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This Instrument Prepared  
and When Recorded Return to:

Claude McCain Moncus, Esq.  
CORLEY MONCUS, P.C.  
728 Shades Creek Parkway  
Suite 100  
Birmingham, Alabama 35209  
205.879.5959

  
20090701000253430 1/32 \$7229.00  
Shelby Cnty Judge of Probate, AL  
07/01/2009 11:15:12 AM FILED/CERT

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## MORTGAGE AND SECURITY AGREEMENT

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**THIS MORTGAGE AND SECURITY AGREEMENT**, made as of the 1<sup>st</sup> day of July, 2009, is by **SHELBY 19 PROPERTY, LLC**, an Alabama limited liability company (hereinafter called the "Borrower"), *mortgagor*, whose mailing address is 6723 Cosimo Lane, Pickerington, Ohio 43147, Attn: C. Edward Harmon, in favor of **COMPASS BANK**, a State Bank (hereinafter called the "Lender"), *mortgagee*, whose mailing address is 15 South 20<sup>th</sup> Street, Second Floor, Birmingham, Alabama 35233, Attn: Thomas K. Genetti.

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**THIS MORTGAGE IS A "CONSTRUCTION MORTGAGE" AS DEFINED IN SECTION 7-9-313(1)(c) OF THE CODE OF ALABAMA, AND SECURES, AMONG OTHER OBLIGATIONS, AN OBLIGATION INCURRED FOR THE CONSTRUCTION OF AN IMPROVEMENT ON LAND.**

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**THIS MORTGAGE AND SECURITY AGREEMENT SERVES AS A FINANCING STATEMENT FILED AS A FIXTURE FILING PURSUANT TO SECTION 7-9-402(6), CODE OF ALABAMA, 1975, AS AMENDED.**

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### WITNESSETH:

**WHEREAS**, Borrower and Concrete Properties, LLC, a New York limited liability company (the "Fee Owner"), have entered into a Ground Lease dated June 17, 2009 (the "Lease"), wherein Borrower (the "Lessee") leased from Fee Owner (the "Lessor") the Land as herein described; and

**WHEREAS**, Borrower is justly indebted to Lender for borrowed money in the principal sum of Four Million Seven Hundred Fifty Thousand and No/100 Dollars (\$4,750,000.00) (the "Loan"), as evidenced by one or more promissory notes of even date herewith from Borrower, payable to Lender in installments with interest thereon (said promissory notes, as the same may hereafter be renewed, extended or modified, being herein collectively called the "Note") (the Note, together with this Mortgage, any amendments, modifications, and replacements hereof or thereof, and all other documents now or hereafter evidencing or securing the Note and all certificates, documents, and instruments now or hereafter executed by Borrower in favor of Lender, are collectively referred to herein as the "Loan Documents"); and



**WHEREAS**, this is a FUTURE ADVANCE MORTGAGE and the Note evidences a construction loan (the "Loan"), the proceeds of which are to be advanced by the Lender to the Borrower pursuant to a construction loan agreement to be entered into of even date herewith (the "Construction Loan Agreement"), and, in addition to the indebtedness evidenced by the Note, this Mortgage shall also secure all other indebtedness, obligations and liabilities of the Borrower to the Lender, whether now existing or hereafter arising; and

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

**NOW, THEREFORE**, for and in consideration of the foregoing recitals, the sum of Ten Dollars, and other valuable considerations, the receipt and sufficiency whereof are hereby acknowledged, and in order to secure the indebtedness and other obligations of Borrower under the Note, this Mortgage and all other Loan Documents (all of such indebtedness and obligations secured hereby being referred to herein as the "Secured Indebtedness"), Borrower, joined in by Fee Owner by Joinder Agreement attached hereto and made a part hereof, have bargained and sold and do hereby grant, bargain, sell, alien, and convey unto Lender, its successors and assigns, all of the foregoing 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 property is hereinafter referred to collectively as the "Premises"):

(a) All of (i) Borrower's interests in the Land, as Lessee, in and under the Lease, including Borrower's Option to Purchase the Land under the Lease, and all of (ii) Fee Owner's interests in and under the Lease, and the Fee Owner's interest in and to the Land as set forth in the Joinder Agreement attached hereto and made a part hereof, of those certain tracts or parcels of land located in Shelby County, 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, vehicles and personal property of every kind and nature whatsoever now or hereafter owned by Borrower and/or the Fee Owner, and located in, or about, or used or intended to be used with or in connection with the construction, use, operation or enjoyment of the Premises, including all extensions, additions, improvements, betterments, renewals and replacements, substitutions, or proceeds from a permitted sale of any of the foregoing, and all building materials and supplies of every kind now or hereafter placed or located on the Land (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 Premises 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 indebtedness herein described and to be secured by this Mortgage; and

(c) 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 Premises or any part thereof, or which hereafter shall in any way belong, relate or be appurtenant thereto, whether now owned or hereafter acquired by them; and

(d) All rents, issues, profits and revenues of the Premises 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 and/or Fee Owner of, in and to the same, reserving only the right to Borrower and/or the Fee Owner 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) All Construction Contracts (between the Contractors and Borrower providing for the construction of the Project, or any portion thereof), the Architect Contracts (between the Architects and the Borrower providing for the design of the Project, the preparation of the Plans and Specifications, the supervision and inspection of the construction of the Project and the provision of any other architectural services or projects related to the Project), the Plans and Specifications (all plans and specifications for the Project, or any portion thereof), and other Construction documents (1) all contracts (including the Architect Contracts) with architects and engineers (including the Architects and the Engineers) responsible for the design of any of the Project, the preparation or evaluation of any of such plans and specifications or the supervision of the construction of any of the Project; (2) all contracts to which the Borrower is a party (including the Construction Contracts) providing for the construction of any of the Project or the furnishing of labor or materials in connection therewith or the furnishing or installation of any equipment or other personal property in connection therewith; (3) all contracts to which the Borrower is a party providing for the management of the construction of any of the Project; (4) all rights of the Borrower as a third party beneficiary under all contracts and subcontracts pertaining to the Project as to which the Borrower is not a party; (5) all payment and performance bonds relating to any of the Project; (6) all other contracts and agreements related to the design, management, construction, equipping and development of any of the Project; and (7) all contracts with public utilities, Governmental Authorities and other persons for the furnishing of roads or utilities to the Project and all deposits thereunder); and

(f) To the fullest extent assignable (if assignable by law), any and all licenses and permits obtained by Borrower relating to the use and operation of the Premises.

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

**PROVIDED, HOWEVER**, that, if Borrower shall pay to 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 Borrower, and shall keep, perform, and observe all and singular the covenants and promises in the Note and in each of the Loan Documents expressed to be kept, performed, and observed by and on the part of 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.

**AND** Borrower covenants and agrees with Lender as follows:



## ARTICLE I

1.01 **Performance of Note and Mortgage.** Borrower will perform, observe, and comply with all provisions hereof and of the Note secured hereby and duly and punctually will pay to Lender the sum of money expressed in the Note with interest thereon and all other sums required to be paid by Borrower pursuant to the provisions of this Mortgage, all without any deductions or credit for taxes or other similar charges paid by Borrower.

1.02 **Warranty of Title.** Borrower is the owner of a valid and subsisting interest as Lessee under the Lease; that the Lease is in full force and effect and has not been assigned, modified, amended, supplemented, or extended in any way; that the Lease presents the entire agreement between the parties as to the leasing described therein; that there is no default which has occurred and is continuing under the Lease nor has any event occurred which with notice, the passage of time, or both would constitute a default under the Lease by either the Landlord or Lessee thereunder; that all rental payments and other charges under the Lease which are due and owing as of the date of this Mortgage have been paid in full; that the Lease is subject to no liens and encumbrances whatsoever on the interest of the Landlord thereunder except such as are listed as exceptions to the title in the title policy insuring the lien of this Mortgage; that it will own the Chattels free and clear of all liens and claims; that this Mortgage is and will remain a valid and enforceable lien on the Mortgaged Property subject only to the exceptions referred to above; and that the Borrower has full power and lawful authority to mortgage the Mortgaged Property in the manner and form herein done or intended hereafter to be done.

The Borrower will preserve the leasehold estate created in it by the Lease, and will forever warrant and defend the same to the Lender and will forever warrant and defend the validity and priority of the lien against the claims of all persons and parties whomsoever.

The Borrower will perform or cause to be performed all of the covenants and conditions required to be performed by it under the Lease, will do all things necessary to preserve unimpaired its rights thereunder, and will not enter into any agreement modifying or amending the Lease or releasing the Lessee thereunder from any obligations imposed upon it thereby. If the Borrower receives a notice of default under the Lease, it shall immediately cause a copy of such notice to be sent by registered United States mail to the Lender.

1.03 **Taxes, Liens and Other Charges.**

(a) Borrower shall pay, on or before the delinquency date thereof, all taxes, levies, license fees, permit fees and all other charges (in each case whether general or special, ordinary or extraordinary, or foreseen or unforeseen) of every character whatsoever, (including all penalties and interest thereon) now or hereafter levied, assessed, confirmed or imposed on, or in respect of, or which may be a lien upon the Premises, or any part thereof, or any estate, right or interest therein, or upon the rents, issues, income or profits thereof, and shall submit to Lender such evidence of the due and punctual payment of all such taxes, assessments and other fees and charges as may be required by law. Borrower shall have the right before they become delinquent to contest or object to the amount of validity of any such tax, assessment, fee or charge by appropriate legal proceedings, but this 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 Borrower has given prior written notice to Lender of Borrower's intent to so contest or object, and unless (i) Borrower shall demonstrate to Lender's satisfaction that the legal



proceedings shall conclusively operate to prevent the sale of the Premises, or any part thereof, to satisfy such tax, assessment, fee or charge prior to final determination of such proceedings; and (ii) if required by Lender, Borrower shall furnish a good and sufficient bond or surety as requested by and satisfactory to Lender; and (iii) Borrower shall have provided a good and sufficient undertaking as may be required or permitted by law to accomplish a stay of such proceedings.

(b) Except for income tax, gross receipts tax or similar tax imposed on Lender by reason hereof, Borrower shall pay, on or before the due date thereof, all taxes, assessments, charges, expenses, costs and fees which may now or hereafter be levied upon, or assessed or charged against, or incurred in connection with, the Note, this Mortgage or any other instrument now or hereafter evidencing, securing or otherwise relating to the Note or this Mortgage.

(c) Borrower shall pay, on or before the due date thereof, all premiums on policies of insurance covering, affecting or relating to the Premises, as required pursuant to Section 1.04, below; and all utility charges which are incurred by Borrower for the benefit of the Premises, or which may become a charge or lien against the Premises for gas, electricity, water and sewer services and the like furnished to the Premises, and all other public or private assessments or charges of a similar nature affecting the Premises or any portion thereof, whether or not the nonpayment of same may result in a lien thereon. Borrower shall submit to Lender such evidence of the due and punctual payment of all such premiums, rentals and other sums as Lender may require.

(d) Borrower shall not suffer any mechanic's, materialmen's, laborer's, statutory or other lien to be created or remain outstanding against the Premises; provided, however, that Borrower may contest any such lien in good faith by appropriate legal proceedings provided the lien is bonded in such manner as not adversely to affect the priority of this Mortgage. Lender has not consented and will not consent to the performance of any work or the furnishing of any materials which might be deemed to create a lien or liens superior to the lien hereof.

#### 1.04 **Insurance.**

(a) Upon the request of Lender, Borrower shall procure for, deliver to and maintain for the benefit of Lender during the term of this Mortgage, certificates of insurance evidencing paid-up insurance policies of such insurance companies, in such amounts, in form and substance, and with such expiration dates as are acceptable to Lender and containing non-contributory standard mortgagee clauses, their equivalent, or a satisfactory mortgagee loss payable endorsement in favor of Lender, providing the following types of insurance covering the Premises and the interest and liabilities incident to the ownership, possession and operation thereof:

(i) insurance against loss or damage by fire, lightning, windstorm, hail, explosion, riot, riot attending a strike, civil commotion, aircraft, vehicles, smoke, vandalism and malicious mischief and against such other hazards as, under good insurance practices, from time to time are insured against for properties of similar character and location, the amount of which insurance shall be not less than the full replacement cost of the Premises without deduction for depreciation, and which policies of insurance shall contain satisfactory replacement cost endorsements;

(ii) comprehensive public liability insurance on an "occurrence basis" against claims for "personal injury", including without limitation bodily injury, death or property damage occurring



on, in or about the Premises and the adjoining streets, sidewalks and passageways, such insurance to afford immediate minimum protection to a limit of not less than \$1,000,000 with respect to personal injury or death to any one or more persons or damage to property;

(iii) worker's compensation insurance (including employer's liability insurance, if requested by Lender) for all employees of Borrower engaged on or with respect to the Premises, in such amount as is reasonably satisfactory to Lender, or, if such limits are established by law, in such amounts;

(iv) business interruption or rental continuation insurance in an amount equal to twelve (12) months' gross revenues from the Premises, less those expenses not typically incurred during a period of business interruption;

(v) such other insurance on the Premises or any replacements or substitutions therefor and in such amounts as may from time to time be reasonably required by Lender against other insurable casualties which at the time are commonly insured against in the case of premises similarly situated, due regard being given to the height and type of the improvements, their construction, location, use and occupancy, or any replacements or substitutions therefor.

(b) All policies of insurance required by the terms of this Mortgage shall contain an endorsement or agreement by the insurer that any loss shall be payable in accordance with the terms of such policy notwithstanding any act of negligence of Borrower which might otherwise result in forfeiture of said insurance, and the further agreement of the insurer waiving all rights of set off, counterclaim or deductions against Borrower.

(c) Lender is hereby authorized and empowered, at its option, to collect and receive all proceeds from the insurance policies required under this Section 1.04, and Borrower does hereby authorize and direct each insurance company to make payment for all such losses accordingly. In the event any insurance company fails to disburse directly and solely to Lender but disburses instead either solely to Borrower or to Borrower and Lender jointly, Borrower agrees immediately to endorse and transfer such proceeds to Lender to the extent of Lender's interest therein. Upon the failure of Borrower to endorse and transfer such proceeds as aforesaid, Lender may execute such endorsement or transfers for and in the name of Borrower, and Borrower hereby irrevocably appoints Lender as Borrower's agent and attorney-in-fact so to do. After deducting from said insurance proceeds all of its expenses incurred in the collection and administration of such sums, including reasonable attorney's fees, Lender may release any moneys so received by it for the repair and restoration of the property so damaged, without affecting the lien of this Mortgage, or Lender may apply the same in such manner as Lender shall determine to reduce the sums secured hereby, and any balance of such moneys then remaining shall be paid to Borrower.

(d) At least thirty (30) days prior to the expiration date of each policy maintained pursuant to this Section 1.04, a renewal or replacement thereof satisfactory to Lender shall be delivered to Lender. If requested by Lender, Borrower shall deliver to Lender receipts evidencing the payment for all such insurance policies and renewals or replacements. The delivery of any insurance policies hereunder shall constitute an assignment of all unearned premiums as further security hereunder. In the event of the foreclosure of this Mortgage or any other transfer of title to the Premises in extinguishment or partial extinguishment of the Secured Indebtedness, all right, title and interest of Borrower in and to all insurance policies then in force shall pass to the purchaser or Lender, and Lender is hereby irrevocably appointed by



Borrower as attorney-in-fact for Borrower to assign any such policy to said purchaser or to Lender without accounting to Borrower for any unearned premiums thereon.

(e) All policies of insurance required pursuant to the terms of this Section 1.04 shall contain a provision that such policies will not be canceled or materially amended, which term shall include any reduction in the scope of limits of coverage, without at least thirty (30) days prior written notice to Lender. In the event Borrower fails to provide, maintain, keep in force or deliver and furnish to Lender evidence of policies of insurance required by this Section 1.04, Lender may procure such insurance or single-interest insurance for such risks covering Lender's interest, and Borrower will pay all premiums thereon promptly upon demand by Lender. Until such payment is made by Borrower, the amount of all such premiums, together with interest as hereinafter set forth, shall be added to the Secured Indebtedness and shall be secured by this Mortgage.

1.05 **Monthly Deposits.** If hereafter required by applicable banking regulatory authority, or otherwise at the option of Lender, Borrower shall, upon request of Lender, deposit with Lender, on the due date of each installment under the Note, an amount equal to one-twelfth (1/12) of the yearly taxes and assessments and insurance premiums as estimated by Lender to be sufficient to pay such charges; said deposits to be held and to be used by Lender to pay current taxes and assessments, insurance premiums and other charges on the Premises as the same accrue and are payable. Payment from said sums for said purposes shall be made by Lender at its discretion and may be made even though such payments will benefit subsequent owners of the Premises. Said deposits shall not be, nor be deemed to be, trust funds, but may be, to the extent permitted by applicable law, commingled with the general funds of Lender; Lender agrees to deposit such funds in an interest-bearing account acceptable to Borrower and Lender, and to pay such interest to Borrower upon the payment in full of the sums secured by this Mortgage. If said deposits are insufficient to pay the taxes and assessments, insurance premiums and other charges in full as the same become payable, Borrower will deposit with Lender such additional sums or sums as may be required in order for Lender to pay such taxes and assessments, insurance premiums and other charges in full. Upon any default in the provisions of this Mortgage or the Note, or any instrument evidencing, securing or in any way related to the Secured Indebtedness, Lender may, at its option, apply any money in the fund relating from said deposits to the payment of the Secured Indebtedness in such manner as it may elect.

1.06 **Condemnation.** If all or any Material Part (as herein defined) of the Premises shall be damaged or taken through condemnation (which term when used in this Mortgage shall include any damage or taking by any governmental authority, and any transfer by private sale in lieu thereof), either temporarily or permanently, the indebtedness secured hereby shall at the option of Lender become immediately due and payable. For purposes hereof, a "Material Part" of the Premises shall be any part thereof, which, if damaged or taken, shall prevent the cash flow available from the remaining portions of the Premises after such taking from supporting the remaining debt secured hereby is substantially the same ratio of coverage as the debt is being supported prior to such damage or taking. Borrower, immediately upon the obtaining knowledge of any institution, or any proposed, contemplated or threatened institution of any action or proceeding for the taking through condemnation of the Premises or any part thereof, will notify Lender, and Lender is hereby authorized, at its option to commence, appear in and prosecute, through counsel selected by Lender, in its own or in Borrower's name, any action or proceeding relating to any condemnation. Borrower may compromise or settle any claim for compensation but shall not make any compromise or settlement for an award that is less than the Secured Indebtedness without the prior written consent of Lender. All such compensation, awards, damages, claims, rights of action and proceeds and the right thereto are hereby assigned by Borrower to Lender, and Lender is authorized, at its option, to collect and receive all such



compensation, awards or damages and to give proper receipts and acquittance therefor without any obligation to question the amount of any such compensation, awards or damages. After deducting from said condemnation proceeds of all its expenses incurred in the collection and administration of such sums, including reasonable attorney's fees, Lender may release any moneys so received by it for the repair or restoration of the Premises taken, or may apply the same in such manner as Lender shall determine to reduce the sums secured hereby, and any balance of such moneys shall be paid to Borrower.

1.07 **Care of Premises.**

(a) Borrower will keep the buildings, parking areas, roads and walkways, landscaping, and all other Improvements of any kind now or hereafter erected on the Land or any part thereof in good condition and repair, will not commit or suffer any waste and will not do or suffer to be done anything which would or could increase the risk of fire or other hazard to the Premises or any other part thereof or which would or could result in the cancellation of any insurance policy carried with respect to the Premises.

(b) Borrower will not remove, demolish or alter the structural character of any Improvement located on the Land without the written consent of Lender, nor make or permit use of the Premises for any purpose other than for which the same are now used.

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

(d) Lender or its representative is hereby authorized to enter upon and inspect the Premises during normal business hours.

(e) Borrower will promptly comply with all present and future laws, ordinances, rules and regulations of any governmental authority affecting the Premises or any part thereof.

(f) If all or any part of the Premises shall be damaged by fire or other casualty, Borrower will promptly restore the Premises to the equivalent of its original condition; and if a part of the Premises shall be damaged through condemnation, Borrower will promptly restore, repair or alter the remaining portions of the Premises in a manner satisfactory to Lender. Notwithstanding the foregoing, Borrower shall not be obligated so to restore unless in each instance Lender agrees to make available to Borrower any net insurance or condemnation proceeds actually received by Lender hereunder in connection with such casualty loss or condemnation, to the extent such proceeds are required to defray the expense of such restoration; provided, however, that the insufficiency of any such insurance or condemnation proceeds to defray the entire expense of restoration shall in no way relieve Borrower of its obligation to restore. In the event all or any portion of the Premises shall be damaged or destroyed by fire or other casualty or by condemnation, Borrower shall promptly deposit with Lender a sum equal to the amount by which the estimated cost of the restoration of the Premises (as determined by Lender in its good faith judgment) exceeds the actual net insurance or condemnation proceeds with respect to such damage or destruction.

1.08 **Leases.** Borrower will comply with and observe its obligations as landlord under all leases affecting the Premises or any part thereof. If requested by Lender, Borrower will furnish Lender with executed copies of all leases now or hereafter created with respect to all or any part of the Premises, and will enter into leases only upon a lease form previously approved by Lender and for a fair market rental, unless Borrower first obtains Lender's written approval of changes to such form or the execution of a lease not on



such form. If requested by Lender, Borrower will separately assign to Lender as additional security any and all such leases whether now existing or hereafter created, including, without limitation, all rents, royalties, issues, and profits of the Premises from time to time accruing.

1.09 **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 Premises, 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 Premises, in compliance with the provisions of the Uniform Commercial Code as enacted in the state wherein the Land is situated, and Borrower hereby grants to Lender a security interest in said personal property. A financing statement or statements reciting this Mortgage to be a security agreement affecting all of said personal property aforementioned shall be executed by Borrower and Lender and appropriately filed. 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 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 Premises 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 awareness 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 Premises, 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 will promptly upon demand reimburse Lender for the costs therefor.

1.10 **Further Assurances; After-Acquired Property.** At any time, and from time to time, upon request by Lender, Borrower will make, execute and deliver or cause to be made, executed and delivered, to Lender and, where appropriate, cause to be recorded and/or filed and from time to time thereafter to be rerecorded and/or refiled at such time and in such offices and places as shall be deemed desirable by Lender, any and all such other and further deeds of trusts, security agreements, financing statements, continuation statements, instruments of further assurance, certificates and other documents as may, in the opinion of Lender, be necessary or desirable in order to effectuate, complete or perfect, or to continue and preserve (a) the obligations of Borrower under the Note and under this Mortgage, and (b) the security interest created by this Mortgage as a first and prior security interest upon and security title in and to all of the Premises, whether now owned or hereafter acquired by Borrower. Upon any failure by Borrower so to do, Lender may make, execute, record, file, re-record and/or re-file any and all such deeds of trust, security agreements,



financing statements, continuation statements, instruments, certificates, and documents for and in the name of Borrower, and Borrower hereby irrevocably appoints Lender the agent and attorney-in-fact of Borrower so to do. The lien of this Mortgage will automatically attach, without further act, to all after-acquired property attached to and/or used in the operation of the Premises or any part thereof.

1.11 **Indemnity; Expenses.** Borrower will pay or reimburse Lender, upon demand therefor, for all reasonable attorney's fees, costs and expenses incurred by Lender in any suit, action, legal proceeding or dispute of any kind in which Lender is made a party or appears as party plaintiff or defendant, affecting the Secured Indebtedness, this Mortgage or the interest created herein, or the Premises, including, but not limited to, the exercise of the power of sale contained in this Mortgage, any condemnation action involving the Premises or any action to protect the security hereof, and any such amounts paid by Lender shall be added to the Secured Indebtedness and shall be secured by this Mortgage. Borrower will indemnify and hold Lender harmless from and against all claims, damages, and expenses, including attorney's fees and court costs, resulting from any action by a third party against Lender relating to this Mortgage or the interest created herein, or the Premises, including, but not limited to, any action or proceeding claiming loss, damage or injury to person or property, or any action or proceeding claiming a violation of any national, state or local law, rule or regulation, including those relating to environmental standards or dangerous or hazardous wastes, provided that Borrower shall not be required to indemnify Lender for matters directly caused by Lender's gross negligence or willful misconduct.

1.12 **Estoppel Affidavits.** Upon ten (10) days prior written notice, Borrower shall furnish to Lender a written statement, duly acknowledged, based upon its records, setting for the unpaid principal of, and interest on, the Secured Indebtedness, stating whether or not to its knowledge any off-sets or defenses exist against the Secured Indebtedness, or any portion thereof, and, if such off-sets or defenses exist, stating in detail the specific facts relating to each such off-set or defense.

1.13 **Subrogation.** To the full extent of the Secured Indebtedness, Lender is hereby subrogated to the liens, claims and demands, and to the rights of the owners and holders of each and every lien, claim, demand and other encumbrance on the Premises which is paid or satisfied, in whole or in part, out of the proceeds of the Secured Indebtedness, and the respective liens, claims, demands and other encumbrances shall be, and each of them is hereby preserved and shall pass to and be held by Lender as additional collateral and further security for the Secured Indebtedness, to the same extent they would have been preserved and would have been passed to and held by Lender had they been duly and legally assigned, transferred, set over and delivered unto Lender by assignment, notwithstanding the fact that the same may be satisfied and canceled of record.

1.14 **Books, Records, Accounts and Reports.**

(a) Borrower shall keep and maintain or shall cause to be kept and maintained, at Borrower's cost and expense, and in accordance with standard accounting principles, proper and accurate books, records and accounts reflecting all items of income and expense in connection with any services, equipment or furnishings provided in connection with the operation of the Premises. Lender, by Lender's agents, accountants and attorneys, shall have the right from time to time to examine such books, records and accounts at the office of Borrower or such other person or entity maintaining such books, records and accounts, to make such copies or extracts thereof as Lender shall desire, and to discuss Borrower's affairs, finances and accounts with Borrower and with the officers and principals of Borrower, at such reasonable times as may be requested by Lender.



(b) For as long as any portion of the Secured Indebtedness shall remain outstanding, Borrower will provide to Lender the following financial information:

(i) annual financial statements of the Borrower within one hundred twenty (120) days of its fiscal year, prepared in accordance with generally acceptable accounting principles consistently applied or with another comprehensive basis of accounting acceptable to Lender, certified by the Manager or chief financial officer of the Borrower, as applicable, to be true and correct (Lender reserves the right to require that the annual financial statements of the Borrower be audited and prepared by a nationally recognized accounting firm or other certified public accounting firm acceptable to Lender if required by external or internal banking regulations or if an event of default shall have occurred under the Loan Documents);

(ii) quarterly operating statements of the Project certified by the Manager or chief financial officer of the Borrower to be true and correct; and

(iii) such other financial information pertaining to Borrower or the Premises as Lender may from time to time reasonably request.

The delivery of each of the financial statements required herein shall constitute Borrower's contemporaneous certification that (i) Borrower has complied with and is in compliance with all terms, covenants and conditions of this Mortgage which are binding upon it, and; (ii) there exists no Event of Default as defined in this Mortgage and no event which with the giving of notice or lapse of time, or both, would constitute such an Event of Default; or, if such is not the case, that one or more specified Events of Default have occurred, and; (iii) the representations and warranties contained in this Mortgage are true with the same affect as though made on the date of such certificate.

1.15 **Licenses and Permits Obtained.** Borrower represents and warrants that all necessary permits, licenses and certificates have been obtained to permit Borrower to operate the Premises in the manner contemplated, and Borrower will maintain in effect all such licenses, permits, and certificates, together with any other agreements necessary for the use and operation of the Premises.

1.16 **Limit of Validity.** If from any circumstances whatsoever, fulfillment of any provision of this Mortgage of the Note, at the time performance of such provision shall be due, shall involve transcending the limit of validity presently prescribed by any applicable usury statute or any other applicable law, with regard to obligations of like character and amount, then, ipso facto, the obligation to be fulfilled shall be reduced to the limit of such validity, so that in no event shall any exaction be possible under this Mortgage or under the Note that is in excess of the current limit of such validity, but such obligation shall be fulfilled to the limit of such validity. The provisions of this Section 1.16 shall control every other provision of this Mortgage and of the Note.

1.17 **Default Affidavits.** Upon the occurrence of any default hereunder, at Lender's request, Borrower shall deliver an affidavit specifying the nature of such default and the period of existence thereof and the action Borrower has taken or proposes to take with respect thereto.

1.18 **Legal Actions.** In the event that Lender is made a party, either voluntarily or involuntarily, in any action or proceeding affecting the Premises, the Note, the Secured Indebtedness or the validity or priority of this Mortgage (but excluding any action or proceeding involving a dispute solely between Lender



and a participating lender, if any), Borrower shall immediately, upon demand, reimburse Lender for all costs, expenses and liabilities incurred by Lender by reason of any such action or proceeding, including reasonable attorney's fees, and any such amounts paid by Lender shall be added to the Secured Indebtedness and shall be secured by this Mortgage.

1.19 **Compliance with Zoning and Restrictions.** Borrower shall at all times operate the Premises in accordance with all applicable restrictions and zoning ordinances.

1.20 **Conveyance of Premises.** Borrower shall not directly or indirectly encumber (by lien, junior mortgage, or otherwise), pledge, convey, transfer or assign any or all of its interest in the Premises or any ownership interests of Borrower without the prior written consent of Lender. Lender's consent to such a transfer, if given in Lender's sole discretion, shall not release or alter in any manner the liability of Borrower or anyone who has assumed or guaranteed the payment of the Secured Indebtedness or any portion thereof. At the option of Lender the Secured Indebtedness shall be immediately due and payable in the event that Borrower conveys all or any portion of the Premises or any interest therein, or in the event that Borrower's equitable title thereto or interest therein shall be assigned, transferred or conveyed in any manner, without obtaining Lender's prior written consent thereto, and any waiver or consent for any prior transfer shall not preclude Lender from declaring the Secured Indebtedness due and payable for any subsequent transfer.

1.21 **Compliance with Applicable Environmental Law.** The term "Applicable Environmental Law" shall be defined as any statutory law or case law pertaining to health or the environment, or petroleum products, or asbestos, or oil, or hazardous substances, including without limitation the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") as codified at 42 U.S.C. §9601 et seq.; the Resource Conservation and Recovery Act of 1976, as amended, as codified at 42 U.S.C. §6901 et seq.; and the Superfund Amendments and Reauthorization Act of 1986, as codified at 42 U.S.C. §9671, et seq.; the terms "hazardous substance" and "release" shall have the meanings specified in CERCLA; provided, in the event CERCLA is amended to broaden the meaning of any term defined thereby, such broader meaning shall apply subsequent to the effective date of such amendment; and 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, such broader meaning shall apply. Borrower represents and warrants to Lender that neither the Premises nor Borrower are 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 response costs or remedial obligations under any Applicable Environmental Law and this representation and warranty would continue to be true and correct following disclosure to the applicable governmental authorities of all relevant facts, conditions and circumstances, if any, pertaining to the Premises; that Borrower has not obtained and is not required to obtain any permits, licenses or similar authorizations to construct, occupy, operate or use any buildings, improvements, fixtures or equipment forming a part of the Premises by reason of any Applicable Environmental Law; that Borrower has taken all steps necessary to determine and has determined that no asbestos, petroleum products, oil, hazardous substances, or solid wastes have been disposed of, or otherwise released on, or are otherwise located on the Premises; and that the use which Borrower has made, makes or intends to make of the Premises will not result in the location on or disposal or other release of any asbestos, petroleum products, oil, hazardous substances or solid waste on or to the Premises. Borrower agrees to notify Lender in the event that any governmental agency or other entity notifies Borrower that it may not be in compliance with any Applicable Environmental Laws. Borrower agrees to permit Lender to have access to the Premises at all reasonable times in order to conduct any tests which Lender deems are necessary to ensure that Borrower and the



Premises are in compliance with all Applicable Environmental Laws. Borrower acknowledges that, pursuant to that certain Environmental Indemnity of even date herewith, it has agreed to pay any fines, charges, fees, expenses, damages, losses, liabilities, or response costs arising from or pertaining to the application of any such Applicable Environmental Law to the Premises and to indemnify and forever save Lender harmless from any and all judgments, fines, charges, fees, expenses, damages, losses, liabilities, response costs, or attorneys' fees and expenses arising from the application of any such Applicable Environmental Law to the Premises or Lender, and that such Environmental Indemnity shall survive any foreclosure of this Mortgage or the taking by Lender of a deed in lieu of foreclosure; provided, however, that such Environmental Indemnity shall not extend to acts of Lender which result in such fines, charges, fees, expenses, damages, losses, liabilities, or response costs.

1.22 **Appraisals.** At Lender's request, Borrower will permit Lender, or its agents, employees or independent contractors, to enter upon and appraise the Premises at any time and from time to time, and Borrower will cooperate with and provide any information requested in connection with such appraisals. At any time while the Secured Indebtedness remains outstanding, Lender may have the Premises reappraised at Borrower's expense if (i) an Event of Default shall then exist under the Loan Documents, or (ii) such appraisal shall be required by any regulatory guideline or authority to which Lender is subject, or (iii) Lender shall have determined, in the exercise of its sole discretion, that the aggregate value of the Premises has materially declined since the date of the last such appraisal, or (iv) Lender shall have determined, in the exercise of its sole discretion, that a material adverse change in the financial condition of Borrower has occurred; provided that Borrower shall in no event be responsible for the cost of more than one such reappraisal during any twelve (12) month period.

1.23 **Future Advances.** Lender, at its option, may make future advances to Borrower, provided, that nothing contained herein shall constitute an obligation to do so except as may otherwise be required of Lender under the Loan Agreement, if applicable. Such future advances, with interest at the rate payable from time to time on the outstanding principal under the Note, shall be secured by this Mortgage when evidenced by the Note or by any other instrument indicating that such advances are secured by this Mortgage or when advanced under the terms of this Mortgage. Lender may make such future advances (a) at the request of Borrower, whether or not there is any obligation to make future advances; or (b) to pay, with or without the consent or request of Borrower, any amounts which may be due under this Mortgage or under any other mortgage or lien affecting the Property.

1.24 **Representations and Warranties.** Borrower represents and warrants to Lender, knowing that Lender will rely on such representations and warranties as incentive to make the loan to Borrower, that:

(a) There are no actions, suits, or proceedings pending or, to the best of Borrower's knowledge, threatened, which might adversely affect the financial condition of Borrower or any guarantor of the Note or which might impair the value of any collateral taken or to be taken by Lender in connection with the transactions contemplated hereby. Neither Borrower nor any guarantor of the Note is in violation of any agreement the violation of which might reasonably be expected to have a materially adverse effect on Borrower's or such guarantor's business or assets, and neither Borrower nor any guarantor of the Note is in violation of any order, judgment, or decree of any court, or any statute or governmental regulation to which Borrower or such guarantor is subject. Neither the execution and performance of this Mortgage, the Note, or any other Loan Document will result in any breach of any mortgage, security deed, lease, credit or loan agreement or any other instrument which may bind or affect Borrower or any guarantor of the Note.



(b) All financial statements of Borrower and other business enterprises in which Borrower has an interest heretofore given and hereafter to be given to Lender are and will be true and complete in all respects as of its respective dates and prepared in accordance with generally accepted accounting principles consistently applied, and fairly represent the financial conditions of the business or persons to which it pertains, and no materially adverse change has occurred in the financial conditions reflected therein since the respective date thereof.

(c) All utility and sanitary sewage services necessary for the use of the Premises and all roads necessary for the use of the Premises are available pursuant to permanent private or public easements which are not subject to the exclusive rights of any other persons which could interfere with Borrower's use thereof.

(d) There are no proceedings pending, or, to the best of Borrower's knowledge, threatened, to acquire by power of condemnation or eminent domain any portion of the Premises, or any interest therein, or to enjoin or similarly prevent the use of any of the Premises as presently used.

(e) All documents furnished to Lender by or on behalf of Borrower as part of or in support of the loan application or pursuant to any commitment letter issued by Lender are true, correct, complete and accurately represent the matters to which they pertain.

(f) The Premises do and shall at all times comply with all applicable laws, ordinances, rules and regulations, including, without limitation, the Americans with Disabilities Act and regulations thereunder, and all laws, ordinances, rules and regulations to zoning, building codes, set back requirements and environmental matters.

(g) Borrower is a duly organized and validly existing limited liability company having full power and authority to consummate the transactions contemplated by the Loan Documents.

(h) The Lease is in full force and effect and has not been modified or amended in any manner whatsoever;

(i) All rents, additional rents and other sums due and payable under the Lease have been paid in full to the extent they were due or payable prior to the date hereof;

(j) There is no existing default under the Lease or in the performance of any of the terms, covenants, conditions or warranties thereof on the part of the tenant under the Lease to be observed and performed, and no event has occurred which, with the giving of notice, the passage of time, or both, would constitute a default under the Lease;

(k) Neither Borrower, as Lessee, nor Fee Owner, as Lessor, has commenced any action or given or received any notice for the purpose of terminating the Lease;

(l) The interest of the tenant under the Lease is vested in Borrower;

(m) Borrower will assure the quiet and peaceful possession of Lender; and



(n) That Borrower will warrant and defend the leasehold estate created by the Lease for the entire remainder of the term set forth in the Lease, against all and every person or persons lawfully claiming, or who may claim the same or any part of the Lease, subject only to the payment of the rents reserved in the Lease and to the performance and observance of all the terms, covenants, conditions and warranties of the Lease.

1.25 **Lease Covenants.** Borrower shall:

(a) Pay all rents, additional rents, taxes, assessments, water rates, sewer rents and other charges required to be paid by Borrower, as the lessee under and pursuant to the provisions of the Lease, when and as often as such rents, taxes, assessments, rates or other charges are due and payable, and shall cause Lessor to pay any portion of said taxes, assessments, rates, rents, and charges to be paid by Lessor that might become liens on the Premises or Lessor's estate at least thirty (30) days prior to the date when due;

(b) Diligently perform, comply with and observe all of the terms, covenants and conditions of the Lease on the part of Borrower, as the tenant thereunder, to be performed, complied with and observed at least twenty (20) days prior to the expiration of any applicable grace period provided in the Lease;

(c) Not do or permit anything to be done, the doing of which, or refrain from doing anything, the omission of which, will impair or tend to impair the security of this Mortgage or will be grounds for declaring a default or forfeiture of the Lease;

(d) Promptly notify Lender of the giving of any notice by Lessor to Borrower of any default by Borrower in the performance or observance of any of the terms, covenants or conditions of the Lease on the part of Borrower, as the tenant thereunder, to be performed or observed and deliver to Lender a true and correct copy of each such notice;

(e) Furnish to Lender, within ten (10) days after demand, proof of payment of all items that are required to be paid by Borrower pursuant to the Lease;

(f) Enforce against Lessor all of the terms, covenants and conditions of the Lease on the part of Lessor to be performed, complied with and observed (short of termination of the Lease); Borrower hereby waives for the benefit of Lender the right to be subrogated to any and all rights of Lessor under the Lease;

(g) Promptly give notice to Lender in writing of (1) the commencement of any litigation by any party with respect to or in connection with the Lease, (2) any request made by either Lessor or Borrower for arbitration proceedings pursuant to the Lease, and (3) the institution of any arbitration proceedings under the Lease; and

(h) Promptly deliver to Lender a true and correct copy of each order of the judge in each such litigation, and each determination of the arbitrators in each such arbitration proceeding. Lender shall have the right to participate in such litigation and such arbitration proceedings, either in the name of Borrower or on Lender's own behalf as an interested party.



Borrower shall not, without the prior written consent of Lender, surrender the leasehold estate created by the Lease; or terminate or cancel the Lease or modify, extend, change, supplement, alter or amend the Lease, in any respect, either orally or in writing; or waive, excuse, condone or in any way release or discharge Lessor of or from the terms, covenants and conditions on the part of Lessor to be performed or observed. As further security for the payment of the Note and for the performance and observance of the terms, covenants and conditions of this Mortgage, Borrower hereby sells, transfers, releases, relinquishes, surrenders and assigns to Lender, all of the rights, privileges, powers, authority and prerogatives of Borrower, as the tenant under the Lease, to surrender the leasehold estate created by the Lease or to terminate, cancel, modify, change, supplement, alter or amend the Lease; and any such surrender of the leasehold estate created by the Lease or termination, cancellation, modification, change, supplement, alteration or amendment of the Lease without the prior written consent of Lender shall constitute an Event of Default and be null and void and of no force and effect.

Borrower shall deliver to Lender a true and correct copy of any notice, demand, or other instrument or document received by Borrower in any way relating to or affecting the Lease or the Premises. If Lessor shall deliver to Lender a copy of any notice of default sent by Lessor to Borrower, as the tenant under the Lease, then Lender may rely on such notice, and such notice shall constitute full protection to Lender for any action taken or omitted to be taken by Lender, in good faith, in reliance thereon. If Borrower shall default in the performance or observance of any term, covenant or condition of the Lease on the part of Borrower, as the tenant under the Lease, to be performed or observed, then, without limiting the generality of the other provisions of this Mortgage, and without waiving or releasing Borrower from any of its obligations hereunder, Lender shall have the right, but not the obligation, to pay any sums and to perform any act or take any action as may be appropriate to cause all of the terms, covenants and conditions of the Lease on the part of Borrower, as the tenant under the Lease, to be promptly performed or observed or to be promptly performed or observed on behalf of Borrower, to the end that the rights of Borrower in, to and under the Lease shall be kept unimpaired and free from default, even though the existence of such event of default or its nature be questioned or denied by Borrower or by any party on behalf of Borrower. In any such event, subject to the rights of tenants, subtenants and other occupants under the Leases, Lender and any person designated by Lender shall have, and are hereby granted, the right to enter upon the Mortgaged Property at any time and from time to time for the purpose of taking any such action. Lender may pay and expend such sums of money as Lender deems necessary for any such purpose, and upon so doing Lender shall be subrogated to any and all rights of Lessor under the Lease. Borrower hereby agrees to pay to Lender immediately and without demand, all such sums so paid and expended by Lender, together with interest thereon from the day of such payment at the Default Rate (as defined in the Note). All sums so paid and expended by Lender together with interest thereon shall be secured by this Mortgage.

If Lender shall make any payment or perform any act or take any action in accordance with the preceding paragraph, then such payment, performance or action shall not remove or waive, as between Borrower and Lender, the corresponding Event of Default under this Mortgage. At the option of Lender, the entire principal balance of the Note and all interest thereon shall immediately become due and payable if Borrower fails to give Lender immediate notice of any default under the Lease or of the receipt by Borrower of any notice of default from Lessor, or if Borrower fails to furnish to Lender immediately any and all information that Lender may request concerning the performance and observance by Borrower of the terms, covenants and conditions of the Lease or of this Mortgage, or if Borrower fails to permit Lender or its representatives at all reasonable times to make an investigation or examination concerning such performance or observance. Borrower will promptly deposit with Lender an original executed copy of the Lease and any



and all documentary evidence received by Borrower showing compliance by Borrower with the provisions of the Lease.

Borrower shall exercise each individual option, if any, to extend or renew the term of the Lease or to purchase the Land upon demand by Lender made at any time prior to the last day upon which any such option may be exercised. Borrower hereby irrevocably authorizes and appoints Lender its attorney-in-fact to exercise any such option in the name of and upon behalf of Borrower, which power of attorney is coupled with an interest and shall be irrevocable. Borrower will not subordinate or consent to the subordination of the Lease to any mortgage, deed of trust, lease or other interest on or in Lessor's interest in all or any part of the Mortgaged Property, unless, in each such case, the prior written consent of Lender shall have been first had and obtained.

1.26 **Subleases.** Each Lease hereafter made and each renewal of any existing Lease shall provide that:

- (a) The Lease is subject and subordinate to the lien of this Mortgage;
- (b) In the event of the termination of the Lease, the Lease shall not terminate or be terminable by the tenant;
- (c) In the event of any action for the foreclosure of this Mortgage, the Lease shall not terminate or be terminable by the subtenant by reason of the termination of the Lease unless the tenant is specifically named and joined in any such action and unless a judgment is obtained therein against the tenant; and
- (d) If the Lease is terminated as aforesaid, the tenant shall attorn to Lessor or to the purchaser at the sale of the Mortgaged Property on such foreclosure, as the case may

## ARTICLE II

2.01 **Events of Default.** The terms "Event of Default" or "Events of Default", wherever used in this Mortgage, shall mean any one or more of the following events:

- (a) Failure of Borrower (i) to make any scheduled payment of interest or principal under the terms of this Note on or before the due date thereof, or (ii) to pay any other sum due, whether by acceleration or otherwise, under the terms of any Loan Document within ten (10) days after written demand therefor by Lender (in each case, a "Monetary Default"); or
- (b) The failure of Borrower to properly and timely perform or observe any covenant or condition set forth in any Loan Document (other than a Monetary Default) 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 notice to Borrower of such Default; or
- (c) The failure of Borrower to properly and timely perform or observe any covenant or condition contained in the Lease; or



(d) The occurrence of any "Event of Default" under, and as defined in, any other Loan Document; or

(e) If Borrower shall default in the performance or observance of any term, covenant or condition of the Lease on the part of Mortgagor, as the tenant under the Lease, to be performed or observed; or

(f) If any one or more of the events referred to in the Lease shall occur which would or may cause the Lease to terminate without notice or action by Lessor or which would or may entitle Lessor to terminate the Lease and the term of the Lease by giving notice to Borrower; or

(g) If the leasehold estate created by the Lease shall be surrendered in whole or in part; or

(h) If the Lease shall be terminated or canceled for any reason or under any circumstance whatsoever; or

(i) If any of the terms, covenants or conditions of the Lease shall in any manner be modified, changed, supplemented, altered or amended without the prior written consent of Lender; or

(j) If Borrower shall, without Lender's prior written consent, elect to treat the Lease as terminated under Section 365(h) of the Code or any comparable federal or state statute or law.

2.02 **Acceleration of Maturity.** If an Event of Default shall have occurred, then the entire Secured Indebtedness shall, at the option of Lender, immediately become due and payable without notice or demand, time being of the essence of this Mortgage, and no omission on the part of Lender to exercise such option when entitled to do so shall be construed as a waiver of such right.

2.03 **Right to Enter and Take Possession.**

(a) If an Event of Default shall have occurred and be continuing, Borrower, upon demand of Lender, shall forthwith surrender to Lender the actual possession of the Premises and, if and to the extent permitted by law, Lender itself, or by such officers or agents as it may appoint, may enter and take possession of all or any part of the Premises without the appointment of a receiver or an application therefor, and may exclude Borrower and its agents and employees wholly therefrom, and take possession of the books, papers and accounts of Borrower;

(b) If Borrower shall for any reason fail to surrender or deliver the Premises or any part thereof after such demand by Lender, Lender may obtain a judgment or decree conferring upon Lender the right to immediate possession or requiring Borrower to deliver immediate possession of the Premises to Lender. Borrower will pay to Lender, upon demand, all expenses of obtaining such judgment or decree, including reasonable compensation to Lender, its attorneys and agents, and all such expenses and compensation shall, until paid, become part of the Secured Indebtedness and shall be secured by this Mortgage;

(c) Upon every such entering upon or taking of possession, Lender may hold, store, use, operate, manage and control the Premises 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 Premises insured; (iii) manage and operate the Premises and exercise all of the rights and powers of Borrower to the same extent as Borrower could in its own name or otherwise act with respect to the same; and (iv) enter into any and all agreements with respect to the exercise by others of any of the powers herein granted to Lender, all as Lender from time to time may determine to be in its best interest. Lender may collect and receive all the rents, issues, profits and revenues from the Premises, including those past due as well as those accruing thereafter, and, after deducting (A) all expenses of taking, holding, managing and operating the Premises (including compensation for the services of all persons employed by 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 similar charges as Lender may at its option pay; (E) other proper charges upon the Premises or any part thereof; and (F) the reasonable compensation, expenses and disbursements of the attorneys and agents of Lender, Lender shall apply the remainder of the monies and proceeds so received by Lender, first, to the payment of accrued interest; second, to the payment of deposits required in Section 1.05 and to other sums required to be paid hereunder; and third, to the payment of overdue installments of principal. Anything in this Section 2.03 to the contrary notwithstanding, Lender shall not be obligated to discharge or perform the duties of a landlord to any tenant or incur any liability as a result of any exercise by Lender of its rights under this Mortgage, and Lender shall be liable to account only for the rents, incomes, issues and profits actually received by Lender;

(d) Whenever all such interest, deposits and principal installments and other sums due under any of the terms, covenants, conditions and agreements of this Mortgage shall have been paid and all Events of Default shall have been cured, Lender shall surrender possession of the Premises to Borrower, its successors and assigns. The same right of taking possession, however, shall exist if any subsequent Event of Default shall occur and be continuing.

2.04 **Performance by Lender.** Upon the occurrence 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 provided in the Note or at the maximum rate from time to time allowed by applicable law, whichever is less, 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 Premises 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 holder 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.

2.05 **Receiver.** If any Event of Default shall have occurred and be continuing, Lender, upon application to a court of competent jurisdiction, shall be entitled as a matter of strict right, without notice and without regard to the occupancy or value of any security for the Secured Indebtedness or the solvency of any party bound for its payment, to the appointment of a receiver to take possession of and to operate the Premises and to collect and apply the rents, issues, profits and revenues thereof. The receiver shall have all of the rights and powers permitted under the laws of the state wherein the Land is situated. Borrower will pay unto Lender upon demand all expenses, including reasonable receiver's fees, reasonable attorney's fees, costs and agent's compensation, incurred pursuant to the provisions of this Section 2.05, and upon any



Borrower's failure to pay the same, any such amounts shall be added to the Secured Indebtedness and shall be secured by this Mortgage.

2.06 **Lender's Power of Enforcement and Power of Sale.**

(a) In an Event of Default shall have occurred and be continuing, 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 (i) to enforce payment of the Note or the performance of any term thereof or any other right, power or remedy hereunder, (ii) to foreclose this Mortgage and to sell the Premises, as an entirety or in separate lots or parcels, as provided by applicable law, and (iii) to pursue any other remedy available to it, all as Lender shall deem most effectual for such purposes. Lender shall take action either by such proceedings or by the exercise of its powers with respect to entry or taking possession, as Lender may determine.

(b) If an Event of Default shall have occurred, Lender may sell the Premises at public outcry to the highest bidder for cash in front of the Court House door in the county where the 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 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 deed to the premises so purchased. Lender may bid at said sale and purchase said premises, or any part thereof, if the highest bidder therefor. At the foreclosure sale the Premises 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.

2.07 **Purchase by Lender.** Upon any foreclosure sale or sale of all or any portion of the Premises under the power herein granted, Lender may bid for and purchase the Premises and shall be entitled to apply all or any part of the Secured Indebtedness as a credit to the purchase price.

2.08 **Application of Proceeds of Sale.** In the event of a foreclosure or other sale of all or any portion of the Premises, 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 Secured Indebtedness 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.

2.09 **Borrower as Tenant Holding Over.** In the event of any such foreclosure sale or sale under the powers herein granted, Borrower (if Borrower shall remain in possession) shall be deemed a tenant holding over and shall forthwith deliver possession to the purchaser or purchasers at such sale or be summarily disposed according to provisions of law applicable to tenants holding over.

2.10 **Waiver of Appraisement, Valuation, Etc.** Borrower agrees, to the full extent permitted by law, that in case of a default on the part of Borrower hereunder, neither Borrower nor anyone claiming through or under Borrower will set up, claim or seek to take advantage of any appraisement, valuation, stay, extension, exemption or laws now or hereafter in force, in order to prevent or hinder the enforcement or foreclosure of this Mortgage, or the absolute sale of the Premises, or the delivery of possession thereof



immediately after such sale to the purchaser at such sale, and Borrower, for itself and all who may at any time claim through or under it, hereby waives to the full extent that it may lawfully so do, the benefit of all such laws, and any and all right to have the assets subject to the security interest of this Mortgage marshaled upon any foreclosure or sale under the power herein granted.

2.11 **Waiver of Homestead.** Borrower hereby waives and renounces all homestead and exemption rights provided for by the Constitution of the laws of the United States and of any state, in and to the Premises and against the collection of the Secured Indebtedness, or any part thereof.

2.12 **Discontinuance of Proceedings.** In case Lender shall have proceeded to enforce any right, power 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 Lender, then in every such case, Borrower and Lender shall be restored to their former positions and rights hereunder, and all rights, powers and remedies of Lender shall continue as if no such proceedings had occurred.

2.13 **Remedies Not Exclusive.** Lender shall be entitled to enforce payment and performance of the Secured Indebtedness and to exercise all rights and powers under this Mortgage or under any other of the Loan Documents or other agreement or under any laws now or hereafter in force, notwithstanding that some or all of the Secured Indebtedness may now or hereafter be otherwise secured, whether by mortgages, deeds of trust, deeds to secure debt, pledges, liens, assignments or otherwise. Neither the acceptance of this Mortgage nor its enforcement, whether by court action or pursuant to the power of sale or other powers herein contained, shall prejudice or in any manner effect Lender's right to realize upon or enforce any other security now or hereafter held by Lender, it being agreed that Lender shall be entitled to enforce this Mortgage and any other security now or hereafter held by Lender in such order and manner as it or either of them may in their absolute discretion determine. No right or remedy herein conferred upon or reserved to Lender is intended to be exclusive of any other remedy herein or by law provided or permitted, but each shall be cumulative and shall be in addition to every other right and remedy given hereunder or now or hereafter existing at law or in equity or by statute. Every power or remedy given by any of the Loan Documents to Lender or to which it otherwise may be entitled, may be exercised concurrently or independently, from time to time and as often as may be deemed expedient by Lender, and either of them may pursue inconsistent remedies.

2.14 **Waivers.** After consulting with and considering the advice of independent legal counsel selected by Borrower, Borrower makes the following arrangements, waivers and relinquishments knowingly and as a material inducement to Lender in making the Loan.

(a) No delay or omission by Lender or by 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 Lender may be exercised from time to time and as often as may be deemed expedient by Lender. No consent or waiver expressed or implied by Lender to or of any breach or default by Borrower in the performance of the obligations of Borrower hereunder shall be deemed or construed to be a consent or waiver to or of any other breach or default in the performance of the same or any other obligations of Borrower hereunder. Failure on the part of Lender to complain of any act or failure to act or failure to declare an Event of Default, irrespective of how long such failure continues, shall not constitute failure to declare an Event of Default, irrespective of how long such failure continues, shall not constitute a waiver by Lender of its rights hereunder or impair any rights, powers or remedies of Lender hereunder.



(b) No act or omission by Lender shall release, discharge, modify, change or otherwise affect the original liability under the Note or this Mortgage or any other obligation of Borrower or any subsequent purchaser of the Premises or any part thereof, or any maker, co-signer, endorser, surety or guarantor, nor preclude Lender from exercising any right, power or privilege herein granted or intended to be granted in the event of any default then existing or of any subsequent default, nor alter the lien of this Mortgage, except as expressly provided in an instrument or instruments executed by Lender. Without limiting the generality of the foregoing, Lender may (i) grant forbearance or an extension of time for payment of all or any portion of the Secured Indebtedness; (ii) take other or additional security for the payment of any of the Secured Indebtedness; (iii) waive or fail to exercise any right granted herein or in the Note; (iv) release any part of the Premises from the security interest or lien of this Mortgage or otherwise change any of the terms, covenants, conditions or agreements of the Note or this Mortgage; (v) consent to the filing of any map, plat or replat affecting the Premises; (vi) consent to the granting of any easement or other right affecting the Premises; (vii) make or consent to any agreement subordinating the security title or lien hereof, or (viii) take or omit to take any action whatsoever with respect to the Note, this Mortgage, the Premises or any document or instrument evidencing, securing or in any way related to the Secured Indebtedness, all without releasing, discharging, modifying, changing or affecting any such liability, or precluding Lender from exercising any such right, power or privilege or affecting the lien of this Mortgage. In the event of the sale or transfer by operation of law or otherwise of all or any part of the Premises, Lender, without notice, is hereby authorized and empowered to deal with any such vendee or transferee with reference to the Premises or the Secured Indebtedness, or with reference to any of the terms, covenants, conditions or agreements 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 liabilities, obligations or undertakings.

(c) Borrower waives and relinquishes any and all rights it may have, whether at law or equity, to require Lender to proceed to enforce or exercise any rights, powers and remedies it may have under the Loan Documents in any particular manner, in any particular order, or in any particular State or other jurisdiction. To the fullest extent that Borrower may do so, Borrower agrees that Borrower will not at any time insist upon, plead, claim, or take the benefit or advantage of any law now or hereafter in force providing for any valuation, appraisal, stay of execution or extension, and Borrower, for Borrower, Borrower's heirs, devisees, representatives, successors and assigns, and for any and all persons ever claiming any interest in the Premises, to the extent permitted by law, hereby waives and releases all rights of valuation, appraisal, marshaling, stay of execution, and extension. Borrower further agrees that if any law referred to in this paragraph and now in force, of which Borrower, Borrower's heirs, devisees, representatives, successors and assigns or other person might take advantage despite this paragraph, shall hereafter be repealed or cease to be in force, such law shall not thereafter be deemed to preclude the application of this paragraph. Borrower expressly waives and relinquishes any and all rights and remedies that Borrower may have or be able to assert by reason of the laws of the State of jurisdiction pertaining to the rights and remedies of sureties.

(d) Borrower, and by acceptance hereof Lender, hereby mutually waive any right to a trial by jury on any claim, counterclaim, setoff, demand, action or cause of action (a) arising out of or in any way pertaining or relating to this Mortgage, any other Loan Document, or any other instrument, document or agreement executed or delivered in connection herewith or therewith, or (b) in any way connected with or pertaining or relating to or incidental to any dealings of the parties hereto with respect to this Mortgage, any other Loan Document, or any other instrument, document or agreement executed or delivered in connection herewith or therewith or in connection with any transactions related thereto or contemplated thereby or the exercise of either party's rights and remedies thereunder, in all of the foregoing cases whether



now existing or hereafter arising, and whether sounding in contract, tort or otherwise. Borrower and Lender agree that either or both of them may file a copy of this paragraph with any court as written evidence of the knowing, voluntary and bargained agreement between the parties irrevocably to waive trial by jury, and that any dispute or controversy whatsoever between them shall instead be tried in a court of competent jurisdiction by a judge sitting without a jury. Borrower hereby certifies that no representative or agent of Lender, including Lender's counsel, has represented, expressly or otherwise, that Lender would not, in the event of such dispute or controversy, seek to enforce the provisions of this paragraph, and Borrower acknowledges that Lender has, in part, been induced to make the Loan to Borrower in reliance on the provisions of this paragraph.

2.15 **Suits to Protect the Premises.** Lender shall have power to institute and maintain such suits and proceedings as it may deem expedient (a) to prevent any impairment of the Premises by any acts which may be unlawful or constitute a default under this Mortgage; (b) to preserve or protect its interest in the Premises and in the rents, issues, profits and revenues 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 materially impair the security hereunder or be prejudicial to the interest of Lender.

2.16 **Proofs of Claim.** In the case of any receivership, insolvency, bankruptcy, reorganization, arrangement, adjustment, composition or other proceedings affecting Borrower, its creditors or its property, Lender, to the extent permitted by law, shall be entitled to file such proofs of claim and other documents as may be necessary or advisable in order to have the claims of Lender allowed in such proceedings for the entire amount due and payable by Borrower under this Mortgage at the date of the institution of such proceedings and for any additional amount which may become due and payable by Borrower hereunder after such date.

### ARTICLE III

3.01 **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.

3.02 **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.

3.03 **Severability; Complete Agreement.** If any provision 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, the Note and the instruments executed in connection herewith constitute the full and complete agreement of the parties and



supersede 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.

**3.04 Limitation of Interest.** It is the intent of Borrower and Lender in the execution of this Mortgage and all other Loan Documents to contract in strict compliance with the usury laws governing the Loan evidenced by the Note. In furtherance thereof, Lender and Borrower stipulate and agree that none of the terms and provisions contained in the Loan Documents shall ever be construed to create a contract for the use, forbearance, or detention of money requiring payment of interest at a rate in excess of the maximum interest rate permitted to be charged by the laws governing the Loan evidenced by the Note. Borrower or any guarantor, endorser or other party now or hereafter becoming liable for the payment of the Note shall never be liable for unearned interest on the Note and shall never be required to pay interest on the Note at a rate in excess of the maximum interest that may be lawfully charged under the laws governing the Loan evidenced by the Note, and the provisions of this paragraph shall control over all other provisions of the Note and any other instrument executed in connection herewith which may be in apparent conflict herewith. In the event any holder of the Note shall collect monies that are deemed to constitute interest and that would otherwise increase the effective interest rate on the Note to a rate in excess of that permitted to be charged by the laws governing the Loan evidenced by the Note, all such sums deemed to constitute interest in excess of the legal rate shall be applied to the unpaid principal balance of the Note and if in excess of such balance, shall be immediately returned to Borrower upon such determination.

**3.05 Notices.** All notices and other communications provided for hereunder shall be in writing and be deemed received (a) on the date delivered, if sent by hand delivery (to the person or department if one is specified below), (b) on the date deposited in U.S. mail, certified, with return receipt requested, or (c) on the date deposited with Federal Express or other national overnight carrier, and in each case properly addressed as set forth below. Either party may change its address for receipt notices to another single address within the United States as provided herein. Actual receipt of any notice other than a change of address notice shall not be required if properly sent in accordance with this Section 3.05.

If to the Borrower:

SHELBY 19 PROPERTY, LLC  
6723 Cosimo Lane  
Pickerington, Ohio 43147  
Attn: C. Edward Harmon

If to the Lender:

COMPASS BANK  
15 South 20<sup>th</sup> Street  
Second Floor  
Birmingham, AL 35233  
Attn: Thomas K. Genetti

**3.06 Replacement of Note.** Upon receipt of evidence reasonably satisfactory to Borrower of the loss, theft, destruction or mutilation of the Note, and in the case of any such loss, theft or destruction, upon delivery of an indemnity agreement reasonably satisfactory to Borrower or, in the case of any such mutilation, upon surrender and cancellation of the Note, Borrower at Lender's expense will execute and



deliver, in lieu thereof, a replacement note, identical in form and substance to such Note and dated as of the date of such Note, and upon such execution and delivery all references in this Mortgage to the Note shall be deemed to refer to such replacement note.

3.07 **Assignment.** This Mortgage is assignable by Lender and any assignment hereof by Lender shall operate to vest in the assignee all rights and powers herein conferred upon and granted to Lender.

3.08 **Time of the Essence.** Time is of the essence with respect to each and every covenant, agreement and obligation of Borrower under this Mortgage, the Note and any and all other instruments now or hereafter evidencing, securing or otherwise relating to the Secured Indebtedness.

3.09 **Governing Law.** THE VALIDITY, INTERPRETATION, ENFORCEMENT AND EFFECT OF THIS AGREEMENT 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 THIS AGREEMENT SHALL BE DELIVERED TO AND HELD BY LENDER AT SUCH PRINCIPAL PLACE OF BUSINESS, AND THE HOLDING OF THIS AGREEMENT 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 LAW; 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 AGREEMENT. NOTHING HEREIN SHALL LIMIT THE JURISDICTION OF ANY OTHER COURT.

3.10 **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 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 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 HEREFTER 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 RIGHT 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.

3.11 **Authorization to File Financing Statements.** The Borrower hereby irrevocably authorizes the Lender at any time and from time to time to file in any filing office in any Uniform Commercial Code jurisdiction any initial financing statements and amendments thereto that (a) indicate the Collateral (i) as all



assets of the Borrower or words of similar effect, regardless of whether any particular asset comprised in the Collateral falls within the scope of Article 9 of the Uniform Commercial Code of the State or such jurisdiction, or (ii) as being of any equal or lesser scope or with greater detail, and (b) provide any other information required by Section 7-9A-502(b) of Article 9 of the Uniform Commercial Code of the State, or such other jurisdiction, for the sufficiency or filing office acceptance of any financing statement or amendment, including (i) whether the Borrower is an organization, the type of organization and any organizational identification number issued to the Borrower and, (ii) in the case of a financing statement filed as a fixture filing or indicating Collateral as as-extracted collateral or timber to be cut, a sufficient description of real property to which the Collateral relates. The Borrower agrees to furnish any such information to the Lender promptly upon Lender's request.

3.12 **Master Agreement.** Lender and Borrower may enter into certain ISDA Master Agreement, a Schedule to the Master Agreement attached thereto and one or more Confirmations issued in connection therewith (collectively, the "Master Agreement"), under the terms of which Lender and Borrower have entered into one or more or the following types of transactions: interest rate swap, cap, floor, collar or option.

(a) Borrower hereby agrees that all of its obligations under the Master Agreement shall be part of the "Secured Indebtedness," as that term is defined in the Mortgage.

(b) Borrower agrees that the Property shall be security for the payment and performance of all of the Borrower's obligations under the Master Agreement, and that the grant of the lien contained in the Mortgage is intended to be the grant of a lien against the Property to secure all of the Obligations, including the obligations of Borrower under the Master Agreement.

(c) Borrower hereby agrees that (i) the occurrence of an Event of Default under the Mortgage shall constitute an Event of Default (as that term is defined in the Master Agreement) under the Master Agreement, and (ii) the occurrence of an Event of Default under The Master Agreement shall constitute the occurrence of an Event of Default under the Mortgage, and Lender shall thereafter have all rights and remedies following the occurrence of an Event of Default under both the Mortgage and the Master Agreement.

*[Signature page to follow]*




*[Signature page to Mortgage and Security Agreement]*

IN WITNESS WHEREOF, Borrower has executed this instrument, or has caused the same to be properly executed, as of the day and year first above written.

**BORROWER:**


**SHELBY 19 PROPERTY, LLC**, an Alabama  
Limited Liability Company

By:  [SEAL]  
C. Edward Harmon  
Its Manager

STATE OF Ohio )  
COUNTY OF Franklin )

I, the undersigned Notary Public in and for said County, in said State, hereby certify that C. Edward Harmon, whose name as Manager of **SHELBY 19 PROPERTY, LLC**, an Alabama 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 said instrument, he as such Manager and with full authority, executed the same for and as the act of said company.

Given under my hand and official seal this 17<sup>th</sup> day of June, 2009.

  
NOTARY PUBLIC  
My Commission Expires: October 24, 2012




[NOTARIAL SEAL]

Christine L. Schulenberg  
Notary Public, State of Ohio  
My Commission Expires on 10/24/12



## EXHIBIT "A"

  
20090701000253430 28/32 \$7229.00  
Shelby Cnty Judge of Probate, AL  
07/01/2009 11:15:12 AM FILED/CERT

Site 19A, according to a redivision of Sites 19 & 20 of Final Plat of Sector I, Phase II, Shelby West Corporate Park, as recorded in Map Book 41, Page 11, in the Records of Probate in Shelby County, Alabama.



**JOINDER BY FEE OWNER AND SUBORDINATION BY FEE OWNER, CONCRETE  
PROPERTIES, LLC  
TO  
MORTGAGE AND SECURITY AGREEMENT**

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by **CONCRETE PROPERTIES, LLC**, a New York limited liability company (the "Fee Owner"), the Fee Owner hereby joins in the execution, acknowledgment and delivery of the Mortgage and Security Agreement (the "Mortgage"), to which this Joinder is attached and shall be made a part thereof, for the following purposes:

1. The Fee Owner represents and warrants to Compass Bank (the "Lender") that it has good and clear record and marketable fee simple title to the Land, subject to the Permitted Encumbrances and the Lease.

2. The Fee Owner further:

(a) Affirms and acknowledges that it has joined in this Mortgage, and has executed, acknowledged and delivered this Joinder solely for the purpose of encumbering the fee simple estate in the Premises herein described as security for the Note and the other obligations and covenants of Borrower set forth in the Mortgage, and that Fee Owner does hereby does hereby irrevocably and absolutely grant, transfer, assign, mortgage, bargain, sell and convey to Mortgagee, with all POWER OF SALE as set forth in the Mortgage, which is expressly incorporated in this Joinder as if fully set forth herein, all of Fee Owner's estate, right, title and interest in, to and under, and grants to Mortgagee a first and prior security interest in the Premises, whether now owned or held or hereafter acquired by Fee Owner. By execution of this Joinder, no personal liability shall attach to or be enforced against Fee Owner by reason of its execution of this Joinder.

(b) Acknowledges that Lender in its sole discretion, with or without notice to Fee Owner and without affecting this encumbrance, from time to time may: change the time of payment of the Note by renewal, extension, acceleration, or otherwise, release, substitute or add one or more endorsers, co-signers, or guarantors for the Note, obtain any other collateral for the payment of the Note and/or guaranty of the Note, release existing or after-acquired collateral on such terms as Lender in its sole discretion shall determine, apply any sums received from Borrower, any guarantor, endorser or co-signer or from collateral or its proceeds to any indebtedness secured hereby, apply any sums received from the sale of any Premises to the Note in any order regardless of whether the Note is secured by collateral or property or is due and payable, and exercise any right or remedy it may have with respect to the Note or any collateral (including the Premises) securing the Note, including without limitation, judicial foreclosure, exercise of the power of sale or taking a deed or assignment in lieu of foreclosure as to any collateral.

(c) Waives any and all rights with respect to remedies exercisable by Lender on default including, without limitation, any right to require Lender to proceed against Borrower or any other person, proceed against collateral granted by Borrower or others before proceeding against collateral granted by Fee Owner, first apply the property of Borrower to the discharge of the Note before applying any property of Fee Owner thereto, pursue any other remedy in Lender's power whatsoever, or disclose any information with respect to the financial condition or character of Borrower, any collateral, guarantees, or any action or non-action on the part of Lender, Borrower or any person connected with the Note or collateral therefore, prior to or after default.

*Joinder by Fee Owner*

*Page 1*



(d) Waives any defense arising by reason of any disability or other defense of Borrower, its successor or endorser or co-maker or guarantor or by reason of the cessation from any cause whatsoever of the liability of Borrower or endorser or co-maker, or any guarantor. Until the Note has been paid in full, even though it may be in excess of the value of the Premises, Fee Owner shall not have any right of subrogation, and Fee Owner waives any benefit of and any right to participate in any such collateral, hereby assigning, setting over and transferring to Lender any of its rights in and to any insurance proceeds or condemnation proceeds, and in and to any rents or profits from the Premises, and will use its best efforts to assist Lender in collecting any such amounts which may be payable in connection therewith. Fee Owner waives physical presentation of the Note to it or Borrower upon any default, and further waives any protest upon any default, notice of protest upon any default of/or notice of acceptance of this accommodation.

(e) Acknowledges that notwithstanding that Fee Owner and Borrower may have entered into a separate agreement relating to their rights and duties with respect to each other, including without limitation, the Lease, no right, remedy or provision thereof shall be binding upon or affect or delay Lender's rights hereunder. Further, Fee Owner acknowledges and agrees that any provision of the Lease to the contrary, Lender has no obligation to the Fee Owner for rental payments, or other payments, due Fee Owner, nor does Lender have any surviving obligation to Fee Owner for rental payments, or other payments, due Fee Owner, after foreclosure or a deed of foreclosure, and Fee Owner agrees and covenants that the Insurance Provisions of the Mortgage, and the application and use of same, and the Condemnation Provisions of the Mortgage, and the application and the use of the same will control over the Lease, the Lease being subordinate to the Mortgage.

(f) Understands and agrees:

(a) That this Mortgage presently securing the Note (and any future renewals, substitutions, restatements, supplements, extensions or modifications thereof) shall unconditionally be and remain at all times a lien and charge on the Premises, prior and superior to any interest it may have under the Lease.

(b) That Lender would not make its loan above-described without this Agreement.

(c) That this Agreement shall be the whole and only agreement with regard to the matters herein set to; and this Agreement shall supersede and cancel, any prior agreement(s) with regard to the matters herein set forth, including, without limitation, those provisions, if any, contained in the Lease.

(d) That the default provisions contained in the Mortgage shall be applicable to Fee Owner.

(g) Represents and warrants that:

(i) Fee Owner is duly organized and validly existing, and in good standing under the laws of the State of New York and has power adequate to carry on its business as presently conducted, to own the Premises, to make and enter into this Joinder to the Mortgage, and to carry out the transactions contemplated therein.



(ii) This Joinder to the Mortgage has been duly authorized, executed and delivered by Fee Owner, and is a legal, valid and binding obligation of Fee Owner, and that Fee Owner will not sell or encumber the Premises as provided herein.

(h) That in the event of any merger of the respective interests of Fee Owner and Borrower in and to the Premises by reason of those interests coming into common ownership, the entire interest of fee Owner and Borrower and of any party succeeding to the interests of Fee Owner and Borrower shall be and remain subject and subordinate to the lien of this Mortgage. Furthermore, notwithstanding any such merger, Fee Owner and Borrower acknowledge that in the event of the exercise of any power of sale under this Mortgage, Lender shall have the right to sell the respective interest of Fee Owner and Borrower in and to the Premises separately or together at the election of Lender in Lender's sole and absolute discretion.

The law of the State of Alabama shall govern the validity, interpretation, construction, enforcement and performance of all other Loan Documents. If, for any reason or to any extent any word, term, provision, or clause of this Mortgage or any of the other Loan Documents, or its application to any person or situation, shall be found by a court or other adjudicating authority to be invalid or unenforceable, the remaining words, terms, provisions or clauses shall be enforced, and the affected word, term, clause or provision shall be applied, to the fullest extent permitted by law.

All notices and other communications provided for hereunder shall be in writing and be deemed received (a) on the date delivered, if sent by hand delivery (to the person or department if one is specified below), (b) on the date deposited in U.S. mail, certified or registered, with return receipt requested, or (c) on the date deposited with Federal Express or other national overnight carrier, and in each case properly addressed as set forth in the heading of this Mortgage. Either party may change its address for receipt notices to another single address within the United States as provided herein. Actual receipt of any notice other than a change of address notice shall not be required if properly sent in accordance with this Section.

If to the Fee Owner:

CONCRETE PROPERTIES, LLC  
130 Crotty Road  
Middletown, New York 10941

If to the Lender:

COMPASS BANK  
15 South 20<sup>th</sup> Street  
Second Floor  
Birmingham, AL 35233  
Attn: Thomas K. Genetti

Time is of the essence with respect to each and every covenant, agreement and obligation of Fee Owner under this Joinder.

*[Signature Page to Follow]*





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Shelby Cnty Judge of Probate, AL  
07/01/2009 11:15:12 AM FILED/CERT

[Signature page to Joinder by Fee Owner]

IN WITNESS WHEREOF, the Fee Owner has executed this instrument this 25<sup>th</sup> day of June, 2009.

Fee Owner:

CONCRETE PROPERTIES, LLC, a New York  
limited liability company

By: [Signature] [SEAL]

Name: Gary Teftz

Its: Managing Member

STATE OF New York )  
COUNTY OF Orange )

I, the undersigned Notary Public in and for said County, in said State, hereby certify that Gary Teftz, whose name as Managing Member of CONCRETE PROPERTIES, LLC, a New York 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 said instrument, he as such Managing Member and with full authority, executed the same voluntarily as the act of said limited liability company on the day the same bears date.

Given under my hand and official seal, this 25<sup>th</sup> day of June, 2009.

[Signature]  
NOTARY PUBLIC

My Commission Expires: \_\_\_\_\_

BURT J. BLUSTEIN  
NOTARY PUBLIC, STATE OF NEW YORK  
QUALIFIED IN ORANGE COUNTY, NY [SEAL]  
COMMISSION EXPIRES MARCH 30, 2012

Joinder by Fee Owner

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