

**THIS INSTRUMENT PREPARED BY:**

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Inst # 2001-35833  
08/22/2001-35833  
08:45 AM CERTIFIED  
SHELBY COUNTY JUDGE OF PROBATE  
6098.00  
029 WSB

**STATE OF ALABAMA )**  
**COUNTIES OF SHELBY AND JEFFERSON )**

**MORTGAGE**  
**AND SECURITY AGREEMENT**

**THIS MORTGAGE AND SECURITY AGREEMENT** (this "Mortgage"), made as of the 20<sup>th</sup> day of August, 2001, is by **DANIEL REALTY COMPANY**, an Alabama general partnership, whose address is 3595 Grandview Parkway, Suite 400, Birmingham, Alabama 35243-1930 (the "**Borrower**"), as mortgagor and debtor, in favor of **SOUTHTRUST BANK**, an banking corporation, its successors and assigns, whose address is 420 North 20th Street, 8th Floor, Birmingham, Alabama 35203, Attn: Commercial Real Estate (the "**Lender**"), as mortgagee and secured party.

**WITNESSETH:**

**WHEREAS**, Borrower is justly indebted to the Lender for borrowed money in the principal sum of **FOUR MILLION AND 00/100 DOLLARS (\$4,000,000.00)** (the "**Loan**"), as evidenced by that certain Promissory Note of even date herewith from the Borrower, payable to Lender in installments with interest thereon (said Promissory Note, as the same may hereafter be renewed, extended or modified, being herein collectively called the "**Note**").

**WHEREAS**, as a condition precedent to making the Loan, the Lender has required that the Borrower execute this Mortgage as security for the Loan.

**NOW, THEREFORE**, for and in consideration of the Loan, the sum of Ten Dollars (\$10.00), and other valuable considerations, the receipt and sufficiency whereof are hereby acknowledged, and in order to secure the Loan Obligations (as hereinafter defined), Borrower has bargained and sold and does hereby grant, bargain, sell, alien, and convey unto the Lender, its successors and assigns, all of the following described land and interests in land, estates, easements, rights, improvements, personal property, fixtures, equipment, furniture, furnishings, appliances and appurtenances, including replacements and additions thereto (which together with any additional such property hereafter acquired by the Borrower and subject to the lien of this Mortgage, or intended to be so, as the same may from time to time be constituted, is hereinafter referred to collectively as the "**Mortgaged Property**"), to-wit:

(a) Those certain tract(s) or parcel(s) of land located in Shelby and Jefferson Counties, Alabama, as more particularly described in Exhibit A attached hereto and by this reference made a part hereof (the "**Land**"); and

(b) All buildings, structures and improvements of every nature whatsoever now or hereafter situated on the Land, and all gas and electric fixtures, radiators, heaters, engines and machinery, boilers, ranges, elevators and motors, plumbing and heating fixtures, carpeting and other floor coverings, water heaters, awnings and storm sashes, and cleaning apparatus which are or shall be attached to said buildings, structures or improvements, and all other furnishings, furniture, fixtures, machinery, equipment, appliances, and personal property of every kind and nature whatsoever now or hereafter owned by Borrower and located in, on or about, or used or intended to be used with or in connection with the construction, use, operation or enjoyment of the Mortgaged Property, including all extensions, additions, improvements, betterments, renewals and replacements, substitutions, or proceeds from a permitted sale of any of the foregoing (collectively the "**Improvements**"), all of which are hereby declared and shall be deemed to be fixtures and accessions to the Land and a part of the Mortgaged Property as between the parties hereto and all persons claiming by, through or under them, and which shall be deemed to be a portion of the security for the Loan Obligations: provided, however, that with respect to any items of equipment which are leased and not owned, the Mortgaged Property shall include the Borrower's leasehold interest only, together with any option to purchase any of said items and any additional or greater rights with respect to such items hereafter acquired; and

(c) All of Borrower's right, title, and interest in any and all easements, rights-of-way, strips and gores of land, vaults, streets, ways, alleys, passages, sewer rights, waters, water courses, water rights and powers, minerals, flowers, shrubs, crops, trees, timber and other emblements now or hereafter located on the Land or under or above the same or any part or parcel thereof, and all ground leases, estates, rights, titles, interests, privileges, liberties, tenements, hereditaments and appurtenances, reversions, and remainders whatsoever, in any way belonging, relating or appertaining to the Mortgaged Property or any part thereof, or which hereafter shall in any way belong, relate or be appurtenant thereto, whether now owned or hereafter acquired by Borrower (collectively, the "**Appurtenant Rights**"); and

(d) All rents, issues, profits and revenues of the Mortgaged Property from time to time accruing, including, without limitation, all sums due under any leases or tenancies, together with all proceeds of insurance, condemnation payments, security deposits and escrow funds, and all of the estate, right, title, interest, property, possession, claim and demand whatsoever at law, as well as in equity, of Borrower of, in and to the same, reserving only the right to Borrower to collect the same so long as an Event of Default has not occurred hereunder or such collection is not otherwise restricted by this Mortgage; and

(e) To the fullest extent assignable (if assignable by law), all licenses, permits, certificates of occupancy, and similar documents, warranties, guarantees, operating



agreements, and service contracts obtained by the Borrower relating to the use and operation of the Mortgaged Property; and

(f) Proceeds and products of all of the foregoing real and personal property.

**TO HAVE AND TO HOLD** the Mortgaged Property and all parts thereof unto the Lender, its successors and assigns forever, subject however to the terms and conditions herein set forth.

**PROVIDED, HOWEVER,** that, if the Borrower shall pay to the Lender the principal and interest payable in respect to the Note, at the times and in the manner stipulated therein and herein, all without any deduction or credit for taxes or other similar charges paid by the Borrower, and shall keep, perform, and observe all and singular the covenants and promises herein, in the Note and in each of the Loan Documents expressed to be kept, performed, and observed by and on the part of the Borrower, all without fraud or delay, then this Mortgage, and all the properties, interest, and rights hereby granted, bargained, and sold shall cease, determine, and be void, but shall otherwise remain in full force and effect.

## **ARTICLE I** **DEFINED TERMS**

**1.01 Defined Terms.** As used in this Mortgage, all defined terms set forth above shall have the meanings so ascribed to them, and, in addition, the following terms shall have the meanings set forth below unless the context otherwise requires:

**"Applicable Environmental Law"** shall mean any applicable federal, state or local laws, rules or regulations pertaining to health or the environment, or petroleum products, or radon radiation, or oil or hazardous substances, including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA"), the Resource Conservation and Recovery Act of 1976, as amended ("RCRA"), the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), the Hazardous Materials Transportation Act, 49 U.S.C. § 6901, et seq., as amended, the Federal Water Pollution Control Act, 33 U.S.C. § 1251, et seq., as amended, the Clean Air Act, 42 U.S.C. § 741, et seq., as amended, the Clean Water Act 33 U.S.C. § 7401 et seq., as amended, the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629, as amended, the Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j, as amended, and the Federal Emergency Planning and Community Right-To-Know Act of 1986, as amended. The terms "hazardous substance" and "release" shall have the meanings specified in CERCLA, and the terms "solid waste," "disposal," "dispose," and "disposed" shall have the meanings specified in RCRA, except that if such acts are amended to broaden the meanings thereof, the broader meaning shall apply herein prospectively from and after the date of such amendments; notwithstanding the foregoing, provided, to the extent that the laws of the State of Alabama establish a meaning for "hazardous substance" or "release" which is broader than that specified in CERCLA, as CERCLA may be amended from time to time, or a meaning for "solid waste," "disposal," and "disposed" which is broader than specified in RCRA, as RCRA may be amended from time to time, such broader meanings under said state law shall apply in all matters relating to the laws of such State.

**"Default"** means the occurrence or existence of any event which, but for the giving of notice or expiration of time or both, would constitute an Event of Default.

**"Default Rate"** means the rate which is two percent (2%) in excess of the rate then accruing on the outstanding principal balance of the Loan.

**"Environmental Indemnity"** means that certain Environmental Indemnity Agreement of even date herewith from the Borrower in favor of Lender with respect to the Mortgaged Property, as the same may hereafter be modified or amended.

**"Loan Documents"** means, collectively, the Note, this Mortgage, the Environmental Indemnity, together with any other documents executed by the Borrower or others in connection with the Loan.

**"Loan Obligations"** means the aggregate of all principal and interest owing from time to time under the Note, and all expenses, charges and other amounts from time to time owing under the Note, this Mortgage, or any of the other Loan Documents, and all covenants, agreements and other obligations of the Borrower from time to time owing to, or for the benefit of, Lender pursuant to the Loan Documents.

**"Permitted Encumbrances"** means all matters set forth in Schedule B-II to the Lender's title insurance policy insuring this Mortgage, as approved by the Lender.

The term **"ERISA"** is defined in Section 2.14 hereof.

The term **"Proceeding"** is defined in Section 3.10 hereof.

The term **"Permitted Lien"** is defined in Section 4.02 hereof.

The term **"Remaining Properties"** is defined in Section 6.01 hereof.

**1.02. Singular and Plural.** Singular terms shall include the plural forms and vice versa, as applicable of the terms defined.

**1.03. UCC.** Terms contained in this Agreement shall, unless otherwise defined herein or unless the context otherwise indicates have the meanings, if any, assigned to them by the Uniform Commercial Code in effect in the State of Alabama.

**1.04. References.** All references to other documents or instruments shall be deemed to refer to such documents or instruments as they may hereafter be extended, renewed, modified or amended, and all replacements and substitutions therefor.



## **ARTICLE II**

### **REPRESENTATIONS AND WARRANTIES OF BORROWER**

Borrower represents and warrants to Lender, knowing that Lender will rely on such representations and warranties as incentive to make the Loan, as follows:

**2.01. Warranty of Title.** Borrower is lawfully seized of an indefeasible estate in fee simple in the Land and Appurtenant Rights hereby mortgaged and has good and absolute title to all existing personal property hereby conveyed and has good right, full power and lawful authority to sell, convey and encumber the same in the manner and form aforesaid; that, except for the Permitted Encumbrances, the same is free and clear of all liens, charges, and encumbrances whatsoever, including, as to the personal property and fixtures, conditional sales contracts, chattel mortgages, security agreements, financing statements, and anything of a similar nature, and that Borrower shall and will warrant and forever defend the title thereto unto the Lender, its successors and assigns, against the lawful claims of all persons whomsoever.

**2.02. Borrower's Existence.** Borrower is a general partnership duly organized and validly existing and in good standing under the laws of the State of Alabama, and is duly qualified to do business in and is in good standing in every jurisdiction in which the character of the properties owned by it or in which the transaction of business makes qualification necessary.

**2.03. Power and Authority.** Borrower has full power and authority to borrow the Loan and to incur the Loan Obligations, all of which have been authorized by all proper and necessary partnership action of Borrower.

**2.04. Due Execution and Enforcement.** Each of the Loan Documents to which Borrower is a party constitutes a valid and legally binding obligation of the Borrower, enforceable in accordance with its respective terms and does not violate, conflict with, or constitute any default under any law, government regulation, decree, judgment, the Borrower's organizational documents, or any other agreement or instrument binding upon the Borrower.

**2.05. Violations or Actions Pending.** There are no actions, suits, or proceedings pending against Borrower or, to the best of Borrower's knowledge, threatened which might adversely affect the financial condition of the Borrower or which might impair the value of any of the Mortgaged Property. The Borrower is not in violation of any agreement the violation of which might reasonably be expected to have a materially adverse effect on its business or assets, and the Borrower is not in violation of any order, judgment, or decree of any court, or any statute or governmental regulation to which it is subject. The execution and performance of this Mortgage by the Borrower will not result in any breach of any mortgage, lease, credit agreement or any other instrument which may bind or affect the Borrower.

**2.06. Financial Statements.** All financial statements of the Borrower heretofore given to Lender are true and complete in all material respects as of their respective dates, are prepared in accordance with generally accepted accounting principles consistently applied, and fairly represent the financial conditions of the business or persons to which they pertain, and no materially adverse change has occurred in the financial conditions reflected therein since the respective dates thereof.

**2.07. Compliance with Laws and Regulations.** Any Improvements which Borrower may construct on the Land shall comply with all covenants and restrictions of record, and all applicable laws and regulations, and all laws, ordinances, rules, and regulations relating to zoning, setback requirements, and building codes. Borrower agrees to indemnify and hold Lender harmless from any fines or penalties assessed or any corrective costs incurred by Lender if the Improvements or the Mortgaged Property, or any part thereof, is hereafter determined to be in violation of any covenants or restrictions of record or any applicable laws, ordinances, rules or regulations, and such indemnity shall survive any foreclosure or deed in lieu of foreclosure.

**2.08. Priority of Mortgage.** This Mortgage, when duly executed, delivered, and recorded, will constitute a first lien against the Mortgaged Property, prior to all other liens and encumbrances, including those which may hereafter accrue, except for the Permitted Encumbrances.

**2.09. Condemnation.** There are no proceedings pending, or, to the best of Borrower's knowledge, threatened, to acquire by any power of condemnation or eminent domain, with respect to the Mortgaged Property, or any interest therein.

**2.10. Accuracy of Documents.** All documents furnished to Lender by or on behalf of Borrower as part of or in support of the Loan application, this Mortgage, or any of the other Loan Documents are, in all material respects, true, correct, complete and accurately represent the matters to which they pertain.

**2.11. Environmental Matters.** Neither the Mortgaged Property nor Borrower is in violation of or subject to any existing, pending, or to the best of Borrower's knowledge, threatened investigation or inquiry by any governmental authority or any remedial obligations under any Applicable Environmental Laws. Borrower further represents and warrants that, to the best of Borrower's knowledge, there are no facts, conditions or circumstances known to it which could result in any such investigation or inquiry if such facts, conditions and circumstances, if any, were fully disclosed to the applicable governmental authority and the Borrower will promptly notify Lender if Borrower becomes aware of any such facts, conditions, or circumstances or any such investigation or inquiry. Borrower further represents and warrants that it has not obtained and, to the best of its knowledge is not required to obtain, any permits, licenses, or similar authorizations to construct, occupy, operate or use any buildings, improvements, fixtures or equipment in connection with the Mortgaged Property or Improvements by reason of any Applicable Environmental Laws. Borrower further represents and warrants that, to the best of its knowledge, no oil, toxic or hazardous substances or solid wastes have been disposed of or released on the Mortgaged Property, and Borrower agrees that it will not in its use of the Mortgaged Property dispose of or release oil, toxic or hazardous substances or solid wastes on the Mortgaged Property in amounts in excess of those permitted under law unless remediated promptly and in accordance with all Applicable Environmental Laws. Borrower has executed and delivered to Lender the Environmental Indemnity Agreement, the terms and conditions of which are incorporated herein by this reference, and Borrower covenants and agrees to perform its obligations thereunder.

**2.12. Solvency.** Borrower is solvent within the meaning of 11 U.S.C. § 548 and generally accepted accounting principles consistently applied, and the borrowing of the Loan will not render



the Borrower insolvent within the meaning of 11 U.S.C. § 548 and generally accepted accounting principles consistently applied.

**2.13. Disclosure.** All information furnished or to be furnished by Borrower to the Lender in connection with the Loan or any of the Loan Documents, is, or will be at the time the same is furnished, accurate and correct in all material respects and complete insofar as completeness may be necessary to provide the Lender a true and accurate knowledge of the subject matter.

**2.14. ERISA.** To the best of Borrower's knowledge, Borrower is in compliance with all applicable provisions of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

### **ARTICLE III** **AFFIRMATIVE COVENANTS OF THE BORROWER**

Borrower agrees with and covenants unto the Lender that until the Loan Obligations have been paid in full, it shall comply with each of the following affirmative covenants:

**3.01. Payment of Loan/Performance of Loan Obligations.** Borrower will duly and punctually pay or cause to be paid the principal and interest of the Note in accordance with its terms and duly and punctually pay and perform or cause to be paid or performed all other Loan Obligations hereunder and under the other Loan Documents to which it is a party.

**3.02. Maintenance of Existence.** Borrower will maintain its partnership existence, and, in each jurisdiction in which the character of the property owned by it or in which the transaction of its businesses makes qualification necessary, maintain qualification and good standing.

**3.03. Accrual and Payment of Taxes.** During each fiscal year, Borrower will accrue all current tax liabilities of all kinds (including, without limitation, federal and state income taxes, franchise taxes, and payroll taxes) all required withholding of income taxes of employees, all required old age and unemployment contributions, and all required payments to employee benefit plans, and will pay the same when they become due.

**3.04. Liens and Encumbrances.** Borrower will (i) keep the Mortgaged Property free from all liens and encumbrances except for the Permitted Encumbrances and Permitted Liens; (ii) pay promptly all persons supplying work or materials in connection with any construction activities at the Mortgaged Property; and (iii) discharge any mechanic's or other lien filed against the Mortgaged Property or the Borrower (provided, however, that the Borrower shall have the right to contest in good faith any such lien as long as such lien is bonded off or otherwise removed from the Mortgaged Property within sixty (60) days after the filing of such lien against the Mortgaged Property).

**3.05. Payment of Indebtedness.** Borrower will duly and punctually pay or cause to be paid all other indebtedness now owing or hereafter incurred by Borrower in accordance with the terms of such indebtedness, except such indebtedness owing to those other than Lender which is

being contested in good faith and with respect to which any execution against properties of Borrower has been effectively stayed and for which reserves adequate for payment have been established.

**3.06. Monthly Tax Deposits.** If required by the Lender, Borrower will pay to the Lender, monthly throughout the term of the Loan, an amount equal to one-twelfth (1/12th) of the yearly taxes and assessments (including, without limitation, municipal assessments) as estimated by the Lender to be sufficient to enable the Lender to pay, at least thirty (30) days before they become due, all taxes, assessments, and other similar charges against the Mortgaged Property or any part thereof. Such payments shall be held in trust by Lender but no interest shall be payable in respect thereof. Upon demand of the Lender, Borrower agrees to deliver to the Lender such additional moneys as are necessary to make up any deficiencies in the amounts necessary to enable the Lender to pay such taxes, assessments and similar charges. Upon the occurrence and during the continuation of an Event of Default, the Lender may apply such funds to the reduction of the sums secured hereby, in such manner as the Lender shall determine, and any amount under this Section 3.06 remaining shall be applied to Borrower's credit.

**3.07. Taxes and Assessments.**

(a) Borrower will pay promptly, when and as due, and will exhibit promptly to the Lender receipts for the payment of, all taxes, assessments (including municipal assessments), water rates, dues, charges, fines and impositions of every nature whatsoever imposed, levied or assessed or to be imposed, levied or assessed upon or against the Mortgaged Property or any part thereof, or upon the interest of the Lender in the Mortgaged Property (other than any of the same for which provision has been made in Section 3.06 hereof), as well as all income taxes, assessments and other governmental charges lawfully levied and imposed by the United States of America or any state, county, municipality, borough or other taxing authority upon the Borrower or in respect of the Mortgaged Property or any part thereof, or any charge which, if unpaid, would become a lien or charge upon the Mortgaged Property prior to or equal to the lien of this Mortgage for any amounts secured hereby or would have priority or equality with this Mortgage in distribution of the proceeds of any foreclosure sale of the Mortgaged Property or any part thereof.

(b) Notwithstanding the provisions of paragraph (a) above, Lender agrees that Borrower shall have the right, before any such tax, assessment, fee, or charges become delinquent, to contest or object to the amount or validity of any such tax, assessment, fee, or charge by appropriate legal proceedings, *provided* that said right shall not be deemed or construed in any way as relieving, modifying, or extending Borrower's covenant to pay any such tax, assessment, fee, or charge at the time and in the manner provided herein unless (i) Borrower has given prior written notice to Lender of Borrower's intent to so contest or object, (ii) Borrower shall demonstrate to Lender's satisfaction that the legal proceedings shall conclusively operate to prevent the sale of the Mortgaged Property or any part thereof, to satisfy such tax, assessment, fee, or charge prior to final determination of such proceedings, (iii) Borrower shall furnish a good and sufficient bond or surety as requested by and satisfactory to Lender; and (iv) Borrower shall have provided a good and sufficient undertaking as might be required or permitted by law to accomplish a stay of such proceedings.



(c) Borrower will pay or cause to be paid promptly all charges by utility companies, whether public or private, for electricity, gas, water, sewer, or other utilities with respect to the Mortgaged Property.

**3.08. Insurance.** Borrower will procure for, deliver to, and maintain for the benefit of, the Lender during the life of this Mortgage, valid, paid-up insurance policies providing for the following insurance:

(a) Liability insurance in an amount equal to at least \$1,000,000 per occurrence, \$3,000,000 aggregate, with a \$5,000,000 umbrella. All such liability insurance shall be written on an occurrence basis and name the Lender as an additional insured;

(b) To the extent hereafter applicable and obtainable, "all-risk" broad form coverage on any Improvements constructed by Borrower on the Land in an amount not less than the replacement cost thereof, with endorsements insuring against such potential causes of loss as shall be required by Lender to the extent the Improvements are of a type and nature customarily insured and are insurable within standard all-risk insurance. Such coverage shall name Lender as mortgagee and loss payee under a standard non-contributory mortgagee payable clause, and shall provide that Lender shall receive not less than thirty (30) days written notice prior to cancellation. The proceeds of said policy shall be payable by check payable to Lender or jointly payable to Borrower and to Lender, and shall be delivered to Lender, and such proceeds (after deducting Lender's costs and expenses of obtaining such proceeds) shall be applied by Lender, at Lender's sole option, either (i) to the full or partial payment or prepayment of the Loan Obligations or (ii) to the repair and/or restoration of the Improvements damaged or taken, or Lender may release the net proceeds to the Borrower.

Borrower appoints Lender as Borrower's attorney-in-fact to cause the issuance of or an endorsement of any policy to bring Borrower into compliance herewith and, as limited above, at Lender's sole option, to make any claim for, receive payment for, and execute and endorse any documents, checks or other instruments in payment for loss, theft, or damage covered under any such insurance policy; however, in no event will Lender be liable for failure to collect any amounts payable under any insurance policy.

**3.09. Monthly Insurance Deposits.** If required by the Lender, Borrower will pay to the Lender on the first (1st) day of each month, together with and in addition to the regular installment of principal and interest and monthly tax deposit (as required by Section 3.06 hereof) until the Note is fully paid, an amount equal to one-twelfth (1/12) of the yearly premiums for insurance. Such amount shall be used by Lender to pay such insurance premiums when due. Such payments shall be held in trust, but no interest shall be payable in respect thereof. Upon demand of the Lender, the Borrower agrees to deliver to the Lender such additional moneys as are necessary to make up any deficiencies in the amounts necessary to enable the Lender to pay such insurance premiums when due. Upon the occurrence and during the continuation of an Event of Default, the Lender may apply any money in such fund to the reduction of the sums secured hereby, in such manner as the Lender shall determine, and any remaining shall be applied to Borrower's credit.

**3.10. Condemnation.** Immediately upon obtaining knowledge of the institution of any proceeding for the condemnation of the Mortgaged Property, or any portion thereof (a "**Proceeding**"), Borrower will notify the Lender immediately of the pendency of such Proceeding. The Lender shall be entitled to all compensation, awards, and other payments or relief therefor and is hereby authorized, at its option, to commence, appear in and prosecute, in its own or the Borrower's name, any Proceeding and to settle or compromise any claim in connection therewith. All such compensation, awards, damages, claims, rights of action and proceeds and the right thereto are hereby assigned by the Borrower to the Lender, and the Borrower agrees to execute such further assignments of any compensations, awards, damages, claims, rights of action and proceeds as the Lender may require. The Lender, after deducting therefrom all its reasonable expenses, including attorney's fees, may release any moneys so received by it from a Proceeding without affecting the lien of this Mortgage or may apply the same in such manner as the Lender shall determine to the reduction of the sums secured hereby, and any balance of such moneys then remaining shall be paid to the Borrower.

**3.11. Care of the Mortgaged Property.**

(a) Borrower will preserve and maintain the Mortgaged Property in good condition and repair, and will not commit or suffer any waste and will not do or suffer to be done anything which will increase the risk of fire or other hazard to the Mortgaged Property or any part thereof.

(b) Borrower will not remove, demolish or substantially alter any buildings, fixtures, personal property, or other part of the Mortgaged Property without the prior written consent of the Lender. The Borrower may sell or otherwise dispose of, free from the lien of this Mortgage, furniture, furnishings, equipment, tools, appliances, machinery, fixtures or appurtenances, subject to the lien hereof, which may become worn out, undesirable, obsolete, disused or unnecessary for use in the operation of the Mortgaged Property, upon replacing the same by, or substituting for the same, other furniture, furnishings, equipment, tools, appliances, machinery, fixtures, or appurtenances not necessarily of the same character, but of at least equal value to the Borrower and costing not less than the amount realized from the property sold or otherwise disposed of, which shall forthwith become, without further action, subject to the lien of this Mortgage.

(c) If the Mortgaged Property or any part thereof is damaged by fire or any other cause, Borrower will give immediate written notice of the same to the Lender.

(d) The Lender is hereby authorized to enter upon and inspect the Mortgaged Property at any time.

(e) Borrower will comply promptly with all present and future laws, ordinances, rules and regulations of any governmental authority affecting the Mortgaged Property or any part thereof, including, without limitation, all laws, ordinances, rules and regulations relating to zoning, building codes, set back requirements and environmental matters, and with all present and future restrictive covenants affecting the Mortgaged Property.



(f) If all or any part of the Mortgaged Property shall be damaged by fire or other casualty, Borrower shall restore promptly the Mortgaged Property to the equivalent of its original condition, regardless of whether or not there shall be any insurance proceeds therefor. If a part of the Mortgaged Property shall be physically damaged through condemnation, the Borrower will restore promptly, repair or alter the remaining property in a manner reasonably satisfactory to the Lender.

**3.12. Further Assurances; After Acquired Property.** At any time, and from time to time, upon request by the Lender, Borrower will make, execute and deliver or cause to be made, executed and delivered, to the Lender and, where appropriate, to cause to be recorded and/or filed and from time to time thereafter to be re-recorded and/or re-filed at such time and in such offices and places as shall be deemed desirable by the Lender any and all such other and further mortgages, instruments of further assurance, certificates and other documents as may, in the opinion of the Lender, be necessary or desirable in order to effectuate, complete, enlarge, or perfect, or to continue and preserve the obligation of the Borrower under the Note and this Mortgage, and the lien of this Mortgage as a first and prior lien upon all of the Mortgaged Property, whether now owned or hereafter acquired by the Borrower. Upon any failure by the Borrower so to do, the Lender may make, execute, and record any and all such mortgages, instruments, certificates, and documents for and in the name of the Borrower and the Borrower hereby irrevocably appoints the Lender the agent and attorney-in-fact of the Borrower so to do. To the extent permitted by applicable law, the lien hereof will automatically attach, without further act, to all after acquired property attached to and/or used in the operation of the Mortgaged Property or any part thereof.

**3.13. Leases Affecting Mortgaged Property.** Borrower will obtain Lender's prior written consent for any lease affecting all or any portion of the Mortgaged Property, and will duly and punctually pay, perform, and observe all of its obligations under such Lender-approved leases hereafter and will do all things reasonably necessary or appropriate to enforce, preserve, and keep unimpaired the rights and obligations of the parties under said leases, and, except for rent as may be held as a security deposit, will not accept payment of rent under the leases in advance for periods in excess of thirty (30) days.

**3.14. Expenses.** Borrower will pay or reimburse the Lender for all reasonable attorney's fees, costs, and expenses incurred by the Lender in any action, proceeding, or dispute of any kind in which the Lender is made a party, or appears as party plaintiff or defendant, affecting any of the Loan Documents, Borrower, or the Mortgaged Property, including but not limited to the foreclosure of this Mortgage, any condemnation action involving the Mortgaged Property, or any action to protect the security hereof; and any such amounts paid by the Lender shall bear interest at a rate equal to the Default Rate, shall be payable upon demand, and shall be secured by the lien of this Mortgage.

**3.15. Performance by Lender of Defaults by Borrower.** If the Borrower shall default in the payment of any tax, lien, assessment, or charge levied or assessed against the Mortgaged Property, subject only to the Borrower's right to contest the same as set forth in Section 3.07(b), in the payment of any utility charge, whether public or private; in the payment of insurance premium; in the procurement of insurance coverage and the delivery of the insurance policies required hereunder; or in the performance or observance of any covenant, condition, or term of this Mortgage, then the Lender, at its option, may perform or observe the same, and all payments made for costs or

incurred by the Lender in connection therewith, shall be secured hereby and shall be, without demand, immediately repaid by the Borrower to the Lender with interest thereon at the Default Rate set forth in the Note. The Lender shall be the sole judge of the legality, validity and priority of any such tax, lien, assessment, charge, claim and premium; of the necessity for any such actions and of the amount necessary to be paid in satisfaction thereof. The Lender is hereby empowered to enter and to authorize others to enter upon the Mortgaged Property or any part thereof for the purpose of performing or observing any such defaulted covenant, condition or term, without thereby becoming liable to the Borrower or any person in possession holding under the Borrower.

**3.16. Books and Records.** The Borrower shall keep and maintain at all times full, true and accurate books of accounts and records, adequate to reflect correctly the results of the operation of the Mortgaged Property.

**3.17. Future Financial and Operating Statements.** Borrower shall furnish to Lender within ninety (90) days after the end of each calendar year, annual financial statements of Borrower, which shall be in form reasonably acceptable to the Lender and which shall be certified as true and correct by the Borrower; Lender reserves the right to require that, following the occurrence and during the continuance of an Event of Default, such statements be audited by a nationally recognized accounting firm or other certified public accounting firm reasonably acceptable to Lender, and Borrower shall be responsible for the cost of such audit. Borrower shall certify with each such financial statement that:

- (a) Borrower has complied with and is in compliance with all terms, covenants, and conditions of this Mortgage which are binding upon it;
- (b) there exists no Default or Event of Default or, if such is not the case, that one or more specified Defaults or Events of Default have occurred; and
- (c) the representations and warranties contained in this Mortgage are true with the same effect as though made on the date of such certificate.

**3.18. Security Agreement.** With respect to the apparatus, fittings, fixtures and articles of personal property referred to or described in this Mortgage or in any way connected with the use and enjoyment of the Mortgaged Property, this Mortgage is hereby made and declared to be a security agreement encumbering each and every item of personal property included herein as a part of the Mortgaged Property, in compliance with the provisions of the Uniform Commercial Code as enacted in the State of Alabama, and Borrower hereby grants to Lender a security interest in said personal property. The remedies for any violation of the covenants, terms and conditions of the security agreement contained in this Mortgage, or otherwise in respect of an Event of Default hereunder, shall be (i) as prescribed herein, or (ii) as prescribed by general law, or (iii) as prescribed by the specific statutory consequences now or hereafter enacted and specified in said Uniform Commercial Code, all at Lender's sole election. Borrower and Lender agree that the filing of such financing statement(s) in the records normally having to do with personal property shall not in any way affect the agreement of Borrower and Lender that everything used in connection with the production of income from the Mortgaged Property or adapted for use therein or which is described or reflected in this Mortgage, is, and at all times and for all purposes and in all proceedings, both legal or equitable, shall be,



regarded as part of the real estate conveyed hereby regardless of whether (a) any such item is physically attached to the Improvements, (b) serial numbers are used for the better identification of certain items capable of being thus identified in an Exhibit to this Mortgage, or (c) any such item is referred to or reflected in any such financing statement(s) so filed at any time. Similarly, the mention in any such financing statement(s) of the rights in and to (i) the proceeds of any fire and/or hazard insurance policy, or (ii) any award in eminent domain proceedings for taking or for loss of value, or (iii) Borrower's interest as lessor in any present or future lease or rights to income growing out of the use and/or occupancy of the Mortgaged Property, whether pursuant to lease or otherwise, shall not in any way alter any of the rights of Lender as determined by this instrument or affect the priority of Lender's security interest granted hereby or by any other recorded document, it being understood and agreed that such mention in such financing statement(s) is solely for the protection of Lender in the event any court shall at any time hold, with respect to the foregoing items (i), (ii), or (iii), that notice of Lender's priority of interest, to be effective against a particular class of persons, must be filed in the Uniform Commercial Code records. This Mortgage may be filed as a financing statement in any office where Lender deems such filing necessary or desirable, and Borrower hereby authorizes the Lender to file the same without the Borrower's signature, and Borrower will promptly upon demand reimburse Lender for the costs therefor.

**3.19. Environmental Matters.** Borrower agrees to remedy promptly any violation of Applicable Environmental Laws with respect to the Mortgaged Property, and to pay any fines, charges, fees, expenses, damages, losses, liabilities, and response costs arising from or pertaining to the application of any such Applicable Environmental Law to the Mortgaged Property or the Borrower. Borrower agrees to permit Lender to have access to the Mortgaged Property at all reasonable times in order to conduct any investigation and testing which Lender deems reasonably necessary to ensure that the Mortgaged Property and the Borrower are in compliance with all Applicable Environmental Laws, and Borrower agrees promptly to reimburse Lender for all reasonable costs incurred in such investigation and testing. Borrower has entered into the Environmental Indemnity Agreement with respect to environmental matters, and the Borrower agrees to perform its obligations thereunder.

**3.20. Updated Appraisals.** For so long as the Loan remains outstanding, if any Event of Default shall occur, or if any external regulatory authority having jurisdiction over Lender shall so require, or if, in Lender's reasonable judgment, a material depreciation in the value of the Mortgaged Property shall have occurred, or in an connection with any reappraisal required under Section 6.01 hereof, then in any such events Lender may cause the Mortgaged Property to be reappraised at Borrower's expense. Lender may, at its own expense, have the Mortgaged Property reappraised at any other time during the term of the Loan as well, and Borrower agrees to cooperate with any such reappraisals required under this paragraph.

#### **ARTICLE IV** **NEGATIVE COVENANTS**

Until the Loan Obligations have been paid in full, Borrower shall not:

4.01. **Additional Indebtedness.** Incur any indebtedness without first obtaining the prior written approval of the Lender, which consent may be granted or refused by the Lender in Lender's sole discretion.

4.02. **No Liens; Exceptions.** Create, incur, assume or suffer to exist any Lien upon or with respect to any of the Mortgaged Property, whether now owned or hereafter acquired, other than the following (a "Permitted Lien"):

(a) Liens at any time existing in favor of the Lender or Permitted Encumbrances;

(b) Inchoate liens arising by operation of law for the purchase of labor, services, materials, equipment or supplies, provided payment shall not be delinquent and, if such Lien is a lien upon the Mortgaged Property, which lien is fully subordinate to the Mortgage and is disclosed to Lender and bonded off or otherwise removed from the Mortgaged Property and Improvements within sixty (60) days after the filing of such lien against the Mortgaged Property; or

(c) Liens for current year's taxes, assessments or governmental charges or levies provided payment thereof shall not be delinquent unless the same are being contested and such contest is conducted in accordance with the provisions of Section 3.07(b) above.

4.03. **Merger, Consolidation, Etc.** Enter into any merger, consolidation or similar transaction, or, except in the ordinary course of business, sell, assign, lease or otherwise dispose of (whether in one transaction or in a series of transactions), all or substantially all of its assets (whether now or hereafter acquired), without the prior written consent of the Lender, which may be granted or refused by Lender in Lender's sole discretion.

4.04. **ERISA Funding and Termination.** Permit (a) the funding requirements of ERISA with respect to any employee plan to be less than the minimum required by ERISA at any time, or (b) any employee plan to be subject to involuntary termination proceedings at any time.

4.05. **Transfer of Interest.** Permit the transfer of more than fifty percent (50%) of the partnership interests in Borrower to any third party other than T. Charles Tickle or Allan D. Worthington without Lender's prior written consent, which consent may be granted or refused by the Lender in Lender's sole and absolute discretion.

## **ARTICLE V**

### **EVENTS OF DEFAULT; REMEDIES**

5.01. **Event of Default.** The term Event of Default, wherever used in this Mortgage, shall mean any one or more of the following events:



(a) The failure by Borrower to pay any installment of principal, interest, or other charges required under the Note or hereunder, as and when the same comes due and payable, and such failure to pay continues for more than ten (10) days following written notice from Lender to Borrower of such Default; or

(b) The failure of Borrower properly and timely to perform or observe any covenant or condition set forth in this Note (other than those specified in (a) of this Section) or any other Loan Documents which is not cured within any applicable cure period as set forth herein or, if no cure period is specified therefor, is not cured within thirty (30) days of Lender's written notice to Borrower of such Default; provided, however, that Borrower shall have a reasonable period of time following the expiration of such initial thirty (30) day cure period within which to cure such Default if the same is not reasonably capable of being cured during the initial thirty (30) day cure period, provided that the Borrower commences to cure such Default within the initial thirty (30) days and thereafter diligently and in good faith prosecutes said cure to completion; or

(c) The filing by the Borrower of a voluntary petition in bankruptcy or the adjudication of the Borrower as a bankrupt or insolvent, or the filing by the Borrower of any petition or answer seeking or acquiescing in any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief for itself under any present or future federal, state or other statute, law or regulation relating to bankruptcy, insolvency or other relief for debtors, or if the Borrower should seek or consent to or acquiesce in the appointment of any trustee, receiver or liquidator for itself or of all or any substantial part its property or of any or all of the rents, revenues, issues, earnings, profits or income thereof, or the making of any general assignment for the benefit of creditors or the admission in writing by the Borrower of its inability to pay its debts generally as they become due; or

(d) The entry by a court of competent jurisdiction of an order, judgment, or decree approving a petition filed against the Borrower, which such petition seeks any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any present or future federal, state or other statute, law or regulation relating to bankruptcy, insolvency, or other relief for debtors, which order, judgment or decree remains unvacated and unstayed for an aggregate of sixty (60) days (whether or not consecutive) from the date of entry thereof, or the appointment of any trustee, receiver or liquidator of the Borrower or of all or any substantial part of its properties or of any or all of the rents, revenues, issues, earnings, profits or income thereof which appointment shall remain unvacated and unstayed for an aggregate of sixty (60) days (whether or not consecutive); or

(e) The failure of at least one of T. Charles Tickle or Allan D. Worthington to (i) retain an active role in the business and affairs of Borrower, and (ii) either directly or indirectly, to own at least a majority of the partnership interests in Borrower; or

(f) Other than transfers of the Mortgaged Property in accordance with the provisions of Section 6.01 hereof, the sale or other transfer of all or any portion the Mortgaged Property; or

(g) The creation or suffering to exist by the Borrower of any lien or encumbrance on the Mortgaged Property, other than (i) the lien of this Mortgage, (ii) any of the Permitted Liens described in Section 4.02 above, or (iii) the Permitted Encumbrances; or

(h) Any certificate, statement, representation, warranty or audit heretofore or hereafter furnished by or on behalf of the Borrower pursuant to or in connection with the Loan (including, without limitation, representations and warranties contained herein or in any other Loan Document) or as an inducement to Lender to extend any credit to or to enter into this or any other agreement with Borrower in connection with the Loan proves to have been false in any material respect at the time when the facts therein set forth were stated or certified, or proves to have omitted any substantial contingent or unliquidated liability or claim against Borrower, or on the date of execution of this Mortgage there shall have been any materially adverse change in any of the facts previously disclosed by any such certificate, statement, representation, warranty or audit, which change shall not have been disclosed to Lender in writing at or prior to the time of such execution; or

(i) The occurrence of any materially adverse change in the financial condition of the Borrower.

Notwithstanding anything in this Section, all requirements of notice shall be deemed eliminated if Lender is prevented from giving such notice by bankruptcy or other applicable law. The cure period, if any, shall run from the occurrence of the event or condition of Default rather than from the date of notice.

**5.02. Acceleration of Maturity.** If an Event of Default shall exist and be continuing, then the entire principal amount of the indebtedness secured hereby with interest accrued thereon shall, at the option of the Lender, become due and payable without notice of demand time being of the essence; and any omission on the part of the Lender to exercise such option when entitled to do so shall not be considered as a waiver of such right.

**5.03. Right of Lender to Enter and Take Possession.**

(a) If an Event of Default shall exist and be continuing, the Borrower, upon demand of the Lender, shall forthwith surrender to the Lender or its agents or representatives, the actual possession, and if and to the extent permitted by law, the Lender may enter and take possession, of all the Mortgaged Property, and may exclude the Borrower and its agents and employees wholly therefrom.

(b) Upon every such entering upon or taking of possession, the Lender or its agents or representatives may hold, store, use, operate, manage, and control the Mortgaged Property and conduct the business thereof, and, from time to time (i) make all necessary and proper maintenance, repairs, renewals, replacements, additions, betterments, and improvements thereto and thereon and purchase or otherwise acquire additional fixtures, personalty, and other property; (ii) insure or keep the Mortgaged Property insured; (iii) manage and operate the Mortgaged Property and exercise all the rights and powers of the Borrower in Borrower's name or otherwise, with respect to the same; (iv) enter into any and all agreements with respect to the exercise by others of any of the



powers herein granted the Lender, all as the Lender from time to time may reasonably determine to be necessary or desirable; and the Lender or its agents or representatives may collect and receive all the income, revenues, rents, issues and profits of the same including those past due as well as those accruing thereafter, and, after deducting (A) all expenses of taking, holding, managing, and operating the Mortgaged Property (including compensation for the services of all persons employed for such purposes); (B) the cost of all such maintenance, repairs, renewals, replacements, additions, betterments, improvements, purchases, and acquisitions; (C) the cost of such insurance; (D) such taxes, assessments, and other charges prior to the lien of this Mortgage as the Lender may determine to pay; (E) other proper charges upon the Mortgaged Property or any part thereof; and (F) the reasonable compensation, expenses, and disbursements of the attorneys and agents of the Lender; shall apply the remainder of the moneys so received to the payment of accrued interest, to the payment of tax and insurance deposits required above, and to the payment of overdue installments of principal, all in such order and priority as the Lender may determine.

(c) Whenever all such Events of Default have been cured and satisfied, the Lender may, at its option, surrender possession of the Mortgaged Property to the Borrower, its successors or assigns. The same right of taking possession, however, shall exist if any subsequent Event of Default shall exist.

**5.04. Performance by Lender.** Upon the occurrence and during the continuance of an Event of Default in the payment, performance or observance of any term, covenant or condition of this Mortgage, Lender may, at its option, pay, perform or observe the same, and all payments made or costs or expenses incurred by Lender in connection therewith, with interest thereon at the Default Rate, shall be secured hereby and shall be, without demand, immediately repaid by Borrower to Lender. Lender shall be the sole judge of the necessity for any such actions and of the amounts to be paid. Lender is hereby empowered to enter and to authorize others to enter upon the Mortgaged Property or any part thereof for the purpose of performing or observing any such defaulted term, covenant or condition without thereby becoming liable to Borrower or any person in possession holding under Borrower. Notwithstanding anything to the contrary herein, Lender shall have no obligation, explicit or implied, to pay, perform, or observe any term, covenant, or condition.

**5.05. Receiver.**

(a) If an Event of Default shall exist and be continuing, the Lender, upon application to a court of competent jurisdiction, shall be entitled without notice and without regard to the adequacy of any security for the indebtedness hereby secured or the solvency of any party bound for its payment, to the appointment of a receiver to take possession of and to operate the Mortgaged Property and to collect the rents, profits, issues, and revenues thereof.

(b) The Borrower will pay to the Lender upon demand all reasonable expenses, including receiver's fees, attorney's fees and costs, and agent's compensation, incurred pursuant to the provisions contained in this Section 5.05; and all such expenses shall be secured by this Mortgage.

**5.06. Lender's Power of Enforcement.** If an Event of Default shall have occurred and be continuing, the Lender may, either with or without entry or taking possession as hereinabove provided or otherwise, proceed by suit or suits at law or in equity or any other appropriate proceeding or remedy (a) to enforce payment of the Note or the performance of any term thereof or any other right, (b) to foreclose this Mortgage and to sell, as an entirety or in separate lots or parcels, the Mortgaged Property, as provided by law, and (c) to pursue any other remedy available to it, all as the Lender shall deem most effectual for such purposes. The Lender shall take action either by such proceedings or by the exercise of the powers herein with respect to entry or taking possession, as the Lender may determine.

**5.07. Power of Sale.** If an Event of Default shall have occurred and be continuing, Lender may sell the Mortgaged Property at public outcry to the highest bidder for cash in front of the Court House door in the county where said property is located, either in person or by auctioneer, after having first given notice of the time, place and terms of sale by publication once a week for three (3) successive weeks prior to said sale in some newspaper of general circulation published in said county, and, upon payment of the purchase money, Lender or any person conducting the sale for Lender is authorized to execute to the purchaser at said sale a foreclosure deed to the Mortgaged Property so purchased. At the foreclosure sale the Mortgaged Property may be offered for sale and sold as a whole without first offering it in any other manner or may be offered for sale and sold in any other manner Lender may elect.

**5.08. Purchase by Lender.** Upon any foreclosure sale or sale of all or any portion of the Mortgaged Property under the power of sale herein granted, Lender may bid for and purchase the Mortgaged Property and shall be entitled to apply all or any part of the Loan Obligations as a credit to the purchase price.

**5.09. Application of Proceeds of Sale.** In the event of a foreclosure or other sale of all or any portion of the Mortgaged Property, the proceeds of said sale shall be applied, first, to the expenses of such sale and of all proceedings in connection therewith, including reasonable attorneys' fees (attorneys fees and expenses shall become absolutely due and payable whenever foreclosure is commenced); then to insurance premiums, liens, assessments, taxes and charges including utility charges advanced by Lender hereunder, and interest thereon; then to payment of the Loan Obligations and accrued interest thereon, in such order of priority as Lender shall determine, in its sole discretion; and finally the remainder, if any, shall be paid to Borrower, or to the person or entity lawfully entitled thereto.

**5.10. Lender's Option on Foreclosure.** At the option of the Lender, this Mortgage may be foreclosed as provided by law or in equity, in which event a reasonable attorney's fee shall, among other costs and expense, be allowed and paid out of the proceeds of the sale. In the event Lender exercises its option to foreclose the mortgage in equity, Lender may, at its option, foreclose this Mortgage subject to the rights of any tenants of the Mortgaged Property, and the failure to make any such tenants parties defendants to any such foreclosure proceeding and to foreclose its rights will not be, nor be asserted to be by the Borrower, a defense to any proceedings instituted by the Lender to collect the sum secured hereby, or any deficiency remaining unpaid after the foreclosure sale of the Mortgaged Property.



**5.11. Waiver of Exemption.** Borrower waives all rights of exemption pertaining to real or personal property as to any indebtedness secured by or that may be secured by this Mortgage, and Borrower waives the benefit of any statute regulating the obtaining of a deficiency judgment or requiring that the value of the Mortgaged Property be set off against any part of the indebtedness secured hereby.

**5.12. Suits to Protect the Mortgaged Property.** The Lender shall have power (a) to institute and maintain such suits and proceedings as it may deem expedient to prevent any impairment of the Mortgaged Property by any acts which may be unlawful or any violation of this Mortgage, (b) to preserve or protect its interest in the Mortgaged Property and in the income, revenues, rents, and profits arising therefrom, and (c) to restrain the enforcement of or compliance with any legislation or other governmental enactment, rule, or order that may be unconstitutional or otherwise invalid, if the enforcement of or compliance with such enactment, rule or order would impair the security hereunder or be prejudicial to the interest of the Lender.

**5.13. Borrower to Pay the Note on Any Default in Payment; Application of Moneys by Lender.** If an Event of Default occurs, then, upon demand of the Lender, the Borrower will pay to the Lender the whole amount due and payable under the Note; and in case the Borrower shall fail to pay the same forthwith upon such demand, the Lender shall be entitled to sue for and to recover judgment for the whole amount so due and unpaid together with costs, which shall include the reasonable compensation, expenses, and disbursements of the Lender's agents and attorneys.

**5.14. Delay or Omission No Waiver.** No delay or omission of the Lender or of any holder of the Note to exercise any right, power, or remedy accruing upon any default shall exhaust or impair any such right, power, or remedy or shall be construed to be a waiver of any such default, or acquiescence therein; and every right, power, and remedy given by this Mortgage to the Lender may be exercised from time to time and as often as may be deemed expedient by the Lender.

**5.15. No Waiver of One Default to Affect Another, etc.** No waiver of any Default hereunder shall extend to or shall affect any subsequent or any other then existing Default or shall impair any rights, powers, or remedies consequent thereon.

If the Lender (a) grants forbearance or an extension of time for the payment of any sums secured hereby; (b) takes other or additional security for the payment thereof; (c) waives or does not exercise any right granted herein or in the Note; (d) releases any part of the Mortgaged Property from the lien of this Mortgage or otherwise changes any of the terms of the Note or this Mortgage; (e) consents to the filing of any map, plat, or replat thereof; (f) consents to the granting of any easement thereon; or (g) makes or consents to any agreement subordinating the lien or charge hereof, any such act or omission shall not otherwise release, discharge, modify, change, or affect the original liability under the Note, this Mortgage or otherwise of the Borrower or any subsequent purchaser of the Mortgaged Property or any part thereof, or any maker, co-signer, endorser, surety, or guarantor; nor shall any such act or omission preclude the Lender from exercising any right, power, or privilege herein granted or intended to be granted in the event of any other default then made or of any subsequent default, nor, except as otherwise expressly provided in an instrument or instruments executed by the Lender, shall the lien of this Mortgage be altered thereby. In the event of the sale or transfer by operation of law or otherwise of all or any part of the Mortgaged Property, the Lender,

at its option, without notice to any person or corporation hereby is authorized and empowered to deal with any such vendee or transferee with reference to the Mortgaged Property or the indebtedness secured hereby, or with reference to any of the terms or conditions hereof, as fully and to the same extent as it might deal with the original parties hereto and without in any way releasing or discharging any of the liabilities or undertakings hereunder.

**5.16. Discontinuance of Proceedings - Position of Parties, Restored.** In case the Lender shall have proceeded to enforce any right or remedy under this Mortgage by foreclosure, entry, or otherwise, and such proceedings shall have been discontinued or abandoned for any reason, or shall have been determined adversely to the Lender, then and in every such case the Borrower and the Lender shall be restored to their former positions and rights hereunder, and all rights, powers, and remedies of the Lender shall continue as if no such proceeding had been taken.

**5.17. Remedies Cumulative.** No right, power, or remedy conferred upon or reserved to the Lender by this Mortgage is intended to be exclusive of any right, power, or remedy, but each and every such right, power, and remedy shall be cumulative and concurrent and shall be in addition to any other right, power, and remedy given hereunder or now or hereafter existing at law or in equity or by statute.

## **ARTICLE VI** **MISCELLANEOUS**

**6.01. Partial Releases.** Notwithstanding any provision herein to the contrary, Lender agrees that it will allow one or more of parcels comprising the Mortgaged Property to be released from the lien and effect of this Mortgage upon the sale of such property, provided that the following conditions are satisfied: (i) the sale is made pursuant to a bona fide contract with a third party not affiliated with the Borrower or its affiliates; (ii) Lender is provided with a copy of the sales contract for such sale; (iii) there is no outstanding Default or Event of Default under the Loan Documents; and (iv) the Mortgaged Property which will remain subject to this Mortgage following such sale (the "**Remaining Properties**") will support a loan-to-value ratio of not more than sixty percent (60%). To the extent an appraisal of the Mortgaged Property has not been conducted within the immediately preceding six (6) months, Lender reserves the right to obtain a re-appraisal of the Remaining Properties at the time of such desired partial release, and Borrower shall be responsible for all costs incurred in connection therewith. In the event that the required loan-to-value ratio is not supported by the Remaining Properties, a partial prepayment will be required in an amount necessary to cause compliance with the required loan-to-value ratio. Borrower shall be responsible for all fees incurred in connection with the preparation of such partial releases, including, without limitation, Lender's attorney's fees.

**6.02. Successors and Assigns.** This Mortgage shall inure to the benefit of and be binding upon Borrower and Lender and their respective heirs, executors, legal representatives, successors, successors-in-title, and assigns. Whenever a reference is made in this Mortgage to "Borrower" or "Lender," such reference shall be deemed to include a reference to the heirs, executors, legal representatives, successors, successors-in-title and assigns of Borrower or Lender, as the case may be, but shall not imply any permission to make or permit any transfer which is otherwise prohibited.



**6.03. Terminology.** All personal pronouns used in this Mortgage, whether used in the masculine, feminine or neuter gender, shall include all other genders; the singular shall include the plural, and vice versa. Titles and Articles are for convenience only and neither limit nor amplify the provisions of this Mortgage, and all references herein to Articles, Sections or subparagraphs shall refer to the corresponding Articles, Sections or subparagraphs of this Mortgage unless specific reference is made to Articles, Sections or subparagraphs of another document or instrument.

**6.04. Severability; Complete Agreement.** If any provisions of this Mortgage or the application thereof to any person or circumstance shall be invalid or unenforceable to any extent, the remainder of this Mortgage and the application of such provisions to other persons or circumstances shall not be affected thereby and shall be enforced to the greatest extent permitted by law. This Mortgage constitutes the full and complete agreement of the parties and supersedes all prior negotiations, correspondence, and memoranda relating to the subject matter hereof, and this Mortgage may not be amended except by a writing signed by the parties hereto.

**6.05. Notices, etc.** Any notice or other communication required or permitted to be given by this Agreement or the other Loan Documents or by applicable law shall be in writing and shall be deemed received (d) on the date delivered, if sent by hand delivery (to the person or department if one is specified below), (e) three (3) days following the date deposited in U.S. mail, certified or registered, with return receipt requested, or (f) one (1) day following the date deposited with Federal Express or other national overnight carrier, and in each case addressed as follows:

*If to Borrower:*

Daniel Realty Company  
3595 Grandview Parkway  
Suite 400  
Birmingham, Alabama 35243-1930  
Attn: Christopher A. Brown

*With a copy to:*

Stephen R. Monk, Esq.  
Bradley Arant Rose & White LLP  
Park Place Tower  
2001 Park Place North, Suite 1400  
Birmingham, Alabama 35203-2736

*If to Lender:*

SouthTrust Bank  
P.O. Box 2554 (35290)  
420 N. 20th Street  
Commercial Real Estate Dept., 8th Floor  
Birmingham, Alabama 35203

*With a copy to:*

Burr & Forman LLP  
420 North 20th Street  
3100 SouthTrust Tower (35203)  
P.O. Box 830719 (35283-0719)  
Birmingham, Alabama  
Attn: Gail Livingston Mills, Esq.

Failure to provide courtesy copies shall not render invalid any notice otherwise properly given. Any party may change its address to another single address by notice given as herein provided, except any change of address notice must be actually received in order to be effective.

**6.07. Benefits.** All of the terms and provisions of this Agreement shall bind and inure to the benefit of the parties hereto and their respective successors and assigns. No Person other than Borrower or Lender, shall be entitled to rely upon this Agreement or be entitled to the benefits of this Agreement.

**6.08. Participation.** Borrower acknowledges that Lender may, at its option, sell participation interests in the Loan, however, all actions, consents and approvals required of Lender herein or in any of the other Loan Documents shall be given and provided at all times by SouthTrust Bank, National Association. Borrower agrees with each present and future participant of the Loan that if an Event of Default should occur, each present and future participant shall have all of the rights and remedies of Lender. The execution by a participant of a participation agreement with Lender, and the execution by the Borrower of this Agreement, regardless of the order of execution, shall evidence an agreement between Borrower and said participant in accordance with the terms of this Section.

**6.09. Controlling Law.** THE VALIDITY, INTERPRETATION, ENFORCEMENT AND EFFECT OF THIS MORTGAGE SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF ALABAMA. THE LENDER'S PRINCIPAL PLACE OF BUSINESS IS LOCATED IN JEFFERSON COUNTY IN THE STATE OF ALABAMA, AND THE BORROWER AGREES THAT THE LOAN SHALL BE FUNDED FROM AND THIS MORTGAGE SHALL BE HELD BY LENDER AT SUCH PRINCIPAL PLACE OF BUSINESS, AND THE HOLDING OF THIS MORTGAGE BY LENDER THEREAT SHALL CONSTITUTE SUFFICIENT MINIMUM CONTACTS OF BORROWER WITH JEFFERSON COUNTY AND THE STATE OF ALABAMA FOR THE PURPOSE OF CONFERRING JURISDICTION UPON THE FEDERAL AND STATE COURTS PRESIDING IN SUCH COUNTY AND STATE. BORROWER CONSENTS THAT ANY LEGAL ACTION OR PROCEEDING ARISING HEREUNDER MAY BE BROUGHT IN THE CIRCUIT COURT OF THE STATE OF ALABAMA, JEFFERSON COUNTY, ALABAMA OR THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA AND ASSENTS AND SUBMITS TO THE PERSONAL JURISDICTION OF ANY SUCH COURT IN ANY ACTION OR PROCEEDING INVOLVING THIS MORTGAGE. NOTHING HEREIN SHALL LIMIT THE JURISDICTION OF ANY OTHER COURT.



**6.10. Waiver of Jury Trial. BORROWER HEREBY WAIVES ANY RIGHT TO TRIAL BY JURY ON ANY CLAIM, COUNTERCLAIM, SETOFF, DEMAND, ACTION OR CAUSE OF ACTION (I) ARISING OUT OF OR IN ANY WAY PERTAINING OR RELATED TO THIS MORTGAGE OR THE LOAN, OR (II) IN ANY WAY CONNECTED WITH OR PERTAINING OR RELATED TO OR INCIDENTAL TO ANY DEALINGS OF LENDER AND BORROWER WITH RESPECT TO THIS MORTGAGE, THE LOAN DOCUMENTS, OR THE LOAN, OR IN CONNECTION WITH THE TRANSACTIONS RELATED HERETO OR CONTEMPLATED HEREBY OR THE EXERCISE OF EITHER PARTY'S RIGHTS AND REMEDIES HEREUNDER, OR THE CONDUCT OF THE RELATIONSHIP OF THE PARTIES HERETO, IN ALL OF THE FOREGOING CASES WHETHER NOW EXISTING OR HEREAFTER ARISING AND WHETHER SOUNDING IN CONTRACT, TORT OR OTHERWISE. BORROWER AGREES THAT LENDER MAY FILE A COPY OF THIS AGREEMENT WITH ANY COURT AS WRITTEN EVIDENCE OF THE KNOWING, VOLUNTARY AND BARGAINED AGREEMENT OF BORROWER IRREVOCABLY TO WAIVE ITS RIGHTS TO TRIAL BY JURY, AND THAT, TO THE EXTENT PERMITTED BY APPLICABLE LAW, ANY DISPUTE OR CONTROVERSY WHATSOEVER BETWEEN BORROWER AND LENDER SHALL INSTEAD BE TRIED IN A COURT OF COMPETENT JURISDICTION BY A JUDGE SITTING WITHOUT A JURY.**

**\*\*\*\*\***

IN WITNESS WHEREOF, the Borrower has caused this Mortgage to be executed by its duly authorized general partner on the day and year first above written.

**BORROWER:**

**DANIEL REALTY COMPANY,**  
an Alabama general partnership

BY: DANIEL EQUITY PARTNERS LIMITED  
PARTNERSHIP, a Virginia limited  
partnership, Its Managing Partner

BY: DANIEL EQUITY CORPORATION I, a  
Virginia corporation  
Its General Partner

By: Christopher A. Brown  
Christopher A. Brown  
Its Senior Vice President

STATE OF ALABAMA     )  
JEFFERSON COUNTY    )

I, the undersigned, a Notary Public in and for said County in said State, hereby certify that Christopher A. Brown, whose name as Senior Vice President of Daniel Equity Corporation I, a Virginia corporation, the general partner of Daniel Equity Partners Limited Partnership, a Virginia limited partnership, the managing general partner of Daniel Realty Company, an Alabama general partnership, is signed to the foregoing conveyance and who is known to me, acknowledged before me on this day that, being informed of the contents of said conveyance, he, as such officer, and with full authority, executed the same voluntarily for and as the act of said corporation, acting in its capacity as aforesaid.

Given under my hand and seal of office this 20th day of August, 2001.

[Signature]  
Notary Public  
My commission expires: 9/8/2001

[NOTARIAL SEAL]



## **EXHIBIT A**

### ***Legal Description***

#### **Parcel I:**

Lot 7, according to the survey of Meadow Brook Corporate Park South, Phase II, as recorded in Map Book 12, Page 10 in the Office of the Judge of Probate of Shelby County, Alabama; being situated in Shelby County, Alabama.

Lot 11-C, according to the survey of Meadow Brook Corporate Park South, Phase II, Resurvey of Lot 11, as recorded in Map Book 13, Page 82 in the Office of the Judge of Probate of Shelby County, Alabama; being situated in Shelby County, Alabama.

Lot 11 A-3, according to Meadow Brook Corporate Park South, Phase II, Resurvey No. 9, being a resurvey of Lot 11 A-1 (being a resurvey of Lots 11-A and 11-B) as recorded in Map Book 28, Page 59 in the Office of the Judge of Probate of Shelby County, Alabama; being situated in Shelby County, Alabama.

Together with all right, title, and interest of Daniel Realty Company as the "Developer" under those certain Declaration of Covenants, Conditions and Restrictions for Meadow Brook Corporate Park South dated as of September 1, 1985, and recorded in Book 064, Page 91 in the Office of the Judge of Probate of Shelby County, Alabama, as amended by (i) First Amendment thereto dated as of April 1, 1986, and recorded in Book 095, Page 826 in said Probate Office, (ii) Second Amendment thereto dated as of July 23, 1988, and recorded in Book 141, Page 784 in said Probate Office, (iii) Third Amendment thereto dated as of March 28, 1988, and recorded in Book 177, Page 244 in said Probate Office, (iv) Fourth Amendment thereto dated as of June 20, 1989, and recorded in Book 243, Page 453 in said Probate Office, (v) Fifth Amendment thereto dated as of July 5, 1989, and recorded in Book 245, Page 89 in said Probate Office, (vi) Sixth Amendment thereto dated as of October 14, 1992, and recorded as Instrument No. 1992-23529 in said Probate Office, (vii) Seventh Amendment thereto dated as of January 31, 1995, and recorded as Instrument No. 1995-03028 in said Probate Office, (viii) Eighth Amendment thereto dated as of February 14, 1995, and recorded as Instrument No. 1995-04188 in said Probate Office, (ix) Ninth Amendment thereto dated as of February 20, 1996, and recorded as Instrument No. 1996-05491 in said Probate Office, (x) Tenth Amendment thereto dated as of September 19, 1996, and recorded as Instrument No. 1996-32318 in said Probate Office, (xi) Eleventh Amendment thereto dated as of September 18, 1997, and recorded as Instrument No. 1997-30077 in said Probate Office, (xii) Twelfth Amendment thereto dated as of November 20, 1997, and recorded as Instrument No. 1997-37856 in said Probate Office and (xiii) Thirteenth Amendment thereto dated as of February 19, 1998, and recorded as Instrument No. 1998-5588 in said Probate Office, (xiv) Fourteenth Amendment thereto dated as of October 21, 1998, and recorded as Instrument No. 1998-41655 in said Probate Office, (xv) Fifteenth Amendment thereto dated as of November 20, 1998 and recorded as Instrument No. 1998-46243 in said Probate Office, and (xvi) Sixteenth Amendment thereto dated as of January 21, 1999 and recorded as Instrument No. 1999-02935 in said Probate Office, which such right have been assigned to Daniel Realty Company

pursuant to that certain Assignment of Developer Rights dated August 20, 2001 from Daniel U.S. Properties Limited Partnership II, and recorded contemporaneously herewith in said Probate Office.

**Parcel II:**

Lot 2, according to a Resurvey of Lot 5A of a Resurvey of Lots 3, 4 and 5, Greystone Commercial, 2<sup>nd</sup> Phase and a part of Lot 1, Greystone Commercial as recorded in Map Book 23, Page 127 in the Office of the Judge of Probate of Shelby County, Alabama; being situated in Shelby County, Alabama.

Together with all right, title, and interest of Daniel Realty Company as the "Developer" under those certain Greystone Office Park Declaration of Covenants, Conditions and Restrictions dated as of September 18, 1992, and recorded as Instrument No. 1992-22117 in the Office of the Judge of Probate of Shelby County, Alabama, as amended by (i) First Amendment thereto dated as of July 28, 1993, and recorded as Instrument No. 1993-22437 in said Probate Office, (ii) Second Amendment thereto dated as of April 14, 1994, and recorded as Instrument No. 1994-12528 in said Probate Office, (iii) Third Amendment thereto dated as of May 17, 1996, and recorded as Instrument No. 1996-17949 in said Probate Office, and (iv) Fourth Amendment thereto dated as of March 18, 1998, and recorded as Instrument No. 1998-09522 in said Probate Office, which such right have been assigned to Daniel Realty Company pursuant to that certain Assignment of Developer Rights dated August 20, 2001 from Daniel Oak Mountain Limited Partnership, and recorded contemporaneously herewith in said Probate Office.

**Parcel III:**

To locate the point of beginning, commence at the Southwest corner of the NE ¼ of Section 32, Township 18 South, Range 1 West, Shelby County, Alabama; thence South 88 deg. 43 min. 44 sec. East on the South boundary line of said NE ¼ a distance of 250.00 feet to a point; thence North 26 deg. 40 min. 48 sec. East a distance of 1300.16 feet to the point of beginning, said point of beginning being on the West boundary line of Lot 2A of the Resurvey of Lot 2, Greystone, Second Sector, a subdivision which was recorded in Map Book 17, Page 27, in the Office of the Judge of Probate, Shelby County, Alabama, and the North right of way of a private road known as Greystone Way; thence South 50 deg. 29 min. 50 sec. West on the North right of way of said road a distance of 265.10 feet to a curve to the left having a central angle of 14 deg. 32 min. 51 sec. and a radius of 840.00 feet; thence along said curve a distance of 213.28 feet to a point; thence tangent to said curve South 35 deg. 56 min. 59 sec. West a distance of 11.79 feet to a curve to the right having a central angle of 40 deg. 29 min. 35 sec. and a radius of 410.00 feet; thence along said curve a distance of 289.76 feet to a point on the East boundary line of Lot 1, Greystone, Third Sector, a subdivision which was recorded in Map Book 14, Page 79, in the Office of the Judge of Probate, Shelby County, Alabama; thence North 20 deg. 09 min. 47 sec. East on the East boundary line of said Lot 1 a distance of 569.30 feet to a point; thence North 16 deg. 15 min. 22 sec. East on the East boundary line of said Lot 1 a distance of 384.30 feet to a point; thence South 73 deg. 44 min. 39 sec. East on the East boundary line of said Lot 1 a distance of 150.02 feet to a point; thence North 16 deg. 15 min.



33 sec. East on the East boundary line of said Lot 1 a distance of 285.20 feet to a point; thence South 59 deg. 11 min. 45 sec. East a distance of 348.34 feet to a point on the West boundary line of Lot 2A of the resurvey of Lot 2, Greystone, Second Sector, thence South 26 deg. 40 min. 17 sec. West on the West boundary line of said Lot 2A a distance of 521.17 feet to the point of beginning.

The above land all lying and being in the NE  $\frac{1}{4}$  of Section 32, Township 18 South, Range 1 West, Shelby County, Alabama, and as shown on the boundary survey dated May 31, 1993, prepared by Charley Foster & Associates, Inc., and being more particularly described as follows:

To locate the point of beginning, commence at the SW corner of the NE  $\frac{1}{4}$  of Section 32, Township 18 South, Range 1 West, Shelby County, Alabama; thence South 88 deg. 43 min. 44 sec. East on the south boundary of said NE  $\frac{1}{4}$  a distance of 250.00 feet to a point; thence North 26 deg. 40 min. 48 sec. East a distance of 1300.16 feet to the point of beginning, said point of beginning being on the West boundary of Lot 2A off the resurvey of Lot 2, Greystone, Second sector, a subdivision which was recorded in Map Book 17, page 27, in the Office of the Judge of Probate, Shelby County, Alabama, and the north right of way of a public road; thence South 55 deg. 30 min. 21 sec. West on the North right of way of said road a distance of 265.10 feet to a curve to the left having a central angle of 14 deg. 32 min. 51 sec. and a radius of 840.00 feet; thence along said curve a distance of 213.28 feet to a point; thence tangent to said curve South 35 deg. 57 min. 29 sec. West a distance of 11.79 feet to a curve to the right having a central angle of 40 deg. 29 min. 35 sec. and a radius of 410.00 feet; thence along said curve a distance of 289.76 feet to a point on the east boundary of Lot 1, Greystone, Third Sector, a subdivision which was recorded in Map Book 14, page 79, in the Office of the Judge of Probate, Shelby County, Alabama; thence North 20 deg. 10 min. 42 sec. East on the east boundary of said Lot 1 a distance of 569.13 feet to a point; thence North 16 deg. 17 min. 42 sec. East on the east boundary of said Lot 1 a distance of 384.29 feet to a point; thence South 73 deg. 42 min. 18 sec. East on the east boundary of Lot 1 a distance of 150.00 feet to a point; thence North 16 deg. 17 min. 42 sec. East on the east boundary of said Lot 1 a distance of 285.30 feet to a point; thence South 59 deg. 11 min. 45 sec. East a distance of 347.93 feet to a point on the west boundary of Lot 2A of the resurvey of Lot 2, Greystone, Second Sector; thence South 26 deg. 40 min. 48 sec. West on the west boundary of said Lot 2A a distance of 521.17 feet to the point of beginning.

Together with all right, title, and interest of Daniel Realty Company as the "Developer" under those certain Greystone Commercial Declaration of Covenants, Conditions and Restrictions dated October 16, 1990, and recorded in Book 314, Page 506 in the Office of the Judge of Probate of Shelby County, Alabama, as amended by (i) First Amendment thereto dated as of July 14, 1995, and recorded as Instrument No. 1996-00531 in said Probate Office, (ii) Second Amendment thereto dated as of July 14, 1995, and recorded as Instrument No. 1996-00532 in said Probate Office, and (iii) Third Amendment thereto dated as of November 30th, 2000, and recorded as Instrument No. 2000-38942 in said Probate Office, which such right have been assigned to Daniel Realty Company pursuant to that certain Assignment of Developer Rights dated August 20, 2001 from Daniel Oak Mountain Limited Partnership, and recorded contemporaneously herewith in said Probate Office.

**Parcel IV:**

Lot 2, according to survey of Grandview Corporate Park Resurvey No. 3, being a resurvey of Lot 2 and Lot 10, Grandview Corporate Park Resurvey No. 2 (as recorded in Map Book 191, page 16) as recorded in Map Book 193, Page 50 in the Office of the Judge of Probate of Jefferson County, Alabama; being situated in Jefferson County, Alabama.

Together with all right, title and interest of Daniel Realty Company as the "Developer" under those certain Declaration of Covenants, Conditions, Restrictions, and Architectural Guidelines as set out in Real 4140, Page 211, amended in Instrument No. 9315/7867 and Instrument No. 9409/7425 in said Probate Office of Jefferson County, Alabama and as affected by Waiver of Termination of Rights under Declaration recorded in Instrument No. 9901/7491 in said Probate Office.

Together with that certain 20' sanitary sewer easement created by virtue of the plat recorded in Map Book 193, Page 50, crossing the Southwesterly property line and as shown on survey of Carl Daniel Moore dated August 1, 2001.



STATE OF ALABAMA

COUNTIES OF JEFFERSON AND SHELBY

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)

**AFFIDAVIT**

Before me, the undersigned Notary Public in and for said county and said state, personally appeared Christopher A. Brown, as Senior Vice President of Daniel Realty Company, an Alabama general partnership, who is known to me, and who being first duly sworn by me, deposes and says as follows:

1. That Daniel Realty Company is the mortgagor under that certain of Mortgage and Security Agreement (the "Mortgage") in favor of SouthTrust Bank (the "Mortgagee") which is to be recorded in the Offices of the Judge of Probate of Jefferson and Shelby Counties, Alabama, a copy of which is attached hereto. The Mortgage secures debt in the amount of \$4,000,000 (the "Secured Debt").


2. That the total value of the real property given as security by Mortgagor, inside the State of Alabama equals or exceeds \$4,000,000.

3. That the value of the real property given as security by Mortgagor which is located in Jefferson County, and the percentage of the Secured Debt allocated to such real property, is thirty-five and 84/100th percent (35.84%) or \$1,433,600.00. Accordingly, mortgage tax in the amount of \$2,150.40 is payable in conjunction with the recording of the Mortgage in Jefferson County.

4. That the value of the real property given as security by Mortgagor which is located in Shelby County, and the percentage of the Secured Debt allocated to such real property, is sixty-four and 16/100th percent (64.16%) or \$2,566,400.00. Accordingly, mortgage tax in the amount of \$3,849.60 is payable in conjunction with the recording of the Mortgage in Shelby County.

5. Duplicate originals of the Mortgage are being contemporaneously recorded in the aforesaid Counties and recording tax as allocated above will be duly paid at the time of recording.

6. That the undersigned has executed this Affidavit in his capacity as Senior Vice President of Daniel Realty Company for the purpose of assisting the Judges of Probate in Jefferson and Shelby Counties in establishing the amount of the recording tax to be collected for the recordation of the Mortgage.

  
\_\_\_\_\_  
Affiant

Sworn to and subscribed before me  
this 20th day of August, 2001.

  
\_\_\_\_\_  
Notary Public

[NOTARIAL SEAL]

My commission expires: 9/8/2001

Inst # 2001-35833

08/22/2001-35833  
08:45 AM CERTIFIED  
SHELBY COUNTY JUDGE OF PROBATE  
029 KSB 6098.00