreclose the lien hereof, Mortgagor shall, forthwith, upon demand by Mortgagee, surrender to Mortgagee, and Mortgagee shall be entitled to take actual possession of, the Premises or any part thereof personally or by its agent or attorneys, subject to the rights of the First Mortgagee. In such event, Mortgagee in its discretion may, in accordance with law, enter upon and take and maintain possession of all or any part of the Premises together with all documents, books, records, papers and accruals of Mortgagor or

3619878

UNOFFICIAL COPY

0 3 6 1 9 8 7 8

the then owner of the Premises relating thereto and may exclude Mortgagor its agents or servants wholly therefrom and may, as attorney in fact, as agent for Mortgagor or in its own name as Mortgagee, and under the powers herein granted, hold, operate, manage and control the Premises and conduct the business, if any, thereof, either personally or by its agents, and with full power to use such measures, legal or equitable, as in its discretion or in the discretion of its successors or assigns may be deemed proper or necessary to enforce the payment or security of the avails, rents, issues, and profits of the Premises, including actions for the recovery of rent, actions in forcible detainer and actions in distress for rent, and with full power: (a) to cancel or terminate any lease or sublease for any cause or on any ground which would entitle Mortgagor to cancel the same; (b) to elect to disaffirm any lease or sublease which is then subordinate to the lien hereof; (c) to extend or modify any then existing leases and to make new leases, which extensions, modifications and new leases may provide for terms to expire, or for options to lessees to extend or renew terms to expire, beyond the maturity date of the indebtedness hereunder and beyond the date of the issuance of a deed or deeds to a purchaser or purchasers at a foreclosure sale, it being understood and agreed that any such leases, and the options or other such provisions to be contained therein, shall be binding upon Mortgagor and all persons whose interests in the Premises are subject to the lien hereof and upon the purchaser or purchasers at any foreclosure sale, notwithstanding any redemption from sale, discharge of the mortgage indebtedness, satisfaction of any foreclosure decree, or issuance of any certificate of sale or deed to any purchaser; (d) to make all necessary or proper repairs, decorating, renewals, replacements, alterations, additions, betterments and improvements to the Premises as to it may seem judicious; (e) to insure and reinsure the same and all risks incidental to Mortgagee's possession, operation and management thereof; and (f) to receive all of such avails, rents, issues and profits; Mortgagor hereby granting full power and authority to exercise each and every of the rights, privileges and powers herein granted at any and all times hereafter, without notice to Mortgagor.

Mortgagor shall be deemed to have constituted and appointed Mortgagee its true and lawful attorney-in-fact with full power of substitution either in the name of Mortgagee or in the name of Mortgagor, to exercise any of the powers granted to Mortgagee pursuant to this Section 17. Mortgagee shall not be obligated to perform or discharge, nor does it hereby undertake to perform or discharge, any obligation, duty or liability under any leases. Mortgagor shall and does hereby agree to indemnify and hold Mortgagee harmless of and from any

3619878

UNOFFICIAL COPY

0 3 6 1 9 3 7 8

and all liability, loss or damage (except for any such liability, loss or damage which may be caused by the willful misconduct or gross negligence of Mortgagee) which Mortgagee may or might incur by reason of its performance of any action authorized under this Section 17 and of and from any and all claims and demands whatsoever which may be asserted against Mortgagee by reason of any alleged obligations or undertakings on its part to perform or discharge any of the terms, covenants or agreements of Mortgagor.

Application of Income Received by Mortgagee

18. Mortgagee, in the exercise of the rights and powers hereinabove conferred upon it by Section 16 and Section 17 hereof, shall have full power to use and apply the avails, rents, issues and profits of the Premises to the payment of or on account of the following, in such order as Mortgagee may determine:

(a) to the payment of the operating expenses of the Premises, including but not limited to the cost of the management and leasing thereof, established claims for damages, if any, and premiums on insurance hereinabove authorized;

(b) to the payment of taxes and special assessments now due or which may hereafter become due on the Premises; and all payments of principal and interest due under the provisions of the First Mortgage;

(c) to the payment of all repairs, decorating, renewals, replacements, alterations, additions, betterments, and improvements of the Premises and of placing the Premises in such condition as will, in the judgment of Mortgagee, make it readily rentable;

(d) to the payment of any indebtedness secured hereby or any deficiency which may result from any foreclosure sale.

Mortgagee's Right of Inspection

19. Mortgagee shall have the right to inspect the Premises at all reasonable times and access thereto shall be permitted for that purpose.

Condemnation

20. Mortgagor hereby assigns, transfers and sets over unto Mortgagee the entire proceeds of any award or any claim for

3619878

UNOFFICIAL COPY

0 3 6 1 9 3 7 8

damages for any of the Premises (or any interest therein) taken or damaged by the power of eminent domain or by condemnation. Mortgagee shall be entitled (but shall not be obligated) to participate in the collection of such proceeds and any such proceeds shall be first applied to reimburse Mortgagee for all costs and expenses, including but not limited to attorney's fees and expenses incurred in connection with the collection of such proceeds. Mortgagee may (i) retain the remainder of such award in payment or reduction of the indebtedness secured hereby in such order as Mortgagee shall determine, whether due or not, or (ii) hold the proceeds of such award and permit the same to be used to reimburse Mortgagor for the cost of the rebuilding or restoration of buildings or improvements on the Premises, in accordance with plans and specifications to be submitted to and approved by Mortgagee. If the proceeds are to be used to reimburse Mortgagor for rebuilding or restoration, the proceeds of the award shall be paid out in the same manner as is provided in Section 5 hereof for the payment of insurance proceeds toward the cost of rebuilding or restoration. If the amount of such award is insufficient to cover the cost of rebuilding or restoration, Mortgagor shall pay such cost in excess of the amount of the award before it receives any reimbursement out of the award. Any surplus which may remain out of said award after payment of such cost of rebuilding or restoration shall, at the option of Mortgagee, be applied on account of the indebtedness secured hereby or be paid to any other party entitled thereto. The foregoing provisions shall in each case be subject to the rights of the First Mortgagee.

Release upon Payment and Discharge of Mortgagor's Obligations

21. If Mortgagor shall fully pay all principal and interest on the indebtedness secured hereby and fully comply with, satisfy and discharge all of the other terms and provisions hereof and all other Obligations to be paid, performed and complied with by Mortgagor, then Mortgagee shall execute and deliver to Mortgagor a release of this Mortgage in recordable form.

Giving of Notice

22. Any notice which either party hereto may desire or be required to give to the other party shall be in writing and shall be hand-delivered or delivered by messenger or air courier service (effective on delivery), or shall be sent by United States registered or certified mail, postage prepaid, return receipt requested effective two (2) business days after mailing, or shall be sent by telegraph or telex effective when delivered to the appropriate office for transmission, charges

3619878

UNOFFICIAL COPY

0 3 6 1 9 8 7 8

prepaid, and in all cases addressed to Mortgagor at 111 West Washington Street, Chicago, Illinois 60602 Attn: Land Trust Department, with a copy to William G. Brown, Bell, Boyd & Lloyd, Three First National Plaza, Suite 3200, Chicago, Illinois 60602; or to Mortgagee at One First National Plaza Chicago, Illinois 60670 Attn: Robert R. Bourke, with a copy to Douglas H. McNaughton, Hopkins & Sutter, Three First National Plaza, Chicago, Illinois 60602, or at such other address and place as any party hereto may by notice in writing designate to the others as the addressee or place for service of notice.

Waiver of Defense; Remedies Not Exclusive; Time is of the Essence.

23. No action for the enforcement of the lien hereof shall be subject to any defense which would not be good and available to the party interposing the same in an action at law upon the Obligations. Mortgagee shall be entitled to enforce payment and performance of any indebtedness secured hereby and to exercise all rights and powers under this Mortgage or under or with respect to any other Obligations or any laws now or hereafter in force, notwithstanding that some or all of the said indebtedness secured hereby may now or hereafter be otherwise secured, whether by mortgage, deed of trust, pledge, lien, assignment or otherwise. Neither the acceptance of this Mortgage nor its enforcement, whether by court action or other powers herein contained, shall prejudice or in any manner affect Mortgagee's right to realize upon or enforce any other security now or hereafter held by Mortgagee, it being agreed that Mortgagee shall be entitled to enforce this Mortgage and any other remedy herein or by law provided or permitted, but each shall be cumulative and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute. Every power or remedy given hereby to Mortgagee or to which it may be otherwise entitled, may be exercised, concurrently or independently, from time to time, and as often as it may be deemed expedient by Mortgagee and Mortgagee may pursue inconsistent remedies. No waiver of any Mortgage Default or Loan Agreement Default of the Mortgagor shall be implied from any omission by the Mortgagee to take any action on account of such default if such default persists or be repeated, and no express waiver shall affect any such default other than the default specified in the express waiver and that only for the time and to the extent therein stated. No acceptance of any payment of any one or more delinquent installments which does not include interest at the Default Rate from the date of delinquency, together with any required late charge, shall constitute a waiver of the right of Mortgagee at any time thereafter to demand and collect payment of interest at such Default Rate or of late charges, if any.

3619878

UNOFFICIAL COPY

0 3 6 1 9 3 7 8

Time is of the essence of this Mortgage and each of the covenants and provisions hereof.

Waiver of Statutory Rights

24. To the fullest extent permitted under applicable law, Mortgagor shall not and will not apply for or avail itself of any appraisement, valuation, stay, extension or exemption laws, or any so-called "Moratorium Laws," now existing or hereafter enacted, in order to prevent or hinder the enforcement or foreclosure of this Mortgage, but hereby waives the benefit of such laws. Mortgagor for itself and all who may claim through or under it waives any and all right to have the property and estates comprising the Premises marshalled upon any foreclosure of the lien hereof and agrees that any court having jurisdiction to foreclose such lien may order the Premises sold as an entirety. Mortgagor hereby waives and any all rights of redemption from sale under any order or decree of foreclosure of this Mortgage on its behalf and on behalf of each and every person acquiring any interest in or title to the Premises subsequent to the date of this Mortgage. The foregoing waiver of the right of redemption is made pursuant to Ill. Rev. Stat. Ch. 110, § 12-125.

Representations of Mortgagor

25. To induce Mortgagee to execute the Loan Agreement, to make the Credit available to Mortgagor in accordance with the terms thereof and to disburse the proceeds of the indebtedness secured by this Mortgage, Mortgagor hereby represents to Mortgagee as follows:

(a) that as of the date hereof and thereafter, Mortgagor has good and marketable fee simple title to the Premises, subject only to the Permitted Exceptions,

(b) that to the best of Mortgagor's knowledge, the existing use and condition of the Premises do not violate any building, health, fire, water, use, or similar statute, ordinance, law, regulation or code, nor has Mortgagor received notice of any such violation which has not been heretofore corrected, except for such violations as would not, in the aggregate, have a material adverse effect on Mortgagor's financial condition, results of operations or business; that the existing use and condition of the Premises do not violate any zoning statute, ordinance, law, regulation or code, nor has Mortgagor received notice of any such violation which has not been heretofore corrected; that the Premises are in conformance in all material respects with current zoning requirements, including, without limitation, all parking requirements, and

3619878

UNOFFICIAL COPY

0 3 6 1 9 8 7 0

that the Premises are not a nonconforming or special use that would in any way prohibit continued use of the Premises as currently operated; and the Premises as mortgaged to Mortgagee shall include all rights to all off-site facilities, if any, necessary to ensure compliance with all laws and to afford adequate utility service to the Premises;

(c) that no litigation or proceedings are pending, or to the best of Mortgagor's knowledge are threatened, against Mortgagor (i) which will or could affect the validity or priority of the lien of the Mortgage, (ii) which has or will have a material adverse effect on the ability of Mortgagor to perform its obligations pursuant to and as contemplated by the terms and provisions of this Mortgage or to pay, perform, satisfy or discharge the other Obligations, or (iii) which has or will have a material adverse effect on the operation or condition of the Premises or any part thereof;

(d) that the execution, delivery and performance of this Mortgage, the Term Notes, the Revolving Notes, the Loan Agreement and the other Loan Documents and the payment, performance, satisfaction or discharge of the other Obligations have not constituted (and will not, upon the giving of notice or lapse of time or both, constitute) a material breach or default under any other agreement to which Mortgagor is a party or may be bound or affected, or a violation of any law or court order which may affect the Premises, any part thereof, any interest therein, or the use thereof;

(e) that Mortgagor has not entered into any leases or other arrangements for occupancy of space within the Premises other than leases previously disclosed to Mortgagee in writing;

(f) that (i) no condemnation of any portion of the Premises, (ii) no condemnation or relocation of any roadways abutting the Premises, and (iii) no denial of access to the Premises from any point of access to the Premises, has commenced which could have a material adverse effect on the use, occupancy or enjoyment of the Premises; and that to the best of Mortgagor's knowledge, none of the foregoing is contemplated by any governmental authority which could have a material adverse effect on the use, occupancy or enjoyment of the Premises;

(g) that Mortgagor has not received any notice from any insurance company of any defects or inadequacies in the Premises which would materially adversely affect the insurability of the Premises or which would materially increase the cost of insuring the Premises beyond that which is customarily charged for similar property in the vicinity of the

3619878

Premises used for a similar purpose; and that Mortgagor has no notice or knowledge of any structural defect in the Premises;

(h) that, to the best of Mortgagor's knowledge, all consents, licenses and permits and all other authorizations or approvals required to operate the Premises have been obtained, and all laws, rules and regulations of the state in which the Premises are located or any subdivision thereof relating to the operation of the Premises have been complied with; and

(i) that, to the best of Mortgagor's knowledge, each of the parcels of real estate constituting the Premises have adequate water, gas and electrical supply, storm and sanitary sewerage facilities, other required public utilities, fire and police protection, and means of access between each of the parcels and public highways, and Mortgagor knows of no fact or condition which would result in the termination or impairment of any of the foregoing; that none of the foregoing will be materially delayed or impeded by virtue of any requirements under any applicable environmental protection or control laws, rules or regulations; and that the Premises comply in all material respects with all applicable environmental protection or control laws, rules and regulations.

Default Rate

26. "Default Rate" as used herein shall mean interest at the annual rate equal to the higher of (x) the "Fixed Rate" (defined in the Loan Agreement) plus two percent (2%) or (y) the "Corporate Base Rate" (defined in the Loan Agreement) plus two percent (2%) -- but in no event higher than the maximum rate, if any, permitted by applicable law.

Binding on Successors and Assigns

27. This Mortgage and all provisions hereof shall be binding upon Mortgagor and all persons claiming under or through Mortgagor and shall inure to the benefit of the successors and assigns of the Mortgagee.

Definitions of "Mortgagor," and "Mortgagee"

28. The word "Mortgagor" when used herein shall include: (a) the original Mortgagor named in the preambles hereof; (b) said original Mortgagor's successors and assigns; and (c) all owners from time to time of the Premises. The word "Mortgagee" when used herein shall include all successors and assigns of the Mortgagee identified in the preambles hereof.

UNOFFICIAL COPY

0 3 6 1 9 0 7 8

Captions

29. The captions and headings of various paragraphs of this Mortgage are for convenience only and are not to be construed as defining or limiting, in any way, the scope or intent of the provisions hereof.

Business Loan Recital

30. Mortgagor agrees that the Obligations: (a) constitute a business loan which comes within the purview of subparagraph (1)(c) of Section 4 of "An Act in relation to the rate of interest and other charges in connection with sales on credit and the lending of money," approved May 24, 1879, as amended (Ill. Rev. Stats. 1985 ed., Ch. 17, Sec. 6404(1)(c)); and (b) are exempted transactions under the Truth-in-Lending Act, 15 U.S.C. Sec. 1601 et seq.

Filing and Recording Fees

31. (a) Mortgagor shall pay all title insurance premiums, escrow charges, filing, registration or recording fees, and all expenses incident to the execution and acknowledgement of this Mortgage and all federal, state, county and municipal taxes, and other taxes, duties, imposts, assessments and charges arising out of or in connection with the execution and delivery of this Mortgage and the Obligations.

(b) Mortgagor agrees to deliver to Mortgagee, on each of the third and fifth anniversaries of the "Loan Closing Date" (defined in the Loan Agreement) evidence of the value of the Premises in form and from a person satisfactory to the Mortgagee. If such evidence of value shows, in Mortgagee's judgment, that the fair market value of the Premises as of the anniversary date in question is more than 10% higher than the amount of the ALTA Loan Policy provided to Mortgagee at the time this Mortgage is executed, then Mortgagor shall obtain, at its sole cost and expense, an endorsement to said policy increasing the amount of said policy to the amount shown on the evidence of value.

Execution of Separate Security Agreement, Financing Statements, Etc.

32. Mortgagor, upon request by Mortgagee from time to time, shall execute, acknowledge and deliver to Mortgagee, a Security Agreement, Financing Statement or other similar security instruments, in form reasonably satisfactory to Mortgagee, covering all property of any kind whatsoever which Mortgagor may hereafter acquire, which in the opinion of

3619878

UNOFFICIAL COPY

0 3 6 1 9 0 7 8

Mortgagee is essential to the operation of the Premises and which constitutes goods within the meaning of the UCC, and Mortgagor will further execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, any financing statement, affidavit, continuation statement or certificate or other document as Mortgagee may reasonably request in order to perfect, preserve, maintain, continue and extend the security interest under and the priority of this Mortgage and such security instrument. Mortgagor further agrees to pay to Mortgagee on demand all costs and expenses incurred by Mortgagee in connection with the preparation, execution, recording, filing and re-filing of any such document.

Partial Invalidity

33. Mortgagor and Mortgagee intend and believe that each provision in this Mortgage comports with all applicable local, state and federal laws and judicial decisions. However, if any provision or provisions, or if any portion of any provision or provisions, in this Mortgage are found by a court of law to be in violation of any applicable local, state or federal ordinance, statute, law, administrative or judicial decisions, or public policy, and if such court should declare such portion, provision or provisions of this Mortgage to be illegal, invalid, unlawful, void or unenforceable as written, then it is the intent both of Mortgagor and Mortgagee that such portion, provision or provisions shall be given force to the fullest possible extent that they are legal, valid and enforceable, that the remainder of this Mortgage shall be construed as if such illegal, invalid, unlawful, void or unenforceable portion, provision or provisions were not contained therein, and that the rights, obligations and interest of Mortgagor and Mortgagee under the remainder of this Mortgage shall continue in full force and effect.

Disbursement of Loan Proceeds

34. The proceeds of the indebtedness evidenced by the Obligations are to be disbursed by Mortgagee to Mortgagor in accordance with the provisions contained in the Loan Agreement. The Loan Agreement is incorporated herein by express reference. All advances and indebtedness arising and accruing under the Loan Agreement from time to time shall be secured hereby to the full extent of the amount stated to be secured hereby and according to law, and in any event the occurrence of any Loan Agreement Default (defined in Section 12 hereinabove) shall constitute a Mortgage Default under this Mortgage entitling Mortgagee to all of the rights and remedies conferred upon Mortgagee by the terms of this Mortgage. Except as otherwise specifically provided herein, in the event of any

3619878

UNOFFICIAL COPY

0 3 6 1 9 8 7 8

conflict or inconsistency between the terms of this Mortgage and the Loan Agreement, the terms and provisions of this Mortgage shall in each instance govern and control to the extent of such conflict or inconsistency.

Mortgagee's Lien for Service Charge and Expenses

35. At all times, regardless of whether any loan proceeds have been disbursed, this Mortgage secures (in addition to any loan proceeds disbursed from time to time) the payment of any and all expenses and advances due to or incurred by Mortgagee in connection with the indebtedness to be secured hereby and which are to be reimbursed by Mortgagor under the terms of this Mortgage or the Loan Agreement; provided, however, that in no event shall the total amount of loan proceeds disbursed plus such additional amounts exceed 200% of the total amount of the Credit.

Maintenance of Mortgagor's Interest

36. So long as any of the Obligations remain unpaid, unperformed, unsatisfied, or undischarged, if Mortgagor shall, without Mortgagee's prior written consent, transfer, convey, alien, lease, pledge, hypothecate or mortgage the Premises or any portion thereof or any interest therein, either voluntarily or involuntarily, or enter into a contract to do any of the foregoing, then, and in any such event, such action shall constitute a Mortgage Default.

Applicable Law

37. This Mortgage, the Loan Agreement, the Term Notes, the Revolving Notes and the other Loan Documents shall be construed, interpreted and governed by the laws of the State of Illinois.

No Offsets

38. No offset or claim that Mortgagor now has or may have in the future against Mortgagee shall relieve Mortgagor from paying any amounts due under or with respect to the Obligations or from performing any other duties contained herein or secured hereby.

Revolving Credit; Future Advances

39. This Mortgage also secures all future advances and revolving credit granted under the Loan Agreement made within twenty years from the date hereof, which future advances and revolving credit shall have the same priority as if all such

3519878

future advances and revolving credit were made on the date of execution hereof. Nothing in this Section 39 or in any other provision of this Mortgage shall be deemed an obligation on the part of Mortgagee to make any future advances other than in accordance with the terms and provisions of the Loan Agreement, or an agreement on the part of Mortgagee to increase the amount of the Credit or the aggregate principal amount of the Term Notes and the Revolving Notes to any amount in excess of \$44,000,000. With regard to the Account, it is acknowledged and agreed that One Million Forty Thousand Dollars (\$1,040,000) of the Account takes the form of one or more letters of credit ("Letter of Credit"), heretofore issued by First Chicago at the request of the Company, all in accordance with the provisions of the Loan Agreement. The Loan Agreement provides that the issuance of the Letter of Credit and each funding thereunder shall constitute an advance under the Account which is repayable by the Company in accordance with the provisions of the Loan Agreement.

First Mortgage

40. This Mortgage is subject and subordinate to that certain Construction and Permanent Mortgage dated September 11, 1978 recorded with the Cook County, Illinois, Registrar of Titles on September 14, 1978, as document number 3046227 ("First Mortgage") made by Mortgagor's predecessor in interest, to Connecticut Mutual Life Insurance Company as mortgagee ("First Mortgagee"), as amended. Mortgagor covenants and agrees to perform fully and faithfully all covenants, agreements and obligations on the part of mortgagor thereunder, and to deliver to Mortgagee a copy of each and every notice sent by First Mortgagee to Mortgagor or vice-versa. If First Mortgagee should ever waive the requirement for tax and insurance premium deposits under the provisions of the First Mortgage, Mortgagor shall make such deposits with Mortgagee who shall hold and apply such deposits in the same manner as provided the First Mortgage.

Trustee's Exculpation

41. This Mortgage is executed by CHICAGO TITLE AND TRUST COMPANY, not personally, but as Trustee aforesaid in the exercise of the power and authority conferred upon and vested in it as such Trustee (and said corporation hereby warrants that it possesses full power and authority to execute this instrument), and it is expressly understood and agreed that nothing herein or in the Loan Agreement, the Term Notes or the Revolving Notes shall be construed as creating any liability on said Trustee or on said bank personally to pay or any interest that may accrue thereon, or any indebtedness accruing

3619878

UNOFFICIAL COPY

0 3 6 1 9 8 7 8

hereunder, or to perform any covenant either express or implied herein contained, all such liability, if any, being expressly waived by Mortgagee and by every person now or hereafter claiming any right or security hereunder, and that so far as said Trustee and said corporation personally are concerned, the legal holder or holders of the Term Notes and the Revolving Notes and the owner or owners of any indebtedness accruing hereunder shall look solely to the Premises hereby conveyed for the payment thereof, by the enforcement of the lien hereby created, in the manner herein and in said Notes provided, and by enforcement of any and all other security given to secure the payment of the Obligations and each of them.

IN WITNESS WHEREOF, Mortgagor has caused these presents to be signed by duly authorized officers as of the day and year first above written.

CHICAGO TITLE AND TRUST COMPANY,
not personally, but as as ^{Trustee} Trustee
as aforesaid

By:

Lucy Catalano
Its: ASST. VICE PRESIDENT

ATTEST:

By:

Alida Di Marco
Its: Assistant Secretary

[SEAL]

UNOFFICIAL COPY

0 3 6 1 9 0 7 0

THE FIRST NATIONAL BANK OF CHICAGO, individually and as Agent

By: [Signature]
Its: VICE PRESIDENT

ATTEST: Richard G. Williams
Its: AVP
[SEAL]

SECURITY PACIFIC NATIONAL BANK

By: [Signature]
Its: RICHARD J. SALMON
Vice President

ATTEST: [Signature]
Its: VICE PRESIDENT
[SEAL]

PITTSBURGH NATIONAL BANK

By: _____
Its: _____

ATTEST: _____
Its: _____
[SEAL]

This instrument was prepared by and after recording return to:

Douglas H. McNaughton, Esq.
Hopkins & Sutter
Three First National Plaza
Chicago, Illinois 60602

3619878

UNOFFICIAL COPY

0 3 6 1 9 8 7 8

THE FIRST NATIONAL BANK OF CHICAGO, individually and as Agent

By: _____

Its: _____

ATTEST: _____

Its: _____
(SEAL)

SECURITY PACIFIC NATIONAL BANK

By: _____

Its: _____

ATTEST: _____

Its: _____
(SEAL)

PITTSBURGH NATIONAL BANK

By: *D. B. Mitchell*

Its: *Vice President*

ATTEST: *William J. Murray*

Its: *Assistant Vice President*
(SEAL)

This instrument was prepared by and after recording return to:

Douglas H. McNaughton, Esq.
Hopkins & Sutter
Three First National Plaza
Chicago, Illinois 60602

3619878

UNOFFICIAL COPY

0 3 6 | 9 8 7 8

JOINDER BY THE COMPANY

The undersigned, ORVAL KENT FOOD COMPANY, INC. (the "Company"), sole beneficiary of Chicago Title and Trust Company Trust No. 4866398-3, under Trust Agreement dated May 24, 1978, and one of the makers of the Term Notes and the Revolving Notes, hereby executes this Mortgage for the purpose of joining herein, making the assignments, grants of security interests, transfers and conveyances hereunder, and making, undertaking and agreeing to the covenants, agreements, obligations and representations herein, all in accordance with and subject to the following:

A. The Company hereby grants to Mortgagee, as security for the Obligations, a security interest in all of the property included in the "Premises" which constitute fixtures under the UCC and also all of said property which constitutes personal property not constituting a part and parcel of the real estate.

B. The Company hereby assigns to Mortgagee, as security for the obligations, all of the rents, issues and profits and all of the leases, lettings, and other agreements for the use as occupancy of the Premises, now or hereafter made, as more fully described in Section 16 of the Mortgage.

C. The Company hereby covenants and agrees to be bound by, and to be deemed to have entered into and made, all of Mortgagor's covenants, agreements, obligations and representations (which shall constitute representations and warranties of the Company) under the following provisions of the Mortgage with the same force and effect as if they were fully set forth herein verbatim: the last unnumbered paragraph of page 4, the first paragraph at the top of page 5 (with respect to the personal property described in paragraph A hereinabove), Section 12, the last unnumbered paragraph of Section 13, Section 14 (with respect to the property described in paragraph A hereinabove), Section 16, Section 18 (with respect to monies received by Mortgagee pursuant to Section 16), Section 19 (with respect to the property described in paragraph A hereinabove), Section 22, Section 23, and Sections 25 through 40, inclusive.

3619875

UNOFFICIAL COPY

0 3 6 1 9 8 7 8

Executed in Chicago, Illinois, this 21st day of May, 1989.

ORVAL KENT FOOD COMPANY, INC.

By X [Signature]
Its _____ President

ATTEST: [Signature]
Its _____ Secretary
[SEAL]

Property of Cook County Clerk's Office

3619878

UNOFFICIAL COPY

0 3 6 1 9 8 7 8

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

I, Shirley Stone, a Notary Public in and
for said County, in the State aforesaid, DO HEREBY CERTIFY that
Richard A. Kent, President of Orval
Kent Food Company, Inc, a Delaware corporation, and William
W. Brown, Secretary of said Corporation,

personally known to me to be the same persons whose names are
subscribed to the foregoing instrument as such Richard A. Kent
and William W. Brown Secretary, respectively, appeared before me
this day in person and acknowledged that they signed and
delivered said instrument as such officers of said corporation,
as their own free and voluntary act and as the free and
voluntary act of the Corporation for the uses and purposes
therein set forth.

GIVEN under my hand and Notarial Seal this 23rd day
of ~~November, 1986~~
May, 1987

Shirley Stone
Notary Public

My Commission Expires:

November 29, 1989

Notary Public of Cook County Clerk's Office

UNOFFICIAL COPY

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

I, SHEILA DAVENPORT, a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY that DOROTHY CATALANO, ASST. VICE PRESIDENT of Chicago Title and Trust Company, which is the Trustee under the Trust Agreement described under the foregoing instrument, and ALDA DI MAYO, ASST Secretary of said Corporation, personally known to me to be the same persons whose names are subscribed to the foregoing instrument as such ASST. VICE PRESIDENT and ASST Secretary, respectively, appeared before me this day in person and acknowledged that they signed and delivered said instrument as such officers of said Corporation, as their own free and voluntary act and as the free and voluntary act of the Corporation, as Trustee aforesaid, for the uses and purposes therein set forth.

GIVEN under my hand and Notarial Seal this 22ND day of ~~November, 1986.~~
MAY 1987

Sheila Davenport
Notary Public

My Commission Expires:

Sept. 21, 1987

2/100792

36#9878

HARRY (RUSI) YOUNG
REGISTRAR OF TITLES

MAY 26 PM 2:55

36#9878

025417
7/17/87

Sub
Add
Pro
De
Ac
Not