

Loan # 100852

FUTURE ADVANCE MORTGAGE
WITH ABSOLUTE ASSIGNMENT OF LEASES AND RENTS,
SECURITY AGREEMENT AND FIXTURE FILING

THE PARTIES TO THIS FUTURE ADVANCE MORTGAGE WITH ABSOLUTE ASSIGNMENT OF LEASES AND RENTS, SECURITY AGREEMENT AND FIXTURE FILING ("Mortgage"), made as of June 23, 2004, are **THIRD CREEK, L.L.C.**, a Missouri limited liability company, **MATTHIAS D. RENNER FAMILY, L.L.C.**, a Missouri limited liability company, and **KENNETH J. WEBER FAMILY, L.L.C.**, a Missouri limited liability company (each, a "Mortgagor" and collectively, the "Mortgagors"), and **WELLS FARGO BANK, NATIONAL ASSOCIATION**, a national banking association ("Mortgagee"). Capitalized terms used herein and not otherwise defined shall have the meaning as in the Loan Agreement (as hereinafter defined).

This Mortgage is filed as and shall constitute a fixture filing in accordance with the provisions of Section 7-9A-502(c) of the Code of Alabama.

ARTICLE 1. GRANT IN TRUST

1.1 **GRANT.** As security for and in consideration of the Secured Obligations herein described, and otherwise for the purposes of and upon the terms and conditions in this Mortgage, Mortgagors irrevocably grant, bargain, sell, alien, convey and confirm, assign, transfer and set over unto Mortgagee, its successors and assigns, the following:

(a) all of that real property located in the County of Shelby, State of Alabama, described on **Exhibit A** attached hereto, including the tenements, hereditaments, appurtenances and all the estates and rights of Mortgagors in and to the real property and all right, title and interest, if any, of Mortgagors in and to the streets, roads, sidewalks and alleys abutting the real property, and strips and gores within or adjoining the real property, whether private or public and whether vacated or to be vacated by law or otherwise; the air space and right to use said air space above the real property and any transferable development or similar rights appurtenant thereto, all rights of ingress and egress by motor vehicle to parking facilities on or within the real property, all easements now or hereafter affecting or benefiting the real property, including, without limitation, all reciprocal easement agreements, royalties and all rights appertaining to the use and enjoyment of the real property, including alley, drainage, mineral, water, oil and gas rights;

(b) all buildings, structures, and other improvements, of every nature, and all fixtures, fittings, building materials, machinery, equipment, furniture and furnishings and personal property of every nature now or hereafter owned by Mortgagors and used or intended to be used in connection with the real property, buildings, structures or other improvements, including all extensions, additions, improvements, betterments, renewals, substitutions, replacements and

accessions to any of the foregoing, whether such fixtures, fittings, building materials, machinery, equipment, furniture, furnishings and personal property actually are located on or adjacent to the real property or not;

(c) all fixtures, and personal property now or at any time hereafter annexed, affixed or attached to said real estate and/or buildings, improvements or structures thereon and all replacements, additions and substitutions thereof or thereto, including, but not limited to, all apparatus, appliances, machinery, equipment and articles used to supply or provide, or in connection with, heat, gas, air conditioning, plumbing, water, lighting, power, elevator, sewerage, cleaning, refrigeration, cooling, ventilation and sprinkler systems, all fire prevention and extinguishing apparatus, all window shades, drapes, drapery equipment, carpeting, tile and floor coverings, all security and access control apparatus, and all trees, plants and landscaping;

(d) all accounts, accounts receivables, lease payments, rental payments, royalties, issues, income profits, lease rights, general intangibles, letter of credit rights, supporting obligations, instruments, promissory notes, and other forms of obligation, deposit accounts, commercial tort claims, payment intangibles, tax refunds and rights to tax refunds, contracts and contract rights relating to the real property and improvements, including, but not limited to, that certain Purchase and Sale Agreement between Kimco Birmingham, L.P. and Mortgagors, dated ~~MAY 20~~, 2004 (the "Purchase Agreement"), and that certain Escrow Agreement between Kimco Birmingham, L.P., Mortgagors and American Escrow Company, dated June ~~23~~, 2004 (the "Escrow Agreement") or any other escrow agreement, whether now owned or existing or hereafter created, acquired or arising, including, without limitation, all leases, construction contracts, management contracts, leasing contracts, purchase and sale contracts, put or other option contracts and all other contracts and agreements relating to the construction of improvements on, or the operation, management and sale of, all or any part of the real property or improvements;

(e) all other personal property, whether now owned or hereafter acquired by any Mortgagor, and used or intended to be used in the possession, occupation or enjoyment thereof, and all replacements, additions and substitutions thereof and thereto, including, but not limited to, the following: all equipment, machinery, fixtures and personal property now or hereafter owned by any Mortgagor and attached to or contained in and used or useful in connection with the real property or any of the improvements now or hereafter located thereon, including without limitation any and all air conditioners, amplifiers, antennae, appliances, apparatus, awnings, basins, boilers, bookcases, booths, cabinets, carpets, chairs, cleaning and janitorial equipment and supplies, coolers, compactors, computers and computer equipment and wiring, conduit, copy machines, cups, curtains, desks, dies, dishes, dishwashers, doors, drapes, drapery equipment and apparatus, ducts, dynamos, elevators, engines, equipment, escalators, fans, fax machines, fittings, floor coverings, freezers, furnaces, furnishings, furniture, glasses, goods, hardware, heaters, humidifiers, incinerators, kitchen equipment and appliances, lights and lighting, machinery, microphones, monitors, motors, ovens, pans, pipes, plates, plumbing, pots, printers, pumps, radiators, ranges, refrigerators, risers, screens, security systems, shades, shelving, silverware, sound systems, speakers, sprinklers, stools, stoves, tile and floor coverings, tables, telephones, tools, ventilators, wall coverings, windows, window coverings, wiring, and all renewals or replacements thereof or articles in substitution therefor, owned by any Mortgagor and now or hereafter used for similar purposes in or in connection with the real property, all appliances, all shelving and storage apparatus, all construction goods and materials whether or not the same have been incorporated into the buildings or improvements thereon, and all tools, supplies and equipment used in connection with construction, repair, maintenance, janitorial or groundskeeping services thereon or therefor;

(f) all right to take any action or file any papers or process in any court of competent jurisdiction, which may in the opinion of Mortgagee be necessary to preserve, protect, or enforce the rights or claims of any Mortgagor in and to the real property or the personal property or both, including the filing of any proof of claim in any insolvency proceeding under any state, federal or other laws and any rights, claims or awards accruing to or to be paid to any Mortgagor; and all books, records, computer records, electronic data, reports, tests, surveys, plans, specifications, permits, conditional use permits, licenses, computer disks, ledger cards, programs and other computer materials, customer and supplier lists, invoices, orders and documents of any kind or nature relating to the foregoing or the development or operation thereof.

(g) All leases, subleases, lettings and licenses of the real property or any part thereof now or hereafter entered into, and all amendments, modifications, extensions, renewals and restatements thereof, and all right, title and interest of Mortgagors thereunder, including cash and securities deposited thereunder (as down payments, security deposits or otherwise), the right to receive and collect the rents, expense reimbursements, security deposits, income, proceeds, earnings, royalties, revenues, issues and profits payable thereunder and the rights to enforce, whether at law or in equity or by any other means, all provisions thereof and the right to apply the same to the payment and performance of the Secured Obligations;

(h) All accessions to any of the foregoing and all substitutions, renewals, improvements and replacements of and additions thereto; all after-acquired property of the nature described above; all products and proceeds of any of the foregoing, including, without limitation, insurance proceeds, whether cash or noncash, immediate or remote, including without limitation, all income, accounts, contract rights, general intangibles, chattel paper, notes, drafts, acceptances, instruments and other rights to the payment of money arising out of the sale, rental, lease, exchange, or other disposition of any of the foregoing items.

All interest or estate which any Mortgagor may now hold or hereafter acquire in the property described above, and all additions and accretions thereto, and the proceeds of any of the foregoing are collectively referred to herein as the "Property". The listing of specific rights or property shall not be interpreted as a limit of general terms.

ARTICLE 2. OBLIGATIONS SECURED

- 2.1 **OBLIGATIONS SECURED.** Mortgagors grant this Mortgage for the purpose of securing: (a) the performance of the Mortgagors' obligations (i) in this Mortgage, (ii) in that certain Loan Agreement dated of even date herewith to which Mortgagors and Mortgagee are parties (as the same may be amended or restated from time to time, the "Loan Agreement"), which Loan Agreement provides for the acquisition and construction of certain Improvements (as defined in the Loan Agreement) on the Property, (iii) in that certain Promissory Note Secured by Mortgage (as the same may be amended or restated from time to time, the "Note"), of even date herewith, executed by each Mortgagor, and payable to Mortgagee, in the stated principal amount of Eighteen Million One Hundred Ninety-Two Thousand and 00/100 Dollars (\$18,192,000.00), with interest thereon according to the terms thereof, (iv) the other Loan Documents (as such term is defined in the Loan Agreement), and (v) all other obligations (in its most comprehensive sense) of Mortgagors to Mortgagee whether in existence prior to the date hereof, created as of the date hereof or hereafter made, incurred or created, whether voluntary or involuntary, absolute or contingent, liquidated or unliquidated, or whether evidenced by one or more notes, guarantees, instruments, agreements, mortgages, leases or assignments; and (b) any and all extensions, renewals, or modifications of the foregoing notes, guarantees, instruments and agreements, whether the same be in greater or lesser amounts (collectively the "Secured Obligations"). It is

expressly understood that this Mortgage is intended to and does secure not only the Loan Agreement, but also future advances and obligations and any and all other present and future Secured Obligations, direct or contingent, of Mortgagors to Mortgagee, whether now existing or hereafter arising, and any and all amendments, modifications, extensions, renewals and restatements thereof, or any part thereof, existing at any time before actual cancellation of this instrument on the probate records of the county where the Property is located.

- 2.2 **INCORPORATION.** The term "obligations" is used herein in its broadest and most comprehensive sense and shall be deemed to include, without limitation, all interest and charges, prepayment charges (if any), late charges and loan fees at any time accruing or assessed on any of the Secured Obligations. All terms of the Secured Obligations and the documents evidencing such obligations are incorporated herein by this reference. All persons who may have or acquire an interest in the Property shall be deemed to have notice of the terms of the Secured Obligations and the rate of interest on one or more Secured Obligations may vary from time to time.

ARTICLE 3. ASSIGNMENT OF LEASES AND RENTS

- 3.1 **ASSIGNMENT.** Mortgagors hereby irrevocably assign to Mortgagee all of Mortgagors' right, title and interest in, to and under: (a) all present and future leases of the Property or any portion thereof, all licenses and agreements relating to the management, leasing or operation of the Property, whether such leases, licenses and agreements are now existing or entered into after the date hereof ("Leases"), and (b) the rents, issues, deposits and profits of the Property, including, without limitation, all amounts payable and all rights and benefits accruing to Mortgagors under the Leases and, the Purchase Agreement and the Escrow Agreement ("Payments"). The term "Leases" shall also include all guarantees of and security for the tenant's performance thereunder, and all amendments, extensions, renewals or modifications thereto which are permitted hereunder. This is a present and absolute assignment, not an assignment for security purposes only, and Mortgagee's right to the Leases and Payments is not contingent upon and may be exercised without possession of the Property.
- 3.2 **GRANT OF LICENSE.** Mortgagee confers upon Mortgagors a revocable license ("License") to collect and retain the Payments as they become due and payable, until the occurrence of a Default (as hereinafter defined). Upon a Default, the License shall be automatically revoked and Mortgagee may collect and apply the Payments pursuant to the terms hereof without notice and without taking possession of the Property. All payments thereafter collected by Mortgagors shall be held by Mortgagors as trustee under a constructive trust for the benefit of Mortgagee. Mortgagors hereby irrevocably authorize and direct the tenants under the Leases to rely upon and comply with any notice or demand by Mortgagors for the payment to Mortgagors of any rental or other sums which may at any time become due under the Leases, or for the performance of any of the tenants' undertakings under the Leases, and the tenants shall have no duty to inquire as to whether any Default has actually occurred or is then existing. Mortgagors hereby relieve the tenants from any liability to Mortgagors by reason of relying upon and complying with any such notice or demand by Mortgagee. Mortgagee may apply, in its sole discretion, any Payments so collected by Mortgagee against any Secured Obligation under the Loan Documents (as defined in the Loan Agreement), whether existing on the date hereof or hereafter arising. Collection of any Payments by Mortgagee shall not cure or waive any Default or notice of Default or invalidate any acts done pursuant to such notice.
- 3.3 **EFFECT OF ASSIGNMENT.** The foregoing irrevocable assignment shall not cause Mortgagee to be: (a) a mortgagee in possession; (b) responsible or liable for the control, care, management or repair of the Property or for performing any of the terms, agreements, undertakings, obligations,

representations, warranties, covenants and conditions of the Leases; (c) responsible or liable for any waste committed on the Property by the tenants under any of the Leases or any other parties, for any dangerous or defective condition of the Property, or for any negligence in the management, upkeep, repair or control of the Property resulting in loss or injury or death to any tenant, licensee, employee, invitee or other person; (d) responsible for or under any duty to produce rents or profits; or (e) directly or indirectly liable to Mortgagors or any other person as a consequence of the exercise or failure to exercise any of the rights, remedies or powers granted to Mortgagee hereunder or to perform or discharge any obligation, duty or liability of Mortgagors arising under the Leases.

ARTICLE 4. SECURITY AGREEMENT, FINANCING STATEMENT AND FIXTURE FILING

- 4.1 **SECURITY INTEREST.** This instrument is intended to be a security agreement pursuant to the Uniform Commercial Code as currently in effect in the State in which the land encumbered hereby is located ("UCC") for any of the items specified as part of the Property which, under applicable law, may be subject to a security interest pursuant to the UCC, and Mortgagors hereby grant and assign to Mortgagee a security interest, to secure payment and performance of all of the Secured Obligations, in all of the Property, including without limitation, the following described personal property and fixtures in which any Mortgagor now or at any time hereafter has any interest (collectively, the "Collateral"):

All goods, building and other materials, supplies, work in process, equipment, machinery, fixtures, furniture, furnishings, signs and other personal property and embedded software therein, wherever situated, which are or are to be incorporated into, used in connection with, or appropriated for use on the Property; together with all rents (to the extent, if any, they are not real property); all inventory, accounts, cash receipts, deposit accounts, accounts receivable, contract rights, licenses, agreements, general intangibles, chattel paper (whether electronic or tangible), instruments, documents, promissory notes, drafts, letters of credit, letter of credit rights, supporting obligations, insurance policies, insurance and condemnation awards and proceeds, any other rights to the payment of money, trade names, trademarks and service marks arising from or related to the ownership, management, leasing or operation of the Property or any business now or hereafter conducted thereon by Mortgagors; all permits, consents, approvals, licenses, authorizations and other rights granted by, given by or obtained from, any governmental entity with respect to the Property; all deposits or other security now or hereafter made with or given to utility companies by Mortgagors with respect to the Property; all advance payments of insurance premiums made by Mortgagors with respect to the Property; all plans, drawings and specifications relating to the Property; all loan funds held by Mortgagee and/or any of its affiliate banks, whether or not disbursed; all funds deposited with Mortgagee and/or any of its affiliate banks pursuant to any loan agreement; all reserves, deferred payments, deposits, accounts, escrow accounts (including, but not limited to, the Purchase Agreement and the Escrow Agreement), refunds, cost savings and payments of any kind related to the Property or any portion thereof; together with all replacements, products and proceeds of, and additions and accessions to, any of the foregoing; together with all books, records and files relating to any of the foregoing.

This Mortgage is intended to be a financing statement and fixture filing within the purview of Ala. Code §7-9A-502(b) of the UCC with respect to the Property, including, without limitation, the goods described herein, which goods are or may become fixtures relating to the land and improvements herein described. The addresses of Mortgagors (debtor) and Mortgagee (secured party) are set forth herein. The property or collateral covered by this financing statement and fixture filing includes all of the Property subject to Article 9 of the UCC. Mortgagors irrevocably authorize Mortgagee to file (a) one or more financing statements describing the Property in all

jurisdictions in which such financing statements are or may be required to be filed to perfect the grant of the security interest in the Property, (b) one or more continuation statements relating to such financing statements, and (c) amendments of such financing statements as may be required by Mortgagee from time to time. Mortgagors hereby authorize Mortgagee to file financing statements covering "all assets" or "all personal property" of debtor as contemplated by Ala. Code §7 9A-504. Any reproduction of this instrument or of any other security agreement or financing statement shall be sufficient as a financing statement. This Mortgage is to be filed for recording with the Recorder of Deeds of the county, counties or other applicable jurisdiction where the land described in the Mortgage is located. The record owner of such land is Mortgagors.

- 4.2 **RIGHTS OF MORTGAGEE.** Upon the occurrence of a Default (as hereinafter defined) Mortgagee shall have all the rights of a "Secured Party" under the UCC. In addition to such rights, Mortgagee may, but shall not be obligated to, at any time without notice and at the expense of Mortgagors: (a) give notice to any person of Mortgagee's rights hereunder and enforce such rights at law or in equity; (b) insure, protect, defend and preserve the Collateral or any rights or interests of Mortgagee therein; (c) inspect the Collateral; and (d) endorse, collect and receive any right to payment of money owing to Mortgagors under or from the Collateral. Mortgagee may: (i) upon written notice, require Mortgagors to assemble any or all of the Collateral and make it available to Mortgagee at a place designated by Mortgagee; (ii) without prior notice, enter upon the Property or other place where any of the Collateral may be located and take possession of, collect, sell, and dispose of any or all of the Collateral, and store the same at locations acceptable to Mortgagee at Mortgagors expense; and/or (iii) sell, assign and deliver at any place or in any lawful manner all or any part of the Collateral and bid and become the purchaser at any such sales. Notwithstanding the above, in no event shall Mortgagee be deemed to have accepted any property other than cash in satisfaction of any obligation of Mortgagors to Mortgagee unless Mortgagee shall make an express written election of said remedy under the UCC or other applicable law.

Mortgagors acknowledge and agree that a disposition of the Collateral in accordance with Mortgagee's rights and remedies as heretofore provided is a disposition thereof in a commercially reasonable manner and that ten (10) days prior notice of such disposition is commercially reasonable notice. Mortgagors further agree that any sale or other disposition of all or any portion of the Collateral may be applied by Mortgagee first to the reasonable expenses in connection therewith, including reasonable attorneys' fees and disbursements, and then to the payment of the Secured Obligations.

ARTICLE 5. RIGHTS AND DUTIES OF THE PARTIES

- 5.1 **PERFORMANCE OF SECURED OBLIGATIONS.** Mortgagors shall promptly pay and perform each Secured Obligation when due.
- 5.2 **TAXES AND ASSESSMENTS.** Mortgagors shall also pay prior to delinquency all taxes, assessments, levies and charges imposed upon the Property by any public authority or upon Mortgagee by reason of its interest in any Secured Obligation or in the Property, or by reason of any payment made to Mortgagee pursuant to any Secured Obligation; provided, however, Mortgagors shall have no obligation to pay taxes which may be imposed from time to time upon Mortgagee and which are measured by and imposed upon Mortgagee's net income.

- 5.3 **LIENS, ENCUMBRANCES AND CHARGES.** Mortgagors shall immediately discharge any lien, encumbrance, claim or charge not approved by Mortgagee in writing that has or may attain priority over this Mortgage.
- 5.4 **DUE ON SALE OR ENCUMBRANCE.** If the Property or any interest therein shall be sold, transferred, including, without limitation, through sale or transfer, directly or indirectly, of a majority or controlling interest in the corporate stock or general partnership interests, limited liability partnership interests, or limited liability company interests of a managing member of any Mortgagor, mortgaged, assigned, further encumbered or leased, whether directly or indirectly, whether voluntarily, involuntarily or by operation of law, without the prior written consent of Mortgagee, **THEN** Mortgagee, in its sole discretion, may at anytime thereafter declare all Secured Obligations immediately due and payable.
- 5.5 **DAMAGES; INSURANCE AND CONDEMNATION PROCEEDS.**
- a. The following (whether now existing or hereafter arising) are all absolutely and irrevocably assigned by Mortgagors to Mortgagee and, at the request of Mortgagee, shall be paid directly to Mortgagee: (a) all awards of damages and all other compensation payable directly or indirectly by reason of a condemnation or proposed condemnation for public or private use affecting all or any part of, or any interest in, the Property or Collateral; (b) all other claims and awards for damages to, or decrease in value of, all or any part of, or any interest in, the Property or Collateral; (c) all proceeds of any insurance policies payable by reason of loss sustained to all or any part of the Property or Collateral; and (d) all interest which may accrue on any of the foregoing. Subject to applicable law, and without regard to any requirement contained in this Mortgage, Mortgagee may at its discretion apply all or any of the proceeds it receives to its expenses in settling, prosecuting or defending any claim and may apply the balance to the Secured Obligations in any order acceptable to Mortgagee, and/or Mortgagee may release all or any part of the proceeds to Mortgagors upon any conditions Mortgagee may impose. Mortgagee may commence, appear in, defend or prosecute any assigned claim or action and may adjust, compromise, settle and collect all claims and awards assigned to Mortgagee; **provided, however,** in no event shall Mortgagee be responsible for any failure to collect any claim or award, regardless of the cause of the failure, including, without limitation, any malfeasance or nonfeasance by Mortgagee or its employees or agents.
- b. At its sole option, Mortgagee may permit insurance or condemnation proceeds held by Mortgagee to be used for repair or restoration but may condition such application upon reasonable conditions, including, without limitation: (i) the deposit with Mortgagee of such additional funds which Mortgagee determines are needed to pay all costs of the repair or restoration, (including, without limitation, taxes, financing charges, insurance and rent during the repair period); (ii) the establishment of an arrangement for lien releases and disbursement of funds acceptable to Mortgagee (the arrangement contained in the Loan Agreement for obtaining lien releases and disbursing loan funds shall be deemed reasonable with respect to disbursement of insurance or condemnation proceeds); (iii) the delivery to Mortgagee of plans and specifications for the work, a contract for the work signed by a contractor acceptable to Mortgagee, a cost breakdown for the work and a payment and performance bond for the work, all of which shall be acceptable to Mortgagee; and (iv) the delivery to Mortgagee of evidence acceptable to Mortgagee (aa) that after completion of the work the income from the Property will be sufficient to pay all expenses and debt service for the Property; (bb) of the continuation of Leases acceptable to and required by Mortgagee; (cc) that upon completion of the work, the size,

capacity and total value of the Property will be at least as great as it was before the damage or condemnation occurred; (dd) that there has been no material adverse change in the financial condition or credit of Mortgagors since the date of this Mortgage; and (ee) of the satisfaction of any additional conditions that Mortgagee may reasonably establish to protect its security. Mortgagors hereby acknowledge that the conditions described above are reasonable, and, if such conditions have not been satisfied within thirty (30) days of receipt by Mortgagee of such insurance or condemnation proceeds, then Mortgagee may apply such insurance or condemnation proceeds to pay the Secured Obligations in such order and amounts as Mortgagee in its sole discretion may choose.

- 5.6 **DEFENSE AND NOTICE OF LOSSES, CLAIMS AND ACTIONS.** At Mortgagors' sole expense, Mortgagors shall protect, preserve and defend the Property and Collateral and title to and right of possession of the Property and Collateral, the security hereof and the rights and powers of Mortgagee hereunder against all adverse claims. Mortgagors shall give Mortgagee prompt notice in writing of the assertion of any claim, of the filing of any action or proceeding, of any material damage to the Property or Collateral and of any condemnation offer or action.
- 5.7 **RIGHT OF INSPECTION.** Mortgagee, its agents and employees, may enter the Property at any reasonable time for the purpose of inspecting the Property and Collateral and ascertaining Mortgagors' compliance with the terms hereof.

ARTICLE 6. DEFAULT PROVISIONS

- 6.1 **DEFAULT.** For all purposes hereof, the term "Default" shall mean any default under the Note, the Loan Agreement, or any of the other Loan Documents, including this Mortgage.
- 6.2 **RIGHTS AND REMEDIES.** At any time after Default, Mortgagee, at Mortgagee's direction, shall have all the following rights and remedies:
- a. With or without notice, to declare all Secured Obligations immediately due and payable;
 - b. With or without notice, and without releasing Mortgagors from any Secured Obligation, and without becoming a mortgagee in possession, to cure any breach or Default of any Mortgagor and, in connection therewith, to enter upon the Property and do such acts and things as Mortgagee deems necessary or desirable to protect the security hereof, including, without limitation: (i) to appear in and defend any action or proceeding purporting to affect the security of this Mortgage or the rights or powers of Mortgagee under this Mortgage; (ii) to pay, purchase, contest or compromise any encumbrance, charge, lien or claim of lien which, in the sole judgment of Mortgagee, is or may be senior in priority to this Mortgage, the judgment of Mortgagee being conclusive as between the parties hereto; (iii) to obtain insurance and to pay any premiums or charges with respect to insurance required to be carried under this Mortgage; or (iv) to employ counsel, accountants, contractors and other appropriate persons;
 - c. To commence and maintain an action or actions in any court of competent jurisdiction to foreclose this instrument as a mortgage or to obtain specific enforcement of the covenants of Mortgagors hereunder, and Mortgagors agree that such covenants shall be specifically enforceable by injunction or any other appropriate equitable remedy and that for the purposes of any suit brought under this subparagraph, Mortgagors waive the defense of laches and any applicable statute of limitations;

- d. To apply to a court of competent jurisdiction for and to obtain appointment of a receiver of the Property as a matter of strict right and without regard to the adequacy of the security for the repayment of the Secured Obligations or the solvency of any party bound for payment of the Secured Obligations, the existence of a declaration that the Secured Obligations are immediately due and payable, or the filing of a notice of default, and Mortgagors hereby consent to such appointment;
- e. To enter upon, possess, manage and operate the Property or any part thereof;
- f. Upon the entering upon or taking of possession, Mortgagee, as attorney-in-fact or agent, of the Mortgagors, or in its own name as mortgagee and under the powers herein granted, may hold, store, use, operate, manage and control the Property (or any portion thereof selected by Mortgagee) and conduct the business thereof either personally or by its agents, 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 Property (or any portion thereof selected by Mortgagee) insured; (iii) manage and operate the Property (or any portion thereof selected by Mortgagee) and exercise all the rights and powers of the Mortgagors in its name or otherwise, with respect to the same, including legal actions for the recovery of rent, legal dispossessory actions against tenants holding over and legal actions in distress of rent, and with full power and authority to cancel or terminate any lease or sublease for any cause or on any ground which would entitle the Mortgagors to cancel the same, and to elect to disaffirm any lease or sublease made subsequent to this Mortgage or subordinated to the lien hereof; (iv) enter into any and all agreements with respect to the exercise by others of any of the powers herein granted Mortgagee, all as Mortgagee from time to time may determine to be to its best advantage; and Mortgagee may collect and receive all the income, revenues, rents, issues and profits of the Property (or any portion thereof selected by Mortgagee), including those past due as well as those accruing thereafter, and, after deducting (aa) all expenses of taking, holding, managing, and operating the Property (including compensation for the services of all persons employed for such purposes), (bb) the cost of all such maintenance, repairs, renewals, replacements, additions, betterments, improvements and purchases and acquisitions, (cc) the cost of such insurance, (dd) such taxes, assessments and other charges prior to this Mortgage as Mortgagee may determine to pay, (ee) other property charges upon the Property or any part thereof, and (ff) the reasonable compensation, expenses and disbursements of the attorneys and agents of Mortgagee, Mortgagee shall apply the remainder of the moneys so received by the Mortgagee, to the payment or prepayment of the Secured Obligation in such order and manner as Mortgagee may elect, with the balance, if any, to be paid as required by law;
- g. To resort to and realize upon the security hereunder and any other security now or later held by Mortgagee concurrently or successively and in one or several consolidated or independent judicial actions or lawfully taken non-judicial proceedings, or both;
- h. To (i) file suit or suits at law or in equity or any other appropriate proceeding or remedy (ii) foreclose this Mortgage; (iii) enforce or exercise any right under any of the Loan Documents; and (iv) pursue any other remedy available to Mortgagee, all as Mortgagee may elect; and

- i. To pursue such other rights and remedies as may be available at law or in equity to collect the Secured Obligations and otherwise enforce the terms and conditions of this Mortgage and the other Loan Documents.

6.3 **RIGHTS OF A SECURED PARTY.** Upon the occurrence of a Default, Mortgagee, in addition to any and all remedies it may have or exercise under this Mortgage, or any of the other Loan Documents or under applicable law, may immediately and without demand exercise any and all of the rights of a secured party upon default under the UCC, all of which shall be cumulative. Such rights shall include, without limitation:

- a. The right to take possession of the Collateral without judicial process and to enter upon any premises where the Collateral may be located for the purposes of taking possession of, securing, removing, and/or disposing of the Collateral without interference from the Mortgagors and without any liability for rent, storage, utilities or other sums;
- b. The right to sell, lease, or otherwise dispose of any or all of the Collateral, whether in its then condition or after further processing or preparation, at public or private sale; and unless the Collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, Mortgagee shall give to the Mortgagors at least ten (10) days' prior notice of the time and place of any public sale of the Collateral or of the time after which any private sale or other intended disposition of the Collateral is to be made, all of which Mortgagors agree shall be reasonable notice of any sale or disposition of the Collateral;
- c. The right to require the Mortgagors, upon request of Mortgagee, to assemble and make the Collateral available to Mortgagee at a place reasonably convenient to Mortgagors and Mortgagee; and
- d. The right to notify account debtors, and demand and receive payment therefrom.

To effectuate the rights and remedies of Mortgagee upon default, Mortgagors do hereby irrevocably appoint Mortgagee attorney-in-fact for Mortgagors, with full power of substitution to sign, execute, and deliver any and all instruments and documents and do all acts and things to the same extent as the Mortgagors could do, and to sell, assign, and transfer any collateral to Mortgagee or any other party. In exercising any of said remedies, Mortgagee may proceed against the items of real property and any items of personal property specified as part of the Property separately or together and in any order whatsoever, without in any way affecting the availability of Mortgagee's remedies under the UCC or of the remedies otherwise provided in this Mortgage.

6.4 **POWER OF SALE.** If a Default shall have occurred, Mortgagee may sell the Property to the highest bidder at public auction in front of the courthouse door in the county or counties, as may be required, where the Property is located, either in person or by auctioneer, after having first given notice of the time, place and terms of sale, together with a description of the property to be sold, by publication once a week for three (3) successive weeks prior to said sale in some newspaper published in said county or counties, as may be required, and, upon payment of the purchase money, Mortgagee or any person conducting the sale for Mortgagee is authorized to execute to the purchaser at said sale a deed to the Property so purchased. Mortgagee may bid at said sale and purchase the Property, or any part thereof, if the highest bidder therefor. At the foreclosure sale the 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 as Mortgagee may

elect. The provisions of Paragraph 6.3 shall apply with respect to Mortgagee's enforcement of rights or interests in personal property which constitutes Property hereunder.

- 6.5 **CREDIT BID.** Upon sale of the Property at any judicial or non-judicial foreclosure proceeding, Mortgagee may credit bid (as determined by Mortgagee in its sole and absolute discretion) all or any portion of the Secured Obligations. In determining such credit bid, Mortgagee may, but is not obligated to, take into account all or any of the following: (i) appraisals of the Property as such appraisals may be discounted or adjusted by Mortgagee in its sole and absolute underwriting discretion; (ii) expenses and costs incurred by Mortgagee with respect to the Property prior to foreclosure; (iii) expenses and costs which Mortgagee anticipates will be incurred with respect to the Property after foreclosure, but prior to resale, including, without limitation, the costs of any structural reports, hazardous waste reports or any remediation costs related thereto; (iv) anticipated discounts upon resale of the Property as a distressed or foreclosed property; and (v) such other factors or matters that Mortgagee deems appropriate. In regard to the above, Mortgagors acknowledge and agree that: (w) Mortgagee is not required to use any or all of the foregoing factors to determine the amount of its credit bid; (x) this Section does not impose upon Mortgagee any additional obligations that are not imposed by law at the time the credit bid is made; (y) the amount of Mortgagee's credit bid need not have any relation to any loan-to-value ratios specified in the Loan Documents or previously discussed between Mortgagors and Mortgagee; and (z) Mortgagee's credit bid may be higher or lower than any appraised value of the Property.
- 6.6 **APPLICATION OF FORECLOSURE SALE PROCEEDS.** After deducting from any proceeds of sale, the costs, fees and expenses of collecting the Secured Obligations and enforcing this Mortgage, including, without limitation, the cost, if any, of obtaining and retaining a receiver for the Property, the costs of Mortgagee in connection with pursuing any proceeding (whether judicial or non-judicial) wherein a sale may be made, including, without limitation, the cost of obtaining evidence of title and attorneys' fees, the remaining balance, if any, of the proceeds of sale shall be applied: (a) to payment of all sums expended by Mortgagee under the terms hereof and not then repaid, with accrued interest at the rate of interest specified in the Note to be applicable on or after maturity or acceleration of the Note; (b) to payment of all other Secured Obligations in such order as Mortgagee shall determine in its sole discretion; provided, however, Mortgagee shall have no liability for funds not actually received by Mortgagee; and (c) the remainder, if any, to the person or persons legally entitled thereto.
- 6.7 **MORTGAGEE'S OPTION ON FORECLOSURE.** At the option of Mortgagee, this Mortgage may be foreclosed as provided by law or in equity, in which event the attorney's fees, among other costs and expenses shall be allowed and paid out of the proceeds of the sale. In the event Mortgagee exercises its option to foreclose this Mortgage in equity, Mortgagee may, at its option, foreclose this Mortgage subject to the rights of any tenants of the Property, and the failure to make any such tenants parties defendants to any such foreclosure proceeding and to foreclose their rights will not be, nor be asserted to be by Mortgagors, a defense to any proceeding instituted by Mortgagee to collect the sums secured hereby, or to collect any deficiency remaining unpaid after the foreclosure sale of the Property.
- 6.8 **NO CURE OR WAIVER.** Neither Mortgagee's nor any receiver's entry upon and taking possession of all or any part of the Property and Collateral, nor any collection of rents, issues, profits, insurance proceeds, condemnation proceeds or damages, other security or proceeds of other security, or other sums, nor the application of any collected sum to any Secured Obligation, nor the exercise or failure to exercise of any other right or remedy by Mortgagee or any receiver shall cure or waive any breach, Default or notice of default under this Mortgage, or nullify the

effect of any notice of default or sale (unless all Secured Obligations then due have been paid and performed and Mortgagors have cured all other defaults), or impair the status of the security, or prejudice Mortgagee in the exercise of any right or remedy, or be construed as an affirmation by Mortgagee of any tenancy, lease or option or a subordination of the lien of or security interests created by this Mortgage.

- 6.9 **POWER TO FILE NOTICES AND CURE DEFAULTS.** Mortgagors hereby irrevocably appoint Mortgagee and its successors and assigns, as its attorney-in-fact, which agency is coupled with an interest, to prepare, execute and file or record any document necessary to create, perfect or preserve Mortgagee's security interests and rights in or to any of the Property and Collateral, and upon the occurrence of an event, act or omission which, with notice or passage of time or both, would constitute a Default, Mortgagee may perform any obligation of Mortgagors hereunder.

ARTICLE 7. MISCELLANEOUS PROVISIONS

- 7.1 **ADDITIONAL PROVISIONS.** The Loan Documents contain or incorporate by reference the entire agreement of the parties with respect to matters contemplated herein and supersede all prior negotiations. The Loan Documents grant further rights to Mortgagee and contain further agreements and affirmative and negative covenants by Mortgagors which apply to this Mortgage and to the Property and Collateral and such further rights and agreements are incorporated herein by this reference. No remedy herein conferred upon or reserved to Mortgagee is intended to be exclusive of any other remedy, but every remedy herein and in the other Loan Documents shall be cumulative, and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity, or by statute; and every power and remedy given by this Mortgage and the other Loan Documents or to Mortgagee may be exercised from time to time and as often as may be deemed expedient. If any additional sum or sums shall become due and owing, by Mortgagors to Mortgagee, pursuant to the provisions hereof, the affidavit of Mortgagee shall be sufficient evidence of the fact that such additional sums are secured hereby in the amount set forth in such affidavit. No waiver of any breach or default hereunder shall constitute or be construed as a waiver by Mortgagee of any subsequent breach or default or of any breach or default of any other provisions of this Mortgage.
- 7.2 **COSTS, EXPENSES AND ATTORNEYS' FEES.** If the Note is placed with an attorney for collection or if an attorney is engaged by Mortgagee to exercise rights or remedies or otherwise take actions to collect thereunder or under any other Loan Document, or if suit be instituted for collection, enforcement of rights and remedies, then in all events, Mortgagors agree to pay all reasonable costs of collection, exercise of remedies or rights or other assertion of claims, including, but not limited to, reasonable attorneys' fees, whether or not court proceedings are instituted, and, where instituted, whether in district court, appellate court, or bankruptcy court.
- 7.3 **NO WAIVER.** No previous waiver and no failure or delay by Mortgagee in acting with respect to the terms of the Note or the Mortgage shall constitute a waiver of any breach, default, or failure of condition under the Note, the Mortgage or the obligations secured thereby. A waiver of any term of the Note, the Mortgage or of any of the obligations secured thereby must be made in writing and shall be limited to the express written terms of such waiver. No delay or omission by Mortgagee to exercise any right or power arising from any Default shall impair any such right or power or shall be construed to be a waiver of any Default or an acquiescence therein. In case Mortgagee shall have proceeded to enforce any right under this Mortgage by foreclosure, entry or otherwise, and such proceedings shall have been discontinued or abandoned because of waiver or for any other reason, or shall have been determined adversely, then, and in such and every such case,

Mortgagors shall severally and respectively be restored to its former position and right hereunder in respect of the Property, and all rights, remedies and powers of Mortgagee shall continue as though no such proceedings had been taken. In the event of any inconsistencies between the terms of the Note and the terms of any other document related to the loan evidenced by the Note, the terms of the Note shall prevail. In the event of any inconsistency between the Loan Agreement and the Mortgage, the Loan Agreement shall govern.

7.4 **MERGER.** No merger shall occur as a result of Mortgagee's acquiring any other estate in, or any other lien on, the Property unless Mortgagee consents to a merger in writing.

7.5 **SUCCESSORS IN INTEREST.** The terms, covenants, and conditions herein contained shall be binding upon and inure to the benefit of the heirs, successors and assigns of the parties hereto; provided, however, that this Section does not waive or modify the provisions of the Section above titled "Due on Sale or Encumbrance".

7.6 **GOVERNING LAW.** This Mortgage shall be construed in accordance with the laws of the State of Alabama, except to the extent that federal laws preempt the laws of such State.

7.7 **INCORPORATION.** **Exhibit A,** as attached, is incorporated into this Mortgage by this reference.

7.8 **NOTICES.** All notices, demands or other communications required or permitted to be given pursuant to the provisions of this Mortgage shall be in writing and shall be delivered and deemed received in accordance with the Loan Agreement. For purposes of notice, the address of the parties shall be as set forth in this Mortgage.

Any party shall have the right to change its address for notice hereunder to any other location by the giving notice to the other party in the manner provided in the Loan Agreement. Mortgagors shall forward to Mortgagee, without delay, any notices, letters or other communications delivered to the Property or to Mortgagors naming Mortgagee, "Lender" or any similar designation as addressee, or which could reasonably be deemed to affect the construction of the improvements or the ability of Mortgagors to perform its obligations to Mortgagee under the Note or the Loan Agreement. Mortgagors requests a copy of any statutory notice of default and a copy of any statutory notice of sale be mailed to Mortgagors at the address for Mortgagors as set forth below.

7.9 **WAIVER OF MARSHALLING AND OTHER RIGHTS.** Mortgagors shall not apply for or avail itself of any appraisal, valuation, redemption, stay, extension or exemption laws, or any so-called "moratorium laws", now existing or hereafter enacted, in order to prevent or hinder the enforcement or foreclosure of this Mortgage, and Mortgagors hereby waive the benefit of such laws. Mortgagors, for themselves, their successors and assigns, hereby wholly waive the period of redemption and any right of redemption provided under any existing or future law in the event of a foreclosure of this Mortgage. Mortgagors hereby waive any order or decree of foreclosure, pursuant to the rights herein granted, on behalf of Mortgagors, and each and every person acquiring any interest in or title to the Property, subsequent to the date of this Mortgage, and on behalf of all other persons to the extent permitted by applicable law. Mortgagors, for themselves and for all parties claiming through or under Mortgagors, and for all parties who may acquire a lien on or interest in the Property hereby waives all rights to have the Property and/or any other property marshaled upon any foreclosure of the lien of this Mortgage or on a foreclosure of any other lien securing the Secured Obligations. Mortgagee shall have the right to sell the Property and any or all of said other property as a whole or in separate parcels, in any order that Mortgagee may designate.

7.10 **ADDRESSES AND OTHER INFORMATION.** The following information is provided in order that this Mortgage shall comply with the requirements of the UCC, as enacted in the State of Alabama, for instruments to be filed as financing statements:

- (a) Names of Mortgagors (Debtors): Third Creek, LLC
Matthias D. Renner Family, LLC
Kenneth J. Weber Family, LLC
- Address of Mortgagors: c/o National Real Estate Management Corporation
1830 Craig Park Court #101
St. Louis, Missouri 63146-4149
Attn: Matthias D. Renner
- (b) Name of Mortgagee (Secured Party): WELLS FARGO BANK NATIONAL ASSOCIATION
- Address of Mortgagee: 120 South Central Avenue
Suite 1420
St. Louis, Missouri 63105
Attention: Michael P. Lane
- (c) Record Owners of Real Estate described on Exhibit A hereto: Third Creek, L.L.C.
Matthias D. Renner Family, L.L.C.
Kenneth J. Weber Family, L.L.C.

7.11 **INSTRUMENT UNDER SEAL.** This Mortgage is given under the seal of all parties hereto, and it is intended that this Mortgage is and shall constitute and have the effect of a sealed instrument according to law.

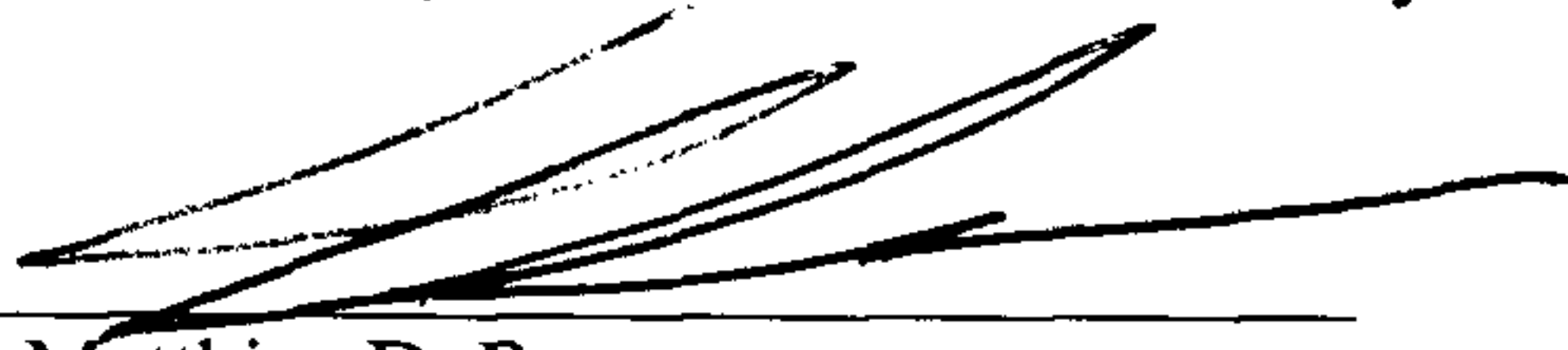
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SIGNATURE PAGE FOR
FUTURE ADVANCE MORTGAGE WITH
ABSOLUTE ASSIGNMENT OF LEASES AND
RENTS, SECURITY AGREEMENT AND FIXTURE FILING

IN WITNESS WHEREOF, Mortgagors have executed this Mortgage as of the date above written.

"Mortgagors"

THIRD CREEK, L.L.C., a Missouri limited liability company

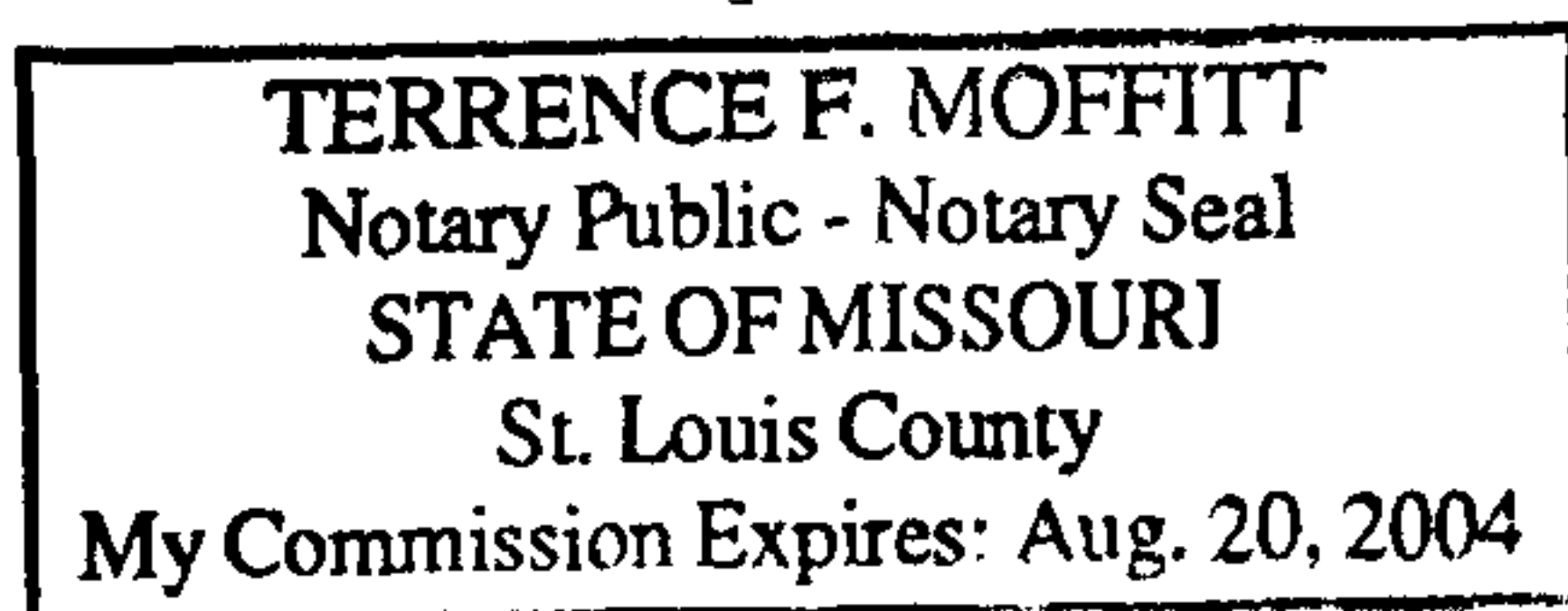
By: 
Printed Name: Matthias D. Renner
Title: Manager

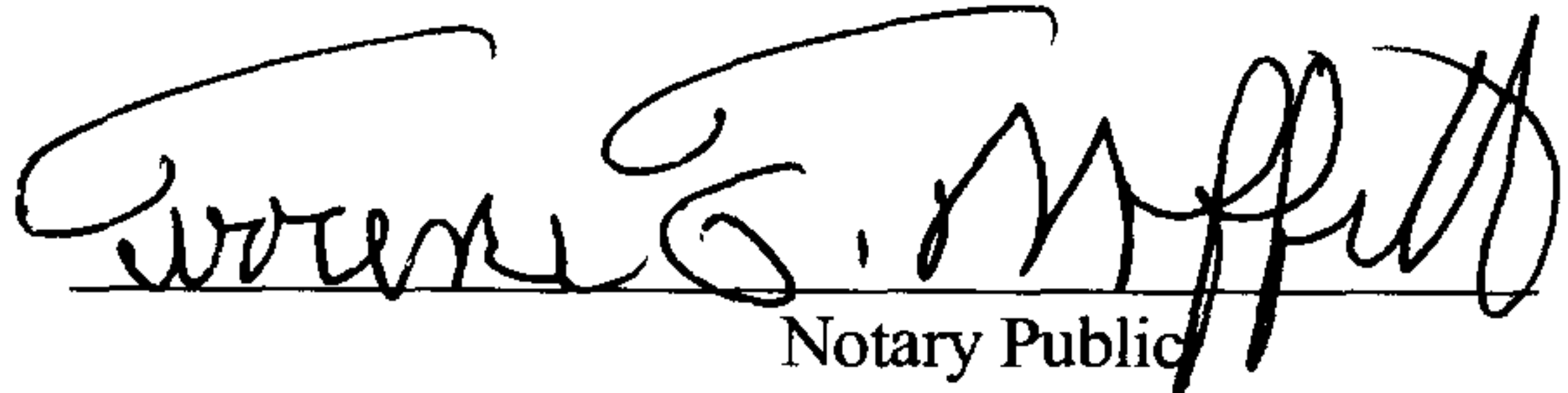
STATE OF MISSOURI)
)
COUNTY OF ST. LOUIS)

I, the undersigned, a Notary Public, in and for said county in said state, hereby certify that MATTHIAS D. RENNER, whose name as Manager of THIRD CREEK, L.L.C., a Missouri limited liability company, is signed to the foregoing instrument and who is known to me, acknowledged before me on this day that, being informed of the contents of such instrument, he, as such officer and with full authority, executed the same voluntarily on the day the same bears date for and as the act of said limited liability company.

Given under my hand and official seal this 21st day of June, 2004.

[NOTARIAL SEAL]




Notary Public

My Commission Expires: _____

SIGNATURES CONTINUED ON FOLLOWING PAGE

SIGNATURE PAGE FOR
FUTURE ADVANCE MORTGAGE WITH
ABSOLUTE ASSIGNMENT OF LEASES AND
RENTS, SECURITY AGREEMENT AND FIXTURE FILING

"Mortgagors"

MATTHIAS D. RENNER FAMILY, L.L.C., a Missouri limited liability company

By: 

Printed Name: Matthias D. Renner

Title: Manager

STATE OF MISSOURI

)

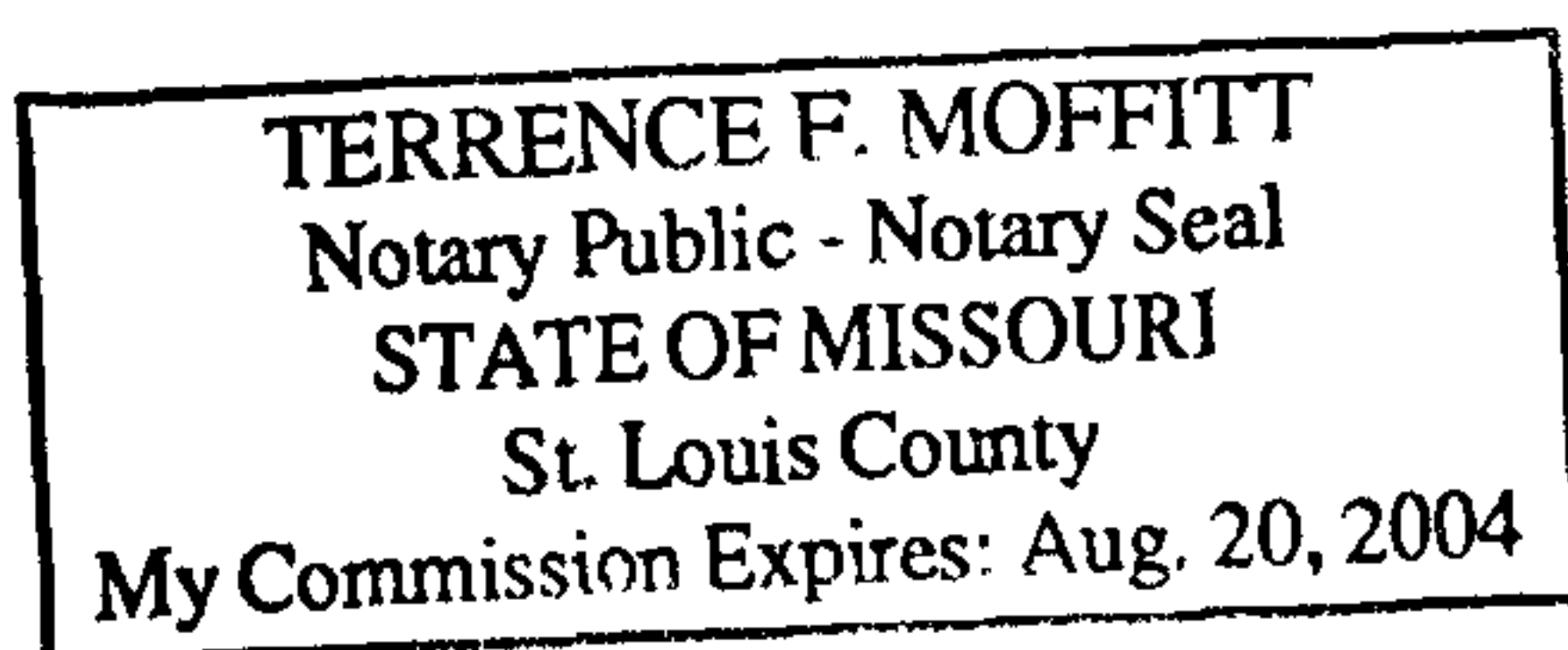
COUNTY OF ST. LOUIS

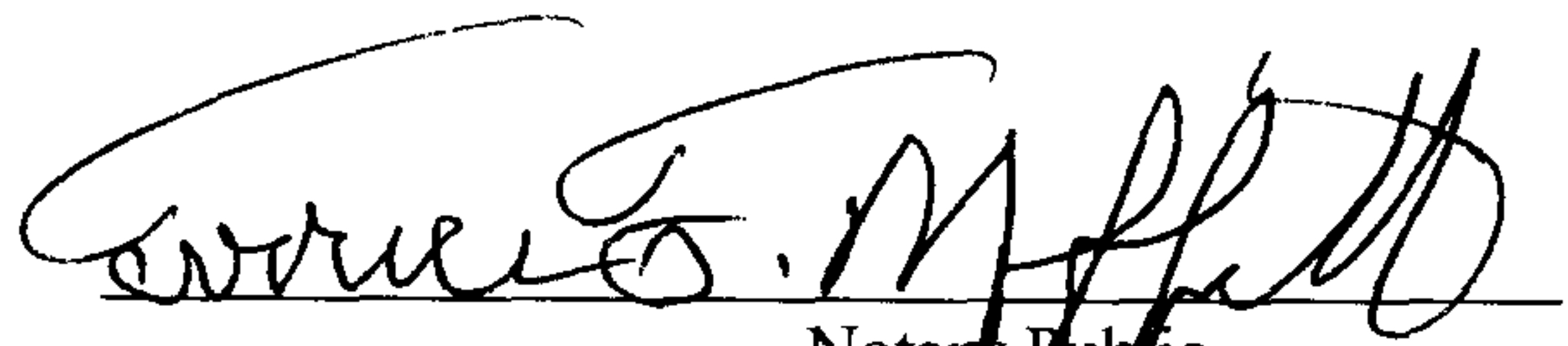
)

I, the undersigned, a Notary Public, in and for said county in said state, hereby certify that MATTHIAS D. RENNER, whose name as Manager of MATTHIAS D. RENNER FAMILY, L.L.C., a Missouri limited liability company, is signed to the foregoing instrument and who is known to me, acknowledged before me on this day that, being informed of the contents of such instrument, he, as such officer and with full authority, executed the same voluntarily on the day the same bears date for and as the act of said limited liability company.

Given under my hand and official seal this 21st day of June, 2004.

[NOTARIAL SEAL]




Notary Public

My Commission Expires: _____

SIGNATURES CONTINUED ON FOLLOWING PAGE

SIGNATURE PAGE FOR
FUTURE ADVANCE MORTGAGE WITH
ABSOLUTE ASSIGNMENT OF LEASES AND
RENTS, SECURITY AGREEMENT AND FIXTURE FILING

"Mortgagors"

KENNETH J. WEBER FAMILY, L.L.C., a Missouri limited liability company

By: _____

Printed Name: Matthias D. Renner

Title: Manager

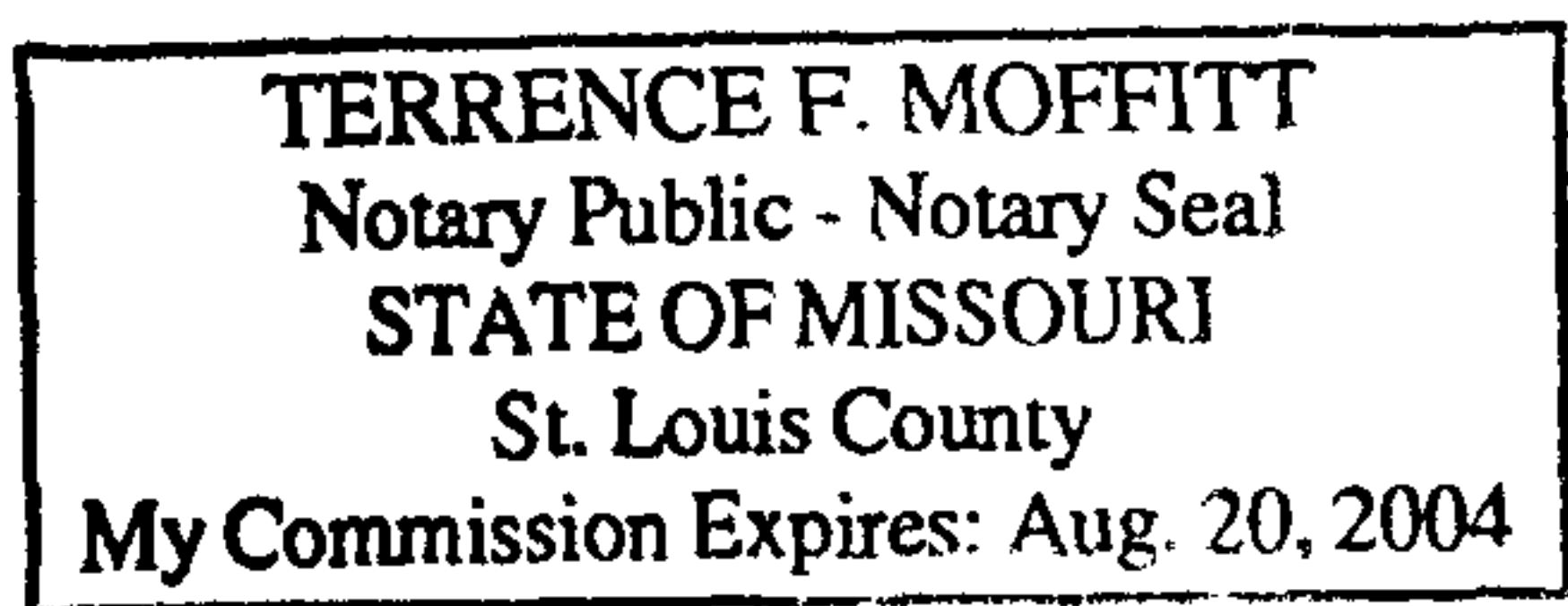
STATE OF MISSOURI)

COUNTY OF ST. LOUIS)

I, the undersigned, a Notary Public, in and for said county in said state, hereby certify that MATTHIAS D. RENNER, whose name as Manager of KENNETH J. WEBER FAMILY, L.L.C., a Missouri limited liability company, is signed to the foregoing instrument and who is known to me, acknowledged before me on this day that, being informed of the contents of such instrument, he, as such officer and with full authority, executed the same voluntarily on the day the same bears date for and as the act of said limited liability company.

Given under my hand and official seal this 21st day of June, 2004.

[NOTARIAL SEAL]



Notary Public

My Commission Expires: _____

THIS INSTRUMENT PREPARED BY:

Gayle Smith-Jones
Thompson Coburn LLP
One US Bank Plaza
Suite 3300
St. Louis, Missouri 63101

EXHIBIT A

DESCRIPTION OF PROPERTY

Exhibit A to Mortgage with Absolute Assignment of Leases and Rents, Security Agreement and Fixture Filing executed by **THIRD CREEK, L.L.C; MATTHIAS D. RENNER FAMILY, L.L.C.; AND KENNETH J. WEBER FAMILY, L.L.C.**, as Mortgagors for the benefit of **WELLS FARGO BANK, NATIONAL ASSOCIATION**, a national banking association as Mortgagee, dated as of June 13, 2004.

All the certain real property located in the County of Shelby, State of Alabama, described as follows:

Lots 1, 2 and 3, according to the Survey of Cypress Equities Addition to Hoover, as recorded in Map Book 31 page 79, in the Office of the Judge of Probate of Shelby County, Alabama; being situated in Shelby County, Alabama.

03-9-31-0-001-048.002
03-9-31-0-001-048.003

Assessor's Tax Account Number for the Property: 002-7-36-0-001-020-001

Property Address: _____