

THIS DOCUMENT IS ALSO A FINANCING STATEMENT FILED AS A FIXTURE FILING PURSUANT TO ALA. CODE § 7-9-402 (1975), AS AMENDED, AND SHOULD BE INDEXED IN THE INDEX OF FINANCING STATEMENTS UNDER THE NAMES OF THE MORTGAGOR, AS DEBTOR, AND THE MORTGAGEE, AS SECURED PARTY.

**MORTGAGE, ASSIGNMENT OF RENTS AND LEASES,
SECURITY AGREEMENT AND FIXTURE FILING**

THIS MORTGAGE, ASSIGNMENT OF RENTS AND LEASES, SECURITY AGREEMENT AND FIXTURE FILING (this "Mortgage") is made as of June 17, 1999 by E-Z SERVE CONVENIENCE STORES, INC., a Delaware corporation ("Debtor"), whose address is 1824 Hillandale Road, Durham, North Carolina 27705, to and for the benefit of FFCA ACQUISITION CORPORATION, a Delaware corporation ("Mortgagee"), whose address is 17207 North Perimeter Drive, Scottsdale, Arizona 85255.

PRELIMINARY STATEMENT:

The capitalized terms used in this Mortgage, if not elsewhere defined herein, have the meanings set forth in Article I. Debtor holds the fee simple interest in the Premises, subject to the Permitted Exceptions. Debtor is executing this Mortgage for the purpose of granting the interest of Debtor in and to the Mortgaged Property (as defined in the Granting Clauses below) as security for the payment of the Obligations. The Mortgaged Property shall be and remain subject to the lien of this Mortgage and shall constitute security for the Obligations so long as the Obligations shall remain outstanding.

GRANTING CLAUSES:

Debtor, in consideration of the premises and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, by these presents does hereby create a security interest in, mortgage, grant, bargain, sell, assign, pledge, give, transfer, set over and convey unto Mortgagee and to its successors and assigns WITH POWER OF SALE, for the benefit and security of Mortgagee and its successors and assigns, all of Debtor's estate, right, title and interest in, to and under any and all of the following property (the "Mortgaged Property"), whether now owned or hereafter acquired, subject only to the Permitted Exceptions:

Premises, Rents and Derivative Interests

The Premises; all rents, issues, profits, royalties, income and other benefits derived from the property comprising the Mortgaged Property (collectively, the "Rents"); all leases or subleases covering the Premises or any portion thereof now or hereafter existing or entered into (collectively, "Leases" and individually, a "Lease"), including, without limitation, all cash or security deposits, advance rentals and deposits or payments of similar nature; all options to purchase or lease the Premises or any portion thereof or interest therein, and any greater estate in

01-194336.01
FFCA No. 8000-9765
Contract No. 4028
Site No. 4416
Columbiana, AL

10/27/1999-44234
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SHELBY COUNTY JUDGE OF PROBATE
047 MMS 125.00

Inst # 1999-44234

the Premises; all interests, estate or other claims, both in law and in equity, with respect to the Premises; all easements, rights-of-way and rights used in connection therewith or as a means of access thereto, and all tenements, hereditaments and appurtenances thereof and thereto, and all water rights and shares of stock evidencing the same; all land lying within the right-of-way of any street, open or proposed, adjoining the Premises and any and all sidewalks, alleys and strips and gores of land adjacent to or used in connection with the Premises;

Personal Property

All tangible personal property (other than inventory) now or at any time hereafter located on or at the Premises or used in connection therewith, including, without limitation, all goods, machinery, tools, equipment, lobby and all other indoor and outdoor furniture, books, records, manuals, computer systems, furnishings, rugs, and maintenance and other supplies (the "Personal Property");

Intangibles

All existing and future contract rights, agreements, franchise, license and/or area development agreements, distributor agreements, permits, licenses and certificates necessary or desirable in connection with the acquisition, ownership, leasing, construction, operation, servicing or management of the property comprising the Mortgaged Property, whether now existing or entered into or obtained after the date hereof, including, without limitation, all construction contracts, architect agreements, plans, specifications, drawings, permits, licenses, agreements, approvals, consents and warranties now or hereafter relating to the Premises and all amendments and modifications thereto; and

Claims and Awards

All claims or demands with respect to the Mortgaged Property, including claims or demands with respect to the proceeds of insurance in effect with respect thereto, and any and all awards made for the taking by eminent domain, or by any proceeding or purchase in lieu thereof, of the whole or any part of the Mortgaged Property, including, without limitation, any awards resulting from a change of grade of streets and awards for severance damages.

TO HAVE AND TO HOLD the Mortgaged Property hereby granted or mortgaged or intended to be granted or mortgaged, unto Mortgagee, and its successors and assigns, upon the terms, provisions and conditions set forth herein.

THIS MORTGAGE SHALL SECURE THE FOLLOWING INDEBTEDNESS AND OBLIGATIONS (the "Obligations"):

- (i) Payment of indebtedness evidenced by the Note together with all extensions, renewals, amendments and modifications thereof;

(ii) Payment of indebtedness evidenced by the Other Notes together with all extensions, renewals, amendments and modifications of any thereof;

(iii) Payment of all indebtedness and other sums, with interest thereon, which may be owed under, and performance of all other obligations and covenants contained in, any Loan Document, together with any other instrument given to evidence or further secure the payment and performance of any obligation secured hereby or thereby; and

(iv) Payment of all indebtedness and other sums, with interest thereon, which may be owed under, and performance of all other obligations and covenants contained in, any Equipment Loan Document, Additional Loan Document or any Other Agreement (excluding any Other Agreement to which Pandix, LLC or Cupboard Peach Properties, LLC, each a Delaware limited liability company, is a party).

It is the intention of the parties hereto that the Mortgaged Property shall secure all of the Obligations presently or hereafter owed, and that the priority of the security interest created by this Mortgage for all such Obligations shall be controlled by the time of proper recording of this Mortgage. In addition, this Mortgage shall also secure unpaid balances of advances made with respect to the Mortgaged Property for the payment of taxes, assessments, insurance premiums, costs or any other advances incurred for the protection of the Mortgaged Property, together with interest thereon until paid at the rate provided for in Section 3.13 hereof, all as contemplated in this Mortgage, all of which shall constitute a part of the Obligations. This paragraph shall serve as notice to all persons who may seek or obtain a lien on the Mortgaged Property subsequent to the date of recording of this Mortgage, that until this Mortgage is released, any debt owed Mortgagee by Debtor, including advances made subsequent to the recording of this Mortgage, shall be secured with the priority afforded this Mortgage as recorded.

The total amount of indebtedness secured by this Mortgage shall not exceed \$98,845,634.00.

Notwithstanding the foregoing or any other provisions of this Mortgage to the contrary:

(x) in the event that the Loan becomes the subject of a Securitization, this Mortgage shall only secure indebtedness and obligations relating to the Loan and any other loans between any of the Debtor Entities on the one hand and any of the Mortgagee Entities on the other hand which are part of the same Securitized Loan Pool as the Loan; and

(y) in the event that any loans between any of the Debtor Entities on the one hand and any of the Mortgagee Entities on the other hand (other than the Loan) becomes the subject of a Securitization, this Mortgage shall not secure any indebtedness and obligations relating to such loans unless the Loan is part of the same Securitized Loan Pool as such loans;

provided, however, in no event shall this Mortgage secure any indebtedness or obligations of Pandix, LLC or Cupboard Peach Properties, LLC, each a Delaware limited liability company.

IT IS HEREBY COVENANTED, DECLARED AND AGREED that the Note and the other Loan Documents are to be executed, delivered and secured and that the Mortgaged Property is to be held and disposed of by Mortgagee, upon and subject to the provisions of this Mortgage.

ARTICLE I

DEFINED TERMS

Unless the context otherwise specifies or requires, the following terms shall have the meanings specified (such definitions to be applicable equally to singular and plural nouns and verbs of any tense):

"Additional Debtors" means, collectively, ES & ES Acquisition Corporation, a Delaware corporation, and Country Cupboard Food Stores, Inc., a Georgia corporation.

"Additional Loan Agreement" means the loan agreement dated as of even date herewith between Debtor, Additional Debtors and Mortgagee relating to the Additional Note, as the same may be amended from time to time.

"Additional Loan Documents" means, collectively, the Additional Loan Agreement, the Additional Note and all other agreements and instruments between, among or by Debtor and/or Additional Debtors, and, or for the benefit of, Mortgagee and executed pursuant to the Additional Loan Agreement, all as amended and supplemented.

"Additional Note" means the promissory note dated as of even date herewith in the amount of \$6,000,000.00 executed by Debtor and Additional Debtors and payable to Mortgagee and relating to certain vacant land parcels and closed stores, and any amendments, extensions or modifications thereof.

"Affiliate" means any person or entity which directly or indirectly controls, is under common control with, or controlled by any other person or entity. For purposes of this definition "controls", "under common control with" and "controlled by" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such person or entity, whether through the ownership of voting securities or otherwise.

"Applicable Loan Agreement" means the loan agreement dated as of even date herewith between Debtor and Mortgagee which relates to the Loan, as the same may be amended from time to time.

"Code" means the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*, as amended.

"Debtor Entities" means, collectively, Debtor, Guarantors and any Affiliate of Debtor or any of the Guarantors.

"Default Rate" means 14% per annum or the highest rate permitted by law, whichever is less.

"De Minimis Amounts" shall mean, with respect to any given level of Hazardous Materials or Regulated Substances, that level or quantity of Hazardous Materials or Regulated Substances in any form or combination of forms which does not constitute a material violation of any Environmental Laws and is customarily employed in, or associated with, similar businesses located in the State, including, without limitation, the retail sale of petroleum products by Debtor in the ordinary course of business.

"Disbursement Agreements" means the disbursement agreements dated as of the date of this Mortgage among Debtor, Mortgagee and Lawyers Title Insurance Corporation, a Virginia corporation.

"Distributors" means the suppliers of petroleum products under the Distributor Agreements, and their successors.

"Distributor Agreements" means those agreements with respect to the supply of petroleum products to the Mortgaged Property from time to time.

"Environmental Disclosure" has the meaning set forth in the Applicable Loan Agreement.

"Environmental Indemnity Agreement" means that certain Environmental Indemnity Agreement dated as of the date of this Mortgage executed by Debtor for the benefit of Mortgagee with respect to the Premises, as the same may be amended from time to time.

"Environmental Insurer" means such environmental insurance company as Mortgagee shall select in its sole discretion.

"Environmental Laws" means any present and future federal, state and local laws, statutes, ordinances, rules, regulations and the like, as well as common law, relating to Hazardous Materials, Regulated Substances or USTs and/or the protection of human health or the environment by reason of a Release or a Threatened Release of Hazardous Materials, Regulated Substances or USTs or relating to liability for or costs of Remediation or prevention of Releases. "Environmental Laws" includes, but is not limited to, the following statutes, as amended, any successor thereto, and any regulations promulgated pursuant thereto, and any state or local statutes, ordinances, rules, regulations and the like addressing similar issues: the Comprehensive Environmental Response, Compensation and Liability Act; the Emergency Planning and Community Right-to-Know Act; the Hazardous Materials Transportation Act; the Resource Conservation and Recovery Act (including but not limited to Subtitle I relating to USTs); the Solid Waste Disposal Act; the Clean Water Act; the Clean Air Act; the Toxic Substances Control Act; the Safe Drinking Water Act; the Occupational Safety and Health Act; the Federal Water Pollution Control Act; the Federal Insecticide, Fungicide and Rodenticide Act; the Endangered Species Act; the National Environmental Policy Act; and the River and Harbors

Appropriation Act. "Environmental Laws" also includes, but is not limited to, any present and future federal, state and local laws, statutes, ordinances, rules, regulations and the like, as well as, common law: conditioning transfer of property upon a negative declaration or other approval of a Governmental Authority of the environmental condition of the property; requiring notification or disclosure of Releases or other environmental condition of the Mortgaged Property to any Governmental Authority or other person or entity, whether or not in connection with transfer of title to or interest in property; imposing conditions or requirements relating to Hazardous Materials, Regulated Substances or USTs in connection with permits or other authorization for lawful activity; relating to nuisance, trespass or other causes of action related to Hazardous Materials, Regulated Substances or USTs; relating to the handling and disposal of solid or hazardous waste; and relating to wrongful death, personal injury, or property or other damage in connection with the physical condition or use of the Mortgaged Property by reason of the presence of Hazardous Materials, Regulated Substances or USTs in, on, under or above the Mortgaged Property.

"*Environmental Policy*" means that certain environmental insurance policy issued by Environmental Insurer to Mortgagee with respect to the Premises, which Environmental Policy shall be in form and substance satisfactory to Mortgagee in its sole discretion.

"*Equipment Loan Agreements*" means the two (2) equipment loan agreements dated as of even date herewith between Debtor, Additional Debtors and Mortgagee relating to the Equipment Notes, as the same may be amended from time to time.

"*Equipment Loan Documents*" means, collectively, the Equipment Loan Agreements, the Equipment Notes and all other agreements and instruments between, among or by Debtor and/or Additional Debtors, and, or for the benefit of, Mortgagee and executed pursuant to the Equipment Loan Agreements, all as amended and supplemented.

"*Equipment Notes*" means the two (2) equipment promissory notes dated as of even date herewith in the aggregate amount of \$25,556,712.00 executed by Debtor and Additional Debtors and payable to Mortgagee, and any amendments, extensions or modifications of any thereof.

"*Franchise Finance*" means Franchise Finance Corporation of America, a Delaware corporation, and its successors.

"*Governmental Authority*" means any governmental authority, agency, department, commission, bureau, board, instrumentality, court or quasi-governmental authority of the United States, the State or any political subdivision thereof.

"*Ground Lease Loan Documents*" means, collectively, all promissory notes, mortgages, deeds of trust, deeds to secure debt, loan agreements, environmental indemnity agreements, guaranties and other loan documents, agreements or instruments executed by Debtor and/or Additional Debtors in connection with the closing of the transactions contemplated by that certain commitment letter between Mortgagee and Debtor dated on or about June 11, 1999.

"Guarantors" means, collectively, Additional Debtors, Swifty Serve, LLC, a Delaware limited liability company, Swifty Serve Holding Corp., a Delaware corporation, Swifty Serve Corp., a Delaware corporation, EBC Texas Acquisition Corp., a Delaware corporation, and E-Z Serve Corp., a Delaware corporation.

"Guaranty" means that certain Unconditional Guaranty of Payment and Performance dated as of the date of this Mortgage executed by Guarantors for the benefit of Mortgagee with respect to the Note, as the same may be amended from time to time.

"Hazardous Materials" means (i) any toxic substance or hazardous waste, substance, solid waste or related material, or any pollutant or contaminant; (ii) radon gas, asbestos in any form which is or could become friable, urea formaldehyde foam insulation, transformers or other equipment which contains dielectric fluid containing levels of polychlorinated biphenyls in excess of federal, state or local safety guidelines, whichever are more stringent, or any petroleum product; (iii) any substance, gas, material or chemical which is or may be defined as or included in the definition of "hazardous substances," "toxic substances," "hazardous materials," "hazardous wastes," "regulated substances" or words of similar import under any Environmental Laws; and (iv) any other chemical, material, gas or substance the exposure to or release of which is or may be prohibited, limited or regulated by any Governmental Authority that asserts or may assert jurisdiction over the Mortgaged Property or the operations or activity at the Mortgaged Property, or any chemical, material, gas or substance that does or may pose a hazard to the health and/or safety of the occupants of the Mortgaged Property or the owners and/or occupants of property adjacent to or surrounding the Mortgaged Property.

"Indemnified Parties" means Mortgagee, Environmental Insurer and any person or entity who is or will have been involved in the origination of the Loan, any person or entity who is or will have been involved in the servicing of the Loan, any person or entity in whose name the encumbrance created by this Mortgage is or will have been recorded, persons and entities who may hold or acquire or will have held a full or partial interest in the Loan (including, but not limited to, investors or prospective investors with respect to a Securitization, Participation or Transfer, as well as custodians, trustees and other fiduciaries who hold or have held a full or partial interest in the Loan for the benefit of third parties), as well as the respective directors, officers, shareholders, partners, members, employees, lenders, agents, servants, representatives, contractors, subcontractors, affiliates, subsidiaries, participants, successors and assigns of any and all of the foregoing (including but not limited to any other person or entity who holds or acquires or will have held a participation or other full or partial interest in the Loan or the Mortgaged Property, whether during the term of the Loan or as a part of or following a foreclosure of the Loan and including, but not limited to, any successors by merger, consolidation or acquisition of all or a substantial portion of Mortgagee's assets and business).

"Loan" means the loan made by Mortgagee to Debtor which is evidenced by the Note and secured by this Mortgage.

"Loan Agreements" means, collectively, the Applicable Loan Agreement and the other multiple mortgage loan agreement dated as of even date herewith between Debtor and Mortgagee, as the same may be amended from time to time.

"Loan Documents" means, collectively, this Mortgage, the Note, the Environmental Indemnity Agreement, the Guaranty, the Other Notes, the Loan Agreements, the Disbursement Agreements and such other notes, deeds of trust or mortgages, guaranties and other documents or instruments contemplated thereby, all as amended and supplemented.

"Losses" means any and all claims, suits, liabilities (including, without limitation, strict liabilities), actions, proceedings, obligations, debts, damages, losses, costs, expenses, diminutions in value, fines, penalties, charges, fees, expenses, judgments, awards, amounts paid in settlement and damages of whatever kind or nature (including, without limitation, attorneys' fees and other costs of defense).

"Material Adverse Effect" means a material adverse effect on (i) the Premises, including, without limitation, the operation of the Premises as a Permitted Facility and/or the value of the Premises, or (ii) Debtor's ability to perform its obligations under this Mortgage.

"Mortgagee Entities" means, collectively, Mortgagee, Franchise Finance and any Affiliate of Mortgagee or Franchise Finance.

"Note" means the promissory note dated as of even date herewith in the amount of \$319,821.00 executed by Debtor and payable to Mortgagee and which corresponds to the Mortgaged Property, and any amendments, extensions or modifications thereof, including without limitation, any amendment and restatement of the Note as a result of a prepayment as contemplated by Section 10 of the Applicable Loan Agreement.

"Other Agreements" means, collectively, all agreements and instruments between, among or by (1) any of the Debtor Entities, and, or for the benefit of, (2) any of the Mortgagee Entities, including, without limitation, the Ground Lease Loan Documents and any promissory notes and guaranties, but excluding the Loan Documents, the Additional Loan Documents and the Equipment Loan Documents.

"Other Notes" means, collectively, the Additional Note, the Equipment Notes and all promissory notes dated as of even date herewith executed by Debtor and payable to Mortgagee and issued pursuant to the Loan Agreements (other than the Note), and any amendments, extensions or modifications of any thereof, including without limitation, any amendment and restatement of any thereof as a result of a prepayment as contemplated by Section 10 of the Loan Agreements.

"Participation" has the meaning set forth in the Applicable Loan Agreement.

"Permitted Encumbrances" has the meaning set forth in the Applicable Loan Agreement.

"Permitted Exceptions" means (i) those recorded easements, restrictions, liens and encumbrances set forth as exceptions in the title insurance policy issued to Mortgagee and approved by Mortgagee in connection with this Mortgage, (ii) Permitted Encumbrances, and (iii) PMSI Liens.

"Permitted Facility" means the type of convenience store and gasoline station identified for the Premises on Exhibit A to the Applicable Loan Agreement.

"PMSI Liens" has the meaning set forth in the Applicable Loan Agreement.

"Premises" means the parcel or parcels of real estate legally described in Exhibit A attached hereto, all rights, privileges and appurtenances associated therewith and all buildings, fixtures and other improvements (including, without limitation, gas pumps and canopies and USTs) now or hereafter located on such real estate (whether or not affixed to the real estate).

"Questionnaire" means that certain environmental questionnaire completed by Debtor and submitted to Environmental Insurer in connection with the issuance of the Environmental Policy.

"Regulated Substances" means "petroleum" and "petroleum-based substances" or any similar terms described or defined in any of the Environmental Laws and any applicable federal, state, county or local laws applicable to or regulating USTs.

"Release" means any presence, release, deposit, discharge, emission, leaking, spilling, seeping, migrating, injecting, pumping, pouring, emptying, escaping, dumping, disposing or other movement of Hazardous Materials, Regulated Substances or USTs.

"Remediation" means any response, remedial, removal, or corrective action, any activity to cleanup, detoxify, decontaminate, contain or otherwise remediate any Hazardous Materials, Regulated Substances or USTs, any actions to prevent, cure or mitigate any Release, any action to comply with any Environmental Laws or with any permits issued pursuant thereto, any inspection, investigation, study, monitoring, assessment, audit, sampling and testing, laboratory or other analysis, or any evaluation relating to any Hazardous Materials, Regulated Substances or USTs.

"Restoration" means the restoration, replacement or rebuilding of the Premises, or any part thereof, as nearly as possible to its value, condition and character immediately prior to any damage, destruction or Taking (as defined in Section 4.01 hereof).

"Securitization" shall have the meaning set forth in the Applicable Loan Agreement.

"Securitized Loan Pool" shall have the meaning set forth in the Applicable Loan Agreement.

"State" means the state where the Premises is located.

"Threatened Release" means a substantial likelihood of a Release which requires action to prevent or mitigate damage to the soil, surface waters, groundwaters, land, stream sediments, surface or subsurface strata, ambient air or any other environmental medium comprising or surrounding the Premises which may result from such Release.

"Transfer" has the meaning set forth in the Applicable Loan Agreement.

"UCC Financing Statements" means the UCC Financing Statements executed by Debtor pursuant to the Loan Agreement.

"USTs" means any one or combination of tanks and associated product piping systems used in connection with storage, dispensing and general use of Regulated Substances.

ARTICLE II

REPRESENTATIONS AND WARRANTIES OF DEBTOR

Debtor hereby represents and warrants to Mortgagee and, with respect to Section 2.06, Environmental Insurer as follows (which representations and warranties shall survive the execution and delivery of this Mortgage):

Section 2.01. **Title.** Debtor has good and marketable fee simple title to the Mortgaged Property, free and clear of all liens, encumbrances, charges and other exceptions to title except the Permitted Exceptions. Debtor has full power and lawful authority to grant the Mortgaged Property to Mortgagee in the manner and form herein done or intended and forever warrant and defend Debtor's title in the Mortgaged Property against the claims of all persons, subject to the Permitted Exceptions. This Mortgage constitutes a valid first lien upon and security interest in the Mortgaged Property.

Section 2.02. **Litigation; Absence of Breaches or Defaults.** (a) To the best of Debtor's knowledge, there are no suits, actions, proceedings or investigations pending or threatened against or involving Debtor, Guarantors or the Mortgaged Property before any arbitrator or Governmental Authority which could reasonably result in a Material Adverse Effect.

(b) Debtor is not in default under any other document, instrument or agreement to which Debtor is a party or by which Debtor, the Premises or any of the property of Debtor is subject or bound, except such default as would not have a Material Adverse Effect. The authorization, execution, delivery and performance of this Mortgage and the documents, instruments and agreements provided for herein will not result in any breach of or default under any other document, instrument or agreement to which Debtor is a party or by which Debtor, the Mortgaged Property or any of the property of Debtor is subject or bound.

Section 2.04. **Licenses and Permits.** Debtor has obtained all required licenses and permits, both governmental and private, to use and operate the Mortgaged Property in the

intended manner, except such licenses and permits the failure of which to maintain would not have a Material Adverse Effect.

Section 2.05. *Financial Condition; Information Provided to Mortgagee.* The financial statements, all financial data and all other documents and information heretofore delivered to Mortgagee by or with respect to Debtor and/or the Mortgaged Property in connection with this Mortgage and/or relating to Debtor and/or the Mortgaged Property are true, correct and complete in all material respects, and there have been no amendments to such financial statements, financial data and other documents and information since the date such financial statements, financial data, documents and other information were prepared, and no material adverse change has occurred to any such financial statements, financial data, documents and other information not disclosed in writing to Mortgagee.

Section 2.06. *Compliance With Laws.* (a) The current use and occupation of the Mortgaged Property, and the condition thereof complies fully with all applicable statutes, regulations, rules, ordinances, codes, licenses, permits, orders and approvals of each Governmental Authority having jurisdiction over the Mortgaged Property, including, without limitation, UST codes, ordinances, requirements and standards, all requirements relating to the handling and disposal of solid or hazardous waste, all health, building, fire, safety and other codes, ordinances and requirements and all applicable standards of the National Board of Fire Underwriters and all policies or rules of common law, in each case, as amended, and any judicial or administrative interpretation thereof, including any judicial order, consent, decree or judgment applicable to Debtor (collectively, "Applicable Regulations"), which the failure to comply with could have a Material Adverse Effect. Debtor is in compliance with all Applicable Regulations, which the failure to comply with could have a Material Adverse Effect.

(b) Without limiting the generality of the other provisions of this Section, the Mortgaged Property is in compliance in all material respects with the Americans with Disabilities Act of 1990.

(c) To the best of Debtor's knowledge, except to the extent set forth in the Environmental Disclosure, the Mortgaged Property and Debtor are not in violation of, or subject to, any pending or, to Debtor's actual knowledge, threatened investigation or inquiry by any Governmental Authority or to any remedial obligations under any Environmental Laws that could have a Material Adverse Effect, and this representation and warranty would continue to be true and correct following disclosure to each Governmental Authority of all relevant facts, conditions and circumstances, if any, pertaining to the Mortgaged Property.

(d) Debtor has not obtained and is not required to obtain any permits, licenses or similar authorizations to construct, occupy, operate or use any buildings, improvements, fixtures and equipment forming a part of the Mortgaged Property by reason of any Environmental Laws, except such permits, licenses or authorizations required to operate a Permitted Facility in the ordinary course of business or the failure of which to obtain would not have a Material Adverse Effect.

(e) Debtor has taken all reasonable steps to determine and has determined to its reasonable satisfaction that (i) no Hazardous Materials, Regulated Substances or USTs have been used, handled, manufactured, generated, produced, stored, treated, processed transferred, disposed of or otherwise Released in, on, under, from or about the Mortgaged Property, except (A) in De Minimis Amounts, (B) to the extent any such Hazardous Materials would not have a Material Adverse Effect, or (C) to the extent set forth in the Environmental Disclosure; (ii) except to the extent set forth in the Environmental Disclosure, (A) the Mortgaged Property does not contain Hazardous Materials, Regulated Substances or USTs other than in De Minimis Amounts or in material compliance with Environmental Laws, and (B) all USTs located on or about the Mortgaged Property, if any, are in material compliance with all Environmental Laws; (iii) to the best of Debtor's knowledge, after due inquiry, except to the extent set forth in the Environmental Disclosure, there is no threat of any Release migrating to the Mortgaged Property that would have a Material Adverse Effect; (iv) to the best of Debtor's knowledge, after due inquiry, except to the extent set forth in the Environmental Disclosure, there is no past or present non-compliance with Environmental Laws, or with permits issued pursuant thereto, in connection with the Mortgaged Property that could have a Material Adverse Effect; (v) Debtor has not received any written notice or other written communication from any person or entity (including but not limited to a Governmental Authority) relating to Hazardous Materials, Regulated Substances or USTs or Remediation thereof, of possible liability of any person or entity pursuant to any Environmental Law, other environmental conditions in connection with the Mortgaged Property, or any actual or potential administrative or judicial proceedings in connection with any of the foregoing, in each case with respect to a condition or event that could have a Material Adverse Effect; and (vi) Debtor has truthfully and fully provided to Mortgagee, in writing, any and all information relating to environmental conditions in, on, under or from the Mortgaged Property that is known to Debtor and that is contained in Debtor's files and records, including but not limited to any reports relating to Hazardous Materials, Regulated Substances or USTs in, on, under or from the Mortgaged Property.

(f) To the best of Debtor's knowledge, after due inquiry, except to the extent set forth in the Environmental Disclosure, (i) all uses and operations on or of the Mortgaged Property, whether by Debtor or any other person or entity, have been in compliance with all Environmental Laws and permits issued pursuant thereto except such failures to comply that have not had a Material Adverse Effect; (ii) there have been no Releases in, on, under or from the Mortgaged Property, except in De Minimis Amounts or in material compliance with all Environmental Laws; (iii) there are no Hazardous Materials, Regulated Substances or USTs in, on, or under the Mortgaged Property, except in De Minimis Amounts or in material compliance with Environmental Laws; and (iv) the Mortgaged Property has been kept free and clear of all liens and other encumbrances imposed pursuant to any Environmental Law (the "Environmental Liens"). Debtor has not allowed any tenant or other user of Mortgaged Property to do any act that materially increased the dangers to human health or the environment, posed an unreasonable risk of harm to any person or entity (whether on or off the Mortgaged Property), impaired the value of the Mortgaged Property, is contrary to any requirement of any insurer, constituted a public or private nuisance, constituted waste, or violated any covenant, condition, agreement or easement applicable to the Mortgaged Property.

(g) The information and disclosures in the Questionnaire are true, correct and complete in all material respects, and the person or persons executing the Questionnaire were duly authorized to do so.

Section 2.07. ***Incorporation of Representations and Warranties.*** The representations and warranties of Debtor set forth in the Applicable Loan Agreement are incorporated by reference into this Mortgage as if stated in full in this Mortgage and such representations and warranties as incorporated herein shall be deemed to have been made as of the date of this Mortgage and shall survive the execution and delivery of this Mortgage.

ARTICLE III

COVENANTS OF DEBTOR

Debtor hereby covenants to Mortgagee and, with respect to Sections 3.07 and 3.16, Environmental Insurer and agrees as follows until the Obligations are satisfied in full:

Section 3.01. ***Payment of the Note.*** Debtor shall punctually pay, or cause to be paid, the principal, interest and all other sums to become due in respect of the Note and the other Loan Documents in accordance with the Note and the other Loan Documents.

Section 3.02. ***Title.*** Debtor shall maintain good and marketable fee simple title to the Mortgaged Property, free and clear of all liens, encumbrances, charges and other exceptions to title, except the Permitted Exceptions. This Mortgage shall constitute a valid first lien upon and security interest in the Mortgaged Property subject to the Permitted Exceptions.

Section 3.03. ***Organization and Status of Debtor.*** Debtor shall be validly existing and in good standing under the laws of its state of incorporation and qualified as a foreign corporation to do business in the State.

Section 3.04. ***Licenses and Permits.*** Debtor shall maintain all required licenses and permits, both governmental and private, to use and operate the Mortgaged Property as a Permitted Facility, other than licenses and permits which the failure to maintain would not have a Material Adverse Effect.

Section 3.05. ***Recording.*** Debtor shall, upon the execution and delivery hereof and thereafter from time to time, take such actions as Mortgagee may request to cause this Mortgage, each supplement and amendment to such instrument and financing statements with respect thereto and each instrument of further assurance (collectively, the "Recordable Documents") to be filed, registered and recorded as may be required by law to publish notice and maintain the first security interest hereof upon the Mortgaged Property and to publish notice of and protect the validity of the Recordable Documents. Debtor shall, from time to time, perform or cause to be performed any other act and shall execute or cause to be executed any and all further instruments (including financing statements, continuation statements and similar statements with respect to

any of said documents) requested by Mortgagee for carrying out the intention of, or facilitating the performance of, this Mortgage. If Debtor shall fail to comply with this Section, Mortgagee shall be and is hereby irrevocably appointed the agent and attorney-in-fact of Debtor to comply therewith (including the execution, delivery and filing of such financing statements and other instruments), which appointment is coupled with an interest, but this sentence shall not prevent any default in the observance of this Section from constituting an Event of Default. To the extent permitted by law, Debtor shall pay or cause to be paid recording taxes and fees incident thereto and all expenses, taxes and other governmental charges incident to or in connection with the preparation, execution, delivery or acknowledgment of the Recordable Documents, any instruments of further assurance and the Note.

Section 3.06. Use; Maintenance and Repair; Leases. (a) The Mortgaged Property shall be used solely for the operation of a Permitted Facility and for no other purpose. Except as set forth below, and except during periods when the Premises are untenable by reason of fire or other casualty or condemnation (provided, however, during all such periods while the Premises are untenable, Debtor shall strictly comply with the terms and conditions of Section 4.01 of this Mortgage), Debtor shall at all times while this Mortgage is in effect occupy the Mortgaged Property and shall diligently operate its business on the Mortgaged Property. Debtor may cease diligent operation of business at the Mortgaged Property for a period not to exceed 90 days and may do so only once within any five-year period while this Mortgage is in effect. If Debtor does discontinue operation as permitted by this Section, Debtor shall (i) give written notice to Mortgagee within 10 days after Debtor elects to cease operation, (ii) provide adequate protection and maintenance of the Mortgaged Property during any period of vacancy and (iii) pay all costs necessary to restore the Mortgaged Property to their condition on the day operation of the business ceased at such time as the Mortgaged Property is reopened for Debtor's business operations or other substituted use approved by Mortgagee as contemplated below. Notwithstanding anything herein to the contrary, Debtor shall pay monthly the principal and interest due under the Note during any period in which Debtor discontinues operation.

Debtor shall not, by itself or through any lease or other type of transfer, convert the Premises to an alternative use while this Mortgage is in effect without Mortgagee's consent, which consent shall not be unreasonably withheld. Mortgagee may consider any or all of the following in determining whether to grant its consent, without being deemed to be unreasonable: (i) whether the converted use will be consistent with the highest and best use of the Mortgaged Property, and (ii) whether the converted use will increase Mortgagee's risks or decrease the value of the Mortgaged Property.

(b) Debtor shall (i) maintain the Mortgaged Property in good condition and repair, subject to reasonable and ordinary wear and tear, free from actual or constructive waste, (ii) operate, remodel, update and modernize the Mortgaged Property in accordance with those standards adopted from time to time on a system-wide basis for Permitted Facilities, with such remodeling and modernizing being undertaken in accordance with system-wide timing schedules for such activities, and (iii) pay all operating costs of the Premises in the ordinary course of business.

(c) Debtor shall not (i) enter into any Leases without Mortgagee's prior written consent; (ii) modify or amend the terms of any Lease without Mortgagee's prior written consent; (iii) grant any consents under any Lease, including, without limitation, any consent to an assignment of any Lease, a mortgaging of the leasehold estate created by any Lease or a subletting by the lessee under any Lease, without Mortgagee's prior written consent; (iv) terminate, cancel, surrender, or accept the surrender of, any Lease, or waive or release any person from the observance or performance of any obligation to be performed under the terms of any Lease or liability on account of any warranty given thereunder, without Mortgagee's prior written consent; or (v) assign, transfer, mortgage, pledge or hypothecate any Lease or any interest therein to any party other than Mortgagee, without Mortgagee's prior written consent. Any lease, modification, amendment, grant, termination, cancellation, surrender, waiver or release in violation of the foregoing provision shall be null and void and of no force and effect. Unless Mortgagee otherwise consents or elects, Debtor's title to the Mortgaged Property and the leasehold interest in the Mortgaged Property created by any Lease shall not merge, but shall always be kept separate and distinct, notwithstanding the union of such estates in Debtor, Mortgagee or any other person by purchase, operation of law, foreclosure of this Mortgage, sale of the Mortgaged Property pursuant to this Mortgage or otherwise.

(d) Debtor shall (i) fulfill, perform and observe in all respects each and every condition and covenant of Debtor contained in any Lease; (ii) give prompt notice to Mortgagee of any claim or event of default under any Lease given to or by Debtor, together with a complete copy or statement of any information submitted or referenced in support of such claim or event of default; (iii) at the sole cost and expense of Debtor, enforce the performance and observance of each and every covenant and condition of any Lease to be performed or observed by any other party thereto, unless such enforcement is waived in writing by Mortgagee; (iv) appear in and defend any action challenging the validity, enforceability or priority of the lien created hereby or the validity or enforceability of any Lease; and (v) hold that portion of the Rents which is sufficient to discharge all current sums due under the Note for use in the payment of such sums.

Section 3.07. **Compliance With Laws.** (a) Debtor's use and occupation of the Mortgaged Property, and the condition thereof, including, without limitation, any Restoration, shall, at Debtor's sole cost and expense, comply fully with all Applicable Regulations now or hereafter in effect which the failure to comply with would have a Material Adverse Effect. In addition, Debtor shall, at all times while this Mortgage is in effect, comply with, and cause Guarantors to comply with, all Applicable Regulations now or hereafter in effect which the failure to comply with would have a Material Adverse Effect.

(b) Without limiting the generality of the other provisions of this Section, Debtor agrees that it shall be responsible for complying in all material respects with the Americans with Disabilities Act of 1990, as such act may be amended from time to time, and all regulations promulgated thereunder (collectively, the "ADA"), as it affects the Mortgaged Property, including, without limitation, making required "readily achievable" changes to remove any architectural or communications barriers, and providing auxiliary aides and services within the Mortgaged Property. Debtor further agrees that any and all alterations made to the Mortgaged

Property while this Mortgage is in effect will comply with the requirements of the ADA. All plans for alterations which must be submitted to Mortgagee under the provisions of Section 2.08 must include a statement from a licensed Architect or Engineer certifying that they have reviewed the plans, and that the plans comply with all applicable provisions of the ADA. Any subsequent approval or consent to the plans by the Mortgagee shall not be deemed to be a representation on Mortgagee's part that the plans comply with the ADA, which obligation shall remain with Debtor. Debtor agrees that it will defend, indemnify and hold harmless the Indemnified Parties from and against any and all Losses caused by, incurred or resulting from Debtor's failure to comply with its obligations under this Section.

(c) The Mortgaged Property and Debtor shall not be in violation of or subject to any investigation or inquiry by any Governmental Authority or to any remedial obligations under any Environmental Laws that could have a Material Adverse Effect. If any such investigation or inquiry by an Governmental Authority with respect to the Premises or Debtor is initiated, Debtor shall promptly notify Mortgagee.

(d) Debtor covenants and agrees that: (i) all uses and operations on or of the Mortgaged Property, whether by Debtor or any other person or entity acting by, through or under Debtor, shall be in compliance with all Environmental Laws and permits issued pursuant thereto except any failure to so comply that could not have a Material Adverse Effect; (ii) there shall be no Releases in, on, under or from the Mortgaged Property, other than in De Minimis Amounts or that could not have a Material Adverse Effect; (iii) there shall be no Hazardous Materials, Regulated Substances or USTs in, on, or under the Mortgaged Property, except in De Minimis Amounts and in material compliance with all Environmental Laws; (iv) Debtor shall keep the Mortgaged Property, or cause the Mortgaged Property to be kept, free and clear of all Environmental Liens, whether due to any act or omission of Debtor or any other person or entity acting by, through and under Debtor; (v) Debtor shall, at its sole cost and expense, fully and expeditiously cooperate in all activities pursuant to subsection (e) below, including but not limited to providing all relevant information and making knowledgeable persons reasonably available for interviews; (vi) in the event that Mortgagee notifies Debtor that it has knowledge of a Release or a Threatened Release at the Mortgaged Property or has a reasonable basis to believe that a material violation of Environmental Laws at the Mortgaged Property may have occurred, Debtor shall, at its sole cost and expense, perform any environmental site assessment or other investigation of environmental conditions in connection with the Mortgaged Property as may be reasonably requested by Mortgagee (including but not limited to sampling, testing and analysis of soil, water, air, building materials and other materials and substances whether solid, liquid or gas), and share with Mortgagee and Environmental Insurer the reports and other results thereof, and Mortgagee, Environmental Insurer and the other Indemnified Parties shall be entitled to rely on such reports and other results thereof; (vii) Debtor shall, at its sole cost and expense, comply with all reasonable written requests of Mortgagee to (1) reasonably effectuate Remediation of any condition (including but not limited to a Release) in, on, under or from the Mortgaged Property; (2) comply with any Environmental Law; (3) comply with any directive from any Governmental Authority; and (4) take any other reasonable action necessary or appropriate for protection of human health or the environment; and (viii) Debtor shall promptly notify

Mortgagee in writing of (A) any presence of Releases or Threatened Releases in, on, under, from or migrating towards the Mortgaged Property known to Debtor; (B) any material non-compliance with any Environmental Laws related in any way to the Mortgaged Property; (C) any actual or potential Environmental Lien; (D) any required or proposed material Remediation of environmental conditions relating to the Mortgaged Property; and (E) any written notice or other written communication which Debtor becomes aware from any source whatsoever (including but not limited to a Governmental Authority) relating in any way to Hazardous Materials, Regulated Substances, USTs or Remediation thereof, possible material liability of any person or entity pursuant to any Environmental Law, other environmental conditions in connection with the Mortgaged Property, or any actual or potential administrative or judicial proceedings in connection with anything referred to in this Section; and Debtor shall, at Mortgagee's request, deliver to Mortgagee a certificate stating that Debtor is and has been in full compliance with all of the environmental representations, warranties and covenants in this Mortgage and the other Loan Documents.

(e) Mortgagee and any other person or entity designated by Mortgagee, including but not limited to Environmental Insurer, any receiver, any representative of a governmental entity, and any environmental consultant, shall have the right, but not the obligation, to enter upon the Mortgaged Property at all reasonable times (including, without limitation, in connection with any Securitization, Participation or Transfer or in connection with the exercise of any remedies set forth in this Mortgage or the other Loan Documents) to assess any and all aspects of the environmental condition of the Mortgaged Property and its use, including but not limited to conducting any environmental assessment or audit (the scope of which shall be determined in Mortgagee's reasonable discretion) and taking samples of soil, groundwater or other water, air, or building materials, and conducting other invasive testing. Debtor shall cooperate with and provide access to Mortgagee, Environmental Insurer and any such person or entity designated by Mortgagee. Any such assessment and investigation shall be at Debtor's sole cost and expense; provided, however, unless Mortgagee has knowledge of a Release or Threatened Release at the Premises or has a reasonable basis to believe that a violation of Environmental Laws at the Premises may have occurred, or unless any such assessment or investigation is required by Environmental Insurer, Debtor shall not be responsible for the cost and expense of such assessment or investigation.

(f) Debtor shall, at its sole cost and expense, protect, defend, indemnify, release and hold harmless the Indemnified Parties from and against any and all Losses (excluding Losses suffered by an Indemnified Party directly arising out of such Indemnified Party's gross negligence or wilful misconduct) and costs of Remediation (whether or not performed voluntarily), engineers' fees, environmental consultants' fees, and costs of investigation (including but not limited to sampling, testing, and analysis of soil, water, air, building materials and other materials and substances whether solid, liquid or gas) imposed upon or incurred by or asserted against any Indemnified Parties, and directly or indirectly arising out of or in any way relating to any one or more of the following: (i) any presence of any Hazardous Materials, Regulated Substances or USTs in, on, above, or under the Mortgaged Property; (ii) any past, present or Threatened Release in, on, above, under or from the Mortgaged Property; (iii) any

activity by Debtor, any person or entity affiliated with Debtor or any tenant or other user of the Mortgaged Property in connection with any actual, proposed or threatened use, treatment, storage, holding, existence, disposition or other Release, generation, production, manufacturing, processing, refining, control, management, abatement, removal, handling, transfer or transportation to or from the Mortgaged Property of any Hazardous Materials, Regulated Substances or USTs at any time located in, under, on or above the Mortgaged Property; (iv) any activity by Debtor, any person or entity affiliated with Debtor or any tenant or other user of the Mortgaged Property in connection with any actual or proposed Remediation of any Hazardous Materials, Regulated Substances or USTs at any time located in, under, on or above the Mortgaged Property, whether or not such Remediation is voluntary or pursuant to court or administrative order, including but not limited to any removal, remedial or corrective action; (v) any past, present or threatened non-compliance or violations of any Environmental Laws (or permits issued pursuant to any Environmental Law) in connection with the Mortgaged Property or operations thereon, including but not limited to any failure by Debtor, any person or entity affiliated with Debtor or any tenant or other user of the Mortgaged Property to comply with any order of any Governmental Authority in connection with any Environmental Laws; (vi) the imposition, recording or filing or the threatened imposition, recording or filing of any Environmental Lien encumbering the Mortgaged Property; (vii) any administrative processes or proceedings or judicial proceedings in any way connected with any matter addressed in this Section; (viii) any past, present or threatened injury to, destruction of or loss of natural resources in any way connected with the Mortgaged Property, including but not limited to costs to investigate and assess such injury, destruction or loss; (ix) any acts of Debtor, any person or entity affiliated with Debtor or any tenant or other user of the Mortgaged Property in arranging for disposal or treatment, or arranging with a transporter for transport for disposal or treatment, of Hazardous Materials, Regulated Substances or USTs owned or possessed by Debtor, any person or entity affiliated with Debtor or any tenant or other user of the Mortgaged Property, at any facility or incineration vessel owned or operated by another person or entity and containing such or similar Hazardous Materials, Regulated Substances or USTs; (x) any acts of Debtor, any person or entity affiliated with Debtor or any tenant or other user of the Mortgaged Property, in accepting any Hazardous Materials, Regulated Substances or USTs for transport to disposal or treatment facilities, incineration vessels or sites selected by Debtor, any person or entity affiliated with Debtor or any tenant or other user of the Mortgaged Property, from which there is a Release, or a Threatened Release of any Hazardous Material, Regulated Substance or UST which causes the incurrence of costs for Remediation; (xi) any personal injury, wrongful death, or property damage arising under any statutory or common law or tort law theory, including but not limited to damages assessed for the maintenance of a private or public nuisance or for the conducting of an abnormally dangerous activity on or near the Mortgaged Property; and (xii) any misrepresentation or inaccuracy in any representation or warranty or material breach or failure to perform any covenants or other obligations pursuant to this Section.

(g) The obligations of Debtor and the rights and remedies of Mortgagee set forth in this Section are independent from those of Debtor pursuant to the Environmental Indemnity Agreement. Furthermore, such obligations of Debtor and rights and remedies of Mortgagee shall survive the termination, expiration and/or release of the Applicable Loan Agreement, the Note,

the other Loan Documents, the Environmental Indemnity Agreement and/or the judicial or nonjudicial foreclosure of this Mortgage by Mortgagee or the delivery of a deed-in-lieu of foreclosure for the Premises by Debtor to Mortgagee.

Section 3.08. ***Alterations and Improvements.*** Debtor shall not alter the exterior (other than aesthetically) or structural elements of the Mortgaged Property in any manner without the consent of Mortgagee, which consent shall not be unreasonably withheld or conditioned; provided, however, Debtor may undertake nonstructural alterations to the Mortgaged Property as contemplated by the applicable Disbursement Agreement or costing less than \$150,000 without Mortgagee's consent. If Mortgagee's consent is required hereunder and Mortgagee consents to the making of any such alterations, the same shall be made by Debtor at Debtor's sole expense by a licensed contractor and according to plans and specifications approved by Mortgagee and subject to such other conditions as Mortgagee shall require. Any work at any time commenced by Debtor on the Mortgaged Property shall be prosecuted diligently to completion, shall be of good workmanship and materials and shall comply fully with all the terms of this Mortgage. Upon completion of any alterations or any Restoration, Debtor shall promptly provide Mortgagee with evidence of full payment to all laborers and materialmen contributing to the alterations and any other documents or information reasonably requested by Mortgagee.

Section 3.09. ***After-Acquired Property.*** All right, title and interest of Debtor in and to all improvements, alterations, substitutions, restorations and replacements of, and all additions and appurtenances to, the Mortgaged Property, hereafter acquired by or released to Debtor, immediately upon such acquisition or release and without any further granting by Debtor, shall become part of the Mortgaged Property and shall be subject to the lien hereof fully, completely and with the same effect as though now owned by Debtor and specifically described in the Granting Clauses hereof. Debtor shall execute and deliver to Mortgagee any further assurances, mortgages, grants, conveyances or assignments thereof as the Mortgagee may reasonably require to subject the same to the lien hereof.

Section 3.10. ***Taxes.*** (a) Debtor shall do or cause to be done everything necessary to preserve the lien hereof without expense to Mortgagee, including, without limitation, paying and discharging or causing to be paid and discharged, whether or not payable directly by Debtor or subject to withholding at the source, (i) all taxes, assessments, levies, fees, water and sewer rents and charges and all other governmental charges, general, special, ordinary or extraordinary, and all charges for utility or communications services, which may at any time be assessed, levied or imposed upon Debtor, the Mortgaged Property, this Mortgage, the Obligations or the Rents or which may arise in respect of the occupancy, use, possession or operation thereof, (ii) all income, excess profits, sales, gross receipts and other taxes, duties or imposts, whether similar or not in nature, assessed, levied or imposed by any Governmental Authority on Debtor, the Mortgaged Property or the Rents and (iii) all lawful claims and demands of mechanics, laborers, materialmen and others which, if unpaid, might create a lien on the Mortgaged Property, or on the Rents, unless Debtor shall contest the amount or validity thereof in accordance with subsection (b).

(b) Debtor may, at its own expense, contest or cause to be contested (in the case of any item involving more than \$25,000.00, after prior written notice to Mortgagee), by appropriate legal proceedings conducted in good faith and with due diligence, the amount or validity or application, in whole or in part, of any item specified in subsection (a) or lien therefor, provided that (i) such proceeding shall suspend the collection thereof from the Mortgaged Property or any interest therein, (ii) neither the Mortgaged Property nor any interest therein would be in any danger of being sold, forfeited or lost by reason of such proceedings, (iii) no Event of Default has occurred and is continuing, and (iv) Debtor shall have furnished the security as may be required in the proceeding or as may be required by Mortgagee to insure payment of any contested taxes.

Section 3.11. **Insurance.** (a) Debtor shall maintain with respect to the Mortgaged Property, at its sole expense, the following types and amounts of insurance (which may be included under a blanket insurance policy if all the other terms hereof are satisfied), in addition to such other insurance as Mortgagee may reasonably require from time to time:

(i) Insurance against loss, damage or destruction by fire and other casualty, including theft, vandalism and malicious mischief, flood (if the Premises are in a location designated by the Federal Secretary of Housing and Urban Development as a flood hazard area), earthquake (if the Premises are in an area subject to destructive earthquakes within recorded history), boiler explosion (if there is any boiler upon the Premises), plate glass breakage, sprinkler damage (if the Premises have a sprinkler system), all matters covered by a standard extended coverage endorsement, special coverage endorsement commonly known as an "all risk" endorsement and such other risks as Mortgagee may reasonably require, insuring the Mortgaged Property for not less than 100% of their full insurable replacement cost.

(ii) Comprehensive general liability and property damage insurance, including a products liability clause, covering Mortgagee, Franchise Finance and Debtor against bodily injury liability, property damage liability and automobile bodily injury and property damage liability, including without limitation any liability arising out of the ownership, maintenance, repair, condition or operation of the Mortgaged Property or adjoining ways, streets or sidewalks and, if applicable, insurance covering Mortgagee and Franchise Finance against liability arising from the sale of liquor, beer or wine on the Premises. Such insurance policy or policies shall contain a broad form contractual liability endorsement under which the insurer agrees to insure Debtor's obligations under all indemnification provisions in this Mortgage to the extent insurable, and a "severability of interest" clause or endorsement which precludes the insurer from denying the claim of either Debtor, Mortgagee or Franchise Finance because of the negligence or other acts of the other, shall be in amounts of not less than \$1,000,000.00 per injury and occurrence with respect to any insured liability, whether for personal injury or property damage, or such higher limits as Mortgagee may reasonably require from time to time, and shall be of form and substance satisfactory to Mortgagee.

(b) Business interruption insurance equal to \$3,000,000.00 per occurrence.

(c) State Worker's compensation insurance in the statutorily mandated limits, employer's liability insurance with limits not less than \$500,000 or such greater amount as Mortgagee may from time to time require and such other insurance as may be necessary to comply with applicable laws.

All insurance policies shall:

(i) Provide for a waiver of subrogation by the insurer as to claims against Mortgagee or Franchise Finance, their employees and agents and provide that such insurance cannot be unreasonably cancelled, invalidated or suspended on account of the conduct of Debtor, its officers, directors, employees or agents;

(ii) Provide that any "no other insurance" clause in the insurance policy shall exclude any policies of insurance maintained by Mortgagee or Franchise Finance and that the insurance policy shall not be brought into contribution with insurance maintained by Mortgagee or Franchise Finance;

(iii) Contain a standard without contribution mortgage clause endorsement in favor of Mortgagee and Franchise Finance and any other lender designated by Mortgagee;

(iv) Provide that the policy of insurance shall not be terminated, cancelled or substantially modified without at least thirty (30) days' prior written notice to Mortgagee, Franchise Finance and to any lender covered by any standard mortgage clause endorsement;

(v) Provide that the insurer shall not have the option to restore the Premises if Mortgagee elects to terminate this Mortgage in accordance with the terms hereof;

(vi) Be issued by insurance companies licensed to do business in the state in which the Premises is located and which are rated A:VI or better by Best's Insurance Guide or otherwise approved by Mortgagee; and

(vii) Provide that the insurer shall not deny a claim because of the negligence of Debtor, anyone acting for Debtor or any tenant or other occupant of the Mortgaged Property.

It is expressly understood and agreed that the foregoing minimum limits of insurance coverage shall not limit the liability of Debtor for its acts or omissions as provided in this Mortgage. All insurance policies (with the exception of worker's compensation insurance to the extent not available under statutory law) shall designate Mortgagee and Franchise Finance as additional insureds as their interests may appear and shall be payable as set forth in Article IV hereof. All such policies shall be written as primary policies, with deductibles not to exceed 10% of the amount of coverage. Any other policies, including any policy now or hereafter carried by Mortgagee or Franchise Finance, shall serve as excess coverage. Debtor shall procure

policies for all insurance for periods of not less than one year and shall provide to Mortgagee certificates of insurance or, upon Mortgagee's request, duplicate originals of insurance policies, evidencing that insurance satisfying the requirements of this Mortgage is in effect at all times.

Section 3.12. *Impound Account.* Upon the occurrence of an Event of Default under this Mortgage or any other Loan Document which is the result of the failure of Debtor to make any payment to Mortgagee required under any of the Loan Documents or a breach of Debtor's obligations under Section 3.10 or 3.11, Mortgagee may require Debtor to pay to Mortgagee sums which will provide an impound account (which shall not be deemed a trust fund) for paying up to the next one year of taxes, assessments and/or insurance premiums. Upon such requirement, Mortgagee will estimate the amounts needed for such purposes and will notify Debtor to pay the same to Mortgagee in equal monthly installments, as nearly as practicable, in addition to all other sums due under this Mortgage. Should additional funds be required at any time, Debtor shall pay the same to Mortgagee on demand. Debtor shall advise Mortgagee of all taxes and insurance bills which are due and shall cooperate fully with Mortgagee in assuring that the same are paid. Mortgagee may deposit all impounded funds in accounts insured by any federal or state agency and may commingle such funds with other funds and accounts of Mortgagee. Interest or other gains from such funds, if any, shall be the sole property of Mortgagee. In the event of any default by Debtor, Mortgagee may apply all impounded funds against any sums due from Debtor to Mortgagee. Mortgagee shall give to Debtor an annual accounting showing all credits and debits to and from such impounded funds received from Debtor.

Section 3.13. *Advances by Mortgagee.* Mortgagee may make advances to perform any of the covenants contained in this Mortgage on Debtor's behalf, and all sums so advanced shall be secured hereby prior to the Note. Debtor shall repay on demand all sums so advanced with interest thereon at the Default Rate, such interest to be computed from and including the date of the making of such advance to and including the date of such repayment.

Section 3.14. *Negative Covenants.* Debtor agrees that Debtor shall not, without the prior written consent of Mortgagee, sell, convey, mortgage, grant, bargain, encumber, pledge, assign, or otherwise transfer the Mortgaged Property or any part thereof or permit the Mortgaged Property or any part thereof to be sold, conveyed, mortgaged, granted, bargained, encumbered, pledged, assigned, or otherwise transferred other than the replacement of obsolete Personal Property. A sale, conveyance, mortgage, grant, bargain, encumbrance, pledge, assignment, or transfer within the meaning of this Section shall be deemed to include, but not limited to, (a) an installment sales agreement wherein Debtor agrees to sell the Mortgaged Property or any part thereof for a price to be paid in installments; (b) an agreement by Debtor leasing all or any part of the Mortgaged Property or a sale, assignment or other transfer of, or the grant of a security interest in, Debtor's right, title and interest in and to any Lease or any Rents; (c) if Debtor or any general or limited partner or member of Debtor is a corporation any merger, by or with such corporation, or the voluntary or involuntary sale, conveyance, transfer or pledge of such corporation's stock (or the stock of any corporation directly or indirectly controlling such corporation by operation of law or otherwise) or the creation or issuance of new stock by which

an aggregate of more than 10% of such corporation's stock shall be vested in a party or parties who are not now stockholders; (d) if Debtor or any general or limited partner or any member of Debtor is a limited or general partnership or joint venture, the change, removal or resignation of a general partner, limited partner or managing partner or the transfer or pledge of the partnership interest of any general partner, limited partner or managing partner or any profits or proceeds relating to such partnership interest; and (e) if Debtor or any general or limited partner or member of Debtor is a limited liability company, the change, removal or resignation of a managing member or the transfer of the membership interest of any managing member or any profits or proceeds relating to such membership interest. Notwithstanding the foregoing, (i) a transfer by devise or descent or by operation of law upon the death of a member, partner or stockholder of Debtor or any general or limited partner or member thereof shall not be deemed to be a sale, conveyance, mortgage, grant, bargain, encumbrance, pledge, assignment, or transfer within the meaning of this Section, and (ii) Debtor may convey the Mortgaged Property to a wholly-owned subsidiary of Debtor or any of the Guarantors provided (1) Debtor shall give Mortgagee prior notice of any such proposed conveyance, (2) Debtor shall not be released from the Obligations and Guarantors shall not be released from any of their obligations under the Guaranty as a result of such conveyance, as evidenced by the acknowledgment of Debtor and Guarantors in an assignment and assumption agreement between Debtor and the grantee of the Mortgaged Property in form and substance reasonably acceptable to Mortgagee, (3) the grantee of the Mortgaged Property shall assume the Obligations with respect to the Mortgaged Property pursuant to such assignment and assumption agreement and other documents, and in such forms, as Mortgagee shall reasonably request, (4) Debtor shall have caused the delivery of such legal opinions as Mortgagee shall reasonably request with respect to the formation and authority of such grantee and, if required by any rating agency which has rated a Securitization involving the Mortgaged Property, the enforceability of the Loan Documents assumed by such grantee, which opinion shall be in form and substance substantially similar to those delivered to Mortgagee simultaneously with the closing of the Loan, and (5) Debtor and such grantee shall have satisfied such other reasonable requirements as Mortgagee may impose with respect to such conveyance (a "Permitted Transfer").

Mortgagee reserves the right to condition the consent required hereunder upon a modification of the terms hereof and on assumption of the Note, this Mortgage and the other Loan Documents as so modified by the proposed transferee, payment of a transfer fee equal to one percent (1%) of the principal balance of the Note (except such transfer fee shall not be payable in the event of a Permitted Transfer) and all of Mortgagee's expenses incurred in connection with such transfer, the approval by a rating agency selected by Mortgagee of the proposed transferee, the proposed transferee's continued compliance with the covenants set forth in this Mortgage, or such other conditions as Mortgagee shall determine in its sole discretion to be in the interest of Mortgagee. Mortgagee shall not be required to demonstrate any actual impairment of its security or any increased risk of default hereunder in order to declare the Obligations immediately due and payable upon Debtor's sale, conveyance, mortgage, grant, bargain, encumbrance, pledge, assignment, or transfer of the Mortgaged Property without Mortgagee's consent as required hereunder. The provisions of this Section shall apply to every sale, conveyance, mortgage, grant, bargain, encumbrance, pledge, assignment, or transfer of the

Mortgaged Property regardless of whether voluntary or not, or whether or not Mortgagee has consented to any previous sale, conveyance, mortgage, grant, bargain, encumbrance, pledge, assignment, or transfer of the Mortgaged Property.

Section 3.15. *Financial Statements.* Within 45 days after the end of each fiscal quarter and within 120 days after the end of each fiscal year of Debtor, Debtor shall deliver to Mortgagee (i) complete financial statements of Guarantors (which shall be consolidated with those of Debtor) including a balance sheet, profit and loss statement, statement of changes in financial condition and all other related schedules for the fiscal period then ended; (ii) income statements for the business at the Mortgaged Property; and (iii) such other financial information as Mortgagee may reasonably request in order to establish the compliance of Debtor with the financial covenants in the Loan Documents, including, without limitation, Section 7 of the Applicable Loan Agreement. All such financial statements shall be prepared in accordance with generally accepted accounting principles, consistently applied from period to period, and shall be certified to be accurate and complete by Debtor (or the Treasurer or other appropriate officer of Debtor). Debtor understands that Mortgagee is relying upon such financial statements and Debtor represents that such reliance is reasonable. In the event that Debtor's property and business at the Mortgaged Property is ordinarily consolidated with other business for financial statement purposes, such financial statements shall be prepared on a consolidated basis showing separately the sales, profits and losses, assets and liabilities pertaining to the Mortgaged Property with the basis for allocation of overhead of other charges being clearly set forth. The financial statements delivered to Mortgagee need not be audited, but Debtor shall deliver to Mortgagee copies of any audited financial statements of Debtor which may be prepared, as soon as they are available.

Section 3.16. *Testing.* (a) At its sole cost and expense, Debtor shall have the Mortgaged Property inspected as may be required by any Environmental Law for seepage, spillage and other environmental concerns. Debtor shall maintain and monitor the USTs in accordance with all Environmental Laws. At Mortgagee's request, Debtor shall provide Mortgagee with written certified results of all inspections performed on the Mortgaged Property. All costs and expenses associated with the inspection, preparation and certification of results, as well as those associated with any corrective action, shall be paid by Debtor. All inspections and tests performed on the Premises shall be in material compliance with all Environmental Laws.

(b) Debtor shall comply or cause the material compliance with all applicable federal, state and local regulations and requirements regarding USTs including, without limitation, any of such regulations or requirements which impose (i) technical standards, including, without limitation, performance, leak prevention, leak detection, notification reporting and recordkeeping, (ii) corrective action with respect to confirmed and suspected Releases, and (iii) financial responsibility for the payment of costs of corrective action and compensation to third parties for injury and damage resulting from Releases. Debtor shall promptly notify Mortgagee, in writing, of (i) the presence on or under the Mortgaged Property, or the escape, seepage, leakage, spillage, discharge, emission or release from any USTs on, above or under the Mortgaged Property of any Hazardous Materials or Regulated Substances, apparent or real that

could have a Material Adverse Effect and (ii) any and all material enforcement, clean-up, remedial, removal or other governmental or regulatory actions threatened, instituted, or completed pursuant to any of the Environmental Laws affecting the Premises.

(c) Upon any Release, escape, seepage, leakage, spillage, discharge, emission or release from any USTs on, above or under the Mortgaged Property of any Hazardous Materials or Regulated Substances, Debtor shall promptly remedy such situation in accordance with all Environmental Laws and any request of Mortgagee. Should Debtor fail to remedy or cause the remedy of such situation in accordance with all Environmental Laws, Mortgagee shall be permitted to take such actions in its sole discretion to remedy such situation and any costs and expenses incurred in connection therewith will be paid by Debtor.

Section 3.17. **Distributor Agreements.** Debtor shall cause the Distributor Agreements, or substitute agreements in form and substance and with such parties as are reasonably acceptable to Mortgagee, to be maintained in full force and effect. Debtor shall cause the distributee under the Distributor Agreements to (i) fulfill, perform and observe in all respects each and every condition and covenant of such distributee contained in each Distributor Agreement; and (ii) give prompt notice to Mortgagee of any claim or event of default under any Distributor Agreement given to such distributee by any Distributor or given by such distributee to any Distributor, together with a complete copy or statement of any information submitted or referenced in support of such claim or event of default.

ARTICLE IV

POSSESSION, USE AND RELEASE OF THE MORTGAGED PROPERTY

Section 4.01. **Casualty or Condemnation.** Debtor, promptly upon obtaining knowledge of any casualty to any portion of the Mortgaged Property or of any proceeding or negotiation for the taking of all or any portion of the Mortgaged Property in condemnation or other eminent domain proceedings, shall notify Mortgagee of such casualty, proceeding or negotiation. Any award, compensation or other payment resulting from such casualty or condemnation or eminent domain proceeding, as applicable, shall be applied as set forth below. Mortgagee may participate in any condemnation or eminent domain proceeding, and Debtor will deliver or cause to be delivered to Mortgagee all instruments requested by Mortgagee to permit such participation.

(a) **Casualty.** (i) In the event of any material damage to or destruction of the Mortgaged Property or any part thereof, Debtor will promptly give written notice to Mortgagee, generally describing the nature and extent of such damage or destruction. No damage to or destruction of the Mortgaged Property shall relieve Debtor of its obligation to pay any monetary sum due under the Loan Documents at the time and in the manner provided in the Loan Documents.

(ii) In the event of any damage to or destruction of the Mortgaged Property or any part thereof, Debtor, whether or not the insurance proceeds, if any, on account of such damage or destruction shall be sufficient for the purpose, at its expense, shall promptly cause the Restoration to be commenced and completed.

(iii) Insurance proceeds received by Mortgagee and Debtor on account of any occurrence of damage to or destruction of the Mortgaged Property or any part thereof, less the costs, fees and expenses incurred by Mortgagee and Debtor in the collection thereof, including, without limitation, adjuster's fees and expenses and attorneys' fees and expenses (the "Net Insurance Proceeds"), shall be paid to (1) Debtor if the amount of such Net Insurance Proceeds is less than \$50,000 and applied by Debtor toward the cost of the Restoration, and (2) Mortgagee if the amount of such Net Insurance Proceeds is \$50,000 or greater. Net Insurance Proceeds paid to Mortgagee shall be held and disbursed by Mortgagee, or as Mortgagee may from time to time direct, as the Restoration progresses, to pay or reimburse Debtor for the cost of the Restoration, upon written request of Debtor accompanied by evidence, satisfactory to Mortgagee, that (v) the Restoration is in full compliance with all applicable laws, regulations, restrictions and requirements, whether governmental or private, (w) the amount requested has been paid or is then due and payable and is properly a part of such cost, (x) there are no recorded mechanics' or similar liens for labor or materials theretofore supplied in connection with the Restoration, (y) if the estimated cost of the Restoration exceeds the Net Insurance Proceeds, Debtor has deposited into an escrow satisfactory to Mortgagee such excess amount, which sum will be disbursed pursuant to escrow instructions satisfactory to Mortgagee, and (z) the balance of such Net Insurance Proceeds, together with the funds deposited into escrow, if any, pursuant to the preceding subsection (y), after making the payment requested will be sufficient to pay the balance of the cost of the Restoration. Upon receipt by Mortgagee of evidence satisfactory to it that the Restoration has been completed and the cost thereof paid in full, and that there are no mechanics' or similar liens for labor or materials supplied in connection therewith, the balance, if any, of such Net Insurance Proceeds shall be paid to Debtor. If an Event of Default has occurred and is continuing at the time of the damage or destruction to the Mortgaged Property or at any time thereafter, all Net Insurance Proceeds shall be paid to Mortgagee, and Mortgagee may retain and apply the Net Insurance Proceeds toward the Obligations whether or not then due and payable, in such order, priority and proportions as Mortgagee in its discretion shall deem proper, or to cure such Event of Default, or, in Mortgagee's discretion, Mortgagee may pay such Net Insurance Proceeds in whole or in part to Debtor to be applied toward the cost of the Restoration. If Mortgagee shall receive and retain Net Insurance Proceeds, the lien of this Mortgage shall be reduced only by the amount received and retained by Mortgagee and actually applied by Mortgagee in reduction of the Obligations.

(b) *Eminent Domain.* (i) In case of a taking of all or any part of the Mortgaged Property or the commencement of any proceedings or negotiations which might result in a taking, for any public or quasi-public purpose by any lawful power or

authority by exercise of the right of condemnation or eminent domain or by agreement between Mortgagee, Debtor and those authorized to exercise such right ("Taking"), Debtor will promptly give written notice thereof to Mortgagee, generally describing the nature and extent of such Taking. Mortgagee shall file and prosecute or settle on behalf of Mortgagee and Debtor any and all claims for an award, and all awards and other payments on account of a Taking shall be paid to Mortgagee.

(ii) In case of a Taking of the whole of the Mortgaged Property, other than for temporary use ("Total Taking"), or in case of a Taking of less than all of the Mortgaged Property ("Partial Taking"), the Loan Documents shall remain in full force and effect. In case of a Partial Taking, Debtor, whether or not the awards or payments, if any, on account of such Partial Taking shall be sufficient for the purpose (but provided they are made available by Mortgagee for such purpose), at its own cost and expense, will promptly commence and complete the Restoration. In case of a Partial Taking, other than a temporary use, of such a substantial part of the Mortgaged Property as shall result in the Mortgaged Property remaining after such Partial Taking being unsuitable for use, such Taking shall be deemed a Total Taking.

(iii) In case of a temporary use of the whole or any part of the Mortgaged Property by a Taking, the Loan Documents shall remain in full force and effect without any reduction of any monetary sum payable under the Loan Documents. In any proceeding for such Taking, Mortgagee shall have the right to intervene and participate; provided that, if such intervention shall not be permitted, Debtor shall consult with Mortgagee, its attorneys and experts, and make all reasonable efforts to cooperate with Mortgagee in the prosecution or defense of such proceeding. At the termination of any such use or occupation of the Mortgaged Property, Debtor will, at its own cost and expense, promptly commence and complete the Restoration.

(iv) Awards and other payments on account of a Taking, less the costs, fees and expenses incurred by Mortgagee and Debtor in connection with the collection thereof, including, without limitation, attorneys' fees and expenses, shall be applied as follows:

(x) Net awards and payments received on account of a Total Taking shall be allocated as follows:

(aa) There shall be paid to the Mortgagee an amount up to the sum of the outstanding principal, including all sums advanced by Mortgagee hereunder, and interest under the Note, all as of the date on which such payment is made, such amount shall be applied first against all sums advanced by Mortgagee under this Mortgage, second against the accrued but unpaid interest on the Note, and third to the remaining unpaid principal amount of the Note.

(bb) Any remaining balance shall be paid to Debtor.

(y) Net awards and payments received on account of a Partial Taking shall be held and allocated as follows: (i) toward the cost of the Restoration, such application of net awards and other payments to be made substantially in the manner provided in Section 4.01(a)(iii) of this Mortgage; (ii) there shall be paid to Mortgagee, as the holder of this Mortgage, an amount equal to that portion of any unpaid principal amount of the Note, and any interest accrued thereon, bearing the same relationship to the total unpaid principal amount of the Note, and any interest accrued thereon, all as of the date on which such payment is made, as the square footage in the Mortgaged Property taken on account of such Partial Taking, bears to the total square footage in the Mortgaged Property prior to such Partial Taking, and such amount shall be applied against the unpaid principal amount of the Note; and (iii) any remaining balance shall be paid to Debtor.

(z) Net awards and payments received on account of a Taking for temporary use shall be held by Mortgagee and applied to the payment of the monthly installments of combined interest and principal becoming due under the Note, until such Taking for temporary use is terminated and the Restoration, if any, has been completed; provided, however, that, if any portion of any such award or payment is made by reason of any damage to or destruction of the Mortgaged Property, such portion shall be held and applied as provided in Section 4.01(a)(iii) hereof. The balance, if any, of such awards and payments shall be paid to Debtor.

(v) Notwithstanding the foregoing, if at the time of any Taking or at any time thereafter an Event of Default shall have occurred and be continuing under the Loan Documents, Mortgagee is hereby authorized and empowered, in the name and on behalf of Debtor and otherwise, to file and prosecute Debtor's claim, if any, for an award on account of any Taking and to collect such award and apply the same, after deducting all costs, fees and expenses incident to the collection thereof (the "Net Award"), toward the Obligations whether or not then due and payable, in such order, priority and proportions as Mortgagee in its discretion shall deem proper, or to cure such Event of Default, or, in Mortgagee's discretion, Mortgagee may pay the Net Award in whole or in part to Debtor to be applied toward the cost of the Restoration. If Mortgagee shall receive and retain the Net Award, the lien of this Mortgage shall be reduced only by the amount received and retained by Mortgagee and actually applied by Mortgagee in reduction of the Obligations.

Section 4.02. *Conveyance in Anticipation of Condemnation, Granting of Easements, Etc.* If no Event of Default shall have occurred and be continuing, Debtor may, from time to time with respect to its interest in the Mortgaged Property, and with Mortgagee's prior written consent, which consent shall not be unreasonably withheld or delayed, (i) sell, assign, convey or otherwise transfer any interest therein to any person legally empowered to take such interest under the power of eminent domain, (ii) grant easements and other rights in the nature of

easements, (iii) release existing easements or other rights in the nature of easements which are for the benefit of the Mortgaged Property, (iv) dedicate or transfer unimproved portions of the Mortgaged Property for road, highway or other public purposes, (v) execute petitions to have the Mortgaged Property annexed to any municipal corporation or utility district, and (vi) execute and deliver to any person any instrument appropriate to confirm or effect such grants, releases, dedications and transfers.

Section 4.03. **Mortgagee's Power.** At any time, or from time to time, without liability therefor, Mortgagee, without affecting the personal liability of any person for payment of the Obligations or the effect of this Mortgage upon the remainder of said Mortgaged Property, may from time to time without notice (i) release any part of said Mortgaged Property, (ii) consent in writing to the making of any map or plat thereof, (iii) join in granting any easement thereon, (iv) join in any extension agreement or any agreement subordinating the lien or charge hereof, (v) release any person so liable, (vi) extend the maturity or alter any of the terms of any Obligations, (vii) grant other indulgences, (viii) take or release any other or additional security for any Obligations, (ix) make compositions or other arrangements with debtors in relation thereto, or (x) advance additional funds to protect the security hereof or to pay or discharge the Obligations in the event Debtor fails to do so, and all amounts so advanced shall be secured hereby and shall be due and payable upon demand by Mortgagee.

ARTICLE V

EVENTS OF DEFAULT AND REMEDIES

Section 5.01. **Events of Default.** Each of the following shall be an event of default under this Mortgage (each, an "Event of Default"):

(i) If any representation or warranty of Debtor set forth in any of the Loan Documents is false in any material respect, or if Debtor renders any false statement or account.

(ii) If any principal, interest or other monetary sum due under the Note, this Mortgage, the Other Notes or any other Loan Document is not paid within five days from the date when due; provided, however, notwithstanding the occurrence of such an Event of Default, Mortgagee shall not be entitled to exercise its remedies set forth in Section 5.02 below unless and until Mortgagee shall have given Debtor notice thereof and a period of five days from the delivery of such notice shall have elapsed without such Event of Default being cured.

(iii) If Debtor fails to pay, prior to delinquency, any taxes, assessments or other charges the failure of which to pay will result in the imposition of a lien against the Mortgaged Property pursuant to Applicable Regulations.

(iv) If Debtor becomes insolvent within the meaning of the Code, files or notifies Mortgagee that it intends to file a petition under the Code, initiates a proceeding under any

similar law or statute relating to bankruptcy, insolvency, reorganization, winding up or adjustment of debts (collectively, hereinafter, an "Action"), becomes the subject of either a petition under the Code or an Action, or is not generally paying its debts as the same become due.

(v) If Debtor fails to observe or perform any of the covenants, conditions, or obligations of this Mortgage; provided, however, if any such failure does not involve the payment of any principal, interest or other monetary sum due under the Note, is not willful or intentional, does not place any rights or property of Mortgagee in immediate jeopardy, and is within the reasonable power of Debtor to promptly cure after receipt of notice thereof, all as determined by Mortgagee in its reasonable discretion, then such failure shall not constitute an Event of Default hereunder, unless otherwise expressly provided herein, unless and until Mortgagee shall have given Debtor notice thereof and a period of 30 days shall have elapsed, during which period Debtor may correct or cure such failure, upon failure of which an Event of Default shall be deemed to have occurred hereunder without further notice or demand of any kind being required. If such failure cannot reasonably be cured within such 30-day period, as determined by Mortgagee in its reasonable discretion, and Debtor is diligently pursuing a cure of such failure, then Debtor shall have a reasonable period to cure such failure beyond such 30-day period, which shall in no event exceed 90 days after receiving notice of the failure from Mortgagee. If Debtor shall fail to correct or cure such failure within such 90-day period, an Event of Default shall be deemed to have occurred hereunder without further notice or demand of any kind being required.

(vi) If there is an "Event of Default" under any of the Loan Agreements, any Equipment Loan Document, any Additional Loan Document or any Other Agreement.

(vii) If a final, nonappealable judgment is rendered by a court against Debtor which could have a Material Adverse Effect and which is not discharged or provision made for such discharge within 60 days from the date of entry thereof.

(viii) If there is a breach or default under any Distributor Agreement or if any Distributor Agreement terminates or expires and a substitute agreement for the terminated or expired agreement is not entered into prior to such expiration or termination, which substitute agreement shall be in form and substance reasonably satisfactory to Mortgagee.

Section 5.02. **Remedies.** Upon the occurrence of an Event of Default, subject to the limitations set forth in Section 5.01, Mortgagee may declare all or any part of the Obligations to be due and payable, and the same shall thereupon become due and payable without any presentment, demand, protest or notice (including notice of intent to accelerate and notice of acceleration) of any kind except as otherwise expressly provided herein or in any of the other Loan Documents. Furthermore, upon the occurrence of an Event of Default, Mortgagee may:

(i) Either in person or by agent, with or without bringing any action or proceeding, or by a receiver appointed by a court, and without regard to the adequacy of

its security, enter upon and take possession of the Mortgaged Property or any part thereof and do any acts which it deems necessary or desirable to preserve the value, marketability, or rentability of the Mortgaged Property, or part thereof or interest therein, increase the income therefrom or protect the security hereof and, with or without taking possession of the Mortgaged Property, take any action described herein, sue for or otherwise collect the Rents, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection including reasonable attorneys' fees, upon any Obligations, all in such order as Mortgagee may determine. The entering upon and taking possession of the Mortgaged Property, the taking of any action described herein, the collection of such Rents and the application thereof as aforesaid, shall not cure or waive any Event of Default or notice of default or invalidate any act done in response to such Event of Default or pursuant to such notice of default and, notwithstanding the continuance in possession of the Mortgaged Property or the collection, receipt and application of Rents, Mortgagee shall be entitled to exercise every right provided for in any of the Loan Documents or by law upon any Event of Default, including the right to exercise the power of sale herein conferred;

(ii) Commence an action to foreclose this Mortgage in a single parcel or in several parcels as provided by law. At such foreclosure sale, the Mortgaged Property may be offered for sale and sold as a whole without first offering it in any other manner or it may be offered for sale and sold in any other manner Mortgagee may elect subject to the requirements and restrictions of applicable law.

(iii) With or without notice to Debtor, any right to such notice being hereby expressly waived by Debtor, enter upon and take possession of the Premises and after or without taking such possession sell the same before the county courthouse door considered the front or main door to the county courthouse in the county or division of the county where the Premises, or any substantial part of the Premises, are located, at public outcry for cash, after first giving notice of the time, place and terms of such sale by publication once a week for three successive weeks prior to such sale in some newspaper published in such county; and upon the payment of the purchase price, Mortgagee, or the owner of the indebtedness and this Mortgage, or the auctioneer at such sale, is authorized to execute to the purchaser for and in the name of Debtor a good and sufficient deed to the Premises, or any part thereof, sold. The proceeds from such sale shall be applied as provided in the following sentence. Debtor agrees that Mortgagee may bid at any sale had under the terms of this Mortgage and may purchase the Mortgaged Property if the highest bidder therefor and credit the amount so bid (x) first, to payment of all costs, fees and expenses, including attorney's fees and expenses, incurred by Mortgagee in exercising the power of sale and (y) second, as directed by Mortgagee or as may be required by law.

(iv) Commence an action to appoint a receiver or specifically enforce any of the covenants hereof;

(v) Exercise any or all of the remedies available to a secured party under the Uniform Commercial Code as adopted in the State ("UCC"), including, without limitation:

(1) Either personally or by means of a court appointed receiver, commissioner or other officer, take possession of all or any of the Personal Property and exclude therefrom Debtor and all others claiming under Debtor, and thereafter hold, store, use, operate, manage, maintain and control, make repairs, replacements, alterations, additions and improvements to and exercise all rights and powers of Debtor in respect of the Personal Property or any part thereof. In the event Mortgagee demands or attempts to take possession of the Personal Property in the exercise of any rights under any of the Loan Documents, Debtor promises and agrees to promptly turn over and deliver complete possession thereof to Mortgagee;

(2) Without notice to or demand upon Debtor, make such payments and do such acts as Mortgagee may deem necessary to protect its security interest in the Personal Property, including, without limitation, paying, purchasing, contesting or compromising any encumbrance, charge or lien which is prior to or superior to the security interest granted hereunder and, in exercising any such powers or authority, to pay all expenses incurred in connection therewith;

(3) Require Debtor to assemble the Personal Property or any portion thereof, at the Premises, and promptly to deliver such Personal Property to Mortgagee, or an agent or representative designated by it. Mortgagee, and its agents and representatives, shall have the right to enter upon any or all of Debtor's premises and property to exercise Mortgagee's rights hereunder;

(4) Sell, lease or otherwise dispose of the Personal Property at public sale, with or without having the Personal Property at the place of sale, and upon such terms and in such manner as Mortgagee may determine. Mortgagee may be a purchaser at any such sale;

(5) Unless the Personal Property is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, Mortgagee shall give Debtor at least 10 days' prior written notice of the time and place of any public sale of the Personal Property or other intended disposition thereof. Such notice may be delivered to Debtor at the address set forth at the beginning of this Mortgage and shall be deemed to be given as provided herein; and

(6) Any sale made pursuant to the provisions of this subsection shall be deemed to have been a public sale conducted in a commercially reasonable manner if held contemporaneously with the sale of all or a portion of the other Mortgaged Property under power of sale as provided herein upon giving the same

notice with respect to the sale of the Personal Property hereunder as is required for such sale of the other Mortgaged Property under power of sale, and such sale shall be deemed to be pursuant to a security agreement covering both real and personal property under the UCC.

(vi) Apply any sums then deposited in the impound account described in Section 3.12 toward payment of the taxes, assessment and insurance premiums for the Mortgaged Property and/or as a credit on the Obligations in such priority and proportion as Mortgagee may determine in its sole discretion;

(vii) If held by Mortgagee, surrender the insurance policies maintained pursuant to Section 3.11, collect the unearned insurance premiums and apply such sums as a credit on the Obligations in such priority and proportion as Mortgagee in its sole discretion shall deem proper, and in connection therewith, Debtor hereby appoints Mortgagee as agent and attorney-in-fact (which is coupled with an interest and is therefore irrevocable) for Mortgagee to collect such insurance premiums; and

(viii) Either with or without entry or taking possession as herein provided or otherwise, proceed by a suit or suits at law or in equity or by any other appropriate proceeding or remedy (x) to enforce payment of the indebtedness under the Note or the performance of any term, covenant, condition or agreement of this Mortgage or any other right and (y) to pursue any other remedy available to it, all as Mortgagee at its sole discretion shall elect.

If Mortgagee elects to sell Debtor's interest in the Mortgaged Property by exercise of the power of sale herein contained, Mortgagee shall cause such sale to be performed in the manner then required by law.

(a) Except as may be otherwise provided herein or by applicable law, Mortgagee shall cause to be recorded, published and delivered such notices of default and notices of sale as may then be required by law and by this Mortgage. Thereafter, Mortgagee shall sell Debtor's interest in the Mortgaged Property at the time and place of sale fixed by it in such notice of sale, either as a whole, or in separate lots or parcels or items as Mortgagee shall deem expedient, and in such order as it may determine, at public auction to the highest bidder for cash in lawful money of the United States payable at the time of sale, or as otherwise may then be required by law. Mortgagee shall deliver to such purchaser or purchasers thereof its good and sufficient deed or deeds conveying the property so sold, without any covenant or warranty, express or implied. The recitals in such deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including, without limitation, Debtor or Mortgagee, may purchase at such sale. Mortgagee may sell not only the real property but also the Personal Property and other interests which are a part of the Mortgaged Property, or any part thereof, as a unit and as a part of a single sale, or may sell any part of the Mortgaged Property separately from the remainder of the Mortgaged Property. Mortgagee shall not be required to take possession of any part of the Mortgaged Property or to have any of the Personal Property

present at any sale of the Mortgaged Property. Mortgagee may appoint or delegate any one or more persons as agent to perform any act or acts necessary or incident to any sale held by Mortgagee, including the posting of notices and the conduct of sale, but in the name and on behalf of Mortgagee. In the event any sale hereunder is not completed or is defective in the opinion of Mortgagee, such sale shall not exhaust the power of sale hereunder, and Mortgagee shall have the right to cause a subsequent sale or sales to be made hereunder.

(b) As may be permitted by law, Mortgagee shall apply the proceeds of sale to payment of (i) first, to payment of all costs, fees and expenses, including attorneys' fees and expenses incurred by the Mortgagee in exercising the power of sale or foreclosing this Mortgage, and (ii) second, to the payment of the Obligations (including, without limitation, the principal, accrued interest and other sums due and owing under the Note, and the Other Notes and the amounts due and owing to Mortgagee under this Mortgage) in such manner and order as Mortgagee may elect, and (iii) third, the remainder, if any, shall be paid to Debtor, or to Debtor's heirs, devisees, representatives, successors or assigns, or such other persons as may be entitled thereto by law.

(c) Mortgagee may in the manner provided by law postpone sale of all or any portion of the Mortgaged Property.

Section 5.03. ***Appointment of Receiver.*** If an Event of Default shall have occurred and be continuing, Mortgagee, as a matter of right and without notice to Debtor or anyone claiming under Debtor, and without regard to the then value of the Mortgaged Property or the interest of Debtor therein, shall have the right to apply to any court having jurisdiction to appoint a receiver or receivers of the Mortgaged Property and Debtor hereby irrevocably consents to such appointment and waives notice of any application therefor. Any such receiver or receivers shall have all the usual powers and duties of receivers in like or similar cases and all the powers and duties of Mortgagee in case of entry as provided herein and shall continue as such and exercise all such powers until the date of confirmation of the Mortgaged Property unless such receivership is sooner terminated. Debtor waives any right to any hearing or notice of hearing prior to the appointment of a receiver. Such receiver shall be empowered (a) to take possession of the Mortgaged Property and any businesses conducted by Debtor thereon and any business assets used in connection therewith, (b) to exclude Debtor and Debtor's agents, servants and employees from the Mortgaged Property, or, at the option of the receiver, in lieu of such exclusion, to collect a fair market rental from any such persons occupying any part of the Mortgaged Property, (c) to collect the Rents, (d) to complete any construction that may be in progress, (e) to continue the development, marketing and sale of the Mortgaged Property, (f) to do such maintenance and make such repairs and alterations as the receiver deems necessary, (g) to use all stores of materials, supplies and maintenance equipment on the Mortgaged Property and replace such items at the expense of the receivership estate, (h) to pay all taxes and assessments against the Mortgaged Property, all premiums for insurance thereon, all utility and other operating expenses, and all sums due under any prior or subsequent encumbrance, (i) to request that Mortgagee advance such funds as may reasonably be necessary to the effective

exercise of the receiver's powers, on such terms as may be agreed upon by the receiver and Mortgagee, but not in excess of the Default Rate, and (j) generally to do anything that Debtor could legally do if Debtor were in possession of the Mortgaged Property. All expenses incurred by the receiver or his agents, including obligations to repay funds borrowed by the receiver, shall constitute a part of the Obligations. Any revenues collected by the receiver shall be applied first to the expenses of the receivership, including reasonable attorneys' fees incurred by the receiver and by Mortgagee, together with interest thereon at the highest rate of interest applicable in the Note from the date incurred until repaid, and the balance shall be applied toward the Obligations or in such other manner as the court may direct.

Section 5.04. Remedies Not Exclusive. Mortgagee shall be entitled to enforce payment and performance of any Obligations and to exercise all rights and powers under this Mortgage or under any Loan Documents or other agreement or any laws now or hereafter in force, notwithstanding some or all of the Obligations may now or hereafter be otherwise secured, whether by mortgage, deed to secure debt, deed of trust, pledge, lien, assignment or otherwise. Neither the acceptance of this Mortgage nor its enforcement, whether by court action or pursuant to the power of sale or other powers herein contained, shall prejudice or in any manner affect Mortgagee's right to realize upon or enforce any other security now or hereafter held by Mortgagee, it being agreed that Mortgagee shall be entitled to enforce this Mortgage and any other security now or hereafter held by Mortgagee in such order and manner as it may in its absolute discretion determine. No remedy herein conferred upon or reserved to Mortgagee is intended to be exclusive of any other remedy given hereunder or now or hereafter existing at law or in equity or by statute. Every power or remedy given by any of the Loan Documents to Mortgagee, or to which Mortgagee may be otherwise entitled, may be exercised, concurrently or independently, from time to time and as often as may be deemed expedient by Mortgagee. Mortgagee may pursue inconsistent remedies.

The acceptance by Mortgagee of any sum after the same is due shall not constitute a waiver of the right either to require prompt payment, when due, of all other sums hereby secured or to declare a subsequent Event of Default as herein provided. The acceptance by Mortgagee of any sum in an amount less than the sum then due shall be deemed an acceptance on account only and upon condition that it shall not constitute a waiver of the obligation of Debtor to pay the entire sum then due, and failure of Debtor to pay such entire sum then due as contemplated by Section 5.01(ii) shall be an Event of Default, notwithstanding such acceptance of such amount on account, as aforesaid. Mortgagee shall be, at all times thereafter and until the entire sum then due shall have been paid, and notwithstanding the acceptance by Mortgagee thereafter of further sums on account, or otherwise, entitled to exercise all rights in this instrument conferred upon them or either of them, and the right to proceed with a sale under any notice of default, or an election to sell, or the right to exercise any other rights or remedies hereunder, shall in no way be impaired, whether any of such amounts are received prior or subsequent to such proceeding, election or exercise. Consent by Mortgagee to any action or inaction of Debtor which is subject to consent or approval of Mortgagee hereunder shall not be deemed a waiver of the right to require such consent or approval to future or successive actions or inactions.

Section 5.05. **Possession of Mortgaged Property.** In the event of a trustee's sale or foreclosure sale hereunder and after the time of such sale, Debtor occupies the portion of the Mortgaged Property so sold, or any part thereof, Debtor shall immediately become the tenant of the purchaser at such sale, which tenancy shall be a tenancy from day to day, terminable at the will of either tenant or landlord, at a reasonable rental per day based upon the value of the portion of the Mortgaged Property so occupied, such rental to be due and payable daily to the purchaser. An action of unlawful detainer shall lie if the tenant holds over after a demand in writing for possession of such Mortgaged Property; and this agreement and a trustee's or sheriff's deed shall constitute a lease and agreement under which the tenant's possession arose and continued. Nothing contained in this Mortgage shall be construed to constitute Mortgagee as a "mortgagee in possession" in the absence of its taking actual possession of the Mortgaged Property pursuant to the powers granted herein.

Section 5.06. **Waiver of Rights.** Debtor waives the benefit of all laws now existing or that hereafter may be enacted (i) providing for any appraisalment before sale of any portion of the Mortgaged Property, or (ii) in any way extending the time for the enforcement of the collection of the Obligations or creating or extending a period of redemption from any sale made in collecting the Obligations. Debtor agrees that Debtor will not at any time insist upon, plea, claim or take the benefit or advantage of any law now or hereafter in force providing for any appraisalment, valuation, stay, extension, redemption or homestead exemption, and Debtor, for Debtor, Debtor's representatives, successors and assigns, and for any and all persons ever claiming any interest in the Mortgaged Property, hereby waives and releases all rights of redemption, valuation, appraisalment, stay of execution, homestead exemption, notice of election to mature or declare due the whole of the Obligations and marshaling in the event of foreclosure of the liens hereby created. If any law referred to in this Section and now in force, of which Debtor, Debtor's heirs, devisees, representatives, successors and assigns or other person might take advantage despite this Section, shall hereafter be repealed or cease to be in force, such law shall not thereafter be deemed to preclude the application of this Section. Debtor expressly waives and relinquishes any and all rights, remedies and defenses that Debtor may have or be able to assert by reason of the laws of the State pertaining to the rights, remedies and defenses of sureties.

Section 5.07. **Relief From Stay.** In the event that Debtor commences a case under the Code or is the subject of an involuntary case that results in an order for relief under the Code, subject to court approval, Mortgagee shall thereupon be entitled and Debtor irrevocably consents to relief from any stay imposed by Section 362 of the Code on or against the exercise of the rights and remedies otherwise available to Mortgagee as provided in the Loan Documents and Debtor hereby irrevocably waives its rights to object to such relief. In the event Debtor shall commence a case under the Code or is the subject of an involuntary case that results in an order for relief under the Code, Debtor hereby agrees that no injunctive relief against Mortgagee shall be sought under Section 105 or other provisions of the Code by Debtor or other person or entity claiming through Debtor, nor shall any extension be sought of the stay provided by Section 362 of the Code.

Section 5.08. **Cash Collateral.** To the extent allowed by applicable law, Debtor hereby acknowledges and agrees that in the event that Debtor commences a case under the Code or is the subject of an involuntary case that results in an order for relief under the Code: (i) that all of the Rents are, and shall for purposes be deemed to be, "proceeds, product, offspring, rents, or profits" of the Premises covered by the lien of this Mortgage, as such quoted terms are used in Section 552(b) of the Code; (ii) that in no event shall Debtor assert, claim or contend that any portion of the Rents are, or should be deemed to be, "accounts" or "accounts receivable" within the meaning of the Code and/or applicable state law; (iii) that the Rents are and shall be deemed to be in any such bankruptcy proceeding "cash collateral" of Mortgagee as that term is defined in Section 363 of the Code; and (iv) that Mortgagee has valid, effective, perfected, enforceable and "choate" rights in and to the Rents without any further action required on the part of Mortgagee to enforce or perfect its rights in and to such cash collateral, including, without limitation, providing notice to Debtor under Section 546(b) of the Code.

Section 5.09. **Assignment of Rents and Leases.** (a) Debtor hereby assigns, transfers, conveys and sets over to Mortgagee all of Debtor's estate, right, title and interest in, to and under the Leases, whether existing on the date hereof or hereafter entered into, together with any changes, extensions, revisions or modifications thereof and all rights, powers, privileges, options and other benefits of Debtor as the lessor under the Leases regarding the current tenants and any future tenants, and all the Rents from the Leases, including those now due, past due or to become due. Debtor irrevocably appoints Mortgagee its true and lawful attorney-in-fact, at the option of Mortgagee, at any time and from time to time upon an Event of Default, to take possession and control of the Premises, pursuant to Debtor's rights under the Leases, to exercise any of Debtor's rights under the Leases and to demand, receive and enforce payment, to give receipts, releases and satisfaction and to sue, in the name of Debtor or Mortgagee, for all of the Rents. The power of attorney granted hereby shall be irrevocable and coupled with an interest and shall terminate only upon the payment of all sums due Mortgagee for all losses, costs, damages, fees and expenses whatsoever associated with the exercise of this power of attorney, and Debtor hereby releases Mortgagee from all liability (other than as a result of the gross negligence or willful misconduct of Mortgagee) whatsoever for the exercise of the foregoing power of attorney and all actions taken pursuant thereto. The consideration received by Debtor to execute and deliver this assignment and the liens and security interests created herein is legally sufficient and will provide a direct economic benefit to Debtor. It is intended by Debtor and Mortgagee that the assignment set forth herein constitutes an absolute assignment and not merely an assignment for additional security. Notwithstanding the foregoing, this assignment shall not be construed to bind Mortgagee to the performance of any of the covenants, conditions or provisions of Debtor contained in the Leases or otherwise to impose any obligation upon Mortgagee, and so long as there is no Event of Default, Debtor shall have a license, revocable upon an Event of Default, to possess and control the Premises and collect and receive all Rents. Upon an Event of Default, such license shall be automatically revoked.

(b) Upon and during the continuance of any Event of Default, Mortgagee may, at any time without notice (except if required by applicable law), either in person, by agent or by a court-appointed receiver, regardless of the adequacy of Mortgagee's security, and at its sole

election (without any obligation to do so), enter upon and take possession and control of the Premises, or any part thereof, to perform all acts necessary and appropriate to operate and maintain the Premises, including, but not limited to, execute, cancel or modify the Leases, make repairs to the Premises, execute or terminate contracts providing for the management or maintenance of the Premises, all on such terms as are deemed best to protect the security of this assignment, and in Mortgagee's or Debtor's name, sue for or otherwise collect such Rents as specified in this Mortgage as the same become due and payable, including, but not limited to, Rents then due and unpaid. Mortgagee may so sue for or otherwise collect such Rents with or without taking possession of the Premises. Debtor agrees that upon and during the continuance of an Event of Default, each tenant of the Premises shall make its rent payable to and pay such rent to Mortgagee (or Mortgagee's agents) on Mortgagee's written demand therefor, delivered to such tenant personally, by mail, or by delivering such demand to each rental unit, without any liability on the part of said tenant to inquire further as to the existence of an Event of Default by Debtor.

(c) All Rents collected subsequent to any Event of Default shall be applied at the direction of, and in such order as determined by, Mortgagee to the costs, if any, of taking possession and control of and managing the Premises and collecting such amounts, including, but not limited to, reasonable attorney's fees, receiver's fees, premiums on receiver's bonds, costs of repairs to the Premises, premiums on insurance policies, taxes, assessments and other charges on the Premises, and the costs of discharging any obligation or liability of Debtor with respect to the Leases and to the sums secured by this assignment. Mortgagee or the receiver shall have access to the books and records used in the operation and maintenance of the Premises and shall be liable to account only for those Rents actually received.

(d) Mortgagee shall not be liable to Debtor, anyone claiming under or through Debtor or anyone having an interest in the Premises by reason of anything done or left undone by Mortgagee hereunder, except to the extent of Mortgagee's gross negligence or willful misconduct.

(e) Any entering upon and taking possession and control of the Premises by Mortgagee or the receiver and any application of Rents as provided herein shall not cure or waive any Event of Default hereunder or invalidate any other right or remedy of Mortgagee under applicable law or provided therein.

ARTICLE VI

MISCELLANEOUS

Section 6.01. *Satisfaction.* If and when the Note shall have become due and payable (whether by lapse of time or by acceleration or by the exercise of the privilege of prepayment), and Debtor shall pay or cause to be paid (provided such payment is permitted or required by the applicable Loan Documents) the full amount thereof and shall also pay or cause to be paid all other sums then due and payable by the Debtor Entities to the Mortgagee Entities with respect to

the Mortgaged Property, then this Mortgage shall be void (otherwise it shall remain in full force and effect in law and equity forever) and Mortgagee agrees to execute an instrument evidencing the satisfaction of all obligations under this Mortgage and releasing this Mortgage, which instrument shall be prepared and recorded at Debtor's sole expense.

Section 6.02. **Limitation of Rights of Others.** Nothing in this Mortgage is intended or shall be construed to give to any person, other than Debtor, Environmental Insurer, Mortgagee and the holder of the Note, any legal or equitable right, remedy or claim under or in respect of this Mortgage or any covenant, condition or provision herein contained.

Section 6.03. **Severability.** In case any one or more of the provisions contained herein or in the Note shall be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision hereof, and this Mortgage shall be construed as if such provision had never been contained herein or therein.

Section 6.04. **Notices; Amendments; Waiver.** All notices, demands, designations, certificates, requests, offers, consents, approvals, appointments and other instruments given pursuant to this Mortgage (collectively called "Notices") shall be in writing and given by (i) hand delivery, (ii) facsimile, (iii) express overnight delivery service or (iv) certified or registered mail, return receipt requested and shall be deemed to have been delivered upon (a) receipt, if hand delivered, (b) transmission, if delivered by facsimile, (c) the next business day, if delivered by express overnight delivery service, or (d) the third business day following the day of deposit of such notice with the United States Postal Service, if sent by certified or registered mail, return receipt requested. Notices shall be provided to the parties and addresses (or facsimile numbers, as applicable) specified below:

If to Debtor:

E-Z Serve Convenience Stores, Inc.
1824 Hillandale Road
Durham, North Carolina 27705
Attention: Wayne M. Rogers
W. Clay Hamner
Telephone: (919) 384-9888
Telecopy: (919) 383-0500

With a copy to:

Alan M. Levenstein
Tabach-Bank & Levenstein
1453 Third Street, Suite 250
Santa Monica, CA 90401
Telephone: (310) 394-4777
Telecopy: (310) 458-2978

If to Mortgagee:

Dennis L. Ruben, Esq.
Executive Vice President and General Counsel
FFCA Acquisition Corporation
17207 North Perimeter Drive
Scottsdale, AZ 85255
Telephone: (602) 585-4500
Telecopy: (602) 585-2226

or to such other address or such other person as either party may from time to time hereafter specify to the other party in a notice delivered in the manner provided above. Whenever in this Mortgage the giving of Notice is required, the giving thereof may be waived in writing at any time by the person or persons entitled to receive such Notice. Except as in this Mortgage otherwise expressly provided, (i) this Mortgage may not be modified except by an instrument in writing executed by Debtor and Mortgagee and (ii) no requirement hereof may be waived at any time except by a writing signed by the party against whom such waiver is sought to be enforced, nor shall any waiver be deemed a waiver of any subsequent breach or default.

Section 6.05. **Counterparts.** This Mortgage may be executed in any number of counterparts and each thereof shall be deemed to be an original, and all such counterparts shall constitute but one and the same instrument.

Section 6.06. **Successors and Assigns.** All of the provisions herein contained shall be binding upon and inure to the benefit of the respective successors and assigns of the parties hereto, to the same extent as if each such successor and assign were in each case named as a party to this Mortgage. Wherever used, the singular shall include the plural, the plural shall include the singular and the use of any gender shall include all genders.

Section 6.07. **Headings.** The headings appearing in this Mortgage have been inserted for convenient reference only and shall not modify, define, limit or expand the express provisions of this Mortgage.

Section 6.08. **Security Agreement.** With respect to the Personal Property or any portion of the Mortgaged Property which constitutes fixtures or other property governed by the UCC, this Mortgage shall constitute a security agreement between Debtor as the debtor and Mortgagee as the secured party, and Debtor hereby grants to Mortgagee a security interest in such portion of the Mortgaged Property. Cumulative of all other rights of Mortgagee hereunder, Mortgagee shall have all of the rights conferred upon secured parties by the UCC. Debtor will execute and deliver to Mortgagee all financing statements that may from time to time be required by Mortgagee to establish and maintain the validity and priority of the security interest of Mortgagee, or any modification thereof, and all costs and expenses of any searches required by Mortgagee. Mortgagee may exercise any or all of the remedies of a secured party available to it under the UCC with respect to such property, and it is expressly agreed that if upon an Event of Default Mortgagee should proceed to dispose of such property in accordance with the provisions of the UCC, 10 days' notice by Mortgagee to Debtor shall be deemed to be reasonable notice under any provision of the UCC requiring such notice; provided, however, that Mortgagee may

at its option dispose of such property in accordance with Mortgagee's rights and remedies with respect to the real property pursuant to the provisions of this Mortgage, in lieu of proceeding under the UCC.

Debtor shall give advance notice in writing to Mortgagee of any proposed change in Debtor's name, identity, or business form or structure and will execute and deliver to Mortgagee, prior to or concurrently with the occurrence of any such change, all additional financing statements that Mortgagee may require to establish and maintain the validity and priority of Mortgagee's security interest with respect to any of the Mortgaged Property described or referred to herein.

Section 6.09. *Effective as a Financing Statement.* Some of the items of the Mortgaged Property described herein are equipment and goods that are or are to become fixtures related to the Premises, and it is intended that as to such equipment and goods, this Mortgage shall be effective as a financing statement filed as a fixture filing from the date of its filing for record in the real estate records of the county in which the Mortgaged Property is situated. Information concerning the security interest created by this instrument may be obtained from Mortgagee, as secured party, at the address of Mortgagee stated in the introductory paragraph of this Mortgage. The mailing address of Debtor, as debtor, is as stated in the introductory paragraph of this Mortgage.

Section 6.10. *Characterization; Interpretation.* It is the intent of the parties hereto that the business relationship created by the Note, this Mortgage and the other Loan Documents is solely that of creditor and debtor and has been entered into by both parties in reliance upon the economic and legal bargains contained in the Loan Documents. None of the agreements contained in the Loan Documents is intended, nor shall the same be deemed or construed, to create a partnership between Mortgagee and Debtor, to make them joint venturers, to make Debtor an agent, legal representative, partner, subsidiary or employee of Mortgagee, nor to make Mortgagee in any way responsible for the debts, obligations or losses of Debtor.

Mortgagee and Debtor acknowledge and warrant to each other that each has been represented by independent counsel and has executed this Mortgage after being fully advised by said counsel as to its effect and significance. This Mortgage shall be interpreted and construed in a fair and impartial manner without regard to such factors as the party which prepared the instrument, the relative bargaining powers of the parties or the domicile of any party.

Section 6.11. *Time of the Essence.* Time is of the essence in the performance of each and every obligation under this Mortgage.

Section 6.12. *Document Review.* In the event Debtor makes any request upon Mortgagee requiring Mortgagee or its attorneys to review and/or prepare (or cause to be reviewed and/or prepared) any document or documents in connection with or arising out of or as a result of this Mortgage, then, except as expressly stated elsewhere herein, Debtor shall reimburse Mortgagee or its designee promptly upon Mortgagee's demand therefor a reasonable processing and reviewing fee in an amount not less than \$500.00 for each such request.

Section 6.13. **Estoppel Certificate.** (a) At any time, and from time to time, Debtor agrees, promptly and in no event later than 10 days after a request from Mortgagee, to execute, acknowledge and deliver to Mortgagee a certificate in the form supplied by Mortgagee, certifying: (1) the date to which principal and interest have been paid under the Note and the amount thereof then payable; (2) that no notice has been received by Debtor of any default under this Mortgage which has not been cured, except as to defaults specified in the certificate; (3) the capacity of the person executing such certificate, and that such person is duly authorized to execute the same on behalf of Debtor; (4) that Mortgagee does not have actual involvement in the management or control of decision making related to the operational aspects or the day-to-day operations of the Mortgaged Property, including the USTs or the handling or disposal of solid or hazardous waste; and (5) any other information reasonably requested by Mortgagee in connection with the Applicable Loan Agreement.

(b) If Debtor shall fail or refuse to sign a certificate in accordance with the provisions of this Section within 10 days following a request by Mortgagee, Debtor irrevocably constitutes and appoints Mortgagee as its attorney-in-fact to execute and deliver the certificate to any such third party, it being stipulated that such power of attorney is coupled with an interest and is irrevocable and binding.

Section 6.14. **Limitation of Interest.** Notwithstanding anything to the contrary contained in any of the Loan Documents, the obligations of Debtor to Mortgagee under the Note, this Mortgage and any other Loan Documents are subject to the limitation that payments of interest and late charges to Mortgagee shall not be required to the extent that receipt of any such payment by Mortgagee would be contrary to provisions of applicable law limiting the maximum rate of interest that may be charged or collected by Mortgagee. The portion of any such payment received by Mortgagee that is in excess of the maximum interest permitted by such provisions of law shall be credited to the principal balance of the Note or if such excess portion exceeds the outstanding principal balance of the Note, then such excess portion shall be refunded to Debtor. All interest paid or agreed to be paid to Mortgagee shall, to the extent permitted by applicable law, be amortized, prorated, allocated and/or spread throughout the full term of the Note (including, without limitation, the period of any renewal or extension thereof) so that interest for such full term shall not exceed the maximum amount permitted by applicable law.

Section 6.15. **Forum Selection; Jurisdiction; Venue; Choice of Law.** Debtor acknowledges that this Mortgage was substantially negotiated in the State of Arizona, this Mortgage was executed and delivered in the State of Arizona, all payments under the Loan Documents will be delivered in the State of Arizona and there are substantial contacts between the parties and the transactions contemplated herein and the State of Arizona. For purposes of any action or proceeding arising out of this Mortgage, the parties hereto expressly submit to the jurisdiction of all federal and state courts located in the State of Arizona. Debtor consents that it may be served with any process or paper by registered mail or by personal service within or without the State of Arizona in accordance with applicable law. Furthermore, Debtor waives and agrees not to assert in any such action, suit or proceeding that it is not personally subject to the jurisdiction of such courts, that the action, suit or proceeding is brought in an inconvenient forum.

or that venue of the action, suit or proceeding is improper. The creation of this Mortgage and the rights and remedies of Mortgagee with respect to the Mortgaged Property, as provided herein, and by the laws of the State, shall be governed by and construed in accordance with the internal laws of the State without regard to principles of conflict of law. With respect to other provisions of this Mortgage, this Mortgage shall be governed by the internal laws of the State of Arizona. Nothing in this Section shall limit or restrict the right of Mortgagee to commence any proceeding in the federal or state courts located in the State to the extent Mortgagee deems such proceeding necessary or advisable to exercise remedies available under the Mortgage or the other Loan Documents.

Section 6.16. **Indemnification.** Debtor shall indemnify and hold harmless each of the Indemnified Parties from and against any and all Losses (excluding Losses suffered by an Indemnified Party arising out of such Indemnified Party's gross negligence or wilful misconduct), caused by, incurred or resulting from Debtor's operations of, or relating in any manner to, the Mortgaged Property, whether relating to its original design or construction, latent defects, alteration, maintenance, use by Debtor or any person thereon, supervision or otherwise, or from any breach of, default under or failure to perform any term or provision of this Mortgage by Debtor, its officers, employees, agents or other persons. It is expressly understood and agreed that Debtor's obligations under this Section shall survive the expiration or earlier termination of this Mortgage for any reason.

Section 6.17. **Waiver of Jury Trial and Punitive, Consequential, Special and Indirect Damages.** MORTGAGEE, BY ACCEPTING THIS MORTGAGE, AND DEBTOR HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE THE RIGHT EITHER MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY AND ALL ISSUES PRESENTED IN ANY ACTION, PROCEEDING, CLAIM OR COUNTERCLAIM BROUGHT BY EITHER OF THE PARTIES HERETO AGAINST THE OTHER OR ITS SUCCESSORS WITH RESPECT TO ANY MATTER ARISING OUT OF OR IN CONNECTION WITH THIS MORTGAGE, THE RELATIONSHIP OF MORTGAGEE AND DEBTOR, DEBTOR'S USE OR OCCUPANCY OF THE MORTGAGED PROPERTY, AND/OR ANY CLAIM FOR INJURY OR DAMAGE, OR ANY EMERGENCY OR STATUTORY REMEDY. THIS WAIVER BY THE PARTIES HERETO OF ANY RIGHT EITHER MAY HAVE TO A TRIAL BY JURY HAS BEEN NEGOTIATED AND IS AN ESSENTIAL ASPECT OF THEIR BARGAIN. FURTHERMORE, DEBTOR HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES THE RIGHT IT MAY HAVE TO SEEK PUNITIVE, CONSEQUENTIAL, SPECIAL AND INDIRECT DAMAGES FROM MORTGAGEE OR ANY OF MORTGAGEE'S AFFILIATES, OFFICERS, DIRECTORS OR EMPLOYEES OR ANY OF THEIR SUCCESSORS WITH RESPECT TO ANY AND ALL ISSUES PRESENTED IN ANY ACTION, PROCEEDING, CLAIM OR COUNTERCLAIM BROUGHT BY DEBTOR AGAINST MORTGAGEE OR ANY OF MORTGAGEE'S AFFILIATES, OFFICERS, DIRECTORS OR EMPLOYEES OR ANY OF THEIR SUCCESSORS WITH RESPECT TO ANY MATTER ARISING OUT OF OR IN CONNECTION WITH THIS MORTGAGE OR ANY DOCUMENT CONTEMPLATED HEREIN OR RELATED HERETO. THE WAIVER BY DEBTOR OF ANY RIGHT IT MAY HAVE TO SEEK PUNITIVE, CONSEQUENTIAL,

SPECIAL AND INDIRECT DAMAGES HAS BEEN NEGOTIATED BY THE PARTIES
HERETO AND IS AN ESSENTIAL ASPECT OF THEIR BARGAIN.


Section 6.18. *Transfer of Loan.* Mortgagee may, at any time, sell, transfer or assign the Note, this Mortgage and the other Loan Documents, and any or all servicing rights with respect thereto, or grant participations therein or issue mortgage pass-through certificates or other securities evidencing a beneficial interest in a rated or unrated public offering or private placement as contemplated by the Applicable Loan Agreement.


Section 6.19. *Reliance By Environmental Insurer.* Debtor acknowledges and agrees that Environmental Insurer may rely on the representations, warranties and covenants set forth in Sections 2.06, 3.07 and 3.16 of this Mortgage, that Environmental Insurer is an intended third-party beneficiary of such representations, warranties and covenants and that Environmental Insurer shall have all rights and remedies available at law or in equity as a result of a breach of such representations, warranties and covenants, including, to the extent applicable, the right of subrogation.

IN WITNESS WHEREOF, Debtor has caused this Mortgage to be executed and delivered as of the day and year first above written.

DEBTOR:

E-Z SERVE CONVENIENCE STORES,
INC., a Delaware corporation

By 
Alan Bentley
Its Chief Financial Officer and Secretary

Taxpayer Identification Number: 

POWER OF ATTORNEY

Mortgagee may act as attorney-in-fact or otherwise on behalf of Debtor pursuant to Sections 3.05, 5.02(v), 5.09(a) and 6.13(b) of this Mortgage. This power of attorney is coupled with an interest, is durable and is not affected by subsequent disability or incapacity of the principal or lapse of time.


Witness


Mortgagee


Debtor

WITNESS

In accordance with the requirements of Arizona Revised Statutes Section 14-5506 and other applicable law, the undersigned has executed this Mortgage for the purpose of witnessing the grant of the powers of attorney by Debtor to Mortgagee.



This Instrument Prepared By:

Mitchell S. Padover, Esq.
Kutak Rock
Suite 1600
3300 North Central Ave.
Phoenix, AZ 85012

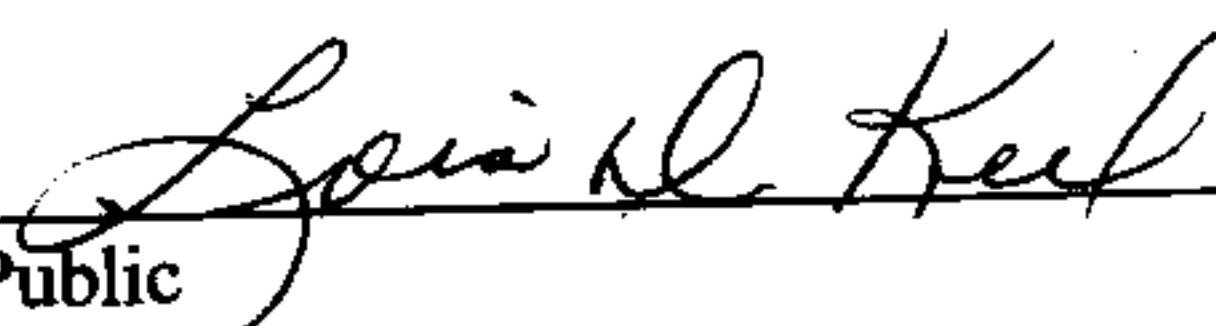
After Recordation Return To:

Lawyers Title Insurance Corporation
3636 N. Central Ave. Suite 350
Phoenix, Arizona 85012

STATE OF ARIZONA]
] SS.
COUNTY OF MARICOPA]

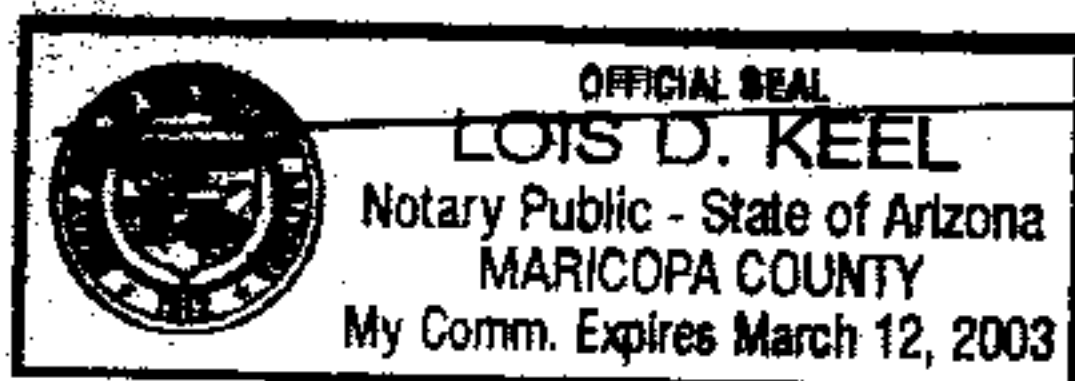
I, the undersigned authority, a Notary Public in and for said County in said State, hereby certify that Alan Bentley, whose name as Chief Financial Officer and Secretary of E-Z Convenience Stores, Inc., a Delaware corporation, is signed to the foregoing Mortgage, and who is known to me, acknowledged before me on this day that, being informed of the contents of the Mortgage, he, as such officer and with full authority, executed the same voluntarily for and as the act of the corporation.

Given under my hand and official seal this 16th day of June, 1999.



Notary Public

My Commission Expires:



**EXHIBIT A
LEGAL DESCRIPTION**

Commence on the East line of Section 26, Township 21 South, Range 1 West, Shelby County, Alabama at a point 1010.86 feet North of the one-half mile corner of said Section 26; thence North 73 degrees, 20 minutes East 16 feet to the point of beginning; run thence South 04 degrees, 15 minutes, East for a distance of 125 feet along the East margin of an alley leading South from East College Street to a point; run thence North 73 degrees, 05 minutes East 151.23 feet to a point; run thence North 15 degrees, 15 minutes West 125 feet to the North side of the paved sidewalk on the South side of East College Street; run thence South 71 degrees, 45 minutes West along North margin of sidewalk a distance of 128 feet to point of beginning; being situated in the southwest quarter of northwest quarter of Section 25, Township 21 South, Range 1 West, Columbiana, Shelby County, Alabama.

FFCA No. 8000-9765
Unit No. 4416
Columbiana, AL

Inst # 1999-44234

10/27/1999-44234
11:09 AM CERTIFIED
SHELBY COUNTY JUDGE OF PROBATE
047 WMS 125.00