

UNOFFICIAL COPY

6 9 2 5 3 8 3 0

09-32-101-018

Permanent Tax No.

Levenfeld, Eisenberg, Janger, Glassberg, Samotny & Halper
33 West Monroe Street
21st Floor
Chicago, Illinois 60603
Attention: Michael J. Tuchman, Esq.

THIS DOCUMENT WAS PREPARED BY,
ITS RECORDING IS REQUESTED BY,
AND WHEN RECORDED RETURN TO:

Common Property Address:
911 East Touhy Avenue
Des Plaines, Illinois

Dated: October 16, 1989

as Mortgages
and Secured Party
MACCREEE'S LIFE INSURANCE COMPANY,
a Michigan corporation
to
as Mortgagor

CAPITOL BANK & TRUST
AS TRUSTEE UNDER AGREEMENT DATED
FEBRUARY 9, 1988, AND KNOWN AS
TRUST NO. 1456
and
SALVATORE BONANNO

FIRST MORTGAGE
AND SECURITY AGREEMENT

3835279

890828-01/MJT
Des Plaines
10/02/89

3835279

1092
S1190477 pm

Property of Cook County Clerk's Office

UNOFFICIAL COPY

Property of Cook County Clerk's Office

FIRST MORTGAGE AND SECURITY AGREEMENT

FIRST MORTGAGE AND SECURITY AGREEMENT made the 16 day of October, 1989 from CAPITOL BANK & TRUST, not personally but as trustee under agreement dated February 9, 1988, and known as trust number 1456 (the "Trust") and SALVATORE BONANNO ("Beneficiary") (the Trust and Beneficiary are hereinafter sometimes referred to individually and collectively as "Mortgagor") to MACCABEES LIFE INSURANCE COMPANY, a Michigan corporation ("Mortgagee").

W I T N E S S E T H:

WHEREAS, Mortgagor and Mortgagee have executed and delivered that certain loan commitment agreement, dated the 7th day of July, 1989 (the "Loan Commitment"), pursuant to which Mortgagee has agreed to advance certain funds to Mortgagor, bearing interest as therein provided and in the principal amount therein provided, all as more particularly described therein; and

WHEREAS, the indebtedness created by the advancing of such funds shall be evidenced by a promissory note, payable to the order of Mortgagee, for the principal amount of One Million Three Hundred Fifty Thousand Dollars (\$1,350,000.00) (the "Original Principal Amount"), and bearing interest as provided therein (the "Note");

NOW, THEREFORE, in consideration of the sum of TEN DOLLARS (\$10.00) and other good and valuable consideration, the receipt and legal sufficiency of which is hereby acknowledged, and the mutual covenants herein contained, the parties hereto agree as follows:

In order to secure the due and punctual payment in full by Mortgagor of the principal amount of the Note, interest thereon and all other amounts due and to become due under or in connection with the Note, this Mortgage, the Loan Commitment or any other document or instrument securing or evidencing the Indebtedness (as hereinafter defined), including without limitation any guaranty (the Note, this Mortgage, the Loan Commitment and all such other documents and instruments are hereinafter collectively called the "Loan Documents"), and any and all reasonable expenses paid or incurred by Mortgagee under or in connection with the Loan Documents and the performance of all other obligations and liabilities of Mortgagor under or in connection with the Loan Documents Amount (all of the aforesaid are hereinafter collectively called the "Indebtedness") (in no event shall the lien of this Mortgage secured indebtedness in excess of two times the Original Principal Amount), Mortgagor does hereby MORTGAGE, GIVE, ENFEOFF, GRANT, BARGAIN, SELL, WARRANT, ALIEN, REMISE, RELEASE, ASSIGN, TRANSFER, GRANT A SECURITY INTEREST IN, SET OVER, DELIVER, CONFIRM AND CONVEY unto Mortgagee upon the terms and conditions of this Mortgage, the following property described in Granting Clauses FIRST through SEVENTH below (all of such property being hereinafter collectively called the "Premises"):

GRANTING CLAUSES

All the estate, right, title and interest of Mortgagor in, to and under, or derived from:

note identified

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

GRANTING CLAUSE FIRST
Land

All those certain lots, pieces and parcels of land located at 911 East Touhy Avenue, in Des Plaines, County of Cook, State of Illinois, and as more particularly described in EXHIBIT A, as the description of the same may be amended or supplemented from time to time and all the reversions or remainders in and to said land and the tenements, hereditaments, easements, rights-of-way or use rights (including alley, drainage, transferable development and other rights), privileges, royalties and appurtenances, if any, to said land, now or hereafter belonging or in anywise appertaining thereto, including any such right, title, interest in, to or under any agreement or right granting, conveying or creating, for the benefit of said land, any easement, right or license in any way affecting other property and in, to or under any streets, ways, alleys, sidewalks, curbs, vaults or chutes, gores or strips of land, if any, adjoining said land or any parcel thereof, or in or to the air space over said land, all rights of ingress and egress by motor vehicles to parking facilities on or within said land, if any, and all claims or demands of Mortgagor, either at law or in equity, in possession or expectancy of, in or to the same (all of the foregoing hereinafter collectively called the "Land").

GRANTING CLAUSE SECOND
Improvements

All buildings, structures, facilities and other improvements now or hereafter located on the Land, and all building material, building equipment, supplies and fixtures of every kind and nature now or hereafter located on the Land or attached to, contained in or used in connection with any such buildings, structures, facilities or other improvements, and all appurtenances and additions thereto and betterments, renewals, substitutions and replacements thereof, owned by Mortgagor or in which Mortgagor has or shall acquire an interest, to the extent of Mortgagor's interest therein (all of the foregoing hereinafter collectively called the "Improvements").

GRANTING CLAUSE THIRD
Equipment and General Intangibles

All machinery, apparatus, equipment, materials, fittings, fixtures, chattels and articles of personal property, and all appurtenances and additions thereto and betterments, renewals, substitutions and replacements thereof, owned by Mortgagor or in which Mortgagor has or shall acquire an interest (to the extent of such interest), and now or hereafter attached to or contained in and used in connection with the ownership and operation of the Land and/or the Improvements, (all of the foregoing hereinafter collectively called the "Equipment"), including, if any, to the extent of Mortgagor's interest therein, all racking and shelving systems, all heating, lighting, plumbing, ventilating, air conditioning, refrigerating, incinerating and/or compacting plants, systems, fixtures and equipment, elevators, escalators, stoves, ranges, vacuum, window washing and other cleaning systems, call systems, sprinkler systems and other fire prevention and extinguishing apparatus and materials, motors, machinery, pipes, ducts, conduits, dynamos, engines, compressors, generators, boilers, stokers, furnaces, pumps, tanks, appliances,

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

equipment, fittings and fixtures; and all abstracts of title, surveys or sketches of survey, engineering drawings, permits, licenses, franchises, certificates and other rights and privileges obtained in connection with the Premises, and all of Mortgagor's present and future "equipment," "fixtures" and "general intangibles" (as such terms are defined in the Uniform Commercial Code of the State of Illinois, as amended from time to time) attached to or contained in and used in connection with the ownership and operation of the Land and/or the Improvements. Mortgagee shall have, in addition to all rights and remedies provided herein (including Article VIII hereof), and in any other agreements, commitments and undertakings made by Mortgagor to Mortgagee, all of the rights and remedies of a "secured party" under said Uniform Commercial Code. This Mortgage constitutes and shall be deemed to be a "security agreement" for all purposes of said Uniform Commercial Code. If any property described in this Granting Clause Third is leased to Mortgagor, then all of the right, title and interest of Mortgagor in and to any and all such property is hereby assigned to Mortgagee, together with the benefits of all deposits and payments now or hereafter made thereon by or on behalf of Mortgagor. To the extent permitted by applicable law, it is agreed that all Equipment is part and parcel of the Premises and appropriated to the use thereof and, whether affixed to the Land and/or the Improvements or not, shall, for purposes of this Mortgage be deemed conclusively to be real estate and mortgaged or otherwise conveyed or encumbered hereby.

GRANTING CLAUSE FOURTH
Leasehold and Other Contractual Interests

All the leases, subleases, lettings and licenses of, and all other contracts, bonds and agreements affecting the use or occupancy of the Land, the Improvements, the Equipment and/or any other property or rights mortgaged or otherwise conveyed or encumbered hereby, or any part thereof, now or hereafter entered into, and all modifications, supplements, additions, extensions and renewals thereof (all of the foregoing hereinafter collectively called the "Tenant Leases"), and all right, title and interest of Mortgagor thereunder, including, to the extent Mortgagor may lawfully do so, all cash and securities deposited under such Tenant Leases, the right to receive and collect the rents, additional rents, increases in rents, security deposits, advance rents, income, proceeds, earnings, royalties, if any, revenues, issues and profits payable thereunder and the rights to enforce, whether at law or in equity or by any other means, all provisions thereof (all of the foregoing hereinafter collectively called the "Rents"), and the right to apply the same to the payment of the Indebtedness, all in accordance with Article III hereof, subject, however, to the provisions of the Assignment of Rents, Leases, Income and Profits of even date (referred to in Article III hereof).

GRANTING CLAUSE FIFTH
Reciprocal Easement Agreement

All rights, benefits, easements and privileges, if any, in favor of Mortgagor in, to, under, over and through the land of any other, including but not limited to all exclusive and non-exclusive easements of use, ingress, egress, passage and parking of motor vehicles, passage and accommodation of pedestrians, created by, under and pursuant to any agreements or instruments or

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

documents (collectively, "REA"); together with all other benefits, easements, licenses and privileges, if any, accruing thereunder in favor of Mortgagor under any REA, and its successors and assigns, and all amendments, modifications and supplements thereto.

GRANTING CLAUSE SIXTH
After Acquired and Other Property

All property hereafter acquired or constructed by Mortgagor and of the type described in Granting Clauses First, Second, Third, Fourth, Fifth and Seventh which shall forthwith upon acquisition or construction thereof by Mortgagor and without any act or deed by Mortgagor be subject to the lien and security interest of this Mortgage as if such property were now owned by Mortgagor and were specifically described in this Mortgage and conveyed or encumbered hereby or pursuant hereto, and Mortgagee is hereby authorized to receive any and all such property as and for additional security hereunder. Additionally, any and all other property, of every kind and nature, which may from time to time be subjected to the lien hereof by Mortgagor through a supplement to this Mortgage, or by anyone on its behalf and with its written consent.

GRANTING CLAUSE SEVENTH
Proceeds and Awards

All unearned premiums, accrued, accruing or to accrue under insurance policies now or hereafter obtained by Mortgagor, all proceeds of the conversion, voluntary or involuntary, of any of the property described in these Granting Clauses into cash or other liquidated claims, including proceeds of hazard, title and other insurance, and all judgments, damages, awards, settlements and compensation (including interest thereon) heretofore or hereafter made to the present and all subsequent owners of the Land, the Improvements and/or any other property or rights encumbered or conveyed hereby for any injury to or decrease in the value thereof for any reason, or by any governmental or other lawful authority for the taking by eminent domain, condemnation or otherwise of all or any part thereof, including awards for any change of grade of streets, subject to the provisions of Sections 2.04 and 2.05 with respect to the use and application of such premiums, proceeds and awards.

3835279

SUBJECT HOWEVER to the encumbrances and other matters, if any, listed on EXHIBIT B (hereinafter collectively referred to as "Permitted Exceptions" or "Permitted Encumbrances").

To HAVE AND TO HOLD the above granted and described Premises unto and to the proper use and benefit of Mortgagee, and the successors and assigns of Mortgagee, forever, subject to the provisions of Section 7.01 hereof.

AND Mortgagor covenants with and represents and warrants to Mortgagee as follows:

ARTICLE I
Representations and Warranties of Mortgagor

SECTION 1.01. Mortgagor represents and warrants as follows:

UNOFFICIAL COPY

Property of Cook County Clerk's Office

(a) Title. (i) Mortgagor has and will have good, marketable and insurable fee simple title to the Land and the Improvements and all rights, privileges and entitlements as a party to any REA, free and clear of all liens, charges and encumbrances of every kind and character except for Permitted Exceptions; (ii) Mortgagor has and will have full power and lawful authority to encumber and convey the Premises as provided herein; (iii) all Equipment now or hereafter comprising part of the Premises is free and clear of all liens, charges and encumbrances of every kind and character, except for Permitted Exceptions; (iv) this Mortgage is and will remain a valid and enforceable first lien on and security interest in the Premises subject only to Permitted Exceptions; and (v) Mortgagor hereby warrants and will forever warrant and defend such title and the validity, enforceability and priority of the lien and security interest hereof against the claims of all persons and parties whomsoever.

(b) Operation of the Premises. (i) Mortgagor has all necessary certificates, licenses, authorizations, registrations, permits and/or approvals necessary for the occupancy and operation of the entirety of the Premises as and the conduct of Mortgagor's business in owning the Premises, and the foregoing certificates, licenses, authorizations, registrations, permits and/or approvals which have been issued or obtained as of the date hereof are in full force and effect and not subject to any revocation, amendment, release, suspension or forfeiture, (ii) promptly upon Mortgagee's request, Mortgagor shall deliver to Mortgagee copies of, all of the same and (iii) to the best of Mortgagor's knowledge, the construction of the Improvements and the present and contemplated use and/or occupancy thereof complies with all applicable zoning, building, safety, health, environmental, subdivision and all other applicable laws, ordinances and regulations.

(c) Status of the Premises. (i) The Premises are not located in an area identified by the Secretary of Housing and Urban Development or a successor thereto as an area having special flood hazards pursuant to the terms of the National Flood Insurance Act of 1986, or the Flood Disaster Protection Act of 1973, as amended, or any successor law; (ii) the Premises are served by all utilities required for the use thereof as herein contemplated; (iii) the Premises are free from damage caused by fire or other casualty; and (iv) there is no condemnation or similar, proceeding pending or, to the best of Mortgagor's actual knowledge, threatened affecting any part of the Premises.

SECTION 1.02. Hazardous Substances. (a) The Mortgagor hereby represents, warrants and covenants that neither the Mortgagor nor, to the best of Mortgagor's knowledge, any other person (including prior owners, tenants or subtenants) has ever caused or permitted any Hazardous Substances (as such term is hereinafter defined) to be placed, stored, treated, manufactured, handled, produced, transported, held, located or disposed of on, under or at the Premises or any part thereof and neither the Premises nor any part thereof has ever been used by the Mortgagor or, to the best of Mortgagor's knowledge, by any other person (including prior owners, tenants and subtenants) as a dump site or

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

storage site (whether permanent or temporary) for any Hazardous Substances. Mortgagor covenants and agrees that Mortgagor shall not, nor shall Mortgagor voluntarily permit any other person or entity to, place, hold, locate or dispose of any Hazardous Substances on, under or at the Premises or any part thereof. Without limiting the foregoing, Mortgagor shall not cause or permit the Premises to be used to generate, manufacture, refine or process Hazardous Substances, nor shall Mortgagor cause or permit, as a result of any intentional or unintentional act or omission on the part of Mortgagor or any tenant or subtenant, a release of Hazardous Substances onto the Premises or onto any other property. Mortgagor shall comply with and ensure compliance by all tenants and subtenants with all applicable federal, state and local laws, ordinances, rules and regulations, and ensure any that all tenants and subtenants obtain and comply with any and all approvals, registrations or permits required thereunder. Mortgagee reserves the right to require Mortgagor to obtain environmental risk studies and reports at any time during the term of this Mortgage.

(b) Mortgagor hereby agrees to indemnify Mortgagee, its employees, agents, officers and directors, and hold Mortgagee harmless from and against any and all losses, liabilities (including strict liability), damages, injuries, penalties, fines, settlements, expenses and costs of whatever kind or nature, known or unknown, contingent or otherwise, including, without limitation, reasonable attorneys fees, of any settlement or judgment and claims of any and every kind whatsoever paid, incurred or suffered by, or asserted against, Mortgagee by any person or entity or governmental agency, for, with respect to, or as a direct or indirect result of (i) the presence on or under, or the escape, leakage, disposal, spillage, emission, discharge or release from the Premises of any Hazardous Substance or (ii) at any time, the incorrectness or breach of this covenant, warranty or representation set forth in this Mortgage, including, without limitation, any violation or claim arising under the Comprehensive Environmental Response, Compensation and Liability Act, the Superfund Amendment and Reauthorization Act, the Resource Conservation and Recovery Act, the Federal Water Pollution Control Act, the Federal Environmental Pesticides Act, the Clean Water Act, the Clean Air Act, any so called federal, state or local "Superfund" or "Superlien" statute, or any other statute, law, ordinance, code, rule, regulation, order or decree regulating, relating to or imposing liability (including strict liability), or standards of conduct concerning any Hazardous Substance, regardless of whether or not caused by, on behalf of, or within the control of Mortgagor; provided however, that Mortgagor shall not indemnify Mortgagee for any such losses, liabilities, damages, injuries, expenses or costs related to or involving Hazardous Substances placed or disposed of on the Premises after Mortgagee acquired title to the Premises through foreclosure or deed in lieu of foreclosure.

(c) For purposes of this Mortgage, the term "Hazardous Substances" shall mean and include those elements or compounds which are contained in the list of hazardous substances adopted by the United States Environmental Protection Agency ("EPA") and the list of toxic pollutants designated by Congress or the EPA or defined by any other Federal, state or local statute, law, ordinance, code, rule, regulation, order or decree regulating, relating to, or imposing liability (including strict liability) or standards of conduct concerning any hazardous, toxic or dangerous

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

waste, substance or material, as now or at any time hereinafter in effect.

(d) If Mortgagor receives any notice or knowledge of (i) the occurrence of any event involving the use, spill, release, leak, seepage, discharge or cleanup of any Hazardous Substance or (ii) any complaint, order, citation or other notice with regard to air emissions, water discharges, or any other environmental, health or safety matter affecting Mortgagor or the Property (an "Environmental Complaint") from any person or entity (including, without limitation, the EPA), then Mortgagor shall immediately notify Mortgagee verbally and in writing of any such notice and, if the Environmental Complaint is in writing, shall immediately deliver a copy of the Environmental Complaint to Mortgagee. Further, Mortgagor shall immediately commence all actions necessary to clean up, remove, resolve and comply with any complaint, order, citation, notice or Environmental Complaint.

(e) In addition to all other rights granted to Mortgagee, upon the occurrence of Mortgagor's receipt of any notice or knowledge specified herein, including, without limitation, an Environmental Complaint and Mortgagor's failure to commence the cleanup, removal or resolution of any Hazardous Substance or Environmental Complaint within thirty (30) days notice of breach of a covenant or warranty or receipt of notice or knowledge specified herein and to thereafter continuously and diligently proceed with such cleanup, removal or resolution, except as may be delayed by an act of God, strike, act of the public enemy, war, blockade, public riot, fire, storm, flood and explosion ("Force Majeure"), Mortgagee shall have the right, but not the obligation, to enter onto the Premises or to take such other actions as it deems necessary or advisable to cleanup, remove, resolve or minimize the impact of, or otherwise deal with, any such Hazardous Substance or Environmental Complaint following receipt of any notice from any person or entity (including without limitation, the EPA) asserting the existence of any Hazardous Substance or an Environmental Complaint pertaining to the Premises or any part thereof, which, if true, could result in an order, suit or other action against Mortgagee and/or which, in the reasonable opinion of Mortgagee, could have a materially adverse impact on the value of the Premises or otherwise jeopardize Mortgagee's lien against the Premises granted or created under the Mortgage. Any funds of Mortgagee used for any purpose referred to in this Section shall constitute advances secured by the Loan Documents and shall bear interest at the rate specified in the Note to be applicable after default thereunder.

(f) The provisions of this Section 1.02 shall be in addition to any and all other obligations and liabilities Mortgagor may have to Mortgagee and shall survive defeasance.

SECTION 1.03. Miscellaneous Representations. (a) Beneficiary is the owner of one hundred percent (100%) of the beneficial interests in the Trust.

(b) The Trust is an Illinois land trust duly organized and validly existing under the laws of the State of Illinois, having full power to carry on its business as presently conducted, including the power to borrow the Loan and execute, deliver and perform its obligations under the Loan Documents.

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

(c) All requisite actions on the part of the Beneficiary to authorize the execution and delivery by the Trust of the Loan Documents have been duly and validly taken.

(d) This Mortgage and all of the other Loan Documents were duly executed and delivered by the Trust and/or the Beneficiary, as the case may be, and each such document constitutes the legal, valid and binding obligation and agreement of the Trust and/or the Beneficiary, as the case may be, enforceable in accordance with their respective terms.

(e) Neither the execution and delivery by the Trust or the Beneficiary of the Loan Documents, the execution and delivery by the Trust or the Beneficiary of existing Tenant Leases nor the performance and observance by the Trust or the Beneficiary of the terms of the Loan Documents and Tenant Leases contravene any provision of existing law or regulation and do not and will not conflict with or result in any breach of the terms, conditions or provisions of or constitute a default under the aforesaid, the agreements creating the Trust or Beneficiary, any instrument binding upon the Trust or the Beneficiary or any order, writ, injunction, decree or demand of any court or any governmental authority affecting the Trust, the Beneficiary or the Premises.

(f) The Premises complies with all applicable building and development ordinances and regulations applicable to the Premises. All licenses, approvals, permits, authorizations, easements and certificates required in connection with the present occupancy of the Premises from all governmental subdivisions and agencies having jurisdiction over the Premises have been duly and validly issued and obtained and are in full force and effect. The use and occupancy of the Premises for the purposes for which they are intended and as presently conducted thereon are wholly lawful.

(g) There are no pending or threatened proceedings before any court or governmental agency or moratoria which would interfere with or enjoin the furnishing of any utility services to the Premises or the operation of the Premises or any part thereof.

(h) There are no pending or threatened bankruptcy or like proceedings against or involving the Trust or the Beneficiary under the Bankruptcy Code of the United States or any chapter thereof or any like statute, state or Federal.

(i) There are no pending or threatened proceedings before any court or governmental agency which could materially affect the Premises or the validity or enforceability of this Mortgage or any of the other Loan Documents or which might materially adversely affect the financial condition or assets of the Trust or the Beneficiary.

(j) Beneficiary is not engaged principally, or as one of its important activities, in the business of extending credit for the purpose of purchasing or carrying margin stock.

ARTICLE II

Covenants of Mortgagor

SECTION 2.01. General Covenants. (a) Payment of Obligations. Mortgagor will punctually pay when due the

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

Indebtedness as provided herein and in the Note, and Mortgagor will perform and observe all of its obligations under, and all of the provisions of, the Loan Documents.

(b) Continuation of Existence. Beneficiary will maintain the Trust's existence, rights and privileges and will not dissolve, terminate or transfer his interest in the Trust or otherwise dispose of all or substantially all of its assets, or change its legal structure, without in each case obtaining Mortgagee's consent. Beneficiary shall promptly notify Mortgagee of any default or alleged default under the Trust agreement and send to Mortgagee a copy of any notice of default under such agreement sent or received by any party thereto.

(c) Further Assurances. Mortgagor will, at Mortgagor's sole cost and expense and at the request of Mortgagee (i) promptly correct any defect or error which may be discovered in the contents of any of the Loan Documents, or in the execution, acknowledgment or recordation hereof or thereof and (ii) promptly do, execute, acknowledge, file, record and deliver, any and all such further acts, deeds, conveyances, mortgages, assignments, financing statements and continuations thereof, notices of assignment, transfers, certificates, assurances and other instruments as Mortgagee may reasonably require from time to time in order to carry out more effectively the purposes of this Mortgage, to subject to the lien and security interest hereby created any of Mortgagor's properties, rights or interests covered or now or hereafter intended to be covered hereby, to perfect and maintain said lien and security interest, and better to assure, convey, grant, assign, transfer and confirm unto Mortgagee the rights granted or now or hereafter intended to be granted to Mortgagee hereunder or under any other instrument executed in connection with this Mortgage or which Mortgagor may be or become bound to convey, mortgage or assign to Mortgagee in order to carry out the intention or facilitate the performance of the provisions of this Mortgage. It is understood and agreed that no request made under this Section 2.01(c) will be for the purpose of changing the financial terms of this Mortgage or any other Loan Document.

(d) Recordation and Re-Recordation of Mortgage. Mortgagor will, at the request of Mortgagee, promptly record and re-record, file and refile and register and re-register this Mortgage, any financing or continuation statements and every other instrument in addition or supplemental to any thereof that shall be required by any present or future law in order to perfect and maintain the validity, effectiveness and priority of this Mortgage and the lien and security interest intended to be created hereby, or to subject, to the extent elsewhere required under this Mortgage, after-acquired property of Mortgagor to such lien and security interest, in such manner and places and within such times as may be necessary to accomplish such purposes and to preserve and protect the rights and remedies of Mortgagee. Mortgagor will furnish to Mortgagee evidence satisfactory to Mortgagee of every such recording, filing and registration.

(e) Defense or Title Litigation. If the lien, security interest, validity or propriety of this Mortgage, or if title or any of the rights of Mortgagor or Mortgagee in or to the Premises, shall be endangered or legally challenged, or shall be attacked directly or indirectly, or if any action or proceeding is instituted against Mortgagor or Mortgagee with respect thereto,

UNOFFICIAL COPY

Property of Cook County Clerk's Office

Mortgagor will promptly notify Mortgagee thereof to the extent Mortgagor has notice thereof and will diligently endeavor to cure any defect on which such challenge, action or proceeding is based except to the extent caused by the act or omission of Mortgagee, and will take all necessary and proper steps for the defense of such action or proceeding, including the employment of counsel, the prosecution or defense of litigation and, subject to Mortgagee's approval, the compromise, release or discharge of any and all adverse claims. If Mortgagor shall have failed to comply with its obligations under this Section 2.01, Mortgagee (whether or not named as a party to such actions or proceedings) is hereby authorized and empowered (but shall not be obligated) to take such steps as Mortgagee may reasonably deem necessary or proper for the defense of any such action or proceeding or the protection of the lien, security interest, validity or priority of this Mortgage or of such title or rights, including the employment of counsel, the prosecution or defense of litigation, the compromise, release or discharge of such adverse claims, the purchase of any tax title and the removal of such prior liens and security interests. Mortgagor shall, within fifteen (15) days after demand, reimburse, Mortgagee for all reasonable expenses (including attorneys fees and disbursements) incurred by Mortgagee in connection with the foregoing matters. All such costs and expenses of Mortgagee, until reimbursed by Mortgagor, shall be part of the Indebtedness and shall be deemed to be secured by this Mortgage.

SECTION 2.02. Operation and Maintenance.

(a) Repair and Maintenance. Subject to the provisions of Sections 2.04 and 2.05, Mortgagor will operate and maintain, or cause to be operated and maintained, the Land, the Improvements and the Equipment in good order, repair and operating condition (ordinary wear and tear excepted), will promptly make all necessary repairs, renewals, replacements, additions and improvements thereto, interior and exterior, structural and nonstructural, foreseen and unforeseen, or otherwise necessary to insure that the same as part of the security under this Mortgage shall not in any way be diminished or impaired, and will not cause or allow any of the Land, the Improvements or the Equipment to be wasted or to deteriorate, subject to normal wear and tear.

(b) Replacement of Equipment; Alterations. Mortgagor will replace all worn out or obsolete fixtures or personal property which form a part of the Improvements or the Equipment with fixtures or personal property comparable thereto unless replacement of such fixtures or personal property is not necessary to the efficient and economical operation or maintenance of the Improvements. Mortgagor will not, without Mortgagee's consent, remove from the Improvements any fixtures or personalty covered by this Mortgage (except to repair the same) unless the same is no longer necessary to the efficient and economical operation or maintenance of the Improvements or unless the same is replaced by Mortgagor with an article of comparable suitability and value owned by Mortgagor free and clear of any lien or security interest (other than Permitted Exceptions and the lien created by this Mortgage), in which case Mortgagee will deliver to Mortgagor an instrument releasing the lien of this Mortgage on the property so removed. The Improvements shall not be removed, demolished, altered or enlarged without Mortgagee's consent.

(c) Compliance with Laws. Subject to Mortgagor's

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

rights under Section 2.06(d), Mortgagor will perform and comply promptly with, and cause the Land, the Improvements and the Equipment to be maintained, used and operated in accordance with, any and all (i) present and future laws, ordinances, rules, regulations and requirements of every duly constituted governmental or quasi-governmental authority or agency applicable to Mortgagor or the Premises, (ii) similarly applicable orders, rules and regulations of any regulatory, licensing, accrediting, insurance underwriting or rating organization or other body exercising similar functions, (iii) similarly applicable duties or obligations of any kind imposed under any Permitted Encumbrance or otherwise by law, covenant, condition, agreement or easement, public or private, and (iv) policies of insurance at any time in force with respect to the Premises. If Mortgagor receives any notice that Mortgagor or the Premises is in default under or is not in compliance with any of the foregoing, or notice of any proceeding initiated under or with respect to any of the foregoing, Mortgagor will promptly furnish a copy of such notice to Mortgagee.

(d) Legality of Use. Subject to Mortgagor's rights under Section 2.06(d) hereof, Mortgagor will not use or occupy, or permit the Land, the Improvements or the Equipment to be used or occupied in any manner which violates any applicable law, rule, regulation or order of any governmental authority having jurisdiction over Mortgagor or the Land, the Improvements or the Equipment, or which constitutes a public or private nuisance or which makes void, voidable or cancellable any insurance then in force with respect thereto.

(e) Zoning; Title Matters. Mortgagor will not, without Mortgagee's consent (i) initiate or support by taking action any zoning reclassification of the Premises, (ii) modify, amend or supplement any of the Permitted Exceptions except to eliminate any Permitted Encumbrance or reduce its effect on the Premises or, with respect to any Tenant Lease which constitutes a Permitted Encumbrance, to the extent permitted under the Assignment of Rents, Leases, Income and Profits referred to in Section 3.01 hereof and except to the extent otherwise permitted by Article III hereof, (iii) impose any restrictive covenants or encumbrances upon the Land or the Improvements (other than easements of access and operation to public utility companies granted in connection with the delivery of utility service by such company to the Land and the Improvements), execute or file any subdivision plat affecting the Land or the Improvements, transfer any air rights or development rights or consent to the annexation of the Premises to any municipality to which it is not already lawfully annexed or (iv) permit or suffer the Premises to be used by the public or any person in such manner as might make possible a claim of adverse usage or possession of or any implied dedication or easement.

(f) Specific Use. Mortgagor will use, operate and maintain the Improvements or cause the Improvements to be used, operated and maintained as and for an office building and for no other use unless agreed to by Mortgagee.

SECTION 2.03. Insurance. (a) Casualty Insurance. Mortgagor will keep the Improvements and the Equipment insured for the benefit of Mortgagee as follows:

(i) against damage or loss by fire and such other

UNOFFICIAL COPY

Property of Cook County Clerk's Office

hazards (including lightening, windstorm, hail, explosion, riot, riot attending a strike, civil commotion, vandalism, malicious mischief, aircraft, vehicle and smoke) and all risk of physical loss as are covered by the broadest form of extended coverage endorsement as is generally available from time to time in the Chicago, Illinois, metropolitan area with respect to commercial properties comparable to the Premises in an amount as shall be sufficient to prevent Mortgagor from becoming a coinsurer, but in any event such insurance shall be maintained in an amount not less than the Full Insurable Value (as defined in subsection (h) of this Section) of the property insured;

(ii) against war risks as, when and to the extent such insurance is obtainable from the United States of America or an agency or instrumentality thereof and for the maximum obtainable amount of such insurance; provided that if Mortgagor is unable to maintain war risk insurance as provided in this clause (ii) at commercially reasonable rates, Mortgagor shall nevertheless be deemed to be in compliance with its covenants contained in this Section 2.03 and no Event of Default shall be deemed to have occurred as long as Mortgagor continues to maintain insurance which is consistent with the then prevailing insurance requirements imposed upon borrowers by commercial lenders making loans in amounts comparable to the principal amount of the Note and secured by properties in the Chicago, Illinois, metropolitan area comparable to the Premises;

(iii) rent or business interruption or use and occupancy insurance on such basis and in such amounts as shall be reasonably satisfactory to Mortgagee but in no event covering less than one year's loss in the aggregate annual amount of rent (including without limitation, base rent, rent based on a percentage of the gross income of tenants and payments for operating expenses and taxes) payable by tenants under all then existing Tenant Leases;

(iv) against damage or loss by earthquake and by flood, on such basis and in such amounts as shall be reasonably required by Mortgagee but in no event exceeding the Full Insurable Value (as defined below); provided that flood insurance shall only be required if the Premises are located in an area identified by the Secretary of Housing and Urban Development or any successor as an area having special flood hazards and in which flood insurance has been made available under the National Flood Insurance Act of 1968 or the Flood Disaster Protection Act of 1973, as amended, modified, supplemented or replaced from time to time; and provided, further, that if Mortgagor is unable to maintain earthquake insurance as provided in this clause (iv) at commercially reasonable rates, Mortgagor shall nevertheless be deemed to be in compliance with its covenants contained in this Section 2.03 and no Event of Default shall be deemed to have occurred as long as Mortgagor continues to maintain insurance which is consistent with the then prevailing insurance requirements imposed upon borrowers by commercial lenders making loans in amounts comparable to the principal amount of the Note and secured by properties in the Chicago, Illinois, metropolitan area comparable to the Premises;

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

(v) against damage or loss from (i) sprinkler system leakage and (ii) boilers, boiler tanks, heating and air conditioning equipment, pressure vessels, auxiliary piping and similar apparatus, if any, on such basis and in such amounts as shall be reasonably required by Mortgagee, provided, however, that the amount required shall in no event exceed the Full Insurable Value (as defined in subsection (h) of this Section); and

(vi) during the period of any construction, repair, restoration or replacement of the Premises (other than construction insured under existing policies in an amount at least equal to the value of the work performed and equipment, supplies, and materials furnished), a standard builder's all risk policy for an amount at least equal to the value of the work performed and equipment, supplies and materials furnished and worker's compensation insurance in statutory amounts; provided that to the extent that any tenant under a Tenant Lease undertakes to perform any construction, repair, restoration or replacement of that portion of the Premises which such tenant is occupying and the terms of such Tenant Lease require the tenant to maintain a standard builder's all risk policy naming Mortgagee as an additional insured in an amount equal to the value of the work being done, Mortgagor shall not be required to maintain the insurance required under this clause (vi) with respect to such work so long as tenant maintains such insurance or, upon failure by tenant to do so, Mortgagor pursues with diligence, all remedies against such tenant to cause such noncompliance to be remedied.

(b) Liability Insurance. Mortgagor shall procure and maintain comprehensive general liability insurance covering Mortgagor and Mortgagee against claims for bodily injury or death or property damage occurring in, upon or about or resulting from the Premises, or any street, drive, sidewalk, curb or passageway adjacent thereto, and, at Mortgagee's request, if any part of the Premises shall be used for the sale or dispensation of intoxicating spirits, appropriate insurance against liability under any dram shop or similar law, all in standard form and with such insurance company or companies reasonably acceptable to Mortgagee and in such amounts as may be reasonably acceptable to Mortgagee, which insurance shall include Blanket Contractual Liability coverage which insures contractual liability under the indemnification set forth in subsection (v) of Section 4.03(a) of this Mortgage (but such coverage or the amount thereof shall in no way limit such indemnification).

(c) Other Insurance. Mortgagor, at Mortgagee's request, will procure and maintain such other insurance or such additional amounts of insurance, covering Mortgagor or the Premises, as Mortgagee shall from time to time reasonably require.

(d) Form of Policy. Premiums and any other charges for all insurance required under this Section shall be paid not later than thirty (30) days prior to the date on which said premiums or charges are due and the policies shall contain such provisions, endorsements and expiration dates as Mortgagee shall from time to time reasonably request, and shall be in such form and amounts (subject to the limitation described herein) and be issued by such insurance companies doing business in the State of Illinois as shall be reasonably approved by Mortgagee. Without limiting the

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

foregoing, all such policies (except policies for worker's compensation and liability insurance in which latter case Mortgagee shall be named as an additional insured) shall have endorsed thereon, in form reasonably acceptable to Mortgagee, the standard mortgagee clause, without contribution, a waiver of subrogation endorsement, a first loss payee clause and a special extended coverage endorsement, all in the name of Mortgagee. All such policies shall provide that the same shall not be cancelled (including by reduction in the scope, or limits of coverage) without at least sixty (60) days notice to Mortgagee. Mortgagor may effect the insurance coverage required hereunder, in whole or in part, under one or more blanket insurance policies, provided that, and so long as (i) each such blanket policy, except in the case of liability insurance, shall specify thereon the total insurance allocated to the Premises, which amount shall be not less than that required hereunder, (ii) each such blanket policy shall otherwise comply in all respects with this Mortgage, (iii) Mortgagee shall be named as an additional insured under each such blanket policy to the extent required hereunder and (iv) the protection afforded thereunder shall be not less than that which would have been afforded under a separate policy with respect to the same insured risks.

(e) Duplicate Originals or Certificates. The original policies or certificates therefor evidencing the insurance required under this Section and any additional insurance which shall be taken out on the Premises by or on behalf of Mortgagor shall be deposited with and held by Mortgagee and, in addition, Mortgagor will deliver to Mortgagee (i) receipts (or other evidence reasonably satisfactory to Mortgagee) evidencing payment of all premiums thereon and (ii) original renewal policies (or certificates therefor or a binding commitment from the insurance company to provide such insurance, which commitment shall be effective not later than the expiration date of the current policy) with evidence satisfactory to Mortgagee of payment of all premiums then due thereon (subject to any grace periods provided in such policies), at least thirty (30) days prior to the expiration of each such policy.

(f) No Separate Insurance. Mortgagor shall not carry separate or additional insurance concurrent in form or contributing in the event of loss with that required under this Section unless endorsed in favor of Mortgagee in accordance with the requirements of this Section and otherwise approved by Mortgagee in all respects, which approval will not be unreasonably withheld or delayed.

(g) Transfer of Title. In the event of foreclosure of this Mortgage or other transfer of title or of the Premises in extinguishment, in whole or in part, of the indebtedness, all right, title and interest of Mortgagor in and to all policies of insurance required under this Section or otherwise then in force with respect to the Premises and all proceeds payable thereunder and unearned premiums thereon (other than any "blanket" insurance policies which cover property in addition to the Premises) shall immediately vest in the purchaser or other transferee of the Premises.

(h) Replacement Cost. For purposes of this Section, the term "Full Insurable Value" shall mean the cost of replacing the Improvements and the Equipment, exclusive of the cost of

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

excavations, foundations and footings, as determined from time to time (but not less often than once every calendar year) by the insurance company or companies holding such insurance or by an appraiser, engineer, architect or contractor proposed by Mortgagor and approved by said company or companies and Mortgagee.

SECTION 2.04. Damage and Destruction. (a) Mortgagor's Obligations. In the event of any damage to or loss or destruction of all or any part of the Premises, Mortgagor shall promptly notify Mortgagee of such event. Subject to Unavoidable Delays (as defined below) and unless instructed by Mortgagee in accordance with Section 2.04(c) hereof that the Insurance Proceeds (as hereinafter defined) payable on account of such damage, loss or destruction are to be applied toward the payment of the Indebtedness, Mortgagor shall promptly, regardless of whether such Insurance Proceeds shall be sufficient for the purpose, commence and diligently proceed to perform and complete, in a first-class workmanlike manner, the restoration, replacement and rebuilding of the Premises as nearly as possible (to the extent permitted by then applicable laws, ordinances, codes, rules and regulations) to its condition immediately prior to such damage, loss or destruction with such changes in design and layout as Mortgagor may deem appropriate and, with respect to any such change costing in excess of Ten Percent (10%) of the Original Principal Amount, as adjusted in accordance with the CPI Escalator (as described in Section 2.04(g)), as shall be reasonably approved by Mortgagee (such restoration, replacement and rebuilding of the Premises is hereinafter referred to as "Restoration"). The plans and specifications therefor and the general contractor and architect in charge of any Restoration shall be approved by Mortgagee. Prior to the commencement of any Restoration estimated to cost in excess of Ten Percent (10%) of the Original Principal Amount, as adjusted in accordance with the CPI Escalator, Mortgagor shall deliver to Mortgagee for its approval an estimate of an independent registered architect or a licensed professional engineer of the cost of Restoration. Prior to the commencement of any Restoration, Mortgagor shall obtain and furnish Mortgagee with copies of all permits, approvals and authorizations as may be required for the Restoration to be performed in accordance with all applicable legal requirements. For purposes of this Mortgage, an "Unavoidable Delay" shall mean a delay caused by strike, lockout, war, act of god, fire or other casualty, unforeseeable adverse weather conditions, inability to obtain or delay in obtaining labor or materials, governmental restriction or other act or condition (except Mortgagor's lack of funds) beyond the reasonable control of Mortgagor.

(b) Proof of Loss, Settlement and Adjustment of Insurance Claims. Except as set forth below in this subsection (b), in the event that all or any part of the Premises is damaged, destroyed or lost, and such damage, destruction or loss is covered, in whole or in part, by insurance and provided no Event of Default shall have occurred and be continuing, Mortgagor may make proof of loss and settle, adjust and compromise any claims under such insurance, provided that with respect to any claim equal to or in excess of Ten Percent (10%) of the Original Principal Amount, as adjusted in accordance with the CPI Escalator, such settlement, adjustment or compromise shall be subject to Mortgagee's prior approval. Mortgagee may, but shall not be obligated to, make proof of loss if not made promptly by Mortgagor and is hereby authorized and empowered by Mortgagor,

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

immediately after notice to Mortgagor and, subject to the approval of Mortgagor, to settle, adjust or compromise any such claims. If an Event of Default shall have occurred and be continuing, Mortgagee shall have the sole right to make proof of loss and settle, adjust or compromise any such claims.

(c) Application of Proceeds. Unless an Event of Default shall have occurred and be continuing, proceeds of insurance payable on account of damage, loss or destruction to the Premises ("Insurance Proceeds") in an amount less than Ten Percent (10%) of the Original Principal Amount, as adjusted in accordance with the CPI Escalator, shall be paid directly to Mortgagor and shall be held in trust and applied to Restoration. If an Event or Default shall have occurred or be continuing or if Insurance Proceeds are equal to or in excess of Ten Percent (10%) of the Original Principal Amount, as adjusted in accordance with the CPI Escalator, all Insurance Proceeds shall be payable to Mortgagee to be held in trust in accordance with the provisions hereof, and Mortgagor hereby authorizes and directs any affected insurance company to make payment of such Insurance Proceeds directly to Mortgagee and, in such event, Mortgagor shall promptly pay over to Mortgagee any such Insurance Proceeds received by Mortgagor. Mortgagee shall have the right to apply the Insurance Proceeds, first, to reimburse Mortgagee for all reasonable costs, and expenses, including reasonable adjusters and attorneys fees and disbursements, incurred in connection with the collection of such Proceeds, and, second, at Mortgagee's option, to (i) the payment (without premium or penalty) of all or any part of the Indebtedness, in the order and manner determined by Mortgagee in its sole discretion (provided that to the extent that any Indebtedness shall remain outstanding after such application, such unpaid Indebtedness shall continue in full force and effect and Mortgagor shall not be excused in the payment thereof), (ii) the cure of any then current default hereunder or (iii) Restoration. Notwithstanding the foregoing, unless an Event of Default shall have occurred and be continuing, Mortgagee will not elect to apply the Insurance Proceeds to the payment of the Indebtedness and shall make all such Insurance Proceeds paid on account of any such damage or destruction (after reimbursement to Mortgagee of all reasonable costs and expenses incurred in connection with the collection of such Insurance Proceeds) available to Mortgagor for the Restoration of the Premises in accordance with the provisions of this Mortgage, provided that Mortgagor has provided Mortgagee with evidence reasonably satisfactory to Mortgagee that (A) there are funds available and/or committed which, when added to the Insurance Proceeds paid on account of such damage or destruction, will be sufficient to pay the cost of the Restoration, the expenses of operating and maintaining the Premises, as such expenses are incurred, and all indebtedness secured by the Premises (including the Indebtedness) when and as due, until the Premises are generating sufficient revenues to cover such costs, expenses and such indebtedness; and (B) either (x) the Premises will be restored in full to its condition immediately prior to such damage, loss or destruction or (y) the collateral value of the Premises as restored will be equal to or greater than the outstanding principal amount of the Note and any other indebtedness secured by the Premises as of the date of such damage, loss or destruction times One Hundred Thirty-Three Percent (133%); and provided further that in the event that Mortgagor has satisfied the requirements of clause (A) above but not the requirements of clause (B) above, such Insurance Proceeds shall be applied, first,

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

to reimburse Mortgagee for all reasonable costs and expenses incurred in connection with the collection of such Proceeds (including reasonable attorneys fees and disbursements and costs incurred by Mortgagee or its agents in inspecting any Restoration and the plans and specifications therefor), second, to prepay (without premium or penalty) the principal amount of the Note to the extent necessary so that the collateral value of the Premises after the completion of Restoration shall equal or exceed the outstanding principal amount of the Note, after giving effect to the aforesaid prepayment, and any other indebtedness secured by the Premises times One Hundred Thirty-Three Percent (133%) and, third, the balance of such Proceeds shall be made available to Mortgagor for the Restoration of the Premises in accordance with the provisions of this Mortgage.

(c) Disbursement of Insurance Proceeds for Restoration.

To the extent Insurance Proceeds are to be applied hereunder for Restoration, Mortgagee shall make such Proceeds available to Mortgagor, upon presentation to Mortgagee of the following:

(i) A requisition therefor, together with invoices, which requisition shall be signed by Mortgagor and verified by Mortgagor's architect in charge of Restoration and shall certify that (A) all of the work completed has been done substantially in compliance with the approved plans and specifications; (B) the sum then requested either has been paid by Mortgagor, or is justly due to contractors, subcontractors, materialmen, engineers, architects or other persons who have rendered services or furnished materials for Restoration, the names and addresses of such persons, a brief description of such services and materials, and the several amounts so paid or due to each of said persons in respect thereof; (C) the sum then requested, when added to all sums previously paid out by Mortgagee, does not exceed the value of the work done to the date of such requisition; (D) the amount of such Insurance Proceeds remaining in the hands of Mortgagee will be sufficient to pay for the completion of the Restoration (giving in such reasonable detail as Mortgagee may require an estimate of the cost of such completion); (E) no part of such expenditures has been or is being made the basis of any previous or then pending requisition; and (F) except for the amount, if any, stated in such certificate to be due for services or materials, there is no outstanding indebtedness known to the person signing such certificate, after due inquiry, which is then due for labor, wages, materials, supplies or services in connection with Restoration;

(ii) A title report or, in lieu thereof, other evidence reasonably satisfactory to Mortgagee, showing that there have not been any vendor's, contractor's, mechanic's, laborer's or materialmen's statutory or similar liens filed with respect to the Premises which have not been discharged of record or duly bonded or insured over, except such as will be discharged upon payment of the sum being requisitioned.

(e) Investment of Insurance Proceeds. Any Insurance Proceeds held by Mortgagee to be applied towards Restoration shall, to the extent practicable, be invested by Mortgagee pending

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

disbursement in (i) direct and general obligations of, or obligations the payment of principal of and interest on which are unconditionally guaranteed by, the United States of America or (ii) FDIC or FSLIC insured bank or savings and loan accounts. All interest earned on the aforesaid investments shall become a part of such Insurance Proceeds.

(f) Miscellaneous. After completion of Restoration in accordance with the plans and specifications approved by Mortgagee and payment in full of all costs of Restoration, as evidenced by a certificate to such effect signed by Mortgagor and verified by Mortgagor's architect, and after payment to Mortgagee of all reasonable costs and expenses incurred in connection with the collection of such Proceeds (including reasonable adjusters and attorneys fees and disbursements and costs incurred by Mortgagee or its agents in inspecting any Restoration and the plans and specification therefor), any remaining Insurance Proceeds shall be paid to Mortgagee and applied against the Indebtedness in the order and manner determined by Mortgagee in its sole discretion.

(g) CPI Escalator. Amounts required to be adjusted in accordance with the CPI Escalator pursuant to this Section 2.04 and Section 2.05 shall be adjusted to reflect increases from the calendar month and year in which this Mortgage is executed in The Consumer Price Index (New Series) (Base Period 1967 = 100) (all items for all urban consumers for Chicago, Illinois area), as issued by the Bureau of Labor Statistics of the United States Department of Labor (the "Price Index"). Such amounts shall be increased annually, in each January during the term hereof, by the product obtained by multiplying each such amount by the percentage, if any, by which the Price Index for the preceding December exceeds the Price Index for the calendar month and year in which this Mortgage is executed.

SECTION 2.05. Condemnation. (a) Mortgagor's Obligation; Proceedings. Mortgagor, upon obtaining knowledge of the institution of any proceedings for the condemnation of all or any part of the Premises, or any interest therein, or of any right of eminent domain, or of any other proceedings arising out of any other claim by a government or governmental agency that if successful will result in injury or damage to, or decrease in the value of the Premises, or any part thereof or interest therein (including a change in grade of any street), will promptly notify Mortgagee thereof. If less than all or substantially all of the Premises are taken, and unless instructed by Mortgagee in accordance with Section 2.05(c) that the Condemnation Proceeds (as defined below) are to be applied toward the payment of the Indebtedness, Mortgagor shall promptly, subject to Unavoidable Delays but regardless of whether or not Condemnation Proceeds, if any, shall be available or, if available, shall be sufficient for the purpose, commence and with reasonable diligence proceed to perform and complete, in a good and first-class workmanlike manner, the Restoration of the remainder of the Premises. In the event that the cost of the Restoration, as estimated by Mortgagor's architect or engineer, shall exceed Ten Percent (10%) of the Original Principal Amount, as adjusted in accordance with the CPI Escalator, then the plans and specifications therefor and the general contractor and architect in charge of construction shall be subject to the Mortgagee's prior approval. Prior to the commencement of any Restoration estimated to cost in excess of Ten Percent (10%) of the Original Principal Amount, as adjusted in

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

accordance with the CPI Escalator, Mortgagor shall deliver to Mortgagee for its approval an estimate of an independent registered architect or a licensed professional engineer of the cost of Restoration. Prior to the commencement of any Restoration, Mortgagor shall obtain and furnish Mortgagee with copies of all permits, approvals and authorizations as may be required for the Restoration to be performed in accordance with all applicable legal requirements.

(b) Total Taking. In the event of a taking by eminent domain or condemnation or by other similar proceedings, or in any other similar manner (any of the foregoing is hereinafter referred to as a "Taking") of all or substantially all of the Premises or if an Event of Default shall have occurred and be continuing, Mortgagee shall be entitled to all compensation, awards, damages, rights of action and proceeds awarded to Mortgagor and Mortgagee (including any awards for change of grade of streets). All of the foregoing are hereinafter referred to as "Condemnation Proceeds," and such Condemnation Proceeds are assigned to Mortgagee to the extent of any sums then owing to Mortgagee by Mortgagor. Mortgagor agrees to execute and deliver such further assignments thereof as Mortgagee may request and authorizes Mortgagee to collect and receive the same, to give receipts and acquittances therefor, and to appeal from any such judgment, decree or award; but if there shall not then be some other Event of Default, such actions may be taken by Mortgagor subject to the reasonable direction of Mortgagee. Mortgagee shall in no event be liable or responsible for failure to collect, or exercise diligence in the collection of, any of the same. Mortgagee shall apply all Condemnation Proceeds received pursuant to this Section 2.05(b), first, to the payment of all reasonable costs and expenses, including reasonable attorneys fees and disbursements, incurred by it in connection with the collection of such Proceeds, second, the payment (without penalty or premium) of all or any part of the Indebtedness, in the order and manner determined by Mortgagee in its sole discretion (provided that to the extent that any of the Indebtedness shall remain outstanding after such application, such unpaid Indebtedness shall continue in full force and effect), and third, the balance, if any, to Mortgagor or to the person or persons legally entitled thereto.

(c) Partial Taking. In the event less than substantially all of the Premises shall be the subject of a Taking and the cost of restoring the remainder of the Premises shall be less than Ten Percent (10%) of the Original Principal Amount, as adjusted in accordance with the CPI Escalator, and provided that at the time the Condemnation Proceeds are paid no Event of Default has occurred and is continuing, such Condemnation Proceeds shall be paid directly to Mortgagor and shall be held in trust and applied by Mortgagor to restore the Premises as nearly as possible to its condition immediately prior to such Taking. In the event less than substantially all of the Premises shall be the subject of a Taking and the cost of restoring the remainder of the Premises which is not the subject of a Taking shall equal or exceed Ten Percent (10%) of the Original Principal Amount, as adjusted in accordance with the CPI Escalator, such Condemnation Proceeds are assigned and shall be payable to Mortgagee and shall be held in trust, and Mortgagor agrees to promptly pay over to Mortgagee any such Condemnation Proceeds received by Mortgagor. Mortgagee shall have the right to apply the Condemnation Proceeds, first, to reimburse Mortgagee for all reasonable costs and

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

expenses, including reasonable attorneys fees and disbursements and costs incurred by Mortgagee or its agents in inspecting any Restoration and the plans and specifications therefor, incurred in connection with the collection of such Condemnation Proceeds, and, second, at Mortgagee's option, to (i) the payment (without premium or penalty) of all or any part of the Indebtedness, in the order and manner determined by Mortgagee in its sole discretion (provided that to the extent that any Indebtedness shall remain outstanding after such application, such unpaid indebtedness shall continue in full force and effect and Mortgagor shall not be excused in the payment thereof), (ii) the cure of any then current default hereunder or (iii) the Restoration of the remainder of the Premises not the subject of the Taking. Notwithstanding the foregoing, unless an Event of Default shall have occurred and be continuing hereunder, Mortgagee will not elect to apply the Condemnation Proceeds to the payment of the Indebtedness and shall make all such Condemnation Proceeds paid on account of any such Taking (after reimbursement to Mortgagee of all reasonable costs and expenses incurred in connection with the collection thereof) available to Mortgagor for the Restoration of the Premises in accordance with the provisions of this Mortgage, provided that Mortgagor has provided Mortgagee with evidence reasonably satisfactory to Mortgagee that (A) there are funds available and/or committed which, when added to the Condemnation Proceeds paid on account of such Taking, will be sufficient to pay the cost of the Restoration, the expenses of operating and maintaining the Premises, as such expenses are incurred and the indebtedness secured by the Premises (including the Indebtedness), when and as due, until the Premises are generating sufficient revenue to cover such costs, expenses and such indebtedness and (B) the collateral value of the Premises as restored will be equal to or greater than the outstanding principal amount of the Note and any other indebtedness secured by the Premises as of the date of the Taking times One Hundred Thirty-Three Percent (133%); and provided further that in the event that Mortgagor has satisfied the requirements of clause (A) above but the collateral value of the Premises after completion of Restoration would be less than the outstanding principal amount of the Note and any other indebtedness secured by the Premises as of the date of the Taking times One Hundred Thirty-Three Percent (133%) such Condemnation Proceeds shall be applied, first, to reimburse Mortgagee for all reasonable costs and expenses incurred in connection with the collection of such Proceeds (including reasonable attorneys fees and disbursements and costs incurred by Mortgagee or its agents in inspecting any Restoration and the plans and specifications therefor), second, to prepay (without premium or penalty) the principal amount of the Note to the extent necessary so that the collateral value of the Premises after the completion of Restoration shall equal or exceed the outstanding principal amount of the Note, after giving effect to the aforesaid prepayment, and any other indebtedness secured by the Premises times One Hundred Thirty-Three Percent (133%) and, third, the balance of such Proceeds shall be made available to Mortgagor for the Restoration of the Premises in accordance with the provisions of this Mortgage.

(d) Temporary Taking. In the event of a Taking for a temporary use or occupancy of all or any part of the Premises for any public or quasi-public use or purpose, this Mortgage shall be and remain unaffected by such temporary Taking and Mortgagor shall continue to be responsible for all of its obligations hereunder and shall continue to pay the Indebtedness, when and as due. In

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

the event of such temporary Taking, Mortgagor shall be entitled to appeal, claim, prove and receive the entire award. At the termination of such public or quasi-public occupancy, Mortgagor shall, at its own expense, restore the Premises as nearly as possible to its condition prior to such temporary Taking.

(e) Disbursement of Condemnation Proceeds for Restoration. To the extent Condemnation Proceeds are held by Mortgagee and are to be applied hereunder for Restoration of the Premises, Mortgagee shall disburse such Proceeds to Mortgagor in accordance with the procedures set forth in Section 2.04(d).

(f) Investment of Condemnation Proceeds. Any Condemnation Proceeds held by Mortgagee to be applied towards Restoration of the Premises shall, to the extent practicable, be invested by Mortgagee pending disbursement in the same manner as provided in Section 2.04(e) with respect to Insurance Proceeds.

(g) Proof of Loss, Settlement and Adjustment of Claims. Except as set forth below in this subsection (g), Mortgagor may make proof of loss and settle, adjust and compromise any claim in connection with a Taking of all or any part of the Premises, provided that, with respect to any claims equal to or in excess of Ten Percent (10%) of the Original Principal Amount, as adjusted in accordance with the CPI Escalator, such settlement, adjustment or compromise shall be subject to Mortgagee's prior approval. Mortgagee may, but shall not be obligated to, make proof of loss if not made promptly by Mortgagor and is hereby authorized and empowered by Mortgagee, immediately after notice to Mortgagor and subject to the approval of Mortgagee, to settle, adjust or compromise any such claims. If an Event of Default shall have occurred and be continuing, Mortgagee shall have the sole right to settle, adjust or compromise any claim in connection with such Taking.

(h) Miscellaneous. After completion of Restoration in accordance with the plans and specifications approved by Mortgagee and payment in full of all costs of Restoration, as evidenced by a certificate to such effect signed by Mortgagor and verified by Mortgagor's architect, and after payment to Mortgagee of all reasonable costs and expenses incurred in connection with the collection of such Condemnation Proceeds (including reasonable adjusters and attorneys, fees and disbursements and costs incurred by Mortgagee or its agents in inspecting any Restoration and the plans and specifications therefor), any remaining Condemnation Proceeds shall be paid to Mortgagee and applied against the Indebtedness in the order and manner determined by Mortgagee in its sole discretion.

SECTION 2.06. Liens and Liabilities. (a) Discharge of Liens. Subject to Mortgagor's rights under Section 2.06(d), Mortgagor will pay, insure over, bond or otherwise discharge all claims and demands of mechanics, materialmen, laborers and others which, if unpaid, might result in, or permit the creation of, a lien on the Premises, or on the revenues, rents, issues, income or profits arising therefrom and, in general, Mortgagor shall do, or cause to be done, at Mortgagor's sole cost and expense, everything necessary to preserve fully the lien and priority of this Mortgage. Mortgagor shall pay, insure over, bond or otherwise discharge such claims and demands within thirty (30) days after receiving notice of the filing thereof.

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

(b) Creation of Liens. Subject to Mortgagor's rights under Section 2.06(d), Mortgagor shall not, without Mortgagee's consent, create, place or permit to be created or placed, or through any act or failure to act acquiesce in the placing of, or allow to remain, any deed of trust, mortgage, voluntary or involuntary lien, whether statutory, constitutional or contractual (except for the lien for real property taxes and/or assessments on the Premises for which fines, penalties, interest or costs may not yet be assessed for nonpayment), security interest, encumbrance or charge, or conditional sale or other title retention document, against or covering the Premises, prior to, on a parity with or subordinate to the lien of this Mortgage, other than Permitted Exceptions, and Mortgagor shall maintain this Mortgage as a first priority lien on the Premises. If any of the foregoing be or become attached to the Premises without such consent, Mortgagor will promptly cause the same to be discharged and released or bonded or insured over (and, in the case of any mechanic's materialmen's, laborers' and other similar liens, within thirty (30) days of the receipt of notice of the filing thereof).

(c) No Consent. Nothing in the Note, the other Loan Documents or this Mortgage shall be deemed or construed in any way as constituting the consent or request by Mortgagee, express or implied, to any contractor, subcontractor, laborer, mechanic or materialman for the performance of any labor or the furnishing of any material for any improvements, construction, alteration or repair of the Premises. Mortgagor further agrees that Mortgagee does not stand in any fiduciary relationship to Mortgagor.

(d) Right to Contest. In this Section 2.06 and to the extent this Section is specifically referred to in Sections 2.02(c), 2.02(d), 2.06(a), 2.06(b), 2.07(a), 2.07(e) and 4.01 of this Mortgage, Mortgagor, at its expense, after prior notice to Mortgagee, may contest by appropriate legal or other proceedings conducted in good faith and with due diligence, the amount, validity or application, in whole or in part, of any Imposition (as hereinafter defined), any tax assessment or lien therefor, any law, ordinance or regulation, any claims or liens of mechanics, materialmen, suppliers or vendors, or any other tax, charge or other matter required to be complied with or paid pursuant to such Sections, provided that (i) in the case of liens of laborers, mechanics, materialmen, suppliers or vendors, or taxes, assessments or liens therefor, such proceedings shall suspend the collection thereof from Mortgagee and the Premises; (ii) the Premises or any interest therein would not be in any danger of being sold, forfeited or lost by reason of such proceedings; (iii) in the case of a law, ordinance or regulation, Mortgagee would not be in any danger of any criminal liability or, unless Mortgagor shall have furnished a bond or other security therefor satisfactory to Mortgagee, any additional civil liability for failure to comply therewith, and the Premises would not be subject to the imposition of any lien as a result of such failure which is not properly contested and/or bonded pursuant to this Section 2.06(d); (iv) no insurance coverage required to be maintained pursuant to this Mortgage shall be cancelled or jeopardized as a result of the contest; and (v) if required by Mortgagee, Mortgagor shall have furnished to Mortgagee a bond, title insurance or other security reasonably satisfactory to Mortgagee to protect Mortgagee from any liability to which it may be exposed or any material loss or impairment of the lien of and security interest granted by this Mortgage.

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

SECTION 2.07. Taxes and Other Charges. (a) Taxes on the Premises. Subject to Mortgagor's rights under Section 2.06(d) hereof, Mortgagor will pay (i) before any penalty, interest or cost for nonpayment thereof may be added thereto, all taxes, assessments, vault, water and sewer rents, rates, charges and assessments, levies, permits, inspection and license fees and other governmental and quasi-governmental charges, general and special, ordinary and extraordinary, foreseen and unforeseen, heretofore or hereafter assessed, levied or otherwise imposed against or upon, or which may become a lien upon, the Premises or any part thereof or any appurtenance thereto, or the revenues, rents, issues, income and profits of the Premises or arising in respect of the occupancy, use or possession thereof (collectively, "Impositions") and (ii) any penalty, interest or cost for nonpayment of Impositions which may become due and payable, and such penalties, interest or cost shall be included within the term "Imposition." Mortgagor may pay in installments any Imposition which is permitted to be paid in installments.

(b) Receipts. Mortgagor will furnish to Mortgagee proof of payment at the time the same is made, and thereafter, upon receipt, validated receipts, or other evidence reasonably satisfactory to Mortgagee, showing payment in full of all Impositions.

(c) Tax and Insurance Deposits. (i) In General. Mortgagor shall deposit with Mortgagee or any service or financial institution reasonably selected by Mortgagee (the "Depository"), as Mortgagee may direct, on the first business day of each month, an amount equal to one-twelfth (1/12) of the Impositions and the annual premiums for insurance required under this Mortgage. In addition, and under the circumstances described in the preceding sentence, Mortgagor shall, if required by Mortgagee, deposit with Mortgagee or the Depository, as Mortgagee may direct, a sum of money which, together with the aforesaid monthly installments, plus any interest earned thereon, will be sufficient to make said payments of Impositions and premiums of insurance at least thirty (30) days before such payments are due. If the actual amount of any such Impositions and premiums is not ascertainable at the time any deposit is required to be made under this Section 2.07(c), the deposit shall be made on the basis of Mortgagee's estimate thereof (by way of illustration and not limitation, Mortgagee's estimate may be based upon One Hundred and Ten Percent (110%) of the most recently ascertainable amount) and, when such amount is fixed, Mortgagor shall promptly deposit any deficiency with Mortgagee or the Depository, as Mortgagee may direct. If the total monthly deposits made by Mortgagor pursuant to this Section 2.07(c), together with any interest earned thereon, shall exceed the amounts actually paid by Mortgagee for Impositions and insurance premiums, such excess shall be credited toward subsequent monthly deposits to be made by Mortgagor pursuant to this Section 2.07(c) or if deposits are no longer required under this Section 2.07(c), such excess, together with any interest earned thereon, shall be returned to Mortgagor.

(ii) Lender's Forebearance. Notwithstanding anything in Section 2.07(c)(i) to the contrary, Mortgagor shall not be required to make the deposits required under Section 2.07(c)(i) unless there shall have occurred an Event of Default or unless Mortgagee shall have delivered to Mortgagor a notice that it reasonably believes that its lien under the Loan Documents may

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

be impaired, whereupon all of the deposits required to be made under Section 2.07(c)(i) shall be made, until such time as all Events of Default have been cured, in accordance with the terms of and within the cure periods contained in this Mortgage, or Mortgagee shall have provided Mortgagor with written notice that said deposits no longer need be made.

(d) Use of Deposits. All funds deposited with Mortgagee or the Depository, as the case may be, pursuant to the provisions of Section 2.07(c) shall be applied to the payment of Impositions and premiums for insurance required under this Mortgage. All funds deposited by Mortgagor with Mortgagee or the Depository, as the case may be, pursuant to the provisions of this Section 2.07 shall constitute additional security for the Indebtedness, shall be held by Mortgagee or the Depository in an interest bearing account (provided that Mortgagee may designate such account in its reasonable discretion and shall have no obligation to maximize the interest earned on any such deposits), may be commingled with other funds of Mortgagee or the Depository, and, together with any interest earned thereon, shall be applied to the payment of Impositions and premiums for insurance required under this Mortgage, but only to the extent that Mortgagee or the Depository shall have such funds on hand. Neither Mortgagee nor the Depository shall have any obligation to apply said funds as stated above prior to the last day on which payment thereof may be made without penalty or interest charge and in any case not until Mortgagor shall have furnished Mortgagee or the Depository, as the case may be, the bills or invoices therefor or other evidence reasonably satisfactory to Mortgagee of the amounts due and payable. Mortgagor hereby grants to Mortgagee a security interest in said deposits in accordance with Article 9 of the Uniform Commercial Code of the State of Illinois and agrees to cooperate with Mortgagee in the execution and filing of financing statements and other documents required to perfect and maintain such security interest. Upon an assignment of its interest in this Mortgage, Mortgagee shall pay over the balance of such deposits to the assignee and Mortgagee shall thereupon be completely released from all liability with respect to such deposits and Mortgagor shall look solely to the assignee thereof. The provision in the preceding sentence shall apply to every transfer of such deposits to a new assignee.

(e) Income and Other Taxes Imposed on Mortgagor. Subject to Mortgagor's rights under Section 2.06(d) hereof, Mortgagor will promptly pay all income, franchise and other taxes owing by Mortgagor the nonpayment of which would result in a lien against the Premises, and any stamp taxes which may be required to be paid in connection with this Mortgage or any other Loan Document, together with any interest or penalties thereon.

(f) Recording Fees and Other Taxes Imposed on Mortgagee. Mortgagor will pay any and all taxes (including any mortgage recording tax), charges, filing, registration and recording fees, excises and levies imposed upon Mortgagee by reason of or in connection with the execution of this Mortgage, the Note or any other Loan Document or Mortgagee's ownership of this Mortgage or any mortgage supplemental hereto, any security instrument with respect to any Equipment or any instrument of further assurance, and shall pay all corporate stamp and other taxes required to be paid on the Indebtedness and this Mortgage. Notwithstanding the foregoing or any other provision of this Mortgage to the contrary,

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

Mortgagor shall not be required to pay any tax which may arise in connection with the transfer of the Note or any income, profits or revenue tax upon the income of Mortgagee or any franchise, excise, corporate, estate, inheritance, succession, capital levy or transfer tax of Mortgagee or any interest, additions to tax or penalties in respect thereof.

(g) Change in Tax Law. In the event (a "Tax Event") of the enactment of or change in (including, without limitation, a change in interpretation of) any applicable law (i) deducting or allowing Mortgagor to deduct from the value of the Premises for the purpose of taxation any lien or security interest thereon or (ii) subjecting Mortgagee to any tax or changing the basis of taxation of mortgages, deeds of trust, or other liens or debts secured thereby, or the manner of collection of such taxes, in each such case, so as to affect this Mortgage, the Indebtedness or Mortgagee, and the result is to increase the taxes imposed upon or the cost to Mortgagee of maintaining the Indebtedness, or to reduce the amount of any payments receivable hereunder, then, and in any such event Mortgagor shall, on demand, pay to Mortgagee additional amounts to compensate for such increased costs or reduced amounts provided that if any such payment or reimbursement shall be unlawful or would constitute usury or render the Indebtedness wholly or partially usurious under applicable law, then Mortgagee may, at its option, declare the Indebtedness immediately due and payable (in which event no prepayment premium or penalty will be imposed) or require Mortgagor to pay or reimburse Mortgagee for payment of the lawful and non-usurious portion thereof. If Mortgagee elects to cause Mortgagor to pay or reimburse Mortgagee aforesaid and the net present value of all such costs to Mortgagor (discounted at the Contract Rate under the Note) exceeds 15 percent of the Original Principal Amount, Mortgagor may, within 30 days of Mortgagee's election, elect to prepay the entire loan, without premium or penalty.

SECTION 2.08. Inspection. Subject to the rights of any tenants under any Tenant Leases, Mortgagor will allow Mortgagee or its authorized representatives, upon reasonable advance notice, to enter upon and inspect the Premises at all reasonable times and will assist Mortgagee or such representatives in effecting said inspection. Except in the case of an emergency, Mortgagee shall inspect the Premises only during normal business hours.

SECTION 2.09. Records and Reports. (a) Maintenance of Records. Mortgagor shall keep and maintain complete and accurate books and records in accordance with sound accounting principles with respect to all operations of or transactions involving the Premises. Copies of said books and records shall be made available by Mortgagor for inspection by Mortgagee, upon request of Mortgagee.

(b) Rent Roll. In addition to any information required under any other Loan Document, within ninety (90) days of the end of each calendar year, Mortgagor shall deliver or cause to be delivered to Mortgagee a current rent roll showing the names of tenants, space occupied by each tenant, rent paid by such tenant (gross, per square foot and percentage rent), tenant's contribution (including but not limited to contributions for insurance, utilities, HVAC, parking, promotional fund, common area maintenance and taxes), lease security, if any, lease or occupancy expiration dates, options for renewal, rental during renewal

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

terms, cancellation provisions, if any, and other information reasonably requested by Mortgagee. Such rent roll shall be certified by Mortgagor or its duly authorized agent. If Mortgagor shall have leased all or substantially all of the Premises to another, with the consent of Mortgagee, Mortgagor shall also deliver to Mortgagee concurrently with the rent roll financial statements covering the earnings and expenses in the latest fiscal year of the lessee under such lease. In the case of such a lease, if the lessee shall be any individual, corporation, partnership, joint venture or other entity of any kind directly or indirectly controlling, controlled by or under common control with either Mortgagor or any related person and such lessee shall be in actual occupancy of such portion of the Premises, Mortgagor will also furnish to Mortgagee, within one hundred eighty (180) days of the end of the calendar year, the lessee's balance sheet, as of the end of the lessee's fiscal year, and the lessee's statement of income and surplus for such fiscal year, all in reasonable detail and stating in comparative form the figures as of the end of and for the previous fiscal year, and prepared, audited and reported upon by an independent certified public accountant or, if permitted by Mortgagee, verified by an authorized financial officer of the lessee. As used herein and in Section 2.11, the term "control" (including the terms "controlling," "controlled by" and "under common control with") shall mean the possession, direct or indirect, of the power to (i) vote more than fifty percent (50%) of the outstanding voting securities or ownership interests of a person or entity or (ii) direct or cause the direction of the management and policies of a person or entity, by contract or otherwise. As used herein and in Section 2.11, the term "related person" shall include, but shall not be limited to, in the case of any individual, any person related to such individual by blood or marriage, in the case of any corporation, any shareholder of that corporation, in the case of any trust, any grantor or beneficiary of that trust, and in the case of any partnership, any partner of that partnership.

(c) Financial Statements. Mortgagor shall furnish to Mortgagee, within ninety (90) days of the end of each calendar year, financial statements, prepared in accordance with generally accepted accounting principles (consisting of a balance sheet as of the end of such fiscal quarter and a statement of operations, on both a cash and an accrual basis, for such year) with respect to the operation of the Premises, all in reasonable detail and stating in comparative form the figures as of the end of and for the previous calendar year, and certified as true and correct by Mortgagor or its duly authorized agent.

(d) Tenants, Sales Reports. Mortgagor shall also furnish to Mortgagee as soon as available copies of all sales reports received by Mortgagor from any tenants leasing space in the Premises with respect to such tenant's sales activities if the corresponding Tenant Lease provides for the payment of rents determined in whole or part with reference, directly or indirectly, to tenant's sales activities or profits.

(e) Inspection of Records. Mortgagor will allow Mortgagee or its authorized representatives, upon five (5) days advance notice, to examine and make copies of all books and records relating to the Premises and all supporting data therefor, and for the reports provided by Mortgagor to Mortgagee under this Section 2.09, during normal business hours at Mortgagor's

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

principal place of business.

(f) Mortgagor's Certification. Mortgagor shall cause to be submitted to Mortgagee, within ninety (90) days of the end of each calendar year, a certification given by the Mortgagor or its duly authorized agent to the effect that, as of the date of such certification, such Mortgagor or its agent has no knowledge of the existence of any Event of Default (as defined in Article VI) nor the existence of any event which, with notice or the passage of time or both, would constitute an Event of Default, or if Mortgagor or such agent has knowledge that any such Event of Default or event exists, specifying the nature and status thereof.

SECTION 2.10. Certificates. Mortgagor and Mortgagee, within ten (10) days after request of the other party therefor, shall furnish to such party a written statement, duly acknowledged, certifying to such party (and/or, any proposed assignee of this Mortgage) as to (a) the amount of the Indebtedness then owing under this Mortgage, (b) whether the Loan Documents have been modified (or, if modified, specifying such modification) and, to the best knowledge of the certifying party, whether there is any default under the Loan Documents (or specifying any defaults), (c) the terms of payment and maturity date of the Indebtedness, (d) the date to which interest has been paid under the Note and this Mortgage and (e) whether, to the best knowledge of the certifying party, any offsets or defenses exist against the Indebtedness and if any are alleged to exist, a detailed description thereof.

SECTION 2.11. Contracts Relating to the Premises. Mortgagor shall not execute any Declaration of covenants, conditions or restrictions, management contract or other instrument or agreement affecting the Premises or any part thereof or any amendment or modification with respect to any of the foregoing (including without limitation any reciprocal easement agreement) without the prior approval of Mortgagee. Notwithstanding the foregoing, Mortgagor may, without the prior approval of Mortgagee, execute (a) any contract (with other than a related person or a person or entity controlling, controlled by or under common control with Mortgagor) relating to the construction of a tenant improvement at the Premises if the total cost of said improvement does not exceed Ten Thousand Dollars (\$10,000); and (b) any contract (with other than a related person or a person or entity controlling, controlled by or under common control with Mortgagor) for the service or maintenance of the Premises provided such contract is (i) made in the ordinary course of business and (ii) provides for reasonable rates or fees, considering the nature and quality of the services rendered, and provided further that, at the time such contract is made (x) no Event of Default has occurred and is continuing and (y) the collateral value of the Premises shall equal or exceed the outstanding principal amount of the Note and any other indebtedness secured by the Premises times One Hundred Thirty-Three Percent (133%).

SECTION 2.12. No Defaults. Mortgagor shall not permit any material default by or with respect to Mortgagor to exist under the terms of any lease applicable to the Premises, any instrument evidencing or securing any financing for the Premises, or any other agreement affecting the Premises. Mortgagor further agrees to promptly furnish Mortgagee with copies of any notices of a material default received or given by Mortgagor under any of the foregoing leases or any other instruments, contracts or

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

agreements.

SECTION 2.13. Litigation and Other Notices. Mortgagor shall give Mortgagee prompt notice of the following:

(i) any Event of Default (as defined in Section 6.01) and any event that, with the giving of notice, or the lapse of time, or both, would constitute an Event of Default;

(ii) levy of an attachment, execution or other process against the Premises or any of the Collateral;

(iii) the filing or commencement of any action, suit or proceeding by or before any court or any Federal, state, municipal or other governmental department, commission, instrumentality or agency which, if adversely determined against Mortgagor would materially impair the right of Mortgagor to perform its obligations hereunder or under any other Loan Document.

(iv) any matter which has resulted in, or which reasonably may be expected to result in, a change in the business, properties, financial condition or operations of Mortgagor which would have a materially adverse effect on the ability of Mortgagor to perform its obligations hereunder or under any other Loan Document.

SECTION 2.14. Compliance with REA. Mortgagor shall at all times faithfully comply with and observe all of the terms, covenants, conditions and warranties made by or being obligations of Mortgagor under any REA and shall use its best efforts to cause the other parties, signatories and guarantors to any REA to faithfully fulfill and discharge all of their respective obligations thereunder. Mortgagor further covenants and agrees that it shall not waive, modify, amend or alter any of the terms, covenants or conditions of any REA nor cancel or surrender the same nor release or discharge any party, signatory or guarantor thereunder or affected thereby for or from any of the terms, provisions and covenants to be performed thereunder without in each instance first securing the express written consent of Mortgagee, all right by Mortgagor to otherwise waive, modify, amend, alter, cancel, or surrender any REA or release or discharge any party, signatory or guarantor thereof from any of their obligations thereunder being hereby relinquished by Mortgagor and assigned over to Mortgagee by Mortgagor. Mortgagor further covenants and agrees that it will not exercise its consent or approval, rights under any REA without first securing Mortgagee's express written consent where such consent or approval would materially affect in any manner any of Mortgagor's rights under any REA or Mortgagee's rights thereunder or hereunder. Mortgagor further covenants and agrees to promptly deliver to Mortgagee any notice, communication, demand, request, statement, approval or disapproval which it shall give or which it shall receive under any REA alleging a default by Mortgagor or any other party, signatory or guarantor of their respective obligations thereunder or that grounds exist for a termination of such party's operating covenant under any REA or which could give rise to a lien. It is also understood, covenanted and agreed by Mortgagor that the proportionate share of pro-rated costs and expenses and any other sums of money now or hereafter due and payable to Mortgagor under the terms of any REA are hereby assigned, transferred and set-over to Mortgagee as additional

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

security hereunder upon condition, however, that such assignment shall become operative and effective only upon the occurrence and continuation of an Event of Default. Mortgagor further covenants and agrees not to sell, assign, transfer or pledge any sums of money so payable.

ARTICLE III

Tenant Leases and Assignment of Rents

SECTION 3.01. Assignment of Rents. Concurrently with the execution of this Mortgage, Mortgagor is executing an Assignment of Rents, Leases, Income and Profits (the "Assignment of Rents") pursuant to which Mortgagor is assigning to Mortgagee, as additional security for the Indebtedness, all of its right, title and interest in and to all Rents and Tenant Leases, subject to the terms and conditions contained therein. All leases affecting the Premises, including without limitation, leases currently in force, shall be subject and subordinate to the lien and provisions of this Mortgage.

SECTION 3.02. Tenant Leases. (a) Performance of Landlord's Obligations. Mortgagor will (i) perform or cause to be performed all of the landlord's material obligations under all Tenant Leases; (ii) enforce the performance by tenants of such of their material obligations as Mortgagor reasonably deems to be appropriate in connection with the management and operation of the Premises and as shall be consistent with then prevailing practices of owners of first-class properties comparable to the Premises; and (iii) give Mortgagee prompt notice and a copy of any notice of default, event of default, termination or cancellation sent or received by the landlord under any Tenant Lease.

(b) Additional Information. Mortgagor will, promptly upon Mortgagee's request from time to time, prepare and deliver to Mortgagee such information concerning the Tenant Leases as Mortgagee shall reasonably specify. Mortgagor shall deliver to Mortgagee executed counterparts of each Tenant Lease and any modifications or amendments thereto within fifteen (15) days after their execution.

(c) Approval of Tenant Leases. (i) Standard Lease Form. Mortgagor shall submit to Mortgagee, for its prior approval, a standard form of Tenant Leases to be used in connection with the further leasing of space in the Improvements. The standard Tenant Lease forms shall contain terms to the effect as follows: (A) the tenancy under the Tenant Lease is subordinate to the rights of Mortgagee under this Mortgage and the other Loan Documents; (B) upon a foreclosure of the lien of this Mortgage or the giving or granting of a deed in lieu thereof, the tenant shall attorn to Mortgagee; (C) in the case of any foreclosure of the Mortgage or the giving or granting of a deed in lieu thereof, the rights and remedies of the tenant in respect of any obligations of any successor landlord under its respective Tenant Lease shall be nonrecourse as to any assets of such successor landlord other than its interest in the Premises; (D) the tenant's obligation to pay rent under its Tenant Lease (including any additional rent) shall not be subject to any abatement, deduction, counterclaim or setoff as against the Mortgagee or purchaser upon the foreclosure of the Mortgage or the giving or granting of a deed in lieu thereof by reason of a landlord default occurring prior to such foreclosure

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

or the giving or granting of such deed, and the Mortgagee and such purchaser will not be bound by any advance payments of rents in excess of one month; and (E) the right of Mortgagee to cause its rights under this Mortgage and any other Loan Document to be subordinate to the Tenant Lease. Any material change in the standard Tenant Lease form shall require Mortgagee's prior approval.

(ii) Execution of Tenant Leases. Except as set forth herein, Mortgagor shall not execute any Tenant Lease or any amendment or modification with respect thereto without Mortgagee's prior written approval. Mortgagee shall be deemed to have approved (A) any Tenant Lease covering less than 1,500 square feet of gross leasable area and for a term of five years or less (including any renewal options) and (B) any Tenant Lease or any amendment or modification with respect thereto covering 1,500 or more square feet of gross leasable area which has been executed by Mortgagor on the then currently approved standard lease form with only immaterial variations therefrom and which provides for then market rent and terms, provided such Tenant Lease, amendment or modification is submitted to Mortgagee for its review (but not approval) no later than ten (10) days after the execution thereof; and provided further, that in the case of a Tenant Lease, such Tenant Lease is entered into with a creditworthy tenant. For purposes of the preceding sentence, "market rent and terms" shall mean the total rate of rent, including all fixed, percentage and/or indexed rental adjustments and rental adjustments or contributions for taxes and expenses (including without limitation common area maintenance changes) for the Improvements, and concessions, rent abatements and tenant improvement allowances which landlords in the Chicago, Illinois metropolitan area are offering to tenants for similar space in properties comparable to the Premises under leases with lease terms similar to and commencing on or about the commencement date of the Tenant Lease in question. Any Tenant Lease covering more than Twenty Percent (20%) of the net rentable area of the Improvements or with a term of more than five years (including options to renew) and any other proposed Tenant Lease or any other amendment or modification with respect to a Tenant Lease which does not provide for then market rent and terms, is not on the then currently approved standard lease form or is not entered into with a creditworthy tenant shall be submitted to Mortgagee for its prior approval, which shall not be unreasonably withheld. Mortgagee shall respond to any request made by Mortgagor for approval of a proposed Tenant Lease, amendment or modification within ten (10) days after receipt by Mortgagee of Mortgagor's notice making such request, which notice shall be accompanied by a copy of the proposed Tenant Lease, amendment or modification and such additional information as Mortgagee shall reasonably request regarding the proposed Tenant Lease, amendment or modification, the proposed tenant thereunder and any proposed guarantor thereunder. If Mortgagee fails to notify Mortgagor of the Mortgagee's approval or disapproval of the proposed Tenant Lease, amendment or modification within said ten (10) day period, Mortgagee shall be deemed to have approved the proposed Tenant Lease, amendment or modification in question. In the event that Mortgagee does not approve a proposed Tenant Lease, amendment or modification, it shall notify Mortgagor in writing of such decision, which writing shall specify the reasons why the proposed Tenant Lease, amendment or modification, as the case may be, is not approved.

3835279

(d) Termination, Surrender or Assignment of Tenant Leases. Without the prior written consent of Mortgagee (which

UNOFFICIAL COPY

Property of Cook County Clerk's Office

shall in each instance not be unreasonably withheld or delayed), Mortgagor shall not terminate or permit the termination of any Tenant Lease, accept the surrender of all or any portion of the space demised under any Tenant Lease prior to the end of the term thereof or accept or permit the assignment by the tenant of any Tenant Lease unless (i) such termination, surrender or assignment is permitted under the terms of a Tenant Lease entered into prior to the date hereof which is either specifically approved or deemed approved by Mortgagee or (ii) the prior written consent of Mortgagee is obtained.

SECTION 3.03. No Merger. (a) Upon Vesting of Landlord's and Tenant's Estates. If both the landlord's and the tenant's interest under any Tenant Lease which constitutes a part of the Premises shall at any time become vested in any one person, the lien of this Mortgage and the Assignment of Rents, Leases, Income and Profits referred to in Section 3.01 shall not be destroyed or terminated by the application of the doctrine of merger and, in such event, Mortgagee shall continue to have and enjoy all of the rights and privileges of Mortgagee hereunder as to each separate estate.

(b) Upon Foreclosure. Upon the foreclosure of this Mortgage, any Tenant Leases then existing shall not be destroyed or terminated by application of the doctrine of merger or as a matter of law or as a result of such foreclosure unless Mortgagee or any purchaser at a foreclosure sale shall, subject to any subordination, non-disturbance and attornment agreement executed by Mortgagee, so elect by notice to the tenant in question. In the event of the enforcement by Mortgagee of the remedies provided for by law or by this Mortgage, the lessee under each lease of all or any part of the Premises shall, at the option of the Mortgagee, attorn to any person succeeding to the interest of Mortgagor as a result of such enforcement and shall recognize each successor in interest as landlord under such lease without change in the terms or other provisions thereof, provided, however, that said successor in interest shall not be bound by any payment of rent or additional rent for more than one month in advance or any amendment or modification to any lease made without the prior consent of Mortgagee or said successor in interest. Each lessee, upon request by Mortgagee or any such successor in interest, shall execute and deliver an instrument or instruments confirming such attornment, and Mortgagor shall cause each such lease or all or any part of the Premises to contain a covenant of the lessee's part evidencing its agreement to such attornment.

ARTICLE IV

Additional Advances; Expenses; Indemnity

SECTION 4.01. Additional Advances and Disbursements. Subject to Mortgagor's rights under Section 2.06(d), Mortgagor agrees that, if Mortgagor shall default, beyond any applicable grace period, if any, in any of its obligations hereunder to pay any amount or to perform any action, including, without limitation, its obligations under Section 2.07 to pay Impositions and under Section 2.03 to procure, maintain and pay premiums on the insurance policies referred to therein, then Mortgagee shall have the right, but not the obligation, in Mortgagor's name or in its own name, upon notice to Mortgagor, to advance all or any part of such amounts or to perform any or all such actions, and, for such

UNOFFICIAL COPY

Property of Cook County Clerk's Office

purpose, Mortgagor expressly grants to Mortgagee the right, in addition and without prejudice to any other rights or remedies hereunder and subject to the rights of tenants under any non-disturbance agreements which Mortgagee may have entered into with such tenants, to enter upon (such entry, except in the case of an emergency, upon reasonable advance notice to Mortgagor) and take possession of the Premises to such extent and as often as Mortgagee may deem necessary or desirable to prevent or remedy any such Event of Default. No such advance or performance shall be deemed to have cured such Event of Default by Mortgagor. All sums advanced and all expenses incurred by Mortgagee in connection with such advances or actions and all other sums advanced or expenses incurred by Mortgagee hereunder or under applicable law (whether required or optional and whether indemnified hereunder or not) shall be demand obligations owing by Mortgagor to Mortgagee and shall bear interest, from the date paid or incurred until paid, at an interest rate equal to the Default Rate (as defined in Section 6.08). All such amounts advanced or incurred, and all such interest thereon shall be part of the Indebtedness and shall be secured by this Mortgage. Mortgagee, upon making any such advance, shall be subrogated to all of the rights of the person receiving such advance.

SECTION 4.02. Other Expenses. (a) Mortgagor will pay or, within fifteen (15) days after demand, reimburse Mortgagee for the payment of, all appraisal fees, engineering fees, recording and filing fees, taxes (except as otherwise provided in Section 2.07), brokerage fees and commissions, abstract fees, title insurance premiums and fees, survey costs, Uniform, Commercial Code search fees, escrow fees, trustee's fees, attorneys fees and disbursements and all other costs and expenses of every character incurred by Mortgagee in connection with the closing of the transactions contemplated hereunder or under the other Loan Documents, or otherwise attributed or chargeable to Mortgagor as owner of the Premises; provided, however, that, if Mortgagee shall desire an appraisal of the Land and/or the Improvements and there shall be no Event of Default then continuing hereunder, Mortgagee shall accept in lieu thereof, such an appraisal, dated not more, than twelve (12) months prior to the date of Mortgagee's request therefor, as shall have been prepared for Mortgagor by an appraiser reasonably satisfactory to Mortgagee. Each party represents and warrants to the other that it has dealt with no brokers, agents or finders (except that Mortgagor has contracted with, and has fully discharged its obligations to, Nahal Financial Services, Inc.) in connection with the transactions contemplated by this Mortgage and the other Loan Documents. Each party hereby agrees to indemnify, defend and hold the other party harmless against any and all loss, damage, claim, commission or expense of any nature whatsoever (including without limitation reasonable attorneys fees and disbursements) arising out of any claim by any broker, agent or finder that he acted on behalf of the indemnifying party in connection with this transaction. In addition, Mortgagor hereby agrees to indemnify, defend and hold Mortgagee harmless against any and all loss, damage or expense of any nature whatsoever (including without limitation reasonable attorneys fees and disbursements) arising out of any claim for payment of any commissions related to executed Tenant Leases.

(b) Mortgagor will pay or, within fifteen (15) days after demand, reimburse Mortgagee for the payment of, any reasonable costs or expenses (including reasonable attorneys fees

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

and disbursements, whether such fees and disbursements are incurred prior to the institution of legal proceedings or thereafter and whether at the trial or appellate level, in pre and post-judgment proceedings, in bankruptcy or otherwise) incurred or expended in connection with or incidental to (i) any default or Event of Default by Mortgagor hereunder or (ii) the exercise or enforcement by or on behalf of Mortgagee of any of Mortgagee's rights or remedies or Mortgagor's obligations under this Mortgage, the Note or any other Loan Document, including the enforcement, compromise or settlement of this Mortgage or the Indebtedness or the defense or assertion of the rights and claims of Mortgagee hereunder in respect thereof, by litigation or otherwise.

SECTION 4.03. Indemnity. (a) Mortgagor agrees to indemnify and hold harmless Mortgagee from and against any and all losses, liabilities, suits, obligations, fines, damages, judgments, penalties, claims, charges, costs and expenses (including reasonable attorneys fees and disbursements) which may be imposed on, incurred by or asserted against Mortgagee by reason or on account of, or in connection with (i) any default or Event of Default by Mortgagor hereunder or under the Note or any other Loan Document, (ii) Mortgagee's exercise of any of its rights and remedies, or the performance of any of its duties, hereunder or under the Note or any other Loan Document, (iii) construction, reconstruction or alteration of the Improvements, (iv) any negligence or willful misconduct of Mortgagor, any lessee of the Premises, or any of their respective agents, contractors, subcontractors, servants, employees, licensees or invitees, (v) any accident, injury, death or damage to any person or property occurring in, on or about the Premises or any street, drive, sidewalk, curb or passageway adjacent thereto or (vi) any other transaction arising out of or in any way connected with the Premises, this Mortgage, the Note or any other Loan Document, except if caused by the act or omission of the indemnified person. Any amount payable to Mortgagee under this Section 4.03 shall be payable within fifteen (15) days after Mortgagee's demand therefor, shall be part of the Indebtedness and shall be secured by this Mortgage; provided that Mortgagor shall have no obligation to indemnify Mortgagee in the case of any action or proceeding brought by Mortgagee against Mortgagor if Mortgagor prevails in such action or proceeding.

(b) Mortgagor's obligations under this Section 4.03 shall not be affected by the absence or unavailability of insurance covering the same or by the failure or refusal by any insurance carrier to perform any obligation on its part under any such policy of insurance. If any claim, action or proceeding is made or brought against Mortgagee which is subject to the indemnity set forth in this Section 4.03, Mortgagor shall resist or defend against the same, if necessary in the name of Mortgagee, by attorneys for Mortgagor's insurance carrier (if the same is covered by insurance) or otherwise by attorneys designated by Mortgagor and approved by Mortgagee, such approval not to be unreasonably withheld. Notwithstanding the foregoing, Mortgagee, in Mortgagee's discretion, may, upon the happening of any Event of Default hereunder, including, without limitation, Mortgagor's failure to carry out its obligations under this Section, engage its own attorneys to resist or defend, or assist therein, and Mortgagor shall pay, or, within fifteen (15) days after demand, reimburse Mortgagee for the payment of, the fees and disbursements of said attorneys.

3835273

UNOFFICIAL COPY

Property of Cook County Clerk's Office

ARTICLE V

Sale or Transfer of the Land, the Improvements or the Equipment or Interests in Mortgagor

SECTION 5.01. Continuous Ownership. Mortgagor acknowledges that the continued ownership of the Land, the Improvements and the Equipment by Mortgagor is of a material nature to the transaction and Mortgagee's agreement to create the Indebtedness. Mortgagor agrees that, except as otherwise provided herein or in any other Loan Document, Mortgagor will not sell, grant, convey, assign, grant an option, lease (other than by a Tenant Lease permitted by, or not prohibited by, Section 3.02) or otherwise transfer or mortgage, hypothecate, pledge or otherwise encumber (collectively, "Transfers"), or permit to be transferred, the Land, the Improvements or the Equipment or any portion thereof, or any legal, beneficial or equitable interest therein or any right to receive income in respect thereof, by operation of law or otherwise, without Mortgagee's prior written consent. If the Mortgagor is a trustee, then (except as provided in the last sentence of Section 6.01(i)), if any beneficiary of the Mortgagor shall without Mortgagee's prior written consent create, effect or consent to, or suffer or permit, any sale, assignment, transfer, lien, pledge, mortgage, security interest or other encumbrance or alienation of such beneficiary's beneficial interest in Mortgagor, a prohibited Transfer shall be deemed to have occurred. The provisions of this Section shall apply to each and every Transfer of all or any portion of the Land, the Improvements or the Equipment or any legal, beneficial or equitable interest therein, except for the making of a Tenant Lease as herein permitted, regardless of whether or not mortgagee has consented to, or waived by its action or inaction, its rights hereunder with respect to any previous Transfer of all or any portion of the Land, the Improvements or the Equipment or any legal, beneficial or equitable interest therein. Except as otherwise provided herein or in any other Loan Document, in the event that Mortgagor shall Transfer the Land, the Improvements, the Equipment, or any portion thereof, or any legal, beneficial or equitable interest therein or any right, to receive income in respect thereof, without Mortgagee's prior written consent, Mortgagee may elect to declare the Indebtedness, together with any other sums secured hereby, immediately due and payable, which amounts shall be due and payable with prepayment premium set forth in the Note. Mortgagee may withhold its consent to any proposed Transfer for no reason or any reason, including, without limitation, the failure of the prospective transferee of the Land, the Improvements or the Equipment to reach an agreement in writing with Mortgagee increasing the interest payable on the Indebtedness to such rate as Mortgagee shall request. For purposes of this Section 5.01, "Equipment" shall not include any Equipment which is replaced in accordance with, or not required to be replaced by the terms of, Section 2.02(b).

3835279

SECTION 5.02. THIS SECTION HAS BEEN INTENTIONALLY OMITTED.

SECTION 5.03. THIS SECTION HAS BEEN INTENTIONALLY OMITTED.

SECTION 5.04. Management. Mortgagor shall be responsible for providing or causing to be provided all services neces-

UNOFFICIAL COPY

Property of Cook County Clerk's Office

sary, proper, desirable and appropriate for the successful leasing, operating and management of the Premises as an office building, and shall perform or cause such management services to be performed as hereinafter set forth (the person performing such services being herein called in such capacity, the "Manager"). For so long as the Note is outstanding or any portion of the Indebtedness remains due and unpaid, Mortgagor shall perform the services of Manager. Mortgagor may substitute another as Manager in its stead without Mortgagee's prior written consent, provided that the new manager shall be a professional management company of recognized standing, experience and capability as a manager of first-class properties comparable to the Premises in the Chicago, Illinois, metropolitan area and which has under management not less than 500,000 square feet of gross leasable area in the United States (exclusive of the Premises and any space occupied by the proposed manager and affiliates thereof). If an Event of Default shall have occurred, Mortgagee shall have the right to select a new Manager, without the consent of Mortgagor.

SECTION 5.05. Release. Mortgagee shall be entitled, in its sole discretion, to release any portion of the Premises for such consideration as Mortgagee may require without, as to the remainder of the Premises, in any way impairing or affecting the lien or priority of this Mortgage or improving the position of any subordinate lienholder with respect thereto, except to the extent that the Indebtedness shall have been reduced by the actual monetary consideration, if any, received by Mortgagee for such release, and Mortgagee may accept by assignment, pledge or otherwise any other property in place thereof as Mortgagee may require without being accountable for so doing to any other lienor.

ARTICLE VI

Defaults and Remedies

SECTION 6.01. Events of Default. The term "Event of Default", as used in this Mortgage, shall mean the occurrence of any of the following events:

(a) Any representation or warranty made by Mortgagor in or in connection with this Mortgage or the other Loan Documents, or the Loan Commitment, or the borrowings hereunder or thereunder or any statement or representation made in any schedule, financial statement, document or other instrument furnished by Mortgagor to Mortgagee in connection with the Loan shall prove to have been false or misleading in any material respect when made or delivered or when deemed made in accordance with the terms of the applicable Loan Document, and the damage sustained by Mortgagee by reason of such misrepresentation or breach of warranty is not cured to Mortgagee's satisfaction within fifteen (15) days after Mortgagee gives Mortgagor written notice thereof.

(b) Any default in the payment of the principal on the Note when and as of the time the same becomes due and payable, whether at the maturity or due date thereof or by acceleration thereof or otherwise, and the failure to cure such default within fifteen (15) days after said due date.

(c) Any default in the payment of (i) the interest on the Note or (ii) any other fee or amount payable (including

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

any late payment penalty) under this Mortgage or any other Loan Document, when and as of the time the same becomes due and payable, whether at the maturity or due date thereof or by acceleration thereof or otherwise, which default continues for fifteen (15) days after said due date.

(d) Any default in the due observance or performance of any covenant on the part of or to be performed by Mortgagor pursuant to Section 2.07 hereof, and such default shall have continued for a period of fifteen (15) days after written notice specifying such default shall have been given to Mortgagor by Mortgagee.

(e) Any default in the due observance or performance of any term, covenant or condition on the part of or to be performed by Mortgagor pursuant to any Loan Document, other than as referred to in paragraphs (b), (c) and (d) above and paragraphs (f), (g), (h), (i), (j), (k), (l), and (m) below, and such default shall have continued for a period of fifteen (15) days after written notice specifying such default shall have been given to Mortgagor by Mortgagee or, if such default cannot be cured solely by the payment of money and cannot with reasonable diligence be cured within fifteen (15) days after notice, then it shall be an Event of Default only if Mortgagor has failed to commence to cure such default within such fifteen (15) day period, or thereafter fails to diligently continue to attempt to cure the same, or if the default shall be continuing for more than sixty (60) days after written notice aforesaid.

(f) Mortgagor shall (i) voluntarily commence any case or proceeding under any Federal or state bankruptcy, insolvency or similar law, (ii) consent to the institution of, or fail to controvert in a timely appropriate manner, any such case or proceeding, (iii) apply for or consent to the appointment of a receiver, trustee, custodian, sequestrator or similar official for Mortgagor, or for a substantial part of its property, (iv) file an answer admitting the material allegations of a complaint filed against it in any such case or proceeding, (v) make a general assignment for the benefit of creditors, (vi) become unable or admit in writing the inability, or fail generally, to pay its debts as they become due or (vii) take action for the purpose of effecting any of the foregoing.

(g) An involuntary case or proceeding shall be commenced seeking (i) relief in respect of Mortgagor or of a substantial part of its property under any Federal or state bankruptcy, insolvency or similar law, (ii) the appointment of a receiver, trustee, custodian, sequestrator or similar official for Mortgagor or a substantial part of its property or (iii) the winding-up or liquidation of Mortgagor which shall not be dismissed within thirty (30) days after the same shall have been commenced.

(h) Any material default by Mortgagor under or with respect to any REA, Tenant Lease or any agreement or instrument which constitutes or evidences a Permitted Exception, and which default is not cured within the time period provided in such document.

UNOFFICIAL COPY

Property of Cook County Clerk's Office

(i) Except as permitted herein or in any other Loan Document, the Premises, or any portion thereof, or any legal, beneficial or equitable interest therein, shall be Transferred (including by way of security for any extension of credit) without Mortgagee's consent; provided that in the case of any Transfer by way of security for an extension of credit, Mortgagee's consent shall not be unreasonably withheld if: (i) the lien or liens securing such extension of credit shall in all respects be subordinate to Mortgagee's liens under the Loan Documents and such subordination, and the continuing priority of Mortgagee's liens, is documented in form and substance reasonably satisfactory to Mortgagee; (ii) Mortgagee shall be reimbursed for all costs and expenses (including reasonable attorney's fees) incurred by Mortgagee; (iii) the total indebtedness which is secured by the Premises, or any portion thereof, or any legal, equitable or beneficial interest therein, including the then-outstanding balance of the Indebtedness, shall not exceed Seventy-Five Percent (75%) of the then-M.A.I. appraised value of the Premises; and (iv) the Transfer does not in any other way result in a material increase in Mortgagee's risks attendant to the Loan. Notwithstanding the foregoing, Mortgage shall not withhold its consent to a transfer by Beneficiary of his interest in the Trust to: (i) his spouse or his children; (ii) a trust for the benefit of himself, his spouse and/or his children; or (iii) an entity all of the interests in which are owned legally and beneficially by any person or entity described in (i) or (ii), immediately above (collectively, the "Permitted Transferees"); provided, however, that (A) there shall be no further Transfer by a Permitted Transferee without the consent of Mortgagee; (B) Mortgagee shall be reimbursed for all costs and expenses (including reasonable attorney's fees) incurred by Mortgagee; (C) the Transfer is documented in form and substance reasonably satisfactory to Mortgagee; and (D) the Transfer does not in any other way result in a material increase in Mortgagee's risks attendant to the Loan.

(j) The abandonment by Mortgagor of the Premises.

(k) Unless there shall be a judicial stay of enforcement in effect with respect thereto, the Premises shall be taken (other than as contemplated by Section 2.05), attached or sequestered on execution or other process of law in any action against Mortgagor.

(l) Mortgagor shall fail at any time to obtain, provide, maintain or keep in force the insurance policies required by Section 2.03 hereof or shall fail, for a period of fifteen (15) days after notice thereof, at any time to deliver to Mortgagor the insurance policies or certificates required by Section 2.03 hereof.

(m) Any claim of priority (except a claim based upon a Permitted Encumbrance) to this Mortgage or any other document or instrument securing the Indebtedness by title, lien or otherwise shall be consented to by Mortgagor or shall be upheld by any court of competent jurisdiction unless Mortgagor shall have appealed the same and, pending any such appeal, there shall be in effect a stay of any action to enforce such claim of priority.

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

SECTION 6.02. Remedies. If an Event of Default occurs and is continuing, Mortgagee may, in addition to any rights or remedies available to it under any of the Loan Documents, take such action, personally or by its agents or attorneys, and without notice, demand, presentment or protest (each and all of which are hereby waived by Mortgagor), as it deems necessary or advisable to protect and enforce its rights and remedies against Mortgagor and in and to the Premises, including without limitation the following actions, each of which, to the extent permitted by applicable law, may be pursued concurrently or otherwise, at such time and in such order as Mortgagee may determine, in its sole discretion, without impairing or otherwise affecting its other rights or remedies:

(a) Declare the entire balance of the Indebtedness (including the entire principal balance thereof, all accrued and unpaid interest, prepayment premiums and all other sums secured hereby) to be immediately due and payable, and upon any such declaration the entire unpaid balance of the Indebtedness shall become and be immediately due and payable;

(b) Institute a proceeding or proceedings for the complete foreclosure of this Mortgage under any applicable provision of law;

(c) Under or by virtue of judicial proceedings or of a judgment or decree of foreclosure and sale, sell the Premises, and all estate, right, title, interest, claim and demand of Mortgagor therein, and all rights of redemption (after sale) thereof, at one or more sales, as an entirety or in parcels, with such elements of real and/or personal property (and, to the extent permitted by applicable law, may elect to deem all of the Premises to be real property for purposes thereof), and at such time or place and upon such terms as Mortgagee may deem expedient, or as may be required by applicable law;

(d) Apply for the appointment of a receiver, custodian, trustee, liquidator or conservator of the Premises, to be invested with the fullest powers permitted under applicable law, as a matter of right and without regard to or the necessity to disprove the adequacy of the security of the Indebtedness or the solvency of Mortgagor or any other person liable for the payment of the Indebtedness, and Mortgagor and each other person so liable waives or shall be deemed to have waived such necessity and consents or shall be deemed to have consented to such appointment;

(e) Subject to the provisions and restrictions of any applicable law and after a judicial order or decree directing or permitting Mortgagee to take any such action and subject to the rights of any tenants pursuant to non-disturbance agreements into which Mortgagee has entered, enter upon the Premises, and exclude Mortgagor and its agents and servants wholly therefrom, without liability for trespass, damages or otherwise, and take possession of all books, records and accounts relating thereto, and Mortgagor agrees to surrender possession of the Premises and of such books, records and accounts to Mortgagee on demand if any Event of Default shall have occurred and be continuing; and having and holding the same may use, operate, manage, preserve, control and otherwise deal therewith and conduct the business thereof, either

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

personally or by its superintendents, managers, agents, servants, attorneys or receivers, without interference from Mortgagor; and upon each such entry and from time to time thereafter may, at the expense of Mortgagor and the Premises, without interference by Mortgagor and as Mortgagee may deem advisable, (i) maintain and restore the Premises, (ii) insure or reinsure the same, (iii) make all necessary or proper repairs, renewals, replacements, alterations, additions, betterments and improvements thereto and thereon, (iv) complete the construction of the Improvements and, in the course of such completion, may make such changes in the contemplated or completed Improvements as it may deem advisable, (v) in every such case in connection with the foregoing have the right to exercise all rights and powers of Mortgagor with respect to the Premises, either in Mortgagor's name or otherwise, including the right to make, cancel, enforce or modify Tenant Leases and subleases, obtain and evict tenants and subtenants on such terms as Mortgagee shall deem advisable and to take any actions described in subsection (f) of this Section:

(f) Subject to the provisions and restrictions of any applicable law, Mortgagee may, with or without the entrance upon or taking possession of the Premises, collect, receive, sue for and recover in its own name all Rents and cash collateral derived from the Premises, and after deducting therefrom all costs, expenses and liabilities of every character incurred by Mortgagee in collecting the same and in using, operating, managing, preserving and controlling the Premises, and otherwise in exercising Mortgagee's rights under subsection (e) of this Section, including all amounts necessary to pay Impositions, insurance premiums and other charges in connection with the Premises, as well as compensation for the services of Mortgagee and its respective attorneys, agents and employees, apply the remainder as provided in Section 6.05;

(g) Take all actions permitted under the Uniform Commercial Code of the State of Illinois;

(h) Terminate the employment of any Manager of the Premises; and

(i) Take any other action, or pursue any other right or remedy, as Mortgagee may have under applicable law, and Mortgagor does hereby grant the same to Mortgagee.

In the event that Mortgagee exercises any of the rights or remedies set forth in subsections (e) and (f) of this Section, Mortgagee shall not be deemed to have entered upon or taken possession of the Premises except upon the exercise of its option to do so, evidenced by its demand and overt act for such purpose, nor shall it be deemed a mortgagee in possession by reason of such entry or taking possession. Mortgagee shall not be liable to account for any action taken pursuant to any such exercise other than for Rents and other amounts actually received by it, nor liable for any loss sustained by Mortgagor resulting from any failure to let the Premises, or from any other act or omission of Mortgagee in connection therewith except to the extent such loss is caused by the gross negligence, willful misconduct or bad faith of Mortgagee. Mortgagor hereby consents to, ratifies and confirms

UNOFFICIAL COPY

Property of Cook County Clerk's Office

the exercise by Mortgagee of said rights and remedies, and appoints Mortgagee as its attorney-in-fact, which appointment shall be deemed to be coupled with an interest and is irrevocable, for such purposes.

SECTION 6.03. Expenses. In any suit to foreclose this Mortgage or enforce any other remedy of Mortgagee hereunder or under any other Loan Document, there shall be allowed and included as an addition to and a part of the Indebtedness in the decree for sale or other judgment or decree all expenditures and expenses which may be paid or incurred in connection with the exercise by Mortgagee of any of its rights and remedies provided or referred to in this Mortgage (including reasonable attorneys fees and disbursements), together with interest thereon at the Default Rate and the same shall be part of the Indebtedness and shall be secured by this Mortgage.

SECTION 6.04. Rights Pertaining to Sales. Subject to applicable requirements of law, the following provisions shall apply to any sale or sales of all or any portion of the Premises under or by virtue of this Article VI, made under or by virtue of judicial proceedings or of a judgment or decree of foreclosure and sale:

(a) Mortgagee may conduct any number of sales from time to time. The right to sell pursuant to this Section 6.04 shall not be exhausted by any one or more such sales as to any part of the Premises which shall not have been sold, nor by any sale which, is not completed or is defective in Mortgagee's opinion, until the Indebtedness shall have been paid in full.

(b) Any sale may be postponed or adjourned by public announcement at the time and place appointed for such sale or for such postponed or adjourned sale without further notice.

(c) After each sale, Mortgagee, or an officer of any court empowered to do so, shall execute and deliver to the purchaser or purchasers at such sale a good and sufficient instrument or instruments granting, conveying, assigning and transferring all right, title and interest of Mortgagor in and to the property and rights sold and shall receive the proceeds of said sale or sales and apply the same as herein provided. Mortgagee is hereby appointed the true and lawful attorney-in-fact of Mortgagor, which appointment is irrevocable and shall be deemed, to be coupled with an interest, in Mortgagor's name and stead, to make all necessary conveyances, assignments, transfers and deliveries of the property and rights so sold, and for that purpose Mortgagee may execute all necessary instruments of conveyance, assignment, transfer and delivery, and may substitute one or more persons with like power, Mortgagor hereby ratifying and confirming all that said attorney or such substitute or substitutes shall lawfully do by virtue thereof. Nevertheless, Mortgagor, if requested by Mortgagee, shall ratify and confirm any such sale or sales by executing and delivering to Mortgagee or such purchaser or purchasers, all such instruments as may be advisable, in Mortgagee's judgment, for the purposes as may be designated in such request.

(d) Any and all statements of fact or other recitals

UNOFFICIAL COPY

Property of Cook County Clerk's Office

made in any of the instruments referred to in subsection (c) of this Section given by Mortgagee as to nonpayment of the Indebtedness, or as to the occurrence of any Event of Default, or as to Mortgagee having declared all or any of the Indebtedness to be due and payable, or as to the request to sell, or as to notice of time, place and terms of sale and of the property or rights to be sold having been duly given, or as to any other act or thing having been duly done by Mortgagee, may be relied upon by third parties as prima facie evidence of the truth of the facts so stated and recited. Mortgagee may appoint or delegate any one or more persons as agent to perform any act or acts necessary or incident to any sale so held, including the posting of notices and the conduct of sale, but in the name and on behalf of Mortgagee.

(e) The receipt of Mortgagee for the purchase money paid at any such sale, or the receipt of any other person authorized to receive the same, shall be sufficient discharge therefor to any purchaser of any property or rights sold as aforesaid, and no such purchaser, or its representatives, grantees or assigns, after paying such purchase price and receiving such receipt, shall be bound to see to the application of such purchase price or any part thereof upon or for any trust or purpose of this Mortgage or, in any manner whatsoever, be answerable for any loss, misapplication or non-application of any such purchase money, or part thereof, or be bound to inquire as to the authorization, necessity, expediency or regularity of any such sale.

(f) Any such sale or sales shall operate to divest all of the estate, right, title, interest, claim and demand whatsoever, whether at law or in equity, of Mortgagor in and to the properties and rights so sold, and shall be a perpetual bar both at law or in equity against Mortgagor and any and all persons claiming or who may claim the same, or any part thereof, by, through or under Mortgagor to the fullest extent permitted by applicable law.

(g) Upon any such sale or sales, Mortgagee may bid for and acquire the Premises and, in lieu of paying cash therefor, may make settlement for the purchase price by crediting against the Indebtedness the amount of the bid made therefor, after deducting therefrom the expenses of the sale, the cost of any enforcement proceeding hereunder and any other sums which Mortgagee is authorized to deduct under the terms hereof, to the extent necessary to satisfy such bid.

(h) In the event that Mortgagor, or any person claiming by, through or under Mortgagor, shall transfer or refuse or fail to surrender possession of the Premises after any sale thereof, then Mortgagor or such person shall be deemed a tenant at sufferance of the purchaser at such sale, subject to eviction by means of forcible entry and detainer proceedings, or subject to any other right or remedy available hereunder or under applicable law.

(i) Upon any such sale, it shall not be necessary for Mortgagee or any public officer acting under execution or order of court to have present or constructively in its possession any of the Premises.

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

SECTION 6.05. Application of Proceeds Except as herein expressly provided to the contrary, the purchase money, proceeds or avails of any sale referred to in Section 6.04, together with any other sums which may be held by Mortgagee hereunder, whether under the provisions of this Article VI or otherwise, shall be applied as follows:

First: To the payment of the costs, and expenses of any such sale, including attorneys fees and disbursements, and of any judicial proceeding wherein the same may be made, and of all expenses, liabilities and advances made or incurred by Mortgagee hereunder, together with interest thereon at the Default Rate, and all taxes, assessments and other charges, except any taxes, assessments or other charges subject to which the Premises shall have been sold.

Second: To the payment in full of the Indebtedness (including principal, interest, premium, penalty and fees) in such order as Mortgagee may elect.

Third: To the extent permitted by applicable law, to be set aside by Mortgagee as adequate security in its reasonable judgment for the payment of sums which would have been paid to Mortgagee under clauses First and Second above, but which sums are not yet due and payable or liquidated.

Fourth: To the payment of the balance, if any, to whomsoever may be lawfully entitled to receive the same.

SECTION 6.06. Additional Provisions as to Remedies.

(a) To the extent permitted by applicable law, no right or remedy herein conferred upon or reserved to Mortgagee is intended to be exclusive of any other right or remedy, and each and every such right or remedy shall be cumulative and continuing, shall be in addition to every other right or remedy given hereunder, or under the Note or any Loan Document or now or hereafter existing at law or in equity, and may be exercised from time to time and as often as may be deemed expedient by Mortgagee.

(b) No delay or omission by Mortgagee in exercising any right or remedy hereunder during the continuance of an Event of Default shall impair such exercise or be construed to be a waiver of any such Event of Default or an acquiescence therein.

(c) The failure, refusal or waiver by Mortgagee of its right to assert any right or remedy hereunder during the continuance of an Event of Default or other occurrence shall not be construed as waiving such right or remedy upon any other or subsequent Event of Default or other occurrence.

(d) Mortgagee shall not have any obligation to pursue any rights or remedies it may have under any other agreement prior to pursuing its rights or remedies hereunder or under the Note or any other Loan Document.

(e) No recovery of any judgment by Mortgagee and no levy or an execution upon the Premises or any other property of Mortgagor shall affect, in any manner or to any extent, the lien of this Mortgage upon the Premises, or any liens, rights, powers

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

or remedies of Mortgagee hereunder, and such liens, rights, powers and remedies shall continue unimpaired as before.

(f) Mortgagee may resort to any security given by this Mortgage or any other security now given or hereafter existing to secure the Indebtedness, in whole or in part, in such portions and in such order as Mortgagee may deem advisable, and no such action shall be construed as a waiver of any of the liens, rights or benefits granted hereunder.

(g) Acceptance of any payment after the occurrence of an Event of Default shall not be deemed a waiver or a cure of such Event of Default except to the extent such payment cures an Event of Default set forth in Section 6.01(b) or Section 6.01(c) hereof, and acceptance of any payment less than any amount then due shall be deemed an acceptance on account only.

(h) Nothing in this Mortgage, the Note or any other Loan Document shall affect the obligations of Mortgagor to pay the indebtedness in the manner and at the time and place herein or therein respectively expressed.

(i) In the event that Mortgagee shall have proceeded to enforce any right or remedy hereunder by foreclosure, entry or otherwise, and such proceeding shall be discontinued, abandoned or determined adversely for any reason, then Mortgagor and Mortgagee shall be restored to their former positions and rights hereunder with respect to the Premises, subject to the lien hereof.

SECTION 6.07. Waiver of Rights and Defenses. To the fullest extent Mortgagor may lawfully do so, Mortgagor agrees with Mortgagee as follows:

(a) Mortgagor will not at any time, insist on, plead, claim or take the benefit or advantage of any statute or rule of law now or hereafter in force providing for any appraisal, valuation, extension, moratorium or redemption at or after sale and Mortgagor, for itself and its heirs, devisees, representatives, successors and assigns, and for any and all persons ever claiming an interest in the Premises (other than Mortgagee), hereby waives and releases all rights of redemption at or after sale, valuation, appraisal, notice of intention to mature or declare due the whole of the Indebtedness, and all rights to a marshaling of the assets of Mortgagor, including the Premises, or to a sale in inverse order of alienation, in the event of foreclosure of the liens and security interests created hereunder.

(b) Mortgagor shall not have or assert any right under any statute or rule of law pertaining to any of the matters set forth in subsection (a) of this Section, to the administration of estates of decedents or to any other matters whatsoever to defeat, reduce or affect any of the rights or remedies of Mortgagee hereunder, including the rights of Mortgagee to the payment of the Indebtedness out of the proceeds of sale of the Premises in preference to any other person. All rights and benefits under any by virtue of the homestead exemption laws of the State of Illinois are expressly released and waived.

(c) If any statute or rule of law referred to in this

UNOFFICIAL COPY

Property of Cook County Clerk's Office

Section and now in force, of which Mortgagor or any of its representatives, successors or assigns and such other persons claiming any interest in the Premises might take advantage despite this Section, shall hereafter be repealed or cease to be in force, such statute or rule of law shall not thereafter be deemed to preclude the application of this Section.

(d) Mortgagor shall not be relieved of its obligation to pay the Indebtedness at the time and in the manner provided herein and in the Note or any other Loan Document, nor shall the lien or priority of this Mortgage or any other Loan Document be impaired by any of the following actions, non-actions or indulgences by Mortgagee:

(i) any failure or refusal by Mortgagee to comply with any request by Mortgagor (A) to consent to any action by Mortgagor or (B) to take any action to foreclose this Mortgage or otherwise enforce any of the provisions of any Loan Document;

(ii) any release, regardless of consideration, of the whole or any part of the Premises or any other security for the Indebtedness, or any person liable for payment of the Indebtedness;

(iii) any waiver by Mortgagee of compliance by Mortgagor with any provision of any Loan Document, or consent by Mortgagee to the performance by Mortgagor of any action which would otherwise be prohibited hereunder or thereunder, or to the failure by Mortgagor to take any action which would otherwise be required hereunder or thereunder; and

(iv) any agreement or stipulation between Mortgagee and Mortgagor renewing, extending or modifying the time of payment or the terms of this Mortgage, the Note or any other Loan Document (including a modification of any interest rate), and in any such event Mortgagor shall continue to be obligated to pay the Indebtedness at the time and in the manner provided herein and in the Note and Loan Documents, as so renewed, extended or modified, unless expressly released and discharged by Mortgagee.

(e) Regardless of consideration, and without the necessity for any notice to or consent by the holder of any subordinate lien, encumbrance, right, title or interest in or to the Premises, Mortgagee may release any person at any time liable for the payment of the Indebtedness or any portion thereof or any part of the security held for the Indebtedness and may extend the time of payment or otherwise modify the terms of this Mortgage, the Note and/or any Loan Document, including, without limitation, a modification of the interest rate payable on the principal balance of the Note, without in any manner impairing or affecting this Mortgage or the lien thereof or the priority of this Mortgage, as so extended and modified, as security for the Indebtedness over any such subordinate lien, encumbrance, right, title or interest. Mortgagee may resort for the payment of the Indebtedness to any other security held by Mortgagee in such order and manner as Mortgagee, in its discretion, may elect. Subject to

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

Section 9.12, Mortgagee may take action to enforce any covenant hereof or of the Note or any other Loan Document without prejudice to the right of Mortgagee thereafter to foreclose this Mortgage. Mortgagee shall not be limited exclusively to the rights and remedies herein stated but shall be entitled to every additional right and remedy now or hereafter afforded by law or equity. The rights of Mortgagee under this Mortgage shall be separate, distinct and cumulative and none shall be given effect to the exclusion of the others. No act of Mortgagee shall be construed as an election to proceed under any one provision herein to the exclusion of any other provision.

SECTION 6.08. Interest After Default. Upon the occurrence of an Event of Default, any Indebtedness then due and owing (including interest to the extent then permitted by applicable law) shall bear interest hereunder at the "Default Rate" which is specified in the Note. Such interest shall be added to and become a part of the Indebtedness and shall be secured hereby.

ARTICLE VII

Defeasance

If Mortgagor shall well and truly pay all of the Indebtedness at the time or times and in the manner as the same becomes due and payable, and if all of the covenants, conditions and provisions set forth in the Loan Documents are performed and observed by Mortgagor, then all rights and obligations hereunder (except for the rights and obligations set forth in Section 1.02 [Hazardous Substances] and Section 1.03 [Indemnity] hereof) shall terminate, the estate hereby granted shall cease, be terminated and be void and the Premises shall become wholly released and cleared of the liens, security interests, conveyances and assignments evidenced hereby, at Mortgagor's sole cost and expense. In such event, Mortgagee, at the request of Mortgagor, shall promptly deliver to Mortgagor, in recordable form, such documents as shall be necessary to release the Premises from the liens, security interests, conveyances and assignments evidenced hereby.

ARTICLE VIII

Security Agreement

SECTION 8.01. Grant of Security Interest. This Mortgage is a security agreement within the meaning of the Uniform Commercial Code of the State of Illinois with respect to all fixtures, equipment and personal property constituting part of the Premises, as set forth in detail in EXHIBIT C hereto, and all leases, contracts and agreements and general intangibles pertaining to the Premises as to which the creation and perfection of a security interest therein are subject to such Uniform Commercial Code (the "Collateral") and is also a mortgage as to those portions of the Premises that are classified as real property. Mortgagor hereby grants to Mortgagee a security interest in and to the Collateral to secure the payment of the Note. Any completely executed counterpart of this instrument may be filed as a mortgage on real property or fixtures, or as a security agreement or financing statement or as both. The address of Mortgagor, as debtor, and the address of Mortgagee, as secured

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

party, are set forth in Section 9.04 of this Mortgage.

SECTION 8.02. Financing Statements. Mortgagor shall cause all financing and continuation statements and other instruments with respect to the Collateral at all times to be kept recorded, filed or registered in such manner and in such places as may be required by law fully to evidence, perfect and secure the interests of Mortgagee in the Collateral, and shall pay all filing fees in connection therewith.

SECTION 8.03. Multiple Remedies. Upon the occurrence and during the continuance of an Event of Default, Mortgagee, pursuant to Section 9-501(4) of the Uniform Commercial Code, as such Section is currently constituted or may be hereafter amended, shall have the option of proceeding as to both real and personal property in accordance with its rights and remedies in respect of the real property as an alternative to proceeding in accordance with the default provisions of the Uniform Commercial Code of the State of Illinois.

SECTION 8.04. Waiver of Rights. To the extent permitted under applicable law, Mortgagor waives all rights of redemption and all other rights and remedies of a debtor under the Uniform Commercial Code of the State of Illinois and all formalities prescribed by law relative to the sale or disposition of the Collateral after the occurrence and during the continuance of an Event of Default hereunder and to all other rights and remedies of Mortgagor with respect thereto. In exercising its rights to take possession of the Collateral upon the occurrence and during the continuance of an Event of Default hereunder, Mortgagee may enter upon any part of the Premises without being guilty of trespass or any wrongdoing, and without liability for damages thereby occasioned except for its gross negligence or willful misconduct. To the extent any notice of sale or other disposition of the Collateral is required and cannot be waived, in the event Mortgagee elects to proceed with respect to the Collateral separately from the real property, Mortgagee shall give at least ten (10) days notice of the sale of the Collateral. All recitals in any instrument of assignment or any other instrument executed by Mortgagee incident to any sale, transfer, assignment, lease or other disposition or utilization of the Collateral or any part thereof shall be full proof of the matter stated therein and no other proof shall be required to establish full legal propriety of the sale or other action taken by Mortgagee or of any fact or condition incident thereto, all of which shall be deemed conclusively to have been performed or to have occurred.

SECTION 8.05. Expenses of Disposition of Collateral. Mortgagor shall reimburse Mortgagee, on demand, for all reasonable expenses of retaking, holding, preparing for sale, lease or other use or disposition, selling, leasing or otherwise using or disposing of the Collateral which are incurred or paid by, Mortgagee, including, without limitation, all attorneys fees, legal expenses and costs, and all such expenses shall be added to the Indebtedness and shall be secured hereby.

ARTICLE IX

Additional Provisions

SECTION 9.01. Provisions as to Payments. (a) All pay-

UNOFFICIAL COPY

Property of Cook County Clerk's Office

ments of the Indebtedness shall be paid in such lawful money of the United States of America as shall be legal tender for payment of all debts, public and private, at the time of payment, shall be made in the manner expressly designated therefor or, if no such designation is made, at the address of Mortgagee indicated in Section 9.04, or at such other place as Mortgagee may designate from time to time upon not less than ten (10) days prior notice.

(b) If any part of the Indebtedness cannot lawfully be secured by this Mortgage, or if any part of the Premises cannot lawfully be subject to the lien and security interest hereof, to the full extent of said Indebtedness, then all payments made thereon shall be applied first in discharge of that portion thereof which is unsecured by this Mortgage.

(c) To the extent that any part of the Indebtedness is used to pay Indebtedness secured by any Permitted Encumbrance or other outstanding lien, security interest, charge or prior encumbrance against the Premises or to pay in whole or in part the purchase price therefor, in each case after the expiration of any period during which Mortgagor has the right to contest the same pursuant to the terms of this Mortgage, Mortgagee shall be subrogated to any and all rights, security interests and liens held by any owner or holder of the same, whether or not the same are released. In consideration of such payment by Mortgagee, Mortgagor hereby waives and releases all demands, defenses and causes of action for offsets and payments with respect to same.

(d) Any payment made under this Mortgage by any person at any time liable for the payment of the Indebtedness, or by any subsequent owner of the Premises, or by any other person whose interest in the Premises might be prejudiced in the event of a failure to make such payment, or by any partner, stockholder, officer or director thereof, shall be deemed, as between Mortgagee and all such persons, to have been made on behalf of all such persons.

SECTION 9.02. Usury Savings Clause. All agreements in this Mortgage, the Note and any other Loan Document are expressly limited so that in no contingency or event whatsoever, whether by reason of advancement or acceleration of maturity of the Indebtedness, or otherwise, shall the amount paid or agreed to be paid hereunder for the use, forbearance or detention of money exceed the highest lawful rate permitted under applicable usury law. If, from any circumstance whatsoever, fulfillment of any provision hereof, of the Note or of any other Loan Document, at the time performance of such provision shall be due, shall involve transcending the limit of validity prescribed by law, then, ipso facto, the obligation to be fulfilled shall be reduced to the limit of such validity and if, from any circumstance whatsoever, Mortgagee shall ever receive as interest an amount which would exceed the highest lawful rate, the receipt of such excess shall be deemed a mistake and shall be cancelled automatically or, if theretofore paid, such excess shall be credited against the principal amount of the Indebtedness to which the same may lawfully be credited, and any portion of such excess not capable of being so credited shall be rebated to Mortgagor.

SECTION 9.03. Separability. If any one or more of the provisions of this Mortgage, the Note or any other Loan Document shall be held to be invalid, illegal or unenforceable in any

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

0 3 8 3 5 2 7 9

respect, then such invalidity, illegality or unenforceability shall not affect any other provision hereof or thereof, and such provision shall be limited and construed as if such invalid, illegal or unenforceable provision were not contained herein or therein.

SECTION 9.04. Notices. All notices, requests, consents, demands, approvals and other communications provided for hereunder shall be in writing and given or served either personally, by telex, with an answerback confirmed or sent by registered or certified mail, postage prepaid, return receipt requested, or by a nationally recognized overnight courier service addressed in each case as follows:

To Mortgagee:

MACCABEES LIFE INSURANCE COMPANY
25800 Northwestern Highway
Southfield, Michigan 48037
Attention: Stephen A. Rozich

with a copy to, in the case of notice of other than approvals or routine administrative matters:

Levenfeld, Eisenberg, Janger,
Glassberg, Samotny & Halper
33 West Monroe Street
21st Floor
Chicago, Illinois 60603
Attention: Michael J. Tuchman, Esq.

To Mortgagor:

Salvatore Bonanno
911 East Touhy Avenue
Des Plaines, Illinois 60018

with a copy to, in the case of notice of other than approvals or routine administrative matters:

Ashcraft & Ashcraft
200 East Randolph Drive
Suite 7750
Chicago, Illinois 60601
Attention: Peter J. Miller

Either party may, by like notice, at any time and from time to time, designate a different address to which notices shall be sent. The first to occur of the date of execution of return receipt or five days after date of mailing by certified or registered mail shall constitute delivery of notice by mail. The date on which personal delivery with receipt acknowledged, telex with answerback confirmed, facsimile transmission or courier delivery with receipt acknowledged is made shall constitute the date of delivery by such means.

SECTION 9.05. Right to Deal. In the event that ownership of the Premises becomes vested in a person other than Mortgagor, Mortgagee may, without notice to Mortgagor, deal with

UNOFFICIAL COPY

Property of Cook County Clerk's Office

such successor or successors in interest with reference to this Mortgage or the Indebtedness in the same manner as with Mortgagor, without in any way being deemed a consent to such vesting.

SECTION 9.06. No Merger. In the event that Mortgagee should acquire an additional interest in or to the Premises, this Mortgage and the lien thereof shall not merge in the fee simple title to the Premises unless a contrary intent is manifested by Mortgagee as evidenced by an express statement to that effect by Mortgagee in a document duly recorded.

SECTION 9.07. Applicable Law. This Mortgage shall be governed by, and construed and enforced in accordance with, the law of the State of Illinois.

SECTION 9.08. Appointment of Mortgagee. Mortgagor hereby appoints Mortgagee its attorney-in-fact, which appointment is irrevocable and shall be deemed to be coupled with an interest, to execute, acknowledge, deliver and file or record for and in the name of Mortgagor any of the documents or instruments referred to in Section 2.01(d); provided, however, that Mortgagee shall not exercise its rights hereunder as such attorney-in-fact unless and to the extent Mortgagor shall have failed to comply with its obligations under said Section 2.01(d) beyond any grace period applicable thereto. Mortgagee shall have the right (but not obligation to) do anything that Mortgagor is required to do hereunder or under any other Loan Document but shall fail to do on a timely basis, and any costs incurred by Mortgagee shall become part of the Indebtedness secured by this Mortgage until reimbursed. All such costs shall be reimbursed promptly by Mortgagor.

SECTION 9.09. Provisions as to Covenants and Agreements. All of Mortgagor's covenants and agreements hereunder shall run with the land.

SECTION 9.10. Matters to be in Writing. This Mortgage cannot be altered, amended, modified, terminated or discharged except in a writing signed by Mortgagor and Mortgagee. No waiver, release or other forbearance by Mortgagee will be effective against Mortgagee unless it is in a writing signed by Mortgagee, and then only to the extent expressly stated.

SECTION 9.11. Construction of Provisions. The following rules of construction shall be applicable for all purposes of this Mortgage and all documents or instruments supplemental hereto, unless the context otherwise requires:

(a) All references herein to numbered Articles or Sections or to lettered Exhibits are references to the Articles and Sections hereof and the Exhibits annexed to this Mortgage, unless expressly otherwise designated in context.

(b) The terms "include," "including," and similar terms shall be construed as if followed by the phrase "without being limited to."

(c) The term "Premises" shall be construed as if followed by the phrase "or any part thereof."

(d) The term "Indebtedness" shall be construed as if followed by the phrase "or any other sums secured hereby, or

3835279

UNOFFICIAL COPY

Property of Cook County Clerk's Office