

44

2004 015280

This instrument prepared by:  
Brian D. Habert, Esq.  
Lewis, Rice & Fingersh, L.C.  
1010 Walnut, Suite 500  
Kansas City, Missouri 64106  
(816) 421-2500

2004 FEB 24 AM 11:42

MORRIS W. GATNER  
RECORDER

STATE OF INDIANA  
LAKE COUNTY  
FILED FOR RECORD

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

Mortgagor: FUEL SERVICE MART, INC., a Missouri corporation

Mortgagee: HILLCREST BANK, a Kansas bank

Borrower's organizational identification number, if any, assigned by the state of its incorporation or organization is: 00543838.

**NOTE TO RECORDER: PLEASE NOTE THAT THIS IS TO BE RECORDED AS A MORTGAGE AND ALSO AS A FIXTURE FILING UNDER THE UNIFORM COMMERCIAL CODE.**

HOLD FOR MERIDIAN TITLE CORP

18780203



Ch 2569

(Indiana)

9.7.00  
Kim

Asg# 2004-015281  
Sub# 2004-015282

IN

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

**THIS MORTGAGE, SECURITY AGREEMENT, ASSIGNMENT OF RENTS AND FIXTURE FILING** (as the same may be amended or supplemented at any time, the "Mortgage") is made as of February 9, 2004, by and between:

**FUEL SERVICE MART, INC.**, a Missouri corporation having an address at 10417 West 84th Terrace, Lenexa, Kansas 66214, as mortgagor (together with its successors and assigns and any subsequent owner or owners of the Mortgaged Property, the "Borrower");

**AND**

**HILLCREST BANK**, a Kansas bank having an office at 11111 West 95<sup>th</sup> Street, Overland Park, Kansas 66214, as mortgagee (together with any subsequent holder or holders of the Note, the "Lender").

**RECITALS**

- A. Certain capitalized terms used in these Recitals and elsewhere herein are defined in §19.7 of this Mortgage. Other terms are defined throughout the text of this Mortgage or, if not defined herein, are used herein as defined in the Loan Agreement.
- B. Lender has agreed to make a loan to Borrower in the principal amount of \$24,500,000.00 (the "Loan"), on or about the date hereof, evidenced by the Note.
- C. Lender has required, as a condition to making the Loan, that Borrower execute this Mortgage in favor of Lender.

**GRANTS; AGREEMENTS**

**NOW, THEREFORE**, in consideration of Lender's agreement to make the Loan secured hereby upon and subject to the terms of this Mortgage and the Loan Documents, and of the payment of ten dollars (\$10.00) and other good and valuable consideration given by Lender to Borrower, the receipt and sufficiency of which are hereby acknowledged by Borrower, at all times until the Debt is fully paid and the Obligations fully performed, Borrower hereby acts, and covenants, promises and agrees with Lender, as follows:

1. GRANTING CLAUSES

- 1.1. Grant of the Real Estate Security. Borrower, to secure the payment of the Debt and payment and performance of the Obligations, hereby grants, bargains, sells, mortgages, warrants, assigns and transfers to Lender all of the following described property:

1.1.1. All of the real property and interests in real property described on Exhibit A attached to and incorporated into this Mortgage (collectively, the "Land"), together with: all of the buildings, structures and other improvements now or hereafter located on the Land (the "Improvements"); all of the easements, rights of way, privileges, hereditaments, gores, streets, alleys, passages, ways, waters, watercourses, rights and appurtenances belonging or appertaining to the Land; all of the right, title and interest of the Borrower in and to the streets and ways adjacent to the Land; all reversions and remainders pertaining to the Land; and all air rights, development rights, water rights and mineral rights appurtenant or belonging to the Land or relating to the Land; and

1.1.2. All fixtures, equipment, apparatus, machinery, fittings and appliances, chattels, building materials and tangible personal property of every kind and character, now or at any time hereafter affixed to or attached to or placed upon or used in any way in connection with the complete and comfortable use, enjoyment, occupancy, operation and/or maintenance of the Improvements or the Land (excepting any personal property owned by any tenant or unit owner occupying any of the Improvements, to the extent the same does not become the property of Borrower under the lease or other agreement with such tenant or unit owner or pursuant to applicable law), including such of the foregoing as may be used in connection with the generating or distributing of air, water, heat, electricity, light, fuel or refrigeration, or for ventilating or sanitary purposes, or for the removal of dust, refuse or garbage, and all renewals, replacements and substitutions thereof, additions and accessions thereto, and all spare parts for any of the same, all of which are intended to be subject to the lien of this Mortgage as if part of the real estate (all the property described in this §1.1.2 is herein collectively called, the "Fixtures"); and

1.1.3. All of the Leases and the Rents and all the other benefits of any of the Land, Improvements and Fixtures; and

1.1.4. All proceeds of the conversion, voluntarily or involuntarily, of any of the property described in this §1 into cash or liquidated claims, including proceeds of insurance and Condemnation Awards.

**TO HAVE AND TO HOLD** the Mortgaged Property unto Lender, its successors and assigns, forever.

**UNDER AND SUBJECT** to Permitted Encumbrances.

For the purpose of securing in such order of priority as Lender shall elect, the payment of the Debt and the performance of the Obligations, in accordance with their respective terms.

1.2. Grant of Security Interest and Assignment. Borrower, to secure payment of the Debt and payment and performance of the Obligations, hereby transfers and assigns to Lender, and grants to Lender a security interest under the Uniform Commercial Code (as adopted and in effect in the State on the date hereof and as amended or supplemented at any time hereafter, the "Code") in and to the following described property, whether now owned or hereafter acquired by Borrower:

1.2.1. All of the Fixtures and all other property described in §1.1 hereof which, under any applicable law, may be deemed to be personal property or fixtures, the creation and perfection of a lien on which is governed by the Code;

1.2.2. All goodwill, trademarks, trade names, option rights, purchase contracts, computer records and software, books and Records and General Intangibles of Borrower relating to any of the Mortgaged Property, all Intellectual Property, all rights of Borrower under or with respect to all accounts, contract rights, instruments, chattel paper and other rights of Borrower for payment of money for property sold or lent, for services rendered, for money lent, or for advances or deposits made, all rights of the Borrower to plans and specifications, designs, drawings, models and other matters prepared for any construction or renovation on the Land, all rights of the Borrower under any contracts executed by the Borrower as owner with any provider of goods or services in connection with any construction or renovation undertaken on, or services performed or to be performed in connection with, any part of the Mortgaged Property, and all other intangible property of the Borrower related to or used in connection with any of the Mortgaged Property, and shall specifically include, without limiting the foregoing, all trademarks, trade insignia and logos (including goodwill related thereto), if any, used in connection with the operation of the Mortgaged Property (all such property described in this §1.2.2 is herein called, the "Intangibles");

1.2.3. All of the Collateral; and

1.2.4. All right, title and interest of Borrower in and to all amounts now or hereafter on deposit with Lender under any provisions of the Loan Documents; and

1.2.5. All the proceeds of any of the property described in this §1.2.

This Mortgage creates a security interest in the Fixtures, Intangibles, Collateral and all other property described in this §1.2, whether now owned or hereafter acquired by Borrower (the Fixtures, Intangibles, and all such other property are herein collectively called the "Personal Property Security"), and shall constitute a Security Agreement under the Code.

1.3. Assignment of Leases and Rents. Borrower hereby assigns, transfers, pledges, grants a lien upon and encumbers in favor of Lender all of the Leases and Rents, as security for the prompt and timely payment of the Debt and performance of the Obligations. This

assignment is in addition to any absolute assignment made pursuant to any separate lease assignment. Lender shall apply any amounts received pursuant to this assignment to the payment of the Debt, the performance of the Obligations, and/or to the operation and Maintenance of the Mortgaged Property, in such order as Lender may elect, without regard to the adequacy of the security or the solvency of the Borrower. Notwithstanding such assignment, Lender hereby grants to Borrower the right to collect and retain the Rents for Borrower's own account, until an Event of Default shall occur; but upon occurrence of any Event of Default, the right herein granted to Borrower to collect the Rents shall at Lender's option terminate. Borrower shall apply any Rents collected by Borrower pursuant to the terms of the Loan Agreement.

Notwithstanding anything seemingly to the contrary contained herein or in any of the other Loan Documents, Borrower shall not enter into or execute any Lease of any of the Mortgaged Property without the prior written approval of Lender. Borrower hereby represents and warrants to Lender that no Leases exist on the date hereof.

Borrower hereby covenants, promises and agrees that Borrower will: (i) Observe, fulfill and perform each and every condition, covenant and provision of the Leases to be fulfilled or performed by Borrower; (ii) Enforce at the sole cost and expense of Borrower the performance or observance of each and every material covenant and condition of each of the Leases; (iii) At the sole cost and expense of Borrower, appear in and defend any action growing out of or in any manner connected with any of the Leases, Rents or the obligations or liabilities of Borrower or any party thereunder; (iv) From time to time, upon request by Lender, execute and deliver to Lender, acknowledge when appropriate and record or file in the public records when appropriate, any and all writings, including without limitation further assignments of any Lease or Leases, financing statements and other writings that Lender may deem necessary or desirable to carry out the purpose and intent of this assignment, or to enable Lender to enforce any right or rights hereunder; and (v) From time to time, upon request by Lender, furnish to Lender a true copy of any Lease.

Borrower will not, without the prior written consent of Lender: (A) Modify or alter any of the terms or provisions of any of the Leases; (B) Terminate the term of, or accept a surrender of, any of the Leases; (C) Anticipate Rents for more than one calendar month prior to the accrual thereof under the terms of the Leases; (D) Waive, or release any party under any of the Leases; (E) Pledge, transfer, mortgage or otherwise encumber or assign the Leases or the Rents; (F) Permit any Lease to be subordinated to any deed of trust or mortgage junior in lien to the Mortgage encumbering the leased premises; (G) In any other manner impair the value of the Leases or Rents or the security of the assignment thereof as provided herein; or (H) Execute any Lease except for actual occupancy by the lessee thereunder.

1.4. Fixture Filing. From the date of its recording, this Mortgage shall be effective as a financing statement filed as a fixture filing with respect to all the Fixtures. For this purpose, the following information is set forth:

1.4.1. Name and Address of Debtor:

FUEL SERVICE MART, INC., a Missouri corporation

Address: as set forth above.

1.4.2. Name and Address of Secured Party:

HILLCREST BANK, a Kansas bank

Address: as set forth above.

1.4.3. Debtor's Organizational Identification No.: 00543838.

1.4.4. This document covers goods which are or are to become, or may be or become, fixtures. This document is to be filed in the real estate records. A description of the real estate is attached hereto as Exhibit A. Borrower is the record owner of the real estate.

2. OBLIGATIONS SECURED. This Mortgage is given for the purpose of securing the payment of all of the Debt and performance of all the Obligations (of every kind and character now or hereafter existing, whether matured or unmatured, contingent or liquidated).

3. COVENANTS AS TO PAYMENT, PERFORMANCE AND TITLE

3.1. Payment of Note. Borrower shall pay to Lender the entire Debt, punctually as and when the same shall become due, without offset, counterclaim or defense. Borrower will fully and faithfully observe and perform all of the provisions of the Loan Documents. The Loan Documents are incorporated herein by this reference.

3.2. Defeasance. If all the Debt shall be paid and the Obligations shall be performed, all at the times and in the manner provided in the Loan Documents, then Lender shall release this Mortgage of record.

3.3. Warranty of Title. Borrower warrants that: (a) Borrower has good and marketable title to an indefeasible estate in fee simple in and to the Land and the Improvements; (b) Borrower has good title to all of the rest of the Mortgaged Property; and (c) this Mortgage is a Lien on and security interest in the Mortgaged Property, subject to no encumbrances except Permitted Encumbrances. Borrower shall not, without the prior written consent of Lender, install in or locate on the Mortgaged Property any equipment or fixtures which are subject to any Lien other than Permitted Encumbrances. None of the Rents is subject to any previous assignment, nor will any of the Rents be assigned hereafter except to Lender as security for any of the Debt and/or Obligations.

- 3.4. Agreement to Defend. Borrower shall preserve Borrower's title and interest in the Mortgaged Property as described in §3.3, and will forever warrant and defend the validity and priority of the lien, security interest and assignment created hereby against the claims of all persons whomsoever, subject only to Permitted Encumbrances.
- 3.5. Additions to the Mortgaged Property. All right, title and interest of Borrower in and to all extensions, improvements, betterments, renewals, substitutes and replacements of, and all additions and appurtenances to, the Mortgaged Property hereafter acquired by, or released to, Borrower, or constructed, assembled or placed by Borrower on the Land, immediately upon such acquisition, release, construction, assembling or placement, and in each such case, without any further act by Borrower, shall become subject to the lien and security interest of this Mortgage as though they were now owned by Borrower and specifically described in the granting clauses hereof.
- 3.6. Easements Outside the Land. In the event any easements or rights in common or otherwise (other than revocable rights) in any lands not covered by the lien of this Mortgage are granted as an appurtenance to the use and operation of any of the Mortgaged Property, then this Mortgage shall attach to and be a lien on such easements and rights in such other lands, and the lien hereof spread to cover such easements and rights with the same force and effect as though specifically described in the granting clauses hereof.
- 3.7. Further Assurances. Promptly upon request of Lender, Borrower shall do all acts and things, including but not limited to the execution and delivery of any further deeds, conveyances, mortgages, assignments, financing statements, continuation statements, and further assurances, deemed necessary or desirable by Lender to establish, confirm, maintain and continue the Lien and security interest created and intended to be conferred hereby and the priority thereof. Borrower hereby appoints Lender as attorney-in-fact for Borrower to execute, deliver and file any and all such documents, writings, and other instruments as Lender may require, in order to perfect and maintain the priority of such Lien and security interest.
- 3.8. Warranties of Borrower. Borrower covenants and warrants that (i) it is a corporation duly formed, existing and in good standing under the laws of the Formation State, (ii) it is duly qualified to do business and is in good standing in the State, (iii) it has the power, authority and legal right to carry on the business now being conducted by it and to engage in the transactions contemplated by the Loan Documents, (iv) the execution and delivery of and the carrying out of the transactions contemplated by the Loan Documents, the execution and delivery of the Loan Documents, and the performance and observance of the provisions of the Loan Documents, have been duly authorized by all necessary actions of Borrower and its board of directors and shareholders, and will not conflict with or result in a breach of the terms or provisions of any existing law or any existing rule, regulation or order of any Governmental Authority or of the operating

agreement or the articles of organization of Borrower, (v) all instruments, documents, financial statements and certificates submitted to Lender by or on behalf of Borrower in connection with the Loan or the Loan Documents are true, correct and complete, and contain no misrepresentations, and (vi) there is no action, suit, proceeding or litigation pending, or to Borrower's knowledge threatened, against Borrower or any of the Mortgaged Property which has not been disclosed to Lender in writing.

#### 4. COVENANTS AS TO IMPOSITIONS

4.1. Payment of Impositions. Prior to the date on which any interest or penalties shall commence to accrue thereon, Borrower will pay and discharge all taxes and assessments of every kind and nature now or hereafter assessed against or levied upon any of the Mortgaged Property or the revenues, rents, issues or profits thereof by any Governmental Authority, including real and personal property taxes, general and special assessments, inspection and license fees, water and sewer rents and charges (all such taxes, assessments and other charges are herein called, the "Impositions").

4.2. Escrow Deposits. If Lender shall so request by written notice to Borrower, Borrower will deposit with Lender on the date specified in such request a sum of money equal to the amount needed to pay the annual real estate taxes and assessments and premiums for insurance required by §5.1 hereof by the Escrow Date for such taxes, assessments, and premiums, less the amount to be deposited under the next sentence hereof between the date such escrow deposits commence and such Escrow Date (such amount to be calculated separately for taxes and for insurance premiums, if the Escrow Date for them is different). If so requested, Borrower shall also deposit with Lender contemporaneously with each monthly payment thereafter coming due under the Note a sum equal to one-twelfth (1/12) of Lender's estimate from time to time of the amount needed to pay the annual real estate taxes and assessments and premiums for insurance required by §5.1 hereof by the Escrow Date for such taxes, assessments and premiums. Lender shall deposit all such amounts in a non-interest bearing savings account separate and apart from Lender's general assets, for application to the real estate taxes, assessments and insurance premiums as the same come due. If any Event of Default shall occur, Lender shall have the right, at its election, to apply any amounts in such account against all or any part of the Debt secured by this Mortgage. If the real estate taxes and assessments and insurance premiums for which deposits are required to be escrowed pursuant to this §4.2 shall at any time exceed the estimate therefor and the amounts paid into escrow under this §4.2, Borrower shall on demand make good the deficiency. Borrower will furnish to Lender tax and insurance bills in sufficient time to enable Lender to pay such taxes and premiums, before interest and penalties accrue thereon. All determinations of the amount so payable and of the fractional part thereof to be deposited with Lender from time to time, so that the aggregate of such deposits shall be sufficient to pay the real estate taxes, assessments and insurance premiums, shall be made by Lender in its sole reasonable discretion. Nothing herein contained shall be deemed to affect any right or remedy of Lender under any other provisions of this Mortgage or



under any statute or rule of law to pay any such amount and to add the amount so paid, together with interest at the Default Rate, to the Debt.

4.3. Evidence of Payment. Within thirty (30) days after the date when any Impositions which are or could become a Lien on any part of the Mortgaged Property would become delinquent, Borrower will furnish to Lender official receipts of the appropriate Governmental Authorities to which the Impositions are payable, or other evidence reasonably satisfactory to Lender evidencing the payment thereof, unless Lender has paid such Impositions from the sums deposited under §4.2 hereof. The certificate, advice or bill of the appropriate official designated by law to receive payment of any Imposition indicating non-payment of such Imposition shall be conclusive evidence (as between Lender and Borrower) that such Imposition is due and unpaid, and Lender may rely thereon.

## 5. INSURANCE

5.1. INSURANCE REQUIRED. At all times until this Mortgage is satisfied of record, Borrower will keep in force and maintain the following insurance coverages:

5.1.1. Property Insurance. A standard property insurance policy on the "Special" or "all-risk" form, covering the Mortgaged Property, and providing coverage against such other risks as Lender may from time to time require, in the amount of the full replacement cost (insurable value) thereof, without reduction for depreciation, but in no event less than the maximum principal amount of the Note. Property insurance policies shall include either an agreed amount endorsement or a waiver of any co-insurance provisions, sufficient to insure that no co-insurance requirements apply.

5.1.2. Boiler and Machinery Coverage. Boiler and machinery insurance coverage, if steam boilers or other pressure-fired vessels are in operation at the Mortgaged Property, or as otherwise required by Lender. Minimum liability coverage per accident must equal the replacement cost (insurable value) of the Improvements housing such boiler or pressure-fired machinery. If one or more large HVAC units is in operation at the Mortgaged Property, "Systems Breakdowns" coverage shall be required, as determined by Lender. Minimum liability coverage per accident must equal the value of such unit(s).

5.1.3. Ordinance or Law Coverage. If any of the Mortgaged Property constitutes a legal non-conforming use under applicable building, zoning or land use laws or ordinances, Borrower shall provide an ordinance or law coverage endorsement to the property insurance policies, which will contain: Coverage A: "Loss Due to Operation of Law" (with a minimum liability limit equal to Replacement Cost With Agreed Value Endorsement), Coverage B: "Demolition Cost", and Coverage C: "Increased Cost of Construction" coverages, and such other coverage as Lender may require.

- 5.1.4. Business Income Insurance. Business Income coverage with respect to the Mortgaged Property, covering loss of rents and "extra expense", in an amount at least equal to the estimated aggregate Rents (such estimate to be subject to Lender's approval) for a period of at least twelve months, and such coverage amount shall be adjusted annually to reflect the anticipated Rents payable in the following twelve months.
- 5.1.5. Builder's Risk. During the period of any construction, renovation or alteration work on the Mortgaged Property, a completed value, "All Risk" Builders Risk form or "Course of Construction" insurance policy in non-reporting form, in an amount approved by Lender, including without limitation such endorsements as Lender may require, insuring Lender against damage to the Mortgaged Property. Such policy shall also provide coverage for collapse and theft, and shall contain a "permission to occupy on completion" endorsement or equivalent.
- 5.1.6. Flood Insurance. If the Improvements or any part thereof are situated in an area now or subsequently designated by FEMA as a special flood hazard area, a policy of flood insurance in an amount equal to the lesser of: (i) the minimum amount required, under the terms of coverage, to compensate for any damage or loss on a replacement basis (or the unpaid balance of the Debt if replacement cost coverage is not available for the type of building insured); or (ii) the maximum insurance available under the appropriate National Flood Insurance program. The maximum deductible shall be \$3,000 per building or a higher minimum amount as required by FEMA or other applicable law.
- 5.1.7. Liability Insurance. A CGL Policy, with coverage on an "occurrence" basis, in such form, amounts and with such companies as Lender may from time to time require. Such CGL Policy shall have an annual general aggregate limit of not less than \$3,000,000, and a "per occurrence" limit of not less than \$2,000,000, and, if it covers more than one location, shall contain a "per location" or "per project" limit of not less than \$2,000,000. Additional coverages beyond those provided by the standard ISO CGL Policy form (such as liquor liability, automobile, aircraft/ watercraft, pollution legal and remediation, garage keepers' legal liability, and others) shall be provided if Lender so requires. Lender shall be named as an additional insured with Borrower on all CGL Policies. Policies providing excess coverage and/or umbrella coverage over the CGL Policy shall be provided, in an amount not less than \$2,000,000. Deductibles under the liability policies shall not exceed \$10,000, without prior written consent of Lender. All policies required by this §5.1.7 shall name Lender as an additional insured under an endorsement satisfactory to Lender.
- 5.1.8. Workmen's Compensation. When required by any applicable law, ordinance or other regulation, Worker's Compensation and Employer's Liability Insurance

covering all persons employed on the Mortgaged Property and subject to the workers' compensation laws of the state in which the Mortgaged Property is located.

5.1.9. Other Insurance. Such other insurance with respect to the Mortgaged Property as may from time to time be required by Lender against other insurable hazards or casualties (including, without limitation, Sinkhole, Mine Subsidence, War Risk, terrorism risk, Earthquake and Environmental insurance [including, without limitation, insurance against contamination of the Mortgaged Property by third parties]) which at the time are commonly insured against in the case of property similarly situated, due regard being given to the height and type of buildings, their construction, location, use and occupancy.

5.2. REQUIREMENTS RE:INSURING COMPANIES, POLICIES, MORTGAGEE

CLAUSE, COVERAGE INCREASES, DEDUCTIBLES, ETC. All policies of insurance required herein: (a) shall be issued by and maintained with insurance companies licensed to do business in the State in which the Mortgaged Property is situate, and having a rating of A-, VII or better by the A.M. Best Company; (b) contain the complete address (or legal description) of the Mortgaged Property; (c) be for terms of at least one year with premium prepaid; (d) be subject to the approval of Lender as to insurance companies, amounts, content, forms of policies, method by which premiums are paid, expiration dates and all other respects; and (e) include a provision naming Lender, its successors and assigns as their interests may appear: (1) as an additional insured under all liability insurance policies, (2) as the first mortgagee and loss payee on all property insurance policies under a standard non-contributory mortgagee clause, and (3) as the lender's loss payee on all loss of rents or loss of business income insurance policies. Each insurance policy: (i) shall provide for at least thirty (30) days' prior written notice to Lender prior to any policy reduction or cancellation for any reason other than non-payment of a premium and at least ten (10) days' prior written notice to Lender prior to any cancellation due to non-payment of premium; (ii) shall contain an endorsement or agreement by the insurer that any loss shall be payable to Lender in accordance with the terms of such policy notwithstanding any act, omission or negligence of Borrower which might otherwise result in forfeiture of such insurance; and (iii) shall waive all rights of subrogation against Lender. Such policies shall provide, among other things, that all proceeds of the policies are payable directly to Lender (and not to Lender and Borrower jointly). All policies must be satisfactory to Lender in all respects, and shall have such endorsements as may be required by Lender from time to time. Lender shall have the right to periodically review the amount of the CGL Policy coverage and the coverage amounts of all other insurance policies required hereunder, and to require an increase in such coverage amounts if Lender deems such an increase to be reasonably prudent under then existing circumstances. Deductibles and self-insured retentions under insurance policies required hereby shall not exceed \$10,000 without written consent of the Lender. Copies of renewal or replacement insurance policies (or such ACCORD certificates, if acceptable to Lender) must be provided to Lender not less than thirty (30) days prior to expiration of any policy of insurance required hereby.

- 5.3. LENDER NOT RESPONSIBLE FOR INSURANCE. Lender, by approving, disapproving, accepting, preventing, obtaining or failing to obtain any insurance, shall not incur any liability for the form or legal sufficiency of insurance contracts, solvency of insurance companies, or payment of lawsuits and expenses, and Borrower hereby expressly assumes full responsibility therefor and for any liability, if any, thereunder.
- 5.4. PROCEEDS ON FORECLOSURE. In the event of foreclosure of this Mortgage, or other transfer of title to the Mortgaged Property in extinguishment of the Debt, all right, title and interest of the Borrower in and to all proceeds of any insurance policies required hereby then in force shall pass to the purchaser or grantee.
- 5.5. PROOF OF LOSS; ADJUSTMENT OF CLAIMS. If any Casualty shall occur, Borrower shall promptly make proof of loss to the insurers; but Lender may itself make proof of loss if Lender gives written notice to Borrower electing to make such proof of loss. Borrower shall not adjust or compromise any claim under any insurance required hereby without the written consent of Lender.
- 5.6. DELIVERY OF POLICIES; RENEWALS. Borrower, as of the date hereof, shall deliver to Lender evidence that the insurance policies required hereby have been prepaid as required above and either duplicate originals of such policies, if required by Lender, or certified copies of such insurance policies and original certificates of insurance (ACCORD Form 27) signed by an authorized agent of the applicable insurance companies evidencing such insurance satisfactory to Lender. Borrower shall renew all such insurance and deliver to Lender certificates and policies evidencing such renewals at least thirty (30) days before any such insurance shall expire. The form of any such ACCORD certificates shall be modified if necessary, to evidence the coverages required by this Mortgage and to evidence compliance with §5 hereof.
- 5.7. BLANKET POLICIES. Any insurance policies required hereby may be in the form of a blanket policy provided that the blanket policy must properly identify and fully protect the Mortgaged Property as if a separate policy were issued for 100% of replacement cost at the time of loss and otherwise meet all of Lender's insurance requirements set forth in this §5. Borrower hereby acknowledges and agrees that failure to pay any portion of the premium therefor which is not allocable to the Mortgaged Property or by any other action not relating to the Mortgaged Property which would otherwise permit the issuer thereof to cancel the coverage thereof, would require the Mortgaged Property to be insured by a separate, single-property policy.
- 5.8. MAINTENANCE OF OTHER INSURANCE. Borrower shall not obtain insurance for the Mortgaged Property in addition to that required by Lender and contributing, in the event of loss, with any insurance required hereby, without the prior written consent of Lender, which consent will not be unreasonably withheld provided that: (a) Lender is named as first mortgagee-loss payee on such insurance, (b) Lender receives complete

copies of all policies evidencing such insurance, and (c) such insurance complies with all of the requirements set forth herein.

5.9. LENDER'S RIGHT TO INSURE. Unless Borrower provides evidence of the insurance coverage required by this Section 5, Lender may purchase insurance at Borrower's expense to protect Lender's interests in the Mortgaged Property. This insurance may, but need not, protect Borrower's interests. The coverage that Lender purchases may not pay any claim that Borrower makes or any claim that is made against Borrower in connection with the Mortgaged Property. Borrower may later cancel any insurance purchased by Lender, but only after providing evidence that Borrower has obtained insurance as required by this Section 5. If Lender purchases insurance for the Mortgaged Property, Borrower will be responsible for the costs of that insurance, including the insurance premium, interest and any other charges Lender may impose in connection with the placement of the insurance, until the effective date of the cancellation or expiration of the insurance. The costs of the insurance may be added to Borrower's total outstanding Debt. The costs of the insurance may be more than the cost of insurance Borrower may be able to obtain on its own.

6. MAINTENANCE AND REMOVAL; PERMITTED USES

6.1. Permitted Removal; Waste. Borrower will not cause or permit any Improvement to be removed or demolished. No Fixture shall be removed, severed or destroyed, without the prior written consent of Lender, unless simultaneously with, or prior to, any such permitted removal such Fixture has been replaced with another Fixture of at least equal value. By such removal and replacement Borrower shall be deemed to have subjected such Fixtures to the Lien of this Mortgage. Borrower will not abandon, or cause or permit any waste to, the Mortgaged Property.

6.2. Maintenance. Throughout the term of this Mortgage, Borrower will keep the Mortgaged Property in good order and condition, and do all necessary Maintenance. All Maintenance shall be equal in quality and class to the original work. The standard for Maintenance required shall be that which is appropriate for facilities and buildings of similar construction and class, provided that Borrower shall in any event do all Maintenance necessary to avoid any structural damage or injury to the Improvements, to comply with all Legal Requirements and to keep the Improvements in a proper condition for their Permitted Uses. Borrower will not permit any condition to exist on the Mortgaged Property which would wholly or partially invalidate the insurance thereon.

6.3. Inspection of Lender. Without notice to Borrower, Lender and Lender's representatives may enter the Mortgaged Property at reasonable times to inspect the same. If any Event of Default occurs, Lender may, at its option, enter the Mortgaged Property to protect, restore or do Maintenance on any part thereof. Lender shall not be liable for any such entry upon the Mortgaged Property.

6.4. Permitted Uses. Borrower will use the Mortgaged Property solely for use as a gasoline service station and convenience store and for other uses reasonably ancillary to such uses (the "Permitted Uses").

7. COMPLIANCE WITH LAWS; STORAGE TANK MATTERS.

7.1. Compliance Required. Borrower shall promptly comply with all present and future Legal Requirements, ordinary or extraordinary, foreseen or unforeseen, and all provisions of all instruments of record affecting the Mortgaged Property. Borrower will not make any application to any federal, state or local Governmental Authority for a change in zoning affecting the Mortgaged Property, nor will Borrower consent to any such change, without the prior written consent of Lender. Borrower, if requested by Lender, will stripe the requisite number of parking spaces on the Mortgaged Property in compliance with all applicable parking requirements.

7.2. Storage Tank Matters. Borrower shall furnish to Lender, concurrent with the execution of this Mortgage, evidence satisfactory to the Lender that Borrower has registered the underground storage tanks on the Land with the Indiana Department of Environmental Management Underground Storage Tank Program (the "Program"). Thereafter, annually on January 15, Borrower shall (a) furnish to Lender evidence satisfactory to Lender that Borrower has paid all fees required for the underground storage tanks for the preceding calendar year; (b) represent and warrant that it is in compliance with the Program and its requirements and with all other rules and regulations imposed by any governmental agencies having jurisdiction over the sale of petroleum products or the use and operation of underground storage tanks; and (c) notify Lender if any tanks have been removed or replaced, and if any have been replaced, that the replacement has been registered. Borrower shall also furnish to Lender within twenty (20) days of Borrower's receipt thereof, (i) copies of any integrity assessments of the underground storage tanks on the Land; and (ii) copies of any incident reports or other evidence received by Borrower of any release from any underground storage tanks on the Land.

8. CHANGES AND ALTERATIONS BY BORROWER

8.1. Conditions to Permitted Changes. Borrower shall have the right from time to time to make changes and alterations in or to the Improvements, at Borrower's expense, subject, however, to the condition that no structural change or alteration, or change which would impair the value of the Mortgaged Property, and no other change or alteration involving an estimated cost of more than \$10,000 (or \$50,000 in the aggregate), shall be undertaken without the prior written consent of Lender.

9. MECHANICS' AND OTHER LIENS

9.1. Payment of Claims; Prohibition on Liens. Borrower will pay, from time to time when the same shall become due, all claims and demands of contractors, subcontractors,

architects, mechanics, materialmen, laborers, and others which, if unpaid, might result in, or permit the creation of, a Lien on any of the Mortgaged Property. Borrower will not create or permit to accrue or suffer to exist any Lien, except Permitted Encumbrances, upon any of the Mortgaged Property, including the Leases and Rents, and shall promptly cause any other Lien whatsoever to be paid and discharged. Borrower shall pay all Liens included in Permitted Encumbrances in accordance with their terms, when and as the same become due.

## 10. DAMAGE OR DESTRUCTION

- 10.1. Notice of Casualty; Covenant to Rebuild. If any Casualty shall occur, Borrower shall promptly give written notice thereof to Lender, describing the damage and the Casualty. Regardless of the damage resulting from any Casualty, and whether or not the Net Insurance Proceeds shall be sufficient or made available for the purpose, Borrower shall promptly commence the Restoration, and prosecute it with diligence and continuity to completion, if Lender makes available the Net Insurance Proceeds (if any) for Restoration. If (a) estimates received, and/or made, by Lender disclose that the cost of Restoration would be in excess of the amount of the Net Insurance Proceeds made available therefor, or (b) during the period of Restoration the amount of the Net Insurance Proceeds made available for the Restoration shall not be sufficient to complete such Restoration, then in either such event, Borrower shall deposit with Lender such cash or other security as shall be satisfactory to Lender with respect to the deficiency.
- 10.2. Application of Proceeds. All insurance proceeds shall be paid to Lender and applied by Lender first to payment of the actual costs, fees and expenses, if any, incurred by Lender in connection with proof of and adjustment of the loss and settlement with the insurance company. The Net Insurance Proceeds shall be applied by Lender: (a) to the payment of the Debt and/or performance of the Obligations; or (b) at Lender's option, to the payment of any of the cost of the Restoration.
- 10.3. Disbursement of Proceeds. If Net Insurance Proceeds are to be applied to the Restoration, Lender shall hold such Net Insurance Proceeds, together with any amounts and security deposited with Lender pursuant to §10.1 and §11.2 hereof, and advance the same for costs of the Restoration from time to time as the Restoration progresses. Such funds will be advanced upon written request of Borrower, and upon Borrower's compliance with such requirements as to the disbursement thereof as Lender shall impose, such requirements to be substantially similar to those imposed by responsible mortgagees or holders of deeds of trust in the State for advances of proceeds of commercial construction loans.
- 10.4. Amounts Deposited With Lender. Lender shall have, and Borrower hereby grants to and creates in favor of Lender, a first lien on and security interest in and right of set-off against any sums of money or other security deposited with Lender pursuant to §10.1 and

§11.2 and the proceeds thereof as security for the payment of the Debt and performance of the Obligations.

## 11. Condemnation

11.1. Notice of Condemnation; Participation. Borrower shall give Lender immediate notice of any actual or threatened Condemnation. In the event that any of the Mortgaged Property shall be taken in Condemnation proceedings, Lender may participate in such Condemnation proceedings. Borrower shall not adjust, contest, accept, reject or compromise any proposed Condemnation Award without approval of Lender. Lender may collect the Condemnation Award and endorse any drafts therefor. All Condemnation Awards shall be deposited with Lender. Borrower will execute any and all further documents that may be required in order to facilitate collection of any Condemnation Award and the payment of any Condemnation Award to Lender.

11.2. Condemnation. If a Condemnation shall occur, the Net Condemnation Award received by Lender shall, at the option of Lender, (i) be applied to the payment of the Debt and/or performance of the Obligations, or (ii) be held by Lender and applied and paid over toward the cost of Restoration, substantially in the same manner and subject to the same conditions as those provided in §10 hereof with respect to Net Insurance Proceeds and other monies. In the event that the costs of Restoration shall exceed the Net Condemnation Award received by Lender and made available for the Restoration, Borrower shall deposit with Lender such cash or other security as shall be satisfactory to Lender with respect to the deficiency.

11.3. Expenses of Collection. Lender shall be entitled as a first priority to reimbursement out of any Condemnation Award for all costs and fees of, expenses incurred by and reimbursements to Lender with respect to the determination and collection of any Condemnation Award.

11.4. Voluntary Condemnations. Neither Borrower nor any Person controlled by or under common control with Borrower will obtain or exercise any power of Condemnation or eminent domain with respect to any of the Mortgaged Property, directly or indirectly, or enter into any agreement with any Person or Governmental Authority with respect to the Condemnation of any of the Mortgaged Property, without the prior written consent of Lender.

## 12. EVENTS OF DEFAULT AND REMEDIES

12.1. Events of Default Defined. The occurrence of any of the following shall constitute an Event of Default under this Mortgage:



- 12.1.1. if default shall be made in the payment of any of the Debt, and such default shall continue beyond the applicable period of grace, if any, provided in the Loan Document requiring such payment; or
- 12.1.2. if an Event of Default as defined in any Loan Document other than this Mortgage shall occur, or if Borrower shall default in the performance of any covenant or obligation of Borrower under any such other Loan Document and such default shall continue beyond the applicable period of grace, if any, provided in such other Loan Document; or
- 12.1.3. if a default by the Borrower shall occur under any Lien not created by any of the Loan Documents, if the effect of such default is to cause, or (immediately or upon the giving of notice or passage of time, or both) to permit the holder or holders (or a trustee on behalf of such holder or holders) of the indebtedness secured by such Lien to cause, the indebtedness secured by such Lien to become due prior to its stated maturity or to cause any of the Mortgaged Property to be subject to sale to foreclose or enforce such Lien; or
- 12.1.4. if insurance on the Mortgaged Property is not provided or maintained, or evidence of coverage is not provided to Lender, as required by §5 hereof; or
- 12.1.5. except as expressly permitted by this Mortgage, if any Transfer prohibited by §16.1 hereof shall occur; or
- 12.1.6. if default shall be made by the Borrower in the performance of, or compliance with, any of the provisions of this Mortgage, a default in the performance of which is not (and with the giving of notice, the passage of time, or both, would not be) an Event of Default under any other subsection of this §12.1, and such default shall continue for a period of twenty (20) days after notice thereof from Lender; provided, however, that if such default is of such a nature that it can be cured by Borrower, but cannot be cured within twenty (20) days, Borrower shall have such additional time to cure such default as may be necessary (but in no event to exceed a total of 60 days, including such 20 day period), if Borrower commences to cure such default within said twenty (20) day period and thereafter pursues such cure with diligence and continuity to completion; or
- 12.1.7. the Borrower or any of the Guarantors shall become insolvent or unable to pay its debts as they mature, shall voluntarily suspend transaction of its business, shall commence a voluntary case under any applicable bankruptcy, insolvency or other similar law now or hereafter in effect, shall consent to the entry of an order for relief in an involuntary case under any such law, or shall consent to the appointment of or taking possession by a receiver, liquidator, assignee, trustee, custodian, sequestrator (or other similar official) of the Borrower or any of the Guarantors, or shall make a

general assignment for the benefit of creditors, or shall take any corporate action in furtherance of any of the foregoing; or

12.1.8. if a proceeding shall have been instituted in a court in respect to the Borrower or any of the Guarantors: (1) seeking a decree or order for relief in an involuntary case under any applicable bankruptcy, insolvency or other similar law now or hereafter in effect; or (2) seeking the appointment of a receiver, liquidator, trustee (or other similar official) for any of them or for any substantial part of their respective properties; (3) for the winding-up or liquidation of their respective affairs; and if any such proceeding shall remain undismissed or unstayed and in effect for a period of 30 days or such court shall enter a decree or order granting the relief sought in such proceeding; or

12.1.9. if Borrower's existence shall be terminated, or if any of the Guarantors shall die, become permanently disabled or go out of existence; or

12.1.10. if formal charges are filed, or any indictment is issued, by or on behalf of any Governmental Authority under any Forfeiture Law against Borrower, any Person owning directly or indirectly an ownership interest in Borrower, or any of the Guarantors, or if proceedings are instituted under any Forfeiture Law for the forfeiture of any of the Mortgaged Property; or

12.1.11. if any default shall occur under Section 18 of this Mortgage.

12.2. Remedies Upon an Event of Default.

12.2.1. Acceleration of Debt. If any Event of Default described in §12.1.7 or §12.1.8 hereof shall occur, then without notice or any other action by Lender, and if any other Event of Default shall occur, then at Lender's option, the entire unpaid Debt (principal, interest and otherwise), shall become immediately due and payable without notice or demand.

12.2.2. Other Remedies. Upon the occurrence of any Event of Default, Lender may immediately undertake any one or more of the following:

12.2.2.1. Foreclosure. Institute an action to foreclose this Mortgage, or take such other action as the law may allow, at law or in equity, for the enforcement thereof and realization on the Mortgaged Property, and proceed thereon to final judgment and judicial sale or execution thereon for the entire unpaid balance of the Debt, including interest at the rates and pursuant to the methods of calculation specified in the Note, together with all costs of suit, interest at the Default Rate on any judgment obtained by Lender from and after the date of any judicial sale of the Mortgaged Property until actual payment is made to

Lender of the full amount due Lender, and an attorneys' reasonable fee for collection, any usage or custom to the contrary notwithstanding.

12.2.2.2. Entry. Lender personally, or by its agents or attorneys, may enter into and upon any of the Mortgaged Property and may exclude Borrower and its agents wholly therefrom without liability for trespass, damages or otherwise and Borrower agrees to surrender possession to Lender on demand after the happening of any Event of Default. Upon such an entry, Lender may: (i) use, operate, manage and control the Mortgaged Property and conduct the business thereof, either personally or by its agents or receivers and exercise all rights and powers of Borrower with respect thereto either in the name of Borrower or otherwise as Lender shall deem best; (ii) restore the Mortgaged Property; (iii) complete the construction of any Improvements under construction or renovation and in the course of such completion may make such changes in the contemplated or completed Improvements as Lender may deem desirable and may insure the same; and (iv) do all such Maintenance as to Lender may seem advisable. Lender shall be entitled to collect and receive all Rents, and after deducting the expenses of conducting the business thereof and of all necessary maintenance and amounts necessary to pay for Impositions, premiums for insurance and other proper charges upon any of the Mortgaged Property, as well as just and reasonable compensation for the services of Lender and for all attorneys and agents properly engaged and employed by Lender, Lender shall apply the remaining Rents first, to the payment of the Debt and/or performance of the Obligations, and second, to the payment of any other sums required to be paid by Borrower under any of the Loan Documents. Lender shall be liable to account only for Rents actually received by Lender.

12.2.2.3. Receivership. Lender may have a receiver appointed to enter into possession of the Mortgaged Property, collect the Rents and apply the same as the court may direct. Lender shall be entitled to the appointment of a receiver without the necessity of proving either the inadequacy of the security or the insolvency of Borrower or any other Person who may be liable to pay any of the Debt and/or perform any of the Obligations and Borrower and each such Person shall be deemed to have waived such proof and to have consented to the appointment of such receiver. Should Lender or any receiver collect Rents, the moneys so collected shall not be substituted for payment of the Debt nor can they be used to cure the Event of Default, without the prior written consent of Lender. Borrower hereby expressly consents to the appointment of a receiver for the Mortgaged Property upon the occurrence of any Event of Default, and waives any requirement for the posting of any bond or other security in connection with such appointment and such receiver, and for any hearing in connection with such appointment.

12.2.2.4. Sale of Personal Property. Lender shall have such rights and remedies in respect of any of the Personal Property Security and Fixtures as are provided by the Code and such other rights and remedies in respect thereof which Lender may have at law or in equity or under any of the Loan Documents, including the right to take possession of the Personal Property and Fixtures wherever located and to sell all or any portion thereof at public or private sale, without prior notice to Borrower, except as otherwise required by law (and if notice is required by law, after 10 days' prior written notice), at such place or places and at such time or times and in such manner and upon such terms, whether for cash or on credit, as Lender in its sole discretion may determine. Lender shall apply the proceeds of any such sale first to the payment of the reasonable costs and expenses incurred by Lender in connection with such sale or collection, including reasonable attorney's fees and legal expenses, and second to the payment of the Debt and performance of the Obligations, and then to pay the balance, if any, as required by law. Upon the occurrence of any Event of Default Borrower, upon demand by Lender, shall promptly assemble any personal property and Fixtures included in the Mortgaged Property and make it available to Lender at a place to be designated by Lender which shall be reasonably convenient to Lender and Borrower. Both Borrower and Lender shall be eligible to purchase any part or all of such property at any such disposition.

12.3. Provisions re: Foreclosure Sale. Except to the extent prohibited by applicable law:

12.3.1. If Lender should become the purchaser at any foreclosure sale, it shall be entitled to credit any of the unpaid balance of the Debt against the amount of the purchase price. The purchaser at any foreclosure sale hereunder may disaffirm any easement granted or Lease made in violation of any provision of this Mortgage, and may take immediate possession of the Mortgaged Property free from, and despite the terms of, such grant of easement or Lease. Borrower hereby expressly waives any right which Borrower may have to direct the order in which any of the Mortgaged Property shall be sold in the event of any sale or sales pursuant hereto.

12.3.2. In the event of a sale or other disposition of any of the Mortgaged Property, and the execution of a deed or other conveyance pursuant thereto, the recitals in such deed or conveyance of facts, such as default, the giving of notice of default and notice of sale, terms of sale, purchaser, payment of purchase money, and any other fact affecting the regularity or validity of such sale or disposition shall be conclusive proof of the truth of such facts; and any such deed or conveyance shall be conclusive against all persons as to such facts recited therein. In case of any sale in foreclosure of this Mortgage, the Mortgaged Property may be sold in one parcel and as an entirety or in such parcels, manner or order as Lender in its sole discretion may elect.

12.3.3. Lender, at its option, may set aside any declared acceleration of maturity of the Note, whereupon the terms and provisions therein stated and the covenants, terms and conditions in this Mortgage shall revive and continue with the same force and effect as if such acceleration had not occurred.

12.3.4. Upon the occurrence of an Event of Default hereunder, Lender in pursuance of the foregoing remedies, or in addition thereto, shall be entitled to resort to its several securities for the payment of the sums secured hereby in such order and manner as Lender may think fit without impairing Lender's lien in, or rights to, any of such securities and without affecting the liability of any Person for the Debt.

#### 12.4. Waivers and Releases.

12.4.1. Consent to Jurisdiction, Venue, etc. Borrower hereby consents to the jurisdiction of the courts of the State in and for the county in the State in which the Land is situate (the "County") with respect to any action, suit or other legal proceeding commenced by Lender pursuant to any of the Loan Documents, and hereby waives any right to transfer any such action to any other court.

12.4.2. Waiver of Redemption. Borrower hereby wholly waives the period of redemption and any right of redemption of any of the Mortgaged Property after sale under this Mortgage, or sale upon foreclosure of this Mortgage, as provided under any law of the State now or hereafter in effect. If title to any of the Mortgaged Property shall become vested in any Person who shall not waive (or who shall not be legally capable of waiving) the right of redemption in the event of foreclosure of (or sale under) this Mortgage, then such transfer of title shall constitute an Event of Default.

12.4.3. Waiver of Marshalling, etc. Borrower, for itself and its successors in title, hereby waives all rights at law or in equity to have the Mortgaged Property marshaled in the event of the foreclosure of this Mortgage. Borrower will not at any time insist upon, plead, or in any manner whatsoever claim or take any benefit or advantage of any present or future laws pertaining to the administration of the estates of decedents, exempting any of the Mortgaged Property from attachment, levy or sale under execution, or providing for any stay of execution, exemption from civil process, or extension of time for payment, or providing for the valuation or appraisal of any of the Mortgaged Property prior to any sale or sales thereof which may be made pursuant to any provision herein, or pursuant to the decree, judgment or order of any court. Borrower hereby covenants not to hinder, delay or impede the execution of any power herein granted or delegated to Lender, but to suffer and permit the execution of every power as though no such law or laws had been made or enacted.

12.4.4. Waiver of Notices. Borrower hereby waives all notices not herein elsewhere specifically required, of Borrower's default or of Lender's exercise, or election to exercise, any option or election under this Mortgage.

12.4.5. Waiver of Personal Service. Borrower hereby waives personal service of process in any action or proceeding at any time commenced to enforce this Mortgage, or any of the Loan Documents, and agrees that such process shall be deemed properly and adequately served if sent to Borrower at the address provided in or pursuant to §12.6 hereof for the giving of notices to Borrower, by certified or registered mail, return receipt requested, in the manner provided in §12.6 hereof for the giving of notices to Borrower.

12.5. Foreclosure Subject to Leases. In the event that Lender shall have the right to foreclose this Mortgage, Borrower authorizes Lender at its option to foreclose subject to the rights of any tenants, and the failure to make any such tenants parties to any such foreclosure proceeding and to foreclose their rights will not be asserted by Borrower as a defense to any proceeding instituted by Lender to collect any of the Debt or any deficiency after foreclosure.

12.6. Notices. All notices, demands, requests and consents required under this Mortgage, unless telephonic notice is expressly provided for, shall be in writing, and shall be deemed properly given: (a) if delivered personally; (b) if sent by United States certified or registered mail with return receipt requested; (c) if sent by Federal Express or other nationally recognized overnight delivery service; or (d) if sent by facsimile transmission, confirmed by certified or registered mail with return receipt requested; in each such case (except for personal delivery), with postage or charges prepaid or billed to sender, and addressed if to Borrower at Borrower's address set forth above, and if to the Lender, at Lender's address set forth above, or at such other address or addresses as any party to this Mortgage may hereafter designate for itself by written notice to each other party to this Mortgage. Notices, demands and requests hereunder shall be deemed sufficiently served or given for all purposes hereunder on the earlier of the date of actual receipt, or: (a) if served by certified or registered mail, three (3) days after the time such notice, demand or request shall be deposited for mailing in any Post Office or Branch Post Office regularly maintained by the United States Postal Service; (b) if sent by overnight delivery service, on the day following delivery thereof to such overnight delivery service; or (c) if sent by facsimile transmission, with confirmation by certified or registered mail, on the date such facsimile transmission is sent if electronic confirmation of receipt is received by the sender.

### 13. CERTAIN SECURITY AGREEMENT PROVISIONS

13.1. Status of Borrower. Borrower's exact legal name is correctly set forth at the end of this Mortgage. Borrower is an organization of the type specified in the first paragraph of this Mortgage. Borrower is incorporated in or organized under the laws of the state specified in the first paragraph of this Mortgage. Borrower will not cause or permit any change to be made in its name, identity or corporate, limited liability company or partnership structure unless the Borrower shall have first notified the Lender in writing of such

change at least 30 days prior to the effective date of such change, and shall have first taken all action required by the Lender for the purpose of perfecting or protecting the lien and security interest of the Lender. Borrower's principal place of business and chief executive office, and the place where Borrower keeps its books and records, including recorded data of any kind or nature, regardless of the medium or recording, including software, writings, plans, specifications and schematics, has been for the preceding four months (or, if less, the entire period of the existence of the Borrower) and will continue to be the address of the Borrower set forth at the end of the Mortgage (unless Borrower notifies the Lender in writing at least 30 days prior to the date of such change). Borrower's organizational identification number, if any, assigned by the state of incorporation or organization is correctly set forth on the first page of this Mortgage. Borrower shall promptly notify the Lender of any change in its organizational identification number. If Borrower does not now have an organizational identification number and later obtains one, the Borrower promptly shall notify the Lender of such organizational identification number.

13.2. Authorization to File Financing Statements; Power of Attorney. Borrower hereby authorizes the Lender at any time and from time to time to file any initial financing statements, amendments thereto and continuation statements with or without the signature of the Borrower as authorized by applicable law, as applicable to all or part of the Mortgaged Property. For purposes of such filings, the Borrower agrees to furnish any information requested by the Lender promptly upon request by the Lender. Borrower also ratifies its authorization for the Lender to have filed any like initial financing statements, amendments thereto and continuation statements, if filed prior to the date of this security instrument. Borrower hereby irrevocably constitutes and appoints the Lender and any officer or agent of the Lender, with full power of substitution, as its true and lawful attorneys-in-fact with full irrevocable power and authority in the place and stead of the Borrower or in the Borrower's own name to execute in the Borrower's name any documents and otherwise to carry out the purposes of this Section 13.2, to the extent that the Borrower's authorization above is not sufficient. To the extent not prohibited by law, Borrower hereby ratifies all acts said attorneys-in-fact have lawfully done in the past or shall lawfully do or cause to be done in the future by virtue hereof. This power of attorney is coupled with an interest and shall be irrevocable.

#### 14. NON WAIVER, ETC.

14.1. Waiver Not Affecting Mortgage. No failure by Lender to insist upon the strict performance by Borrower of any of the provisions hereof shall be deemed to be a waiver of any of the provisions hereof, and Lender, notwithstanding any such failure, shall have the right thereafter to insist upon the strict performance by Borrower of all of the provisions of this Mortgage. Neither Borrower nor any other Person liable for the payment of any of the Debt or the performance of any of the Obligations, nor any Person giving security for any of the Debt or for the performance of any of the Obligations, shall be relieved of any of such respective obligations, nor shall any security given by any of

them be released, nor the position of any subordinate lienholder be improved, by reason of: (a) any failure by Lender to comply with any request by Borrower or of any other Person so obligated to foreclose or otherwise enforce this Mortgage; (b) the release, regardless of consideration, of any of the security held for payment of any of the Debt and/or the performance of any of the Obligations; (c) any agreement or stipulation between any subsequent owner or owners of the Mortgaged Property and Lender extending the time of payment or modifying the terms of the Note or any of the Loan Documents; (d) any grant of forbearance or extension of time for the payment of any of the Debt or the performance of the Obligations; (e) Lender's acceptance of any other or additional security for the payment of any of the Debt or the performance of any of the Obligations; (f) Lender's waiver of or failure to exercise any right granted herein or in any of the Loan Documents; (g) any changes hereafter made in any of the terms, covenants, conditions or agreements of this Mortgage or in any other Loan Document; (h) Lender's giving of consent to the filing of any map, plat, replat or condominium declaration affecting any of the Mortgaged Property; (i) Lender's giving of consent to the granting of any easement or other right affecting the Mortgaged Property; or (j) Lender's making or consenting to any agreement subordinating the lien hereof.

14.2. Right to Cure Defaults. If Borrower shall fail to fully and timely perform any of the Obligations, Lender shall be under no obligation to take action to correct such failures. However, at its option, Lender may take such action and expend such sums as Lender deems necessary to correct such failures and/or any consequences thereof. Such action or payment by Lender shall not constitute a waiver by Lender of the performance of said act, and Lender may treat Borrower's failure to perform such act as a default (and, upon expiration of any applicable grace period, an Event of Default) notwithstanding Lender's having undertaken (or completed) the performance of the act. Borrower will repay to Lender upon demand any amounts expended by Lender to correct each such failure and/or any consequences thereof, and all expenses of Lender in taking such action, with interest at the Default Rate from the incurring of such expense or the making of such payment, as the case may be. The payment of such amounts to Lender shall be secured by this Mortgage.

## 15. GENERAL COVENANTS

15.1. Estoppel Certificate. Borrower, within three days upon request in person or within ten (10) days upon request by mail, will furnish a duly acknowledged written statement in form satisfactory to Lender setting forth the amount of the Debt then secured by this Mortgage, and stating either that no offsets or defenses exist against the Debt, or if such offsets or defenses are alleged to exist, the nature and extent thereof, and containing such other matters as Lender shall reasonably request.

15.2. Lender Expenses. Borrower shall promptly pay upon request all expenses and costs incurred by Lender, including reasonable attorney's fees, together with interest thereon at the Default Rate from the date of the payment thereof by Lender in connection with:



- 15.2.1. any action, proceeding, litigation or claim instituted or asserted by or against Lender or in which Lender becomes engaged, wherein it becomes necessary in the opinion of Lender to protect Lender's interests in the Mortgaged Property or the security afforded hereby or by any of the Loan Documents, or to defend or uphold the Lien of this Mortgage, or the validity or effectiveness of any assignment of any claim, award, payment, insurance policy or any other right or property conveyed, encumbered or assigned by Borrower to Lender under any of the Loan Documents, or the priority of any of the same;
- 15.2.2. any further assurances requested by Lender under §3.7, or any other provision hereof, including all filing and recording costs and costs of searches;
- 15.2.3. the negotiation, preparation, execution and delivery of the Loan Documents, and any amendments and supplements thereto at any time entered into;
- 15.2.4. all taxes, fees and other assessments, including stamp taxes, if any, upon any documents or transactions contemplated hereby or in connection with the recording and filing of any Loan Document;
- 15.2.5. the collection and/or enforcement of any of the Debt and/or Obligations, including realization upon any of the Mortgaged Property or other security for any of the Debt or Obligations; and
- 15.2.6. the collection and application of any insurance proceeds and Condemnation Awards.

All such expenses and costs, with interest thereon at the Default Rate as provided above, shall be added to and become part of the Debt and be secured by this Mortgage; provided, however, that in any action to foreclose this Mortgage or to recover or collect the sums due hereunder, the provisions of law and of this Mortgage relative to the recovery of costs, disbursements, commissions, allowances and attorneys' fees, shall prevail over any conflicting requirements of this §15.2. The provisions of this §15.2 shall survive payment of the Debt and performance of the Obligations and any release of, or reconveyance under, this Mortgage.

15.3. Taxation of Mortgage. In the event of the passage after the date of this Mortgage of any law deducting from the value of the Mortgaged Property for the purpose of taxation any Lien thereon, or changing in any way the laws now in force for the taxation of mortgages or deeds of trust or debts secured thereby so as to adversely affect the interest of Lender, then Borrower shall bear and pay the full amount of such taxes, provided that if payment by Borrower of any such new or additional taxes would be unlawful or would render the Debt wholly or partially usurious, Lender may, at Lender's option, declare the whole sum secured by this Mortgage, with interest thereon, to be due and payable on a date to be

specified in a written notice to Borrower, which shall be not less than 60 days after the date such notice is given.

15.4. Amendments. No provision of this Mortgage shall be changed, altered, modified or released, except by an agreement in writing, signed by Borrower and Lender. No compliance with or failure to comply with any provision of this Mortgage shall be waived or excused except by a written instrument executed by Lender.

15.5. Usury Savings Provision. It is the intention of the parties to conform strictly to the Usury Laws. All agreements contained in the Loan Documents are expressly limited so that in no contingency or event whatsoever, whether by reason of the making of advances on account of the Loan, or under any of the Loan Documents, or acceleration of maturity of the unpaid principal balance of the Loan or otherwise, shall the amount paid or agreed to be paid by or on behalf of Borrower to Lender for the use, forbearance or detention of money exceed the highest lawful rate permissible under any applicable Usury Law. If, from any circumstances whatsoever, compliance with any of the Loan Documents, at the time performance thereunder shall be due, shall involve transcending the limit of validity under any Usury Law then, ipso facto, the obligations to be fulfilled shall be reduced to the limit of such validity. If Lender shall ever receive as interest an amount which would exceed the highest lawful rate, such amount which would be excessive interest shall be applied to the reduction of the unpaid principal balance due under the Note and not to the payment of interest. This provision shall control every other provision of all agreements between Borrower and Lender; provided, however, that there shall be no automatic reduction of such payments or obligations as to any party barred by law from availing itself in any action or proceeding of the defense of usury, or any party barred or exempted from the operation of any Usury Law, or in the event and to the extent the Loan, because of its amount or purpose or for any other reason, is exempt from the operation of the Usury Law. All sums paid or agreed to be paid to Lender for the use, forbearance or detention of any of the Debt or for the Obligations outstanding from time to time shall, to the extent permitted by applicable law, and to the extent necessary to preclude exceeding the limit of validity prescribed by law, be amortized, prorated, allocated and spread from the earliest date of disbursement of any of the proceeds of the Note until payment in full of the principal balance of the Debt and the Obligations so that the actual rate of interest on account of such Debt and Obligations is uniform throughout such term.

15.6. Accounting; Financial Statements.

15.6.1. Books and Records. Borrower will keep adequate records and books of account in accordance with generally accepted accounting principles (or other accounting principles acceptable to Lender and consistently applied) and will permit Lender, by its agents, accountants and attorneys, to visit and inspect the Mortgaged Property and examine and make copies or extracts from Borrower's records and books of

account and to discuss Borrower's affairs, finances and accounts with Borrower, its officers, partners, agents and employees.

15.6.2. Financial Statements. Borrower will deliver to Lender: with reasonable promptness (and in any event within 90 days) after the close of each of its fiscal years, a balance sheet and income statement or statement of profit and loss, setting forth in each case, in comparative form, figures for the preceding year which, for each year after 2003, shall be prepared in accordance with GAAP and accompanied by an unqualified audit report of an independent certified public accountant. Borrower shall deliver to Lender within 45 days after the end of each quarter of each of Borrower's fiscal years, a balance sheet and statement of profit and loss of Borrower with respect to the preceding fiscal quarter, certified by a manager if Borrower is a limited liability company, or, if Borrower is a corporation, the principal financial officer of the Borrower, or if Borrower is a partnership (general or limited), a general partner, prepared in accordance with GAAP except to the extent that GAAP may require the inclusion of footnotes. Each of the Guarantors will deliver to Lender by April 1 of each year a balance sheet and income statement for such Guarantor, prepared in accordance with accounting principles acceptable to Lender. Each financial statement of a Guarantor shall be certified as true, complete and accurate by the Guarantor whose statement it is.

15.6.3. Operating Statements. Borrower shall furnish to Lender monthly, or at such longer intervals as Lender may request, an operating statement for the Mortgaged Property, showing such information concerning the income and expenses of the operation of the Mortgaged Property and such other information as Lender may reasonably request.

15.6.4. Other Information. Throughout the term of this Mortgage, Borrower and the Guarantors, with reasonable promptness, will deliver such other information with respect to Borrower, the Mortgaged Property and the Guarantors as Lender may request from time to time.

15.7. Subrogation. Lender shall be subrogated, notwithstanding their release of record, to any Liens, superior titles, rights, equities and charges of all kinds heretofore or hereafter existing on the Mortgaged Property to the extent that the same are paid or discharged from the proceeds of the Loan or are otherwise paid by Lender.

15.8. Lost Note. If the Note shall be mutilated, destroyed, lost or stolen, Borrower will deliver to Lender in substitution therefor a new promissory note containing the same terms and conditions as the Note with a notation thereon of the unpaid principal and accrued but unpaid interest. Borrower shall be furnished with reasonably satisfactory evidence of the mutilation, destruction, loss or theft of the Note.

15.9. Application of Moneys. Whenever in this Mortgage Lender is to apply, or shall elect to apply, any sum of money to payment of any of the Debt, or to performance of any of the Obligations, Lender may so apply such sums to principal, interest, costs and expenses, or otherwise, all in such order of priority as Lender may elect, unless a different order of priority is required by applicable law.

15.10. Lender Not Liable; Indemnity. Lender shall not be responsible or liable in any way for any condition in or upon any of the Mortgaged Property (whether or not discovered by Lender), including any condition relating to the presence on the Mortgaged Property of any Hazardous Substance, or any defects in any of the Mortgaged Property or any personal injury, death, damage to property, loss, cost, liability, damage or expense in any way arising out of or connected with the condition or maintenance of any of the Mortgaged Property or any construction or other work thereon, or Borrower's use and occupancy of the Mortgaged Property. Borrower will indemnify, defend and hold Lender harmless from and against all such liability and responsibility. The provisions of this §15.10 shall survive the payment of the Debt, performance of the Obligations, release of this Mortgage and the reconveyance of the Mortgaged Property.

15.11. Lease Priority. This Mortgage shall not be subordinate to any Lease. Each Lease hereafter made shall: (a) require the tenant to enter into an agreement with Lender, if Lender so requests, which will provide that, in the event of the sale of any of the Mortgaged Property under the power of sale herein contained, or under any judicial foreclosure hereof, or of a deed in lieu of foreclosure, such tenant will, upon the written request of any Person succeeding to the interest of Borrower as the result of said sale or deed, automatically become the tenant of any such successor in interest, without any change in the terms or other provisions of the Lease, and that said successor in interest shall not be bound by (i) any payment of rent for more than one (1) month in advance, (ii) any provision requiring the return of any security deposit or prepayment in the nature of security for the performance by said Tenant of its obligations under said Lease, or any provision entitling the Tenant to credit any such amounts to its obligations under its Lease, or (iii) any amendment or modification in the Lease made without the consent of Lender or any such successor in interest; and (b) require the tenant, upon Lender's request, to enter into an agreement in recordable form with Lender to provide, at the option of Lender, that this Mortgage shall become subject and subordinate, in whole or in part (but not with respect to priority of entitlement to any Condemnation Awards or insurance proceeds), to such tenant's Lease. Borrower shall join in any of such agreements if Lender so requests. On request of Lender, Borrower shall obtain from the tenants and furnish to Lender the agreements required by this §15.11, all of which agreements shall be in form and substance satisfactory to Lender.

## 16. TRANSFER OF MORTGAGED PROPERTY

16.1. Restrictions Upon Transfer. Lender has made the Loan in reliance in part upon the management and development skills of Borrower. Accordingly, without the prior written

approval of Lender, Borrower, except as may be permitted by §16.2 hereof, shall not: (a) allow a Transfer of any of Borrower's interest in the Mortgaged Property to occur, or (b) permit any Transfer of any ownership interest (whether stock, partnership interest, or otherwise) in Borrower; or (c) permit or suffer to occur any Transfer of any ownership interest (direct or indirect) in any non-publicly traded Person which is a shareholder, partner, member or other owner of an interest in Borrower; and any such prohibited act shall be an Event of Default.

16.2. Permitted Transfers. Lender shall have the right to condition its consent to any Transfer prohibited by §16.1 hereof upon the payment of a fee or charge and/or upon an increase in the rate of interest and/or changes in the other provisions of any of the Loan Documents. References in this Mortgage to proceeds of any of the Mortgaged Property are not intended as a consent to, and do not authorize, any Transfer of any of the Mortgaged Property.

## 17. FUTURE ADVANCES

17.1. Future Advances. In addition to the indebtedness evidenced by the Note and all other Debt, this Mortgage, to the fullest extent permitted by the law of the State, shall secure also and constitute a Lien on the Mortgaged Property for all future advances made by Lender to Borrower and future obligations incurred by Borrower to Lender in connection with the Mortgaged Property to the same extent as if such future advances were made or such future obligations incurred on the date of the execution of this Mortgage.

## 18. ENVIRONMENTAL MATTERS

18.1. Environmental Covenants. Borrower hereby covenants and agrees with Lender as follows:

18.1.1. At all times until this Mortgage has been satisfied of record, the Mortgaged Property and the use and operation of the Mortgaged Property shall comply with all Environmental Requirements, all governmental permits, approvals and licenses required with respect to the Mortgaged Property by any Environmental Requirements shall be and remain in effect, and Borrower shall comply therewith. Any Hazardous Substance at any time present, handled or generated on the Mortgaged Property will be disposed of in strict compliance with all Environmental Requirements. Without limiting the foregoing, Borrower shall not allow or permit any Hazardous Substance to exist or be stored, located, discharged, manufactured, possessed, managed, processed or otherwise handled on the Mortgaged Property at any time, except in strict compliance with all applicable Environmental Requirements.

18.1.2. There are no underground storage tanks or above-ground storage tanks on the Mortgaged Property, except as previously disclosed to Lender in writing, and

Borrower will not place or allow any underground storage tanks or above-ground storage tanks to be placed on the Mortgaged Property while this Mortgage remains in effect, except to replace underground storage tanks existing on the date of this Mortgage.

18.1.3. Borrower shall immediately notify Lender should Borrower become aware of any Hazardous Substance on, in, or under the Mortgaged Property, and any other environmental problem or liability with respect to the Mortgaged Property. Borrower shall immediately notify Lender and provide copies upon receipt of all written complaints, claims, citations, demands, inquiries, reports or notices relating to the condition of the Mortgaged Property or its compliance with Environmental Requirements. Borrower shall promptly cure and have dismissed with prejudice any such actions and proceedings to the satisfaction of Lender. Borrower shall keep the Mortgaged Property free of any lien imposed pursuant to any Environmental Requirements.

18.1.4. Borrower shall not do or take any action or omit or fail to take any action which will result in the unauthorized release of any Hazardous Substance or the existence of any environmental contamination in, on, under or with respect to, any of the Mortgaged Property.

18.1.5. Failure of Borrower to comply with any Environmental Requirements and governmental safety requirements shall be a default under this Mortgage and Lender, in addition to all the other rights and remedies available to Lender, shall have the option to require specific performance of Borrower's obligations hereunder.

18.1.6. In the event that there shall be filed a lien against the Mortgaged Property by any Governmental Authority, arising from an intentional or unintentional action or omission of Borrower and resulting in the releasing, spilling, pumping, pouring, emitting, emptying or dumping of any Hazardous Substance, then Borrower shall, within thirty (30) days after the date that Borrower is given notice that the lien has been placed against the Mortgaged Property or within such shorter period of time in the event that the holder of such lien has commenced steps to cause the Mortgaged Property to be sold pursuant to the lien, either (A) pay the claim and remove the lien from the Mortgaged Property, or (B) furnish a cash deposit or a bond satisfactory to Lender in the amount of the claim out of which the lien arises, or other security reasonably satisfactory to Lender in an amount sufficient to discharge the claim out of which the lien arises. Notwithstanding any other provision of this Mortgage, any default by Borrower under this §18.1.6 which continues beyond the end of said thirty (30) day period, time being of the essence, shall be an Event of Default under this Mortgage.

18.1.7. If any Governmental Authority serves upon Borrower a directive to remove or arrange for the removal or discharge of any Hazardous Substance in, under or on the

Mortgaged Property, Borrower agrees that the repayment of the Loan may, at Lender's election, be accelerated unless Borrower shall have complied with such directive within sixty (60) days from its date, time being of the essence, to the satisfaction of the Governmental Authority involved.

18.1.8. Promptly following completion of any actions imposed upon any Borrower under any Environmental Requirements, Borrower shall obtain and deliver to Lender certifications of environmental consultants acceptable to Lender, in form and substance satisfactory to Lender, stating that all action required by any Environmental Requirement has been taken, and that upon completion of such action, the Mortgaged Property, to the knowledge of such professional, is then in compliance with the applicable Environmental Requirements.

18.1.9. Borrower shall promptly after obtaining knowledge thereof advise Lender in writing of (i) any governmental or regulatory actions instituted or threatened in writing under any Environmental Requirements affecting the Mortgaged Property or any Indemnity hereunder including, without limitation, any notice of inspection, abatement or noncompliance, (ii) all claims made or threatened in writing by any third party against Borrower or the Mortgaged Property relating to any Hazardous Substance or to any alleged violation of an Environmental Requirement, and (iii) Borrower's discovery of any occurrence or condition on the Mortgaged Property or any real property adjoining or in the vicinity of the Mortgaged Property which could subject Borrower or the Mortgaged Property to a claim under any Environmental Requirement or to any restrictions on ownership, occupancy, transferability or use of the Mortgaged Property under any Environmental Requirement. Borrower shall deliver to Lender all such documentation and records relating to any matter, notice of which is required by this §18.1, as Lender may reasonably request.

18.2. Indemnities. Borrower shall indemnify, defend, and hold the Lender and each Indemnified Party harmless from and against any and all Environmental Claims that are asserted at any time against the Lender, any Indemnified Party, the Borrower or any of the Mortgaged Property, and any and all losses, liabilities, damages, expenses (including reasonable attorneys' fees and disbursements), that Lender or any Indemnified Party suffers or incurs as a result of any such Environmental Claim or the assertion of any such Environmental Claim (whether such Environmental Claim is meritorious or not). The provisions of this §18.2 shall survive the payment of the Debt, the performance of the Obligations and the release and satisfaction of this Mortgage.

18.3. No CERCLA Claim Against Lender. Borrower hereby waives, releases and agrees not to make any claim or bring any cost recovery action against Lender under the Comprehensive Environmental Response Compensation and Liability Act of 1980 (42 U.S.C. Section 9601 et seq.), as now and hereafter amended ("CERCLA") or any state equivalent, or any similar law now existing or hereafter enacted, nor for contribution or indemnity from Lender.

18.4. No Control of Borrower by Lender. Borrower hereby acknowledges and agrees that Lender has not participated, and shall not participate, in the management of Borrower and that any indicia of ownership which Lender may have in and to the Mortgaged Property by virtue of this Mortgage and the other Loan Documents (and the rights granted to Lender therein) is primarily to protect Lender's security interest and lien in and to the Mortgaged Property.

18.5. Right to Inspect, etc. Lender, in person or by agent, shall have the right, but not the obligation, at any time and from time to time to enter upon the Mortgaged Property, take samples, review Borrower's books and records, interview Borrower's employees and officers, and conduct similar activities to ascertain the status of Borrower's compliance with this §18. Borrower shall cooperate in the conduct of such an audit. Such entry may be made at any time or times upon not less than 24 hours notice to Borrower (which may be oral notice). In addition, Lender may have tests (which may include drilling and sampling, among other things) and audits of the Mortgaged Property done for the purpose of testing for evidence of noncompliance. If at the time such tests or audits are done, Borrower is in default under any provision of this Mortgage, or an Event of Default exists, or if such tests or audits done at any time show that Borrower is not in compliance with this §18, then all of Lender's costs, fees and expenses incurred in connection with such tests and audits shall be paid for by the Borrower.

19. CONSTRUCTION AND INTERPRETATION; DEFINITIONS

19.1. Governing Law. This Mortgage shall be construed and enforced in accordance with the internal laws (without regard to the conflict of laws rules) of the State of Indiana (the "State"). Notwithstanding anything to the contrary contained in this Mortgage or in any other document described herein, Borrower expressly consents to jurisdiction in the courts and laws of the State of Indiana, and consents to the applicability of the laws of the State of Indiana, with respect to any action for a deficiency judgment, whether before or after any foreclosure.

19.2. Successors and Assigns. All of the grants, obligations, covenants, agreements, terms, provisions and conditions herein shall run with the Land, and shall apply to, bind and inure to the benefit of, the successors of Borrower and any subsequent owner of the Land or the Improvements, and the successors of Lender and any subsequent holder of the Note.

19.3. Provisions Severable. If any term or provision of this Mortgage or the application thereof to any person or circumstances shall, to any extent, be invalid or unenforceable, the remainder of this Mortgage, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term and provision of this Mortgage shall be valid and be enforced to the fullest extent permitted by law.



19.4. Multiple Counterparts. This Mortgage may be executed in any number of counterparts, and by the parties hereto on different counterparts. Each such counterpart shall for all purposes be deemed to be an original and all such counterparts shall together constitute but one and the same Mortgage. Executed signature pages to any counterpart instrument may be detached and affixed to a single counterpart, which single counterpart with multiple executed signature pages affixed thereto constitutes the original counterpart instrument. All of these counterpart pages shall be read as though one and they shall have the same force and effect as if all of the parties had executed a single signature page.

19.5. Other Interpretive Provisions. As used herein, the following words and phrases shall have the following meanings: (i) "including" shall mean "including but not limited to"; (ii) "provisions" shall mean "provisions, terms, covenants and/or conditions"; (iii) "any of" shall mean all or any part of or interest in that with respect to which such phrase is used.

19.6. Miscellaneous Provisions. Whenever used herein, the singular number shall include the plural, the plural shall include the singular, and the use of any gender shall be applicable to all genders. If any provision of this Mortgage shall conflict with any provision of any other Loan Document, the provision of the document which shall enlarge the interest of the Lender in the Mortgaged Property, afford the Lender greater financial security in the Mortgaged Property and/or assure payment of the Debt and performance of the Obligations in full, shall control. Except as otherwise expressly stated herein, with respect to any matters which, under this Mortgage, Lender shall have the right to approve, consent to, be satisfied with, exercise its judgment with regard to or calculate, the decisions of Lender with respect to such matters shall be made in the sole discretion of Lender, may be given or withheld without regard to reasonableness, and shall be final and conclusive. The headings and captions in this Mortgage are for convenience only, and are not to be construed as defining or limiting in any way the scope or intent of the provisions of this Mortgage. The granting of consent by Lender to any matter as to which such consent is required by the provisions hereof shall not be deemed a waiver of the right to require consent to future or successive matters. If any of the Mortgaged Property could, under applicable law, be treated either as personal property or as a part of the real estate, or if it is unclear whether such property is real property or personal property, it is the intention of Borrower and Lender that such property be treated for all purposes hereunder as real estate. Each of the parties have participated in the negotiation and preparation of this Mortgage, with the advice of counsel, and this Mortgage shall not be construed against any party by reason of that party having prepared the initial draft, or subsequent versions, of this Mortgage.

19.7. Definitions. As used herein, each of the following terms shall have the meaning indicated below, unless the context clearly requires otherwise:

"Accounts" shall mean all "Accounts", as defined in the Code, now owned or hereafter acquired by Borrower.

"Casualty" shall mean any damage, destruction, or loss to or of any of the Mortgaged Property resulting from fire, any peril insured against, or any other cause except a Condemnation.

"CGL Policy" shall mean a Commercial General Liability insurance policy meeting the requirements of Section §5.1.7 hereof.

"Chattel Paper" shall mean shall mean all "Chattel Paper", as defined in the Code, now owned or hereafter acquired by Borrower.

"Collateral" shall mean collectively the Accounts, Chattel Paper, Documents, Equipment, General Intangibles, Goods, Instruments, Intellectual Property, Inventory, Personal Property, Records, and all other assets, tangible or intangible, now owned or hereafter acquired by Borrower, and the Proceeds of each thereof.

"Condemnation" shall mean any condemnation or taking of any of the Mortgaged Property or the use thereof by any Governmental Authority or other Person pursuant to the power of eminent domain or condemnation, and any conveyance of any of the Mortgaged Property in lieu of condemnation.

"Condemnation Award" shall mean any and all awards, damages and other sums of money at any time owed or becoming payable, or paid, with respect to any Condemnation, including any payments for any conveyance in lieu of Condemnation, and awards for changes of grade of any streets.

"Debt" shall mean (i) all indebtedness of Borrower evidenced by the Note, including principal, interest, additional interest if any, late charges, and interest after default, (ii) any and all extensions, renewals, refinancings or refundings of any of such indebtedness in whole or in part, whether or not now provided for in the Loan Documents, (iii) all costs and expenses incurred by Lender in the collection of any of such indebtedness, including attorneys' fees and legal expenses, (iv) all future advances made by Lender for the protection or preservation of any of the Mortgaged Property, and (v) all other amounts coming due to Lender under any provision of any of the Loan Documents.

"Default Rate" shall mean the "Default Rate" as defined in the Note.

"Documents" shall mean shall mean all "Documents", as defined in the Code, now owned or hereafter acquired by Borrower.

"Environmental Claim" or "Environmental Claims" shall mean any and all claims, demands, actions or causes of action that are asserted at any time against Lender or any Indemnified Party which directly or indirectly relate to or arise from any Environmental Activity which occurs

during the Indemnity Period.

"Environmental Activity" (whether one or more), shall mean any one or more of the following: (1) any present or future storage, holding, existence, release, emission, discharge, generation, abatement, disposition, handling or transportation of any Hazardous Substance from, on, under or otherwise relating to the Mortgaged Property or any Migration Tract, or the use, operation or occupancy thereof, or any threat of any such activity, including but not limited to any failure of all "hazardous waste" (as defined in RCRA) generated or removed from the Mortgaged Property to be removed and disposed of at sites and transported by carriers which maintain valid permits under RCRA and any other applicable Environmental Requirements; (2) any failure of any Person, including without limitation the Borrower, to comply with any of the Environmental Requirements relating to the Mortgaged Property or the ownership, use, operation or occupancy thereof, or any Migration Tract, including but not limited to any failure by any Person to properly obtain or file any notices, permits, licenses or similar authorizations, if any, required under any Environmental Requirements in connection with the Mortgaged Property or the ownership, use, operation or occupancy thereof; (3) any investigation, inquiry, order or proceeding by any Governmental Authority, and/or any remedial obligations of the Borrower or any Person under any Environmental Requirements relating to the Mortgaged Property or any Migration Tract; (4) any failure of any representation or warranty set forth in §18 of this Mortgage to be true and correct in all respects when made; and (5) any failure of the Borrower to perform, or cause to be performed, any covenant in §18 of this Mortgage.

"Environmental Requirements" shall mean, collectively: CERCLA; RCRA; the Hazardous Materials Transportation Act (49 U.S.C. Section 1802 et seq.); the Federal Water Pollution Prevention and Control Act (33 U.S.C. Section 1251 et seq.); the Safe Drinking Water Act (42 U.S.C. Section 300f et seq.); the Toxic Substances Control Act (15 U.S.C. Section 2601 et seq.); the Clean Air Act (42 U.S.C. Section 7401 et seq.); the Clean Water Act, 33 U.S.C. Section 7401 et seq.; all international treaties, compacts, conventions and agreements having the force of law in the United States of America and all federal, state or local statutes, ordinances, codes, rules, regulations, judgments, orders and decrees, regulating, relating to or imposing liability or standards of conduct concerning any hazardous, toxic or dangerous waste, substance or material as now or at any time hereafter in effect, each as now or hereafter amended; and all permits, licenses, authorizations, concessions, grants, franchises, agreements or other governmental restrictions or requirements relating to the protection of the environment or to any Hazardous Substance or to any Environmental Activity.

"Equipment" shall mean all "Equipment" (as defined by the Code) now owned or hereafter acquired by Borrower, and includes but is not limited to all attachments, accessories and parts used or intended to be used with said equipment, whether now or hereinafter installed therein or thereon or affixed thereto, as well as all substitutions and replacements thereof, in whole or in part.

"Escrow Date" shall mean: (a) when used in relation to real estate taxes and assessments on the Mortgaged Property, the thirtieth (30th) day before any of such taxes and assessments are first

due and payable in each year; and (b) when used with respect to insurance premiums, the thirtieth (30th) day before such premiums are due.

"Event of Default" shall mean an Event of Default as defined in §12.1 hereof, and any event, omission or circumstance otherwise specifically stated in this Mortgage to be an Event of Default.

"FEMA" shall mean the Federal Emergency Management Agency, and its successors.

"Forfeiture Law" shall mean all federal or state laws, including without limitation, the Racketeer Influenced and Corrupt Organizations Act of 1970, as now or hereafter amended, which provide for any forfeiture of assets as a potential penalty.

"Formation State" shall mean the state under the laws of which Borrower is organized or formed, i.e., Missouri.

"GAAP" shall mean general accepted accounting principals, consistently applied.

"General Intangibles" shall mean all "General Intangibles", as defined in the Code, now owned or hereafter acquired by Borrower.

"Goods" shall mean all "goods" as defined by the Code, now owned or hereafter acquired by Borrower.

"Governmental Authority" shall mean the United States of America, the State of Indiana, the State of Missouri, any political subdivision of any of them, and any court, agency, department, commission, board, bureau, officer or instrumentality of any of them.

"Guarantor" or "Guarantors" shall mean collectively, Abraham J. Gustin, individually, the Abraham J. Gustin Revocable Trust dated December 29, 1994, Gregory J. Gustin, David George and Michael George, and any person or entity who may at any time guarantee the payment of any or all of the Loan or the performance of any of the Obligations.

"Guaranty" shall mean that certain Guaranty Agreement (or collectively, Guaranty Agreements) of even date herewith given by the Guarantors to Lender as security for the payment of the Debt and/or the performance of any of the Obligations, and any amendments thereto made at any time.

"Hazardous Substance" shall mean: (a) any "hazardous substance" as such term is presently defined in CERCLA; (b) any additional substances or materials which are hereafter incorporated in or added to the definition of "hazardous substance" for the purposes of CERCLA; (c) any element, substance, compound or mixture, including disease-causing agents, now or hereafter designated as, or containing components designated as, hazardous, dangerous, toxic, harmful, and/or subject to regulation by any Environmental Requirement, including asbestos in any form

and any substance containing asbestos, mold, fungus, microbial contamination or pathogenic organisms, urea formaldehyde foam insulation, transformers or other equipment which contains dielectric fluid or polychlorinated biphenyls, flammable explosives, radioactive materials, chemicals known to cause cancer or reproductive toxicity, pollutants, effluents, contaminants, emissions or related materials, lead and any waste, substance or material now or hereafter regulated by any Environmental Requirement; and (d) any radioactive material, including any source, special nuclear or by-product material as defined at 42 U.S.C. Section 2014, as now or hereafter amended; (e) any lead-based paint; and (f) mold, fungus, microbacterial contamination or pathogenic organisms.

"Illinois Mortgage" shall mean that certain Mortgage, Security Agreement, Assignment of Rents and Fixture Filing dated the date hereof from Borrower to Lender, encumbering certain real and personal property located in the State of Illinois, and securing repayment of the Loan and performance of the Obligations, as the same may hereafter be amended.

"Indemnified Parties" shall mean collectively Lender, its successors, any subsequent holder(s) of the Note, and any nominee(s) or designee(s) of Lender who shall purchase the Mortgaged Property (or any part thereof) at a sale upon foreclosure of this Mortgage, or who shall succeed to title to any or all of the Mortgaged Property by deed in lieu of foreclosure, and their respective agents, directors, officers, partners, members, shareholders, attorneys and employees.

"Indemnity Period" shall mean that period of time commencing with the beginning of time and ending on the earlier of: (i) the first date on which all sums and obligations payable under the Note and other Loan Documents have been paid and the Lender's obligation to make further disbursements of proceeds of the Loan has terminated; or (ii) the date on which Borrower's title to the Mortgaged Property is transferred through foreclosure (judicial or by power of sale) of the lien of the Mortgage or by deed in lieu thereof.

"Instruments" shall mean all "Instruments" as defined by the Code, now owned or hereafter acquired by Borrower.

"Intellectual Property" shall mean all patents, trademarks, trade names, and service marks, and related goodwill, now or hereafter acquired by Borrower.

"Inventory" shall mean all "Inventory" as defined by the Code, now owned or hereafter acquired by Borrower.

"Leases" shall mean all agreements for use and occupancy of any part of the Mortgaged Property, now existing or hereafter entered into, including all present and future leases (including all subleases), licenses, concessions, rights in respect of tenants holding over and tenancies following attornment, and all extensions, modifications, renewals or supplements to any lease, license or concession, and all cash or securities deposited with the Borrower to secure performance of the tenant's obligations under such Lease.

"Legal Requirements" shall mean collectively (i) all present and future laws, ordinances, orders, rules, regulations and requirements of all Governmental Authorities, including those with respect to zoning, subdivision, building, safety, fire protection, wetlands protection, historical preservation, access for the handicapped or disabled, ecological or environmental matters; and (ii) all covenants, restrictions and conditions now or hereafter of record which may apply to any of the Mortgaged Property or the use, occupancy, possession, Maintenance, Restoration or enjoyment thereof.

"Lien" shall mean any mortgage, deed of trust, security agreement, financing statement, security interest, judgment lien, mechanic's or materialman's lien, any other lien, encumbrance, charge, retention or reservation of title as security, pledge, hypothecation or assignment as security, of any of, or upon, the Mortgaged Property, whether now existing or hereafter created, suffered or incurred.

"Loan Agreement" shall mean that certain Loan Agreement between Borrower and Lender dated the date hereof, as the same may hereafter be amended.

"Loan Documents" shall mean collectively the Loan Agreement, the Note, this Mortgage, the Wisconsin Mortgage, the Illinois Mortgage, the Guaranty, financing statements to evidence security interests securing the Loan, and all other instruments, documents and agreements now or hereafter evidencing, securing or supporting any of the Debt or the Obligations, and any amendments, extensions and supplements to any of them made at any time.

"Maintenance" shall mean all repairs, renewals, replacements, alterations, additions, betterments and improvements to the Mortgaged Property (whether interior or exterior, structural or non-structural, ordinary or extraordinary, foreseen or unforeseen), that are necessary to keep the Mortgaged Property in good order, condition and repair, consistent with the standard described in §6.2 and suitable for the Permitted Uses.

"Migration Tract" shall mean any property other than the Land, from which any Hazardous Substance may move or migrate onto, into or under the Land (including the groundwater thereunder), and any property other than the Land into, onto or under which any Hazardous Substance may move or migrate from the Land (including the groundwater thereunder).

"Mortgage" shall mean collectively this Mortgage, the Wisconsin Mortgage, and the Illinois Mortgage, and any amendments to any of the same hereafter entered into.

"Mortgaged Property" shall mean collectively all the property and interests, tangible and intangible, described or referred to in §1.1, §1.2 and §1.3 hereof, whether now owned or hereafter acquired by Borrower.

"Net Condemnation Award" shall mean a Condemnation Award, less the costs and expenses, including reasonable attorney's fees, incurred by Lender in connection with such Condemnation Award and the Condemnation to which it relates.

"Net Insurance Proceeds" shall mean all of the proceeds and sums of money owed or becoming due or paid under any policy of insurance upon any of the Mortgaged Property, including any sums paid in settlement of any claim under any such insurance policy, less the costs and expenses, including reasonable attorney's fees, incurred by Lender in connection with such insurance proceeds and the Casualty to which they relate.

"Note" shall mean that certain Promissory Note of even date herewith in the amount of \$24,500,000.00 from Borrower to the order of Lender, as amended, modified, supplemented, replaced, exchanged, extended, renewed, increased, refunded or restated from time to time.

"Obligations" shall mean the obligation to pay the Debt and all obligations of Borrower to Lender arising from or out of any of the Loan Documents.

"Permitted Encumbrances" shall mean collectively (a) the liens, encumbrances, and security interests in favor of Lender created by the Loan Documents; and (b) any and all matters affecting title to the Mortgaged Property that are listed as exceptions to coverage on Schedule B to the loan policy of title insurance issued to Lender insuring the lien of this Mortgage; except that those matters which are listed on Schedule B-II or B-2 to said policy as matters which are subordinate to the lien of this Mortgage shall be included as "Permitted Encumbrances" only as matters which are subordinate to the lien of this Mortgage, and notwithstanding any provision of this Mortgage seemingly to the contrary, this Mortgage shall not be subject to such items listed on Schedule B-II or B-2.

"Person" shall mean an individual, corporation, general partnership, limited partnership, limited liability company, unincorporated association, trust or any other legal entity.

"Personal Property" shall mean all tangible personal property now owned or hereafter acquired by Borrower.

"Proceeds" shall mean all "Proceeds" as defined in the Code, with respect to the Collateral or Mortgaged Property, and includes without limitation proceeds of insurance payable by reason of loss or damage to Collateral or Mortgaged Property.

"RCRA" shall mean the Resources Conservation and Recovery Act of 1976, as now or hereafter amended (42 U.S.C. Section 6901 et seq.) and any regulations promulgated thereunder.

"Records" shall mean all "Records" as defined in the Code, now owned or hereafter acquired by Borrower, and includes without limitation all books, records, computer records and software relating to any part of the Mortgaged Property.

"Rents" shall mean: all rentals, security deposits, reimbursements and other sums of money now or hereafter due to Borrower under any Lease; all of the rents, issues, profits, royalties, income, receipts, revenues and earnings now or hereafter due Borrower under any Lease or arising from the use and enjoyment of any of the Mortgaged Property; all damages for default by any party under any Lease; all proceeds of any policy of insurance covering loss of rents or business interruption resulting from any Casualty; all rights of Borrower to collect and recover any of such amounts; and the proceeds of all such Rents.

"Restoration" shall mean the restoration, repair, rebuilding, alteration and/or replacement of any of the Mortgaged Property made necessary by any Casualty or Condemnation, to a condition as nearly as possible to its condition prior to such Casualty or Condemnation (but with such changes as Borrower may make pursuant to §8.1 hereof), and includes demolition, temporary repairs and the protection of the Mortgaged Property pending the completion of Restoration.

"Transfer" shall mean: (a) with respect to Borrower's interest in the Mortgaged Property, any sale, assignment, lease, transfer or conveyance (whether voluntarily, involuntarily, by operation of law or otherwise) of any of Borrower's interest in the Mortgaged Property, or any agreement by Borrower to do any of the same; and (b) with respect to any ownership interest (whether stock, partnership interest, membership interest or otherwise) of any Person in Borrower, or any ownership interest (direct or indirect) in any Person which is a shareholder, partner, member or other owner of an interest in Borrower, any sale, assignment, conveyance, transfer, grant of a security interest in or encumbrance of any of such ownership interest, or any agreement by any such Person to do so.

"Usury Law" shall mean any law or regulation of any Governmental Authority having jurisdiction, limiting the amount of interest that may be paid for the loan, use or detention of money and applicable to the Debt and/or any of the Obligations.

"Wisconsin Mortgage" shall mean that certain Mortgage, Security Agreement, Assignment of Rents and Fixture Filing dated the date hereof from Borrower to Lender, encumbering certain real and personal property located in the State of Wisconsin, and securing repayment of the Loan and performance of the Obligations, as the same may hereafter be amended.

## 20. WAIVER OF TRIAL BY JURY

- 20.1. Waiver of Trial By Jury. **LENDER AND BORROWER IRREVOCABLY WAIVE ALL RIGHT TO TRIAL BY JURY IN ANY COURT IN ANY ACTION: (A) LENDER BRINGS TO COLLECT AMOUNTS OWED UNDER OR SECURED BY THIS MORTGAGE; (B) ALLEGING THAT (I) LENDER OR BORROWER HAS BREACHED THIS AGREEMENT OR ANY AGREEMENT SECURED BY THIS AGREEMENT, (II) LENDER OR BORROWER HAS BREACHED ANY OTHER AGREEMENT, EXPRESS OR IMPLIED, (III) LENDER OR ANY OF LENDER'S OFFICERS, EMPLOYEES OR AGENTS HAVE ACTED WRONGFULLY, NEGLIGENTLY OR OTHERWISE**



**TORTIOUSLY WITH RESPECT TO BORROWER; OR (C) TO WHICH BORROWER AND LENDER ARE PARTIES. THIS WAIVER OF TRIAL BY JURY DOES NOT WAIVE EITHER BORROWER'S OR LENDER'S RIGHT TO BRING A LAWSUIT THAT A JUDGE, WITHOUT A JURY, WOULD DECIDE.**

**[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]**





**EXHIBIT A**

Legal Description

**[1 Indiana Property]**



**EXHIBIT A**

THAT PART OF LOT 5, ARIE JABAAY'S SUBDIVISION OF A PART OF THE WEST HALF OF SECTION 13 AND PART OF THE NORTH HALF OF SECTION 24, TOWNSHIP 36 NORTH, RANGE 10 WEST OF THE SECOND PRINCIPAL MERIDIAN, IN THE TOWN OF MUNSTER DESCRIBED AS COMMENCING AT A POINT ON THE NORTH LINE OF RIDGE ROAD 160 FEET SOUTHEASTERLY FROM THE WEST LINE OF SAID LOT 5, MEASURED ALONG THE NORTH LINE OF RIDGE ROAD; THENCE RUNNING SOUTHEASTERLY ALONG THE NORTH LINE OF RIDGE ROAD 124.61 FEET TO THE WEST LINE OF LYMAN STREET; THENCE NORTH ALONG LYMAN STREET 107.3 FEET; THENCE NORTHWESTERLY PARALLEL WITH THE NORTH LINE OF RIDGE ROAD 124.15 FEET; THENCE SOUTH PARALLEL WITH THE WEST LINE OF SAID LOT 5, 107.25 FEET TO THE PLACE OF BEGINNING, IN LAKE COUNTY, INDIANA.

ALSO DESCRIBED AS FOLLOWS:

PART OF LOT 5, ARIE JABAAY'S SUBDIVISION OF A PART OF THE WEST HALF OF SECTION 13 AND A PART OF THE NORTH HALF OF SECTION 24, TOWNSHIP 36 NORTH, RANGE 10 WEST IN THE TOWN OF MUNSTER DESCRIBED AS FOLLOWS: BEGINNING AT AN IRON PIPE ON THE NORTH LINE OF RIDGE ROAD 160 FEET SOUTHEASTERLY FROM THE WEST LINE OF LOT 5; THENCE NORTH 00 DEGREES 00 MINUTES 00 SECONDS EAST, 106.74 FEET TO AN IRON PIPE; THENCE SOUTH 80 DEGREES 12 MINUTES 40 SECONDS EAST, 124.62 FEET TO AN IRON PIPE ON THE WEST LINE OF LYMAN STREET; THENCE ALONG SAID WEST LINE SOUTH 00 DEGREES 00 MINUTES 15 SECONDS WEST, 106.74 FEET TO THE NORTH LINE OF RIDGE ROAD; THENCE ALONG SAID NORTH LINE NORTH 80 DEGREES 12 MINUTES 40 SECONDS WEST, 124.61 FEET TO THE POINT OF BEGINNING CONTAINING 0.30 ACRES.

