


Prepared by and return to:

Darrell D. Garvey, Esquire  
Lowndes, Drosdick, Doster,  
Kantor & Reed, P.A.  
450 South Orange Avenue, Suite 800  
Orlando, Florida 32801

  
20070810000376650 1/10 \$38.00  
Shelby Cnty Judge of Probate, AL  
08/10/2007 11:49:07AM FILED/CERT

**This instrument is being filed simultaneously with and secures the same indebtedness secured by that certain Mortgage and Security Agreement, upon which mortgage tax has been collected, such that no additional mortgage tax is due in connection with the recordation of this instrument.**

Borrower Name: Shelby West Industrial Enterprises, LLC  
Project Name: Shelby West Distribution Center  
Alabaster, Alabama  
Loan Number: 00-1101524

**ASSIGNMENT OF LEASES, RENTS AND PROFITS**

**THIS ASSIGNMENT OF LEASES, RENTS AND PROFITS** (hereinafter referred to as the "Assignment") is made and executed as of the 9 day of August, 2007 by **SHELBY WEST INDUSTRIAL ENTERPRISES, LLC**, a Delaware limited liability company, whose address is c/o EGS Commercial Real Estate, Inc. Post Office Box 530487, Birmingham, Alabama 35253 for regular mail and for 505 North 20<sup>th</sup> Street, Suite 700, Birmingham, Alabama 32503 for overnight delivery (hereinafter referred to as "Borrower"), to and in favor of **NATIONWIDE LIFE INSURANCE COMPANY**, an Ohio corporation, its successors and assigns, having its principal office at One Nationwide Plaza, Columbus, Ohio 43215-2220, Attention: Real Estate Investment Department, 1-34-03 (hereinafter referred to as the "Lender");

**WITNESSETH:**

**WHEREAS**, Borrower is the present owner in fee simple of certain real property located in the City of Alabaster, County of Shelby, and State of Alabama more particularly described on Exhibit A attached hereto and by this reference made a part hereof (hereinafter referred to as the "Real Property"); and

**WHEREAS**, Lender is the owner and holder of that certain Note of even date herewith in the amount of NINE MILLION AND NO/100 DOLLARS (\$9,000,000.00) made by Borrower as Maker to and in favor of Lender as Holder (hereinafter referred to as the "Note"); which Note is secured by that certain Mortgage and Security Agreement of even date herewith (hereinafter referred to as the "Mortgage") encumbering the Real Property and other property more specifically described in the Mortgage (all of which property is referred to herein and in the Mortgage as the "Property"); and

**WHEREAS**, Lender, as a condition to making a loan to Borrower as hereinabove



described (the "Loan") and to obtain additional security therefor, has required the execution of this Assignment by Borrower.

**NOW, THEREFORE**, in order to further secure the payment of the Loan by Borrower to Lender, and in further consideration of the sum of TEN AND NO/100 DOLLARS (\$10.00) in hand paid by Lender to Borrower, the receipt and sufficiency of which are hereby acknowledged, Borrower does hereby sell, assign, transfer and set over unto Lender all of the leases, rents, issues, security deposits, profits and income of, from or pertaining to the Property, including all of Borrower's right, title and interest under any and all lease guaranties, letters of credit and any other credit support furnished to Borrower in connection with any of the foregoing (collectively, the "Rents"), including without limitation, any and all fees that permit any tenant of any portion of the Property to terminate its lease, license, or rental agreement ("Termination Fees"). This Assignment shall include any and all leases, licenses or rental agreements (collectively, the "Leases") that may now be in effect, as well as any future or additional Leases, and any renewals or extensions of the same, that may be entered into by Borrower with respect to the Property. Borrower hereby agrees to execute and deliver such further assignments of said Leases as Lender may from time to time request.

This Assignment is absolute and effective immediately and without possession of the Property by Lender. Notwithstanding the foregoing, Borrower shall have a revocable license to receive, collect and enjoy the Rents accruing from the Property (but excluding any Termination Fees, which shall be paid directly and entirely to Lender), until a default has occurred under any of the Loan Documents (hereinafter defined). Any such Termination Fees shall be deposited into an interest-bearing escrow account (with interest payable to Borrower) and used to retrofit or build out the space for a new tenant(s) under guidelines satisfactory to Lender. Upon the occurrence of a default or if there is a material adverse change in the Property, the Termination Fees shall be deposited into an interest-bearing escrow account (with interest payable to Borrower) and Lender, in its sole discretion, may decide whether to use the funds to (1) retrofit or build out the space for new tenant(s) under guidelines satisfactory to Lender, or (2) otherwise apply such funds in its discretion. Upon the occurrence of a default under any of the Loan Documents, Borrower's license to receive, collect and enjoy the Rents accruing from the Property as provided herein shall immediately and automatically be revoked, without need of notice, possession, foreclosure or any other act or procedure, and all Leases and Rents assigned hereby shall thereafter be payable to Lender.

**PROVIDED ALWAYS** that if Borrower shall fully repay the Loan, and if Borrower shall duly, promptly and fully perform, discharge, execute, effect, complete, comply with and abide by each of the terms, covenants and conditions of the Note, the Mortgage, this Assignment and the other documents executed by Borrower to and in favor of Lender as further evidence of, or as additional security for, the Loan (collectively, the "Loan Documents"), then this Assignment, and the estates and interests hereby granted and created, shall terminate.

1. Representations, Warranties, and Covenants of Borrower. In furtherance of the foregoing, Borrower:



(a) Represents and warrants to Lender: (i) that Borrower is the owner in fee simple of the Real Property, has good title to the Leases and Rents hereby assigned, and has good right to assign the same; (ii) that the Leases are valid, enforceable and in full force and effect; (iii) that the premises demised under the Leases have been completed and lessees under the Leases have accepted the same and have taken possession of the same on a rent-paying basis except as explicitly identified on the certified rent roll dated as of the end of the month preceding the month hereof, delivered by Borrower to Lender; (iv) that to Borrower's knowledge there exist no offsets or defenses to the payment of any portion of the Rents; (v) that no other person or entity has any right, title, security interest, lien or other interest in, to or on the Leases or Rents; (vi) that Borrower has not previously sold, assigned, transferred, mortgaged or pledged the Leases or Rents; and (vii) that payment of any of the same has not otherwise been anticipated, waived, released, discounted, set off, discharged or compromised.

(b) Except as provided in the Mortgage, agrees and warrants that, without the prior written consent of Lender, the terms of the Leases will not be amended, altered, modified or changed in any manner whatsoever, nor will any Leases be surrendered or canceled, nor will any proceedings for dispossession or eviction of any lessee or licensee under said Leases be instituted by Borrower.

(c) Agrees and warrants that no request will be made of any lessee or licensee to pay any Rents, and no Rents will be accepted by Borrower, for more than one (1) month in advance of the date such Rents become due and payable under the terms of the applicable Leases, it being agreed between Borrower and Lender that such Rents shall be paid as provided in said Leases, and not otherwise. The foregoing shall not prevent Borrower from charging and collecting security deposits from each tenant leasing space in the Property.

(d) Authorizes Lender, by and through its employees, agents or a duly appointed receiver, at Lender's sole option, after the occurrence of a default under this Assignment or any of the other Loan Documents, to enter upon the Property, and to collect in the name of Borrower as Borrower's lawful attorney-in-fact, or in Lender's own name, any Rents, including Termination Fees, accrued but unpaid and/or in arrears on the date of such default, as well as the Rents, including Termination Fees, thereafter accruing and becoming payable during the period of the continuance of such default or after any other default. To this end, Borrower further agrees that it will cooperate with and facilitate in all reasonable ways Lender's collection of said Rents, including Termination Fees, and will, upon request by Lender, execute a written notice (said notice shall be provided in a similar fashion as that prescribed by Written Notice as that term is defined in the Mortgage) to each tenant, occupant, licensee or governmental entity directing said tenant, occupant, licensee or governmental entity to pay all Rents, including Termination Fees, which are due and payable directly to Lender; provided, however, that Lender may notify said tenant, occupant, licensee or governmental entity of the effectiveness of this Assignment without first giving notice to Borrower or requesting Borrower to give such notice or join in such notice.

(e) Authorizes Lender, upon such entry and at Lender's sole option, to assume the management, operation and maintenance of the Property, to perform all acts necessary and proper, and to expend such sums out of the income of the Property as in Lender's sole discretion



may be reasonable or necessary in connection therewith, in the same manner and to the same extent as Borrower theretofore might do. **BORROWER HEREBY RELEASES ALL CLAIMS AGAINST LENDER ARISING OUT OF SUCH MANAGEMENT, OPERATION AND MAINTENANCE OF THE PROPERTY, INCLUDING LENDER'S NEGLIGENCE OR STRICT LIABILITY, EXCEPT FOR LENDER'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT.**

(f) Agrees to execute, upon the request of Lender, any and all other instruments requested by Lender to effectuate this Assignment or to accomplish any other purpose deemed by Lender to be necessary or appropriate in connection with this Assignment.

(g) Agrees and acknowledges that nothing in this Assignment shall be construed to limit or restrict in any way the rights and powers granted to Lender in any of the Loan Documents. The collection and application of the Rents, including Termination Fees, as described herein, shall not constitute a waiver of any default which might at the time of application or thereafter exist under this Assignment or any of the other Loan Documents, and the exercise by Lender of the rights provided herein shall not prevent Lender's exercise of any other rights provided under any of the Loan Documents, at law or in equity, such rights being cumulative.

(h) Agrees to use best efforts to obtain and deliver to Lender, upon request, tenant estoppel certificates from each commercial lessee at the Property in form and substance reasonably satisfactory to Lender (provided, however, that Borrower shall not be required to deliver such certificates more frequently than one (1) time in any calendar year unless Borrower is in default).

(i) Agrees to deliver to Lender executed copies of all Leases now existing or hereafter arising.

2. Lender's Rights Following Default By Borrower.

(a) Borrower intends that this Assignment constitute a present, absolute and unconditional assignment and not an assignment for additional security only. Nevertheless, subject to the terms of this subsection, Lender grants to Borrower a license (revocable only upon a default by Borrower) to operate and manage the Property and to collect the Rents. Borrower shall hold the Rents, or a portion thereof sufficient to discharge all current sums due on the Loan for use in the payment of such sums. Upon a default, the license granted to Borrower herein shall automatically be revoked and Lender shall immediately be entitled to possess and apply all Rents, whether or not Lender enters upon and takes control of the Property. Borrower hereby grants and assigns to Lender the right, at its option, upon the revocation of the license granted herein to enter upon the Property in person, by agent or by court-appointed receiver to collect the Rents. Any Rents collected after the revocation of the license herein granted may be applied toward payment of the Loan in such priority and proportion as Lender, in its discretion, shall deem proper.



(b) Lender may, after the occurrence of a default, from time to time, appoint and dismiss such agents, contractors or employees as shall be necessary or reasonable for the collection of the Rents, including Termination Fees, derived from the Property and for the proper care and operation of the Property, and Borrower hereby grants to Lender the authority to give such agents, contractors or employees so appointed, full and irrevocable authority on Borrower's behalf to manage the Property and to do all acts relating to such management, including, without limitation, the entry into and execution of new Leases in the name of Borrower or otherwise, the alteration, amendment or termination of existing Leases, the authorization to repair or replace any Fixtures and Personal Property (as defined in the Mortgage) necessary in order to maintain the building or buildings, and chattels incidental thereto, in good and tenantable condition, and the effectuation of such alterations or improvements as in the judgment of Lender may be reasonable or necessary to maintain, increase or enhance the value of or the income from the Property. Lender shall have the sole control of such agents, contractors or employees, whose remuneration shall be paid out of the Rents as hereinabove provided, at the rate of compensation reasonably customary in the community where the Property is situated.

3. Application by Lender of Net Income from the Property. Lender shall, after the payment of all proper charges and expenses enumerated above, and after retaining sufficient sums to fully pay, as they become due, taxes, assessments, utilities and insurance premiums on insurance policies having coverages in requisite amounts (including liability, fire and extended coverage), credit the net income received by Lender from the Property, by virtue of this Assignment, to any amounts due and owing to Lender by Borrower under and pursuant to the terms of the Loan Documents, but the manner of application of such net income shall be determined in the sole discretion of Lender. Lender shall make a reasonable effort to collect the Rents, including Termination Fees, reserving, however, within its sole discretion, the right to determine the method of collection and the extent to which enforcement of the collection of delinquent Rents, including Termination Fees, shall be prosecuted. Notwithstanding the foregoing, no such credit shall be given by Lender for any sum or sums received from the Rents, and/or Termination Fees of or relating to the Property until the sums collected are actually received by Lender at its principal office as stated above (or at such other place as Lender shall designate in writing), and no credit shall be given for any uncollected Rents or other uncollected amounts or bills, nor shall credit be given for any Rents, and/or Termination Fees derived from the Property under any court order or decision or by operation of law until such amounts are actually received by Lender at its principal office as stated above. The net amount of income received by Lender hereunder and applied by Lender to the amounts due and owing by Borrower shall not serve to cure any default under any of the Loan Documents, nor shall any amounts received by Lender hereunder be in full satisfaction of the Loan unless such amounts are sufficient to pay such Loan in full (including any accrued but unpaid interest thereon, prepayment premiums, late payment charges and advances) in accordance with the terms of the Loan Documents.

4. Limitation of Lender's Liability. **LENDER SHALL NOT BE OBLIGATED TO PERFORM OR DISCHARGE ANY OBLIGATION UNDER THE LEASES HEREBY ASSIGNED OR BY REASON OF THIS ASSIGNMENT, AND BORROWER HEREBY AGREES TO INDEMNIFY, DEFEND AND HOLD LENDER HARMLESS AGAINST ANY AND ALL LIABILITY, LOSS OR DAMAGE WHICH LENDER MIGHT INCUR**



**UNDER THE LEASES, OR BY REASON OF THIS ASSIGNMENT, AND OF AND FROM ANY AND ALL CLAIMS AND DEMANDS WHATSOEVER WHICH MAY BE ASSERTED AGAINST LENDER BY REASON OF ANY ALLEGED OBLIGATION OR UNDERTAKING ON LENDER'S PART TO PERFORM OR DISCHARGE ANY OF THE TERMS OF SUCH LEASES, INCLUDING LENDER'S NEGLIGENCE OR STRICT LIABILITY, EXCEPT FOR CLAIMS AND DEMANDS ARISING BY REASON OF LENDER'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT.**

5. Reinstatement after Default. Lender may reinstate the Loan upon Borrower having complied with all the terms, covenants and conditions of the Loan Documents, and/or fully curing all of the defaults under said documents. In such event, Lender may reinstate Borrower's license to collect Rents and return possession of the Property to Borrower. Thereafter Borrower shall remain in possession of the Property unless and until another default occurs under any of the Loan Documents, at which time Lender may, at its option, again revoke Borrower's license to collect Rents, including Termination Fees, and may again take possession of the Property under authority, and pursuant to the terms and provisions, of this Assignment.

6. Tenant's Notification of Assignment. Upon request by Lender, at any time, Borrower will deliver a written notice to each of the tenants, occupants, lessees and licensees of the Property, which notice shall inform such tenants, occupants, lessees and licensees of this Assignment, and instruct them that upon receipt of notice by them from Lender of the existence of a default by Borrower under any of the Loan Documents, all Rents, and Termination Fees due or payable thereafter shall be paid directly to Lender.

7. Satisfaction of Mortgage; Satisfaction of Assignment. This Assignment shall remain in full force and effect as long as the Loan remains unpaid in whole or in part. It is understood and agreed that a complete release or satisfaction of the Mortgage shall operate as a complete release or satisfaction of all of Lender's rights and interest hereunder, and that satisfaction of the Mortgage shall operate to satisfy this Assignment.

8. Exculpation. Notwithstanding anything contained herein to the contrary, the liability of Borrower is subject to the limited recourse provisions contained in the Exculpation section of the Note, which are incorporated herein and made a part hereof by reference as if fully set forth herein. If Borrower is comprised of more than one person or entity, then the liability of each such person and entity hereunder shall be joint and several.

9. Full Recourse. Notwithstanding any provisions in the Note to the contrary, including without limitation, the provisions set forth in the section captioned "Exculpation" hereinabove, Borrower shall be personally liable, jointly and severally, for the entire Loan evidenced by the Note (including all principal, interest and other charges) in the event: (a) Borrower violates the covenant governing the placing of subordinate financing on the Property as set forth in the Mortgage; (b) Borrower violates the covenant restricting transfers of interest in the Property or transfers of ownership interests in Borrower as set forth in the Mortgage; or (c) there is filed against the Borrower a petition in bankruptcy or for the appointment of a receiver, or there commences under any bankruptcy or insolvency law, proceedings for the Borrower's



relief, or for the compromise, extension, arrangement or adjustment of Borrower's obligations which is not dismissed within thirty (30) days after the filing of same.

10. Captions. The captions set forth at the beginning of the various paragraphs of this Assignment are for convenience only, and shall not be used to interpret or construe the provisions of this Assignment.

11. Attorneys' Fees. As used herein, the phrase "Reasonable Attorneys' Fees" shall mean fees charged by attorneys selected by Lender based upon such attorneys' then prevailing hourly rates as opposed to any statutory presumption specified by any statute then in effect in the State where the Property is located.

12. Miscellaneous. Any notices required or permitted to be given hereunder shall be given as provided in the Mortgage.

13. Governing Law; Waiver of Jury Trial; Severability. BORROWER, TO THE FULL EXTENT PERMITTED BY LAW, HEREBY KNOWINGLY, INTENTIONALLY AND VOLUNTARILY, WITH AND UPON THE ADVICE OF COMPETENT COUNSEL, WAIVES, RELINQUISHES AND FOREVER FORGOES HEREBY THE RIGHT TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING, INCLUDING, WITHOUT LIMITATION, ANY TORT ACTION, AGAINST LENDER, ITS SUCCESSORS AND ASSIGNS, BASED UPON, ARISING OUT OF, OR IN ANY WAY RELATING TO OR IN CONNECTION WITH ANY OF THE LOAN DOCUMENTS, THE LOAN OR ANY COURSE OF CONDUCT, ACT, OMISSION, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PERSON (INCLUDING, WITHOUT LIMITATION, LENDER'S DIRECTORS, OFFICERS, PARTNERS, MEMBERS, EMPLOYEES, AGENTS OR ATTORNEYS, OR ANY OTHER PERSONS AFFILIATED WITH LENDER), IN CONNECTION WITH THE LOAN OR THE LOAN DOCUMENTS, INCLUDING, WITHOUT LIMITATION, IN ANY COUNTERCLAIM WHICH ANY PARTY MAY BE PERMITTED TO ASSERT THEREUNDER, WHETHER SOUNDING IN CONTRACT, TORT OR OTHERWISE. IN NO EVENT SHALL LENDER, ITS SUCCESSORS OR ASSIGNS BE LIABLE FOR ANY SPECIAL, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES WHATSOEVER (INCLUDING WITHOUT LIMITATION LOSS OF BUSINESS PROFITS OR OPPORTUNITY) AND BY ITS EXECUTION HEREOF, BORROWER WAIVES ANY RIGHT TO CLAIM OR SEEK ANY SUCH DAMAGES. This Assignment and the rights and obligations of the parties hereunder shall be governed by, and construed in accordance with, the internal laws of the State of Alabama, without regard to principles of conflicts of laws. The parties hereto irrevocably (a) agree that any suit, action or other legal proceeding arising out of or relating to this Assignment may be brought in a court of record in the State of Alabama or in the courts of the United States of America located in such State, (b) consent to the non-exclusive jurisdiction of each such court in any suit, action or proceeding, and (c) waive any objection which it may have to the laying of venue of any such suit, action or proceeding in any of such courts and any claim that any such suit, action or proceeding has been brought in an inconvenient forum. The creation of rights and powers under this Assignment in favor of, or available to, Lender shall, in no way whatsoever, be construed to impose concomitant duties or obligations upon Lender in favor of Borrower except





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as expressly set forth herein or in the other Loan Documents. If any clauses or provisions herein contained operate, or would prospectively operate, to invalidate this Assignment, then such clauses or provisions only shall be held for naught, as though not herein contained, and the remainder of this Assignment shall remain operative and in full force and effect.

14. Bankruptcy.

(a) Upon or at any time after the occurrence of a default, Lender shall have the right to proceed in its own name or in the name of Borrower in respect of any claim, suit, action or proceeding relating to the rejection of any Lease, including, without limitation, the right to file and prosecute, to the exclusion of Borrower, any proofs of claim, complaints, motions, applications, notices and other documents, in any case in respect of the lessee under such Lease under the Bankruptcy Code.

(b) If there shall be filed by or against Borrower a petition under the Bankruptcy Code, and Borrower, as lessor under any Lease, shall determine to reject such Lease pursuant to Section 365(a) of the Bankruptcy Code, then Borrower shall give Lender not less than ten (10) business days' prior notice of the date on which Borrower shall apply to the bankruptcy court for authority to reject the Lease. Lender shall have the right, but not the obligation, to serve upon Borrower within such ten (10)-day period a notice stating that (i) Lender demands that Borrower assume and assign the Lease to Lender pursuant to Section 365 of the Bankruptcy Code, and (ii) Lender covenants to cure or provide adequate assurance of future performance under the Lease. If Lender serves upon Borrower the notice described in the preceding sentence, Borrower shall not seek to reject the Lease and shall comply with the demand provided for in clause (i) of the preceding sentence within thirty (30) days after the notice shall have been given, subject to the performance by Lender of the covenant provided for in clause (ii) of the preceding sentence.

15. Secondary Market. Lender may, at any time, sell, transfer or assign the Note, the Mortgage, this Assignment and the other Loan Documents, and any or all servicing rights with respect thereto, or grant participation therein or issue mortgage pass-through certificates or other securities evidencing a beneficial interest in a rated or unrated public offering or private placement. Lender may forward to each purchaser, transferee, assignee, servicer, participant, investor in such securities or any credit rating agency rating such securities (collectively, the "Investor") and each prospective Investor, all documents and information which Lender now has or may hereafter acquire relating to the Loan and to Borrower, any guarantor and the Property, whether furnished by Borrower, any guarantor or otherwise, as Lender determines necessary or desirable.

**[SIGNATURES BEGIN ON THE NEXT PAGE.]**



IN WITNESS WHEREOF, Borrower has duly executed this Assignment as of the day and year first above written.

Signed, sealed and delivered  
in the presence of:

**SHELBY WEST INDUSTRIAL ENTERPRISES,  
LLC**, a Delaware limited liability company

By: [Signature]  
Marc A. Eason, Manager

[Signature]  
Name: Steven Tandel

[Signature]  
Name: R.A. SCHLESINGER

STATE OF ALABAMA  
COUNTY OF ~~SHELBY~~  
Jefferson

I, the undersigned authority, a Notary Public in and for said County in the State of Alabama, hereby certify that Marc A. Eason, whose name as Manager of **SHELBY WEST INDUSTRIAL ENTERPRISES, LLC**, a Delaware 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 the instrument, he as such Manager and with full authority, executed the same voluntarily for and as the act of said limited liability company.

Given under my hand this the 9<sup>th</sup> day of August, 2007.

[Signature]  
Notary Public  
Print Name: Dwight L. Mixson  
My Commission Expires: 1-17-08

(SEAL)



**EXHIBIT "A"**



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Shelby Cnty Judge of Probate, AL  
08/10/2007 11:49:07AM FILED/CERT

**LEGAL DESCRIPTION**

Site 28, according to the survey of Sites 26 & 28, Shelby West Corporate Park, as recorded in Map Book 35, page 67, in the Probate Office of Shelby County, Alabama.