

Recorded at Request of:

Nationwide Life  
Insurance Company



48 PGS

When Recorded Mail to:

Pepe & Hazard LLP  
225 Asylum Street  
Hartford, CT 06103-4302  
Attention: Adam F. Zweifler, Esq.

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**DEED OF TRUST, SECURITY AGREEMENT AND FIXTURE FILING**

THIS DEED OF TRUST, SECURITY AGREEMENT AND FIXTURE FILING (the "Deed of Trust"), is made and executed as of the 8 day of May, 2002, by ROTUNDA PARTNERS II, LLC, a California limited liability company (hereinafter referred to as "Borrower"), to CHICAGO TITLE INSURANCE COMPANY, a California corporation (hereinafter referred to as "Trustee"), and in favor of NATIONWIDE LIFE INSURANCE COMPANY, an Ohio corporation, its successors and assigns (hereinafter referred to as "Lender"), having its principal office at One Nationwide Plaza, Columbus, Ohio 43215-2220, Attention: Real Estate Investment Department, or at such other place either within or without the State of Ohio, as Lender may from time to time designate;

**WITNESSETH:**

WHEREAS, Borrower is justly indebted to Lender in the original principal sum of Twenty Million Dollars (\$20,000,000.00) with interest thereon (hereinafter referred to as the "Loan"), which Loan is evidenced and represented by that certain "Note" of even date herewith from Borrower to Lender in the amount of the Loan (hereinafter referred to as the "Note"), both principal and interest being payable as therein provided, with the first payment on the Note becoming due and payable on the date of disbursement, and the term "Note" shall include all other notes given in substitution, modification, increase, renewal or extension of the original Note described herein, in whole or in part; and

WHEREAS, Lender, as a condition precedent to the extension of credit and the making of the Loan evidenced by the Note, has required that Borrower provide Lender with security for the repayment of the Loan as well as for the performance, observance and discharge by Borrower of various terms, covenants, conditions and agreements made by Borrower to, with, in favor of and for the benefit of Lender with respect to the Loan and such security;

NOW THEREFORE, in consideration of and in order to secure the repayment of the Loan evidenced and represented by the Note, together with interest on such Loan, as well as the payment of all other sums of money secured hereby, as hereinafter provided; to secure the observance, performance and discharge by Borrower of all terms, covenants, conditions and agreements set forth in the Note, this Deed of Trust and in all other documents and instruments executed and delivered by Borrower to and in favor of Lender for the purpose of further securing the repayment of the Loan evidenced and represented by the Note; in order to charge the properties, interests and rights hereinafter described with such payment, observance, performance and discharge; and in consideration of the sum of ONE AND 00/100 DOLLAR (\$1.00) paid by Lender to Borrower, and other good and valuable considerations, the receipt and sufficiency of which are hereby acknowledged, Borrower, as trustor, hereby irrevocably grants, transfers and assigns to Trustee, IN TRUST, WITH POWER OF SALE, for the benefit and security of Lender, as beneficiary, all of Borrower's right, title and interest in and to the following described properties, including all rights, interests, replacements, substitutions and additions thereto, therein or therefore, to wit:

(i) All that certain piece, parcel or tract of land or real property of which Borrower is now seized and in actual or constructive possession, situated in the City of Oakland, County of Alameda, and State of California (the "State"), and being more particularly described on Exhibit A attached hereto and by this reference made a part hereof (hereinafter referred to as the "Real Property"); and

(ii) All estate, right, title and interest of Borrower in, to, under or derived from that certain leasehold estate (the "Dalziel Garage Leasehold Estate") created by that certain Lease dated October 20, 1999, by and between The City of Oakland, a public body, corporate and politic, as lessor, and Borrower, as lessee, filed in the Official Records of Alameda County, California on October 20, 1999 as Document Number 394066 (the "Dalziel Garage Ground Lease"), and which encumbers certain real property located in City of Oakland, Alameda County, California and more particularly described in Exhibit B attached thereto, which Exhibit B is incorporated herein as if set forth in full (the "Dalziel Garage Ground Lease Real Property");

(iii) All estate, right, title and interest of Borrower in, to, under or derived from that certain leasehold estate (the "Surface Parking Leasehold Estate"; the Dalziel Garage Leasehold Estate and the Surface Parking Leasehold Estate are hereinafter referred to collectively as the "Leasehold Estate") created by that certain Lease dated October 20, 1999, by and between The Redevelopment Agency of the City of Oakland, a public body, corporate and politic, as lessor, and Borrower, as lessee, filed in the Official Records of Alameda County, California on October 20, 1999 as Document Number 394067 (the Dalziel Garage Ground Lease and the Surface Parking Ground Lease are hereinafter referred to collectively as the "Ground Lease"), and which encumbers certain real property located in City of Oakland, Alameda County, California and more particularly described in Exhibit B attached thereto,

which Exhibit B is incorporated herein as if set forth in full (the "Surface Parking Ground Lease Real Property"; the Dalziel Garage Ground Lease Real Property and the Surface Parking Ground Lease Real Property are hereinafter referred to collectively as "Ground Lease Real Property"; and the Fee Real Property and the Ground Lease Real Property are hereinafter referred to as the "Real Property"), and including, without limitation, any extensions and renewals thereof and any greater estate, right, title or interest which Borrower may now or hereafter acquire in the Ground Lease Real Property by exercise of any right, power or option now or hereafter contained in the Ground Lease;

(iv) All buildings, structures and other improvements of any kind, nature or description now or hereafter erected, constructed, placed or located upon the Real Property including, without limitation, all fixtures, attachments, appliances, equipment, machinery, and other articles now or hereafter affixed or attached to such buildings, structures or other improvements (all of which shall, to the full extent under applicable law, constitute real property and are hereinafter sometimes together referred to as the "Improvements"), including, without limitation, any and all additions to, substitutions for or replacements of such Improvements; and

(v) All minerals, royalties, gas rights, water, water rights, water stock, flowers, shrubs, lawn plants, crops, trees, timber and other emblements now or hereafter located on, under or above all or any part of the Real Property; and

(vi) All and singular, the tenements, hereditaments, strips and gores, rights-of-way, easements, privileges, profits and other appurtenances now or hereafter belonging or in any way appertaining to the Real Property, including, without limitation, all right, title and interest of the Borrower in any after-acquired right, title, interest, remainder or reversion in and to the beds of any ways, streets, avenues, roads, alleys, passages and public places, open or proposed, in front of, running through, adjoining or adjacent to said Real Property (hereinafter sometimes together referred to as "Appurtenances"); and

(vii) Any and all leases, licenses, contracts, rents, license fees, royalties, issues, revenues, profits, proceeds, deposits, income and other benefits, including accounts receivable, termination fees, of, accruing to or derived from the Real Property, Improvements and Appurtenances, and any business or enterprise presently situated or hereafter operated thereon and therewith and all of Borrower's right, title and interest under any and all lease guaranties, letters of credit, and any other credit support furnished to Borrower in connection with any of the foregoing (hereinafter sometimes together referred to as the "Rents"); and

(viii) Any and all awards, payments or settlements, including interest thereon, and the right to receive the same, as a result of: (a) the exercise of the right of eminent domain; (b) the alteration of the grade of any way, street, avenue, road, alley, passage or public place; (c) any other injury, damage, casualty or claim relating to the taking of, or decrease in the value of,

the Real Property, Improvements or Appurtenances; or (d) proceeds of insurance awards, to the extent of all amounts which may be secured by this Deed of Trust at the date of any such award or payment including but not limited to Reasonable Attorneys' Fees (as hereinafter defined), costs and disbursements incurred by Lender in connection with the collection of such award or payment; and

(ix) All of the right, title and interest of Borrower in and to all fixtures, goods, inventory, chattels, construction supplies and materials, fittings, furniture, furnishings, equipment, machinery, apparatus, appliances, and other items of personal property, whether tangible or intangible, of any kind, nature or description, whether now owned or hereafter acquired by Borrower, including, without limitation all signs and displays; all heating, air conditioning, water, gas, lighting, incinerating and power equipment; all engines, compressors, pipes, pumps, tanks, motors, conduits, wiring, and switchboards; all plumbing, lifting, cleaning, fire prevention, fire extinguishing, sprinkling, refrigerating, ventilating, waste removal and communications equipment and apparatus; all boilers, furnaces, oil burners, vacuum cleaning systems, elevators, and escalators; all stoves, ovens, ranges, disposal units, dishwashers, water heaters, exhaust systems, refrigerators, cabinets and partitions; all rugs, attached floor coverings, curtains, rods, draperies, and carpets; all building materials, tools, shades, awnings, blinds, screens, storm doors and windows; and all other Goods (including Consumer Goods, Inventory, Equipment and Farm Products), Accounts, Chattel Paper (including Electronic Chattel Paper and Tangible Chattel Paper), Instruments; General Intangibles (including Payment Intangibles and Software), Letter-of-Credit Rights, Documents and Deposit Accounts (all as such terms are defined in the Uniform Commercial Code as now adopted or amended from time to time in the State of California), of every kind, including, without limitation, any and all licenses, permits, franchises, trademarks, trade names, service marks, or logos; any of which is, are or shall hereafter be located upon, attached, affixed to or used or useful, either directly or indirectly, in connection with the complete and comfortable use, occupancy and operation of the Real Property, Improvements and Appurtenances as a office, or any other business, enterprise or operation as may hereafter be conducted upon or within said Real Property, Improvements and Appurtenances, as well as the proceeds thereof or therefrom regardless of form (hereinafter sometimes together referred to as the **"Fixtures and Personal Property,"** which term expressly excludes any toxic waste or substance deemed hazardous under federal, regional, state or local laws, codes, ordinances, statutes, rules, regulations, decisions or orders). Borrower hereby expressly grants to Lender a present security interest in, and a lien and encumbrance upon, the Fixtures and Personal Property.

The Real Property, Improvements, Appurtenances, Rents, Fixtures, Personal Property and all other property of any kind described herein and in which Borrower has granted Lender a security interest is collectively hereinafter referred to as the **"Property."**

If Borrower shall pay to Lender the Loan evidenced by the Note, and if Borrower shall duly, promptly and fully perform, discharge, execute, effect, complete and comply with and

abide by each and every one of the terms, covenants, conditions and agreements of the Note, this Deed of Trust and all other documents and instruments executed as further evidence of or as security for the Loan secured hereby, then this Deed of Trust and the estates and interests hereby granted and created shall cease, terminate and be null and void, and shall be discharged of record at the expense of Borrower.

This Deed of Trust also constitutes a "fixture filing" for the purposes of the Uniform Commercial Code. As such, this Deed of Trust covers all items of Personal Property that are or are to become Fixtures. Information concerning the security interest herein granted may be obtained from the parties at the addresses of the parties set forth in this Deed of Trust.

**FOR THE PURPOSE OF SECURING:**

- A. Payment of the entire indebtedness evidenced by the Note, and performance of each covenant and agreement of Borrower in the Note, and all modifications, amendments, replacements, extensions and renewals thereof and substitutions therefor.
- B. Performance of all obligations of Borrower under all other documents and instruments executed and delivered by Borrower to Lender relating to the loan evidenced by the Note and performance of each covenant and agreement of Borrower therein, and all modifications, amendments, replacements, extensions and renewals thereof and substitutions therefor (excluding, however, any unsecured indemnity agreements).
- C. Performance of all obligations of Borrower under this Deed of Trust and performance of each covenant and agreement of Borrower in this Deed of Trust.
- D. Payment of all sums advanced by Lender to protect the security of this Deed of Trust or the Property, with interest thereon at the annual interest rate provided herein.
- E. Payment of all other sums, with interest thereon, which may hereafter be loaned to Borrower, or its successors or assigns, by Lender, when evidenced by a promissory note or promissory notes reciting that they are secured by this Deed of Trust.

Borrower covenants and warrants with and to Lender that Borrower is indefeasibly seized of the Property and has good right, full power and lawful authority to convey and encumber all of the same as aforesaid; that Borrower hereby fully warrants the title to the Property and will defend the same and the validity and priority of the lien and encumbrance of this Deed of Trust against the lawful claims of all persons whomsoever; and Borrower further warrants that the Property is free and clear of all liens and encumbrances of any kind, nature or description, save and except only (with respect to the Real Property, Improvements and Appurtenances) for real property taxes for the current fiscal year not delinquent and those

matters set forth in the title insurance policy delivered to Lender insuring the first lien priority of this Deed of Trust (hereinafter referred to as the "Permitted Exceptions");

Borrower, for the benefit of Lender, and its successors and assigns, does hereby expressly covenant and agree:

### **PAYMENT OF PRINCIPAL AND INTEREST**

1. To pay the principal of the Loan evidenced by the Note, together with all interest thereon, in accordance with the terms, covenants and conditions of the Note, promptly at the times, at the place and in the manner that said principal and interest shall become due. To promptly and punctually pay all other sums required to be paid by Borrower pursuant to the terms, covenants and conditions of the Note, this Deed of Trust, the Assignment of Leases, Rents and Profits (hereinafter referred to as the "Assignment") and all other documents and instruments executed as further evidence of, as additional security for or executed in connection with the Loan evidenced by the Note and secured by this Deed of Trust (which documents are collectively hereinafter referred to as the "Loan Documents").

### **PERFORMANCE OF OTHER OBLIGATIONS**

2. To perform, comply with and abide by each and every one of the terms, covenants, conditions and agreements contained and set forth in the Note, this Deed of Trust, and the other Loan Documents. To comply with all laws, codes, ordinances, statutes, rules, regulations, decisions and orders of any governmental authorities having jurisdiction over the parties hereto or the Property which now or hereafter affect the Property or which require or would require any alterations or improvements to be made to the Property. To perform all of its obligations under any term, covenant, condition, restriction or agreement of record affecting the Property, and to insure that at all times the Property constitutes one or more legal lots capable of being conveyed without violation of any subdivision or platting laws, codes, ordinances, statutes, rules, regulations, or other laws relating to the division or separation of real property.

### **PRESERVATION AND MAINTENANCE OF PROPERTY; ACCESSIBILITY; HAZARDOUS WASTE**

3. (a) To keep all Improvements now existing or hereafter erected on the Real Property in good order and repair, and not to do or permit any waste, impairment or deterioration thereof or thereon, nor to alter, remove or demolish any of the Improvements or any Fixtures and Personal Property attached or appertaining thereto, without the prior written consent of Lender, nor to initiate, join in or consent to any change in any private restrictive covenant, zoning ordinance or other public or private restrictions limiting or defining the uses which may be made of the Property or any part thereof, nor to do or permit any other act

whereby the Property shall become less valuable, be used for purposes contrary to applicable law or be used in any manner which will increase the premium for or result in a termination or cancellation of the insurance policies hereinafter required to be kept and maintained on the Property. In furtherance of, and not by way of limitation upon, the foregoing covenant, Borrower shall effect such repairs as Lender may reasonably require, and from time to time make all needful and proper replacements so that the Improvements, Appurtenances, Fixtures and Personal Property will, at all times, be in good condition, fit and proper for the respective purposes for which they were originally erected or installed. In connection with the making of such repairs, Borrower shall use contractors who are properly licensed, who carry workers' compensation insurance and appropriate liability insurance, who generally have a good reputation for completing their work in a neat, prompt and workmanlike manner, and use only new or re-manufactured goods of a quality as good or better than that originally used on the Property. As provided herein, Borrower shall insure that no liens are filed against the Property that relate in any way to the repair work provided for herein.

(b) Borrower at all times shall keep the Property and ground water of the Property free of Hazardous Materials (as hereinafter defined) and any liens arising in connection therewith. Borrower shall not and shall not knowingly permit its tenants or any third party requiring the consent of Borrower to enter the Property, to use, generate, manufacture, treat, store, release, threaten release, transport on or over, emit or dispose of Hazardous Materials in, on, over, under or about the Property including the ground water of the Property in violation of any federal, regional, state or local law, code, ordinance, statute, rule, regulation, decision or order currently in existence or hereinafter enacted or rendered (hereinafter collectively referred to as "Hazardous Waste Laws"). Borrower shall give Lender prompt Written Notice (as hereinafter defined) of any claim by any person, entity, or governmental agency that a significant release or disposal of Hazardous Materials has occurred in, on, over, under or about the Property, including the ground water of the Property, in excess of those permitted by the Hazardous Waste Laws, whether caused by the Borrower, tenant or any third party. Borrower, through its professional engineers and at Borrower's sole cost, shall promptly and thoroughly investigate any suspected release of Hazardous Materials in, on, over, under or about the Property, including the ground water of the Property. Borrower shall forthwith remove, repair, remediate, clean up, and/or detoxify any Hazardous Materials found in, on, over, under or about the Property or in the ground water of the Property to the extent such actions are required by any applicable Hazardous Waste Laws, and whether or not Borrower was responsible for the existence of the Hazardous Materials in, on, over, under or about the Property or the ground water of the Property. Hazardous Materials shall include, but not be limited to, substances defined as "hazardous substances," "hazardous materials," or "toxic substances" in The Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by The Superfund Amendments and Reauthorization Act of 1986, The Hazardous Materials Transportation Act, The Resource Conservation and Recovery Act of 1976, as amended by The Used Oils Recycling Act of 1980, The Solid Waste Disposal Act amendment of 1984, The Toxic Substances Control Act,

15 U.S.C. Sec. 2601, et seq.; the Clean Air Act, 42 U.S.C. Sec. 7401, et seq.; the Clean Water Act, 33 U.S.C. Sec. 1251, et seq.; the California Hazardous Substance Account Act, Health and Safety Code Sec. 25300, et seq.; the California Occupational Safety and Health Act of 1973, Labor Code Sec. 6300, et seq.; the California Hazardous Waste Control Act, Health and Safety Code Sec. 25100, et seq.; the California Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code Sec. 25249, et seq.; or the Porter-Cologne Water Quality Control Act, Water Code Sec. 13000, et seq., or in any other Hazardous Waste Laws. In addition, Borrower shall not incorporate any underground storage tanks into the Real Property without the prior written consent of Lender, and shall insure that all tanks currently on the Real Property comply with current Hazardous Waste Laws and underground storage tank regulations and are properly registered.

Borrower hereby agrees to indemnify Lender and hold Lender harmless from and against any and all losses, liabilities, damages, injuries, costs, expenses, fines, fees and claims of any and every kind whatsoever paid, incurred or suffered by, or asserted against, Lender for, with respect to, or as a direct or indirect result of, the presence in, on, over, under or about, or the escape, seepage, leakage, spillage, discharge, emission or release from, the Property of any Hazardous Materials (including, without limitation, any losses, liabilities, damages, injuries, costs, expenses or claims asserted or arising under any Hazardous Waste Laws), regardless of the source of origination and whether or not caused by, or within the control of, Borrower.

Liability under this Paragraph 3(b) and similar provisions in this Deed of Trust and the other Loan Documents concerning Hazardous Materials shall survive repayment of the Note and satisfaction of this Deed of Trust; provided, however, Borrower shall have no liability under this Paragraph 3(b) regarding Hazardous Materials if either (i) the Property becomes contaminated subsequent to Lender's acquisition of the Property by foreclosure, acceptance by Lender of a deed in lieu thereof, or subsequent to any transfer of ownership of the Property which was approved or authorized by Lender in writing, pursuant to this Deed of Trust, provided that such transferee assumes in writing all of the obligations of Borrower with respect to Hazardous Materials pursuant to the Loan Documents, or (ii) at such time Borrower provides Lender with an environmental assessment report acceptable to Lender, in Lender's sole discretion, showing the Property to be free of Hazardous Materials and not in violation of any Hazardous Waste Laws. The burden of proof under this Paragraph 3(b) with regard to establishing the date upon which any Hazardous Materials was released in, on, over, under or about the Property shall be upon Borrower.

(c) Borrower at all times shall maintain the Property in full compliance with all federal, state, county, regional or local laws, codes, ordinances, rules, regulations, decisions and orders currently in existence or hereafter enacted or rendered, governing accessibility for the disabled, including but not limited to: The Architectural Barriers Act of 1968; The Rehabilitation Act of 1973; The Fair Housing Act of 1988; The Americans with



Disabilities Act; and The California Elimination of Architectural Barriers Act (hereinafter collectively referred to as the "Accessibility Laws").

Borrower hereby agrees to indemnify Lender and hold Lender harmless from and against any and all losses, liabilities, damages, injuries, costs, expenses and claims of any and every kind whatsoever paid, incurred or suffered by, or asserted against Lender for, with respect to, or as a direct or indirect result of, the non-compliance of the Property with the Accessibility Laws whether or not caused by, or within the control of, Borrower.

Liability under this Paragraph 3(c) and similar provisions in this Deed of Trust and the other Loan Documents concerning Accessibility Laws shall survive repayment of the Note and satisfaction of this Deed of Trust; provided, however, shall not be liable under this Paragraph 3(c) for compliance with any Accessibility Laws if such Accessibility Laws first become effective, or such violations result from alterations or improvements to the Property that are performed subsequent to Lender's acquisition of the Property by foreclosure or acceptance of a deed in lieu thereof or subsequent to any transfer which was approved or authorized by Lender pursuant to this Deed of Trust, provided that such transferee assumes in writing all obligations pertaining to the Accessibility Laws pursuant to this Deed of Trust and the other Loan Documents.

(d) Lender, and/or its agents, shall have the right and shall be permitted, but shall not be required, at all reasonable times, to enter upon and inspect the Property to insure compliance with the foregoing covenants, and any and all other terms, covenants, conditions and agreements set forth in this Deed of Trust.

#### **PAYMENT OF TAXES, ASSESSMENTS AND OTHER CHARGES**

4. To pay all taxes, assessments and other charges as already levied or assessed, or that may be hereafter levied or assessed, upon or against the Property, when the same shall become due and payable according to law, before delinquency, and before any interest or penalty shall attach thereto, and to deliver official receipts evidencing the payment of the same to Lender not later than thirty (30) days following the payment of the same. Borrower shall have the right to contest, in good faith, the proposed assessment of ad valorem taxes or special assessments by governmental authorities having jurisdiction over the Property; provided, however, Borrower shall give Written Notice of its intent to bring such an action to Lender, and Lender may, in its sole discretion, require Borrower to post a bond or other collateral satisfactory to Lender (and acceptable to the title company insuring this Deed of Trust) as a result of Borrower's act.

## **PAYMENT OF LIENS, CHARGES AND ENCUMBRANCES**

5. To immediately pay and discharge from time to time when the same shall become due, all lawful claims and demands of mechanics, materialmen, laborers, realtors, brokers and others which, if unpaid, might result in, or permit the creation of, a lien, charge or encumbrance upon the Property or any part thereof, or on the rents, license fees, issues, income, revenues, profits and proceeds, including termination fees and taking proceeds, arising therefrom and, in general, to do or cause to be done everything necessary so that the lien of this Deed of Trust shall be fully preserved, at the sole cost of Borrower, without expense to Lender. Borrower shall have the right to contest, in good faith and in accordance with applicable laws and procedures, mechanics', materialmens' and other such liens filed against the Property; provided however, that Borrower shall give Written Notice to Lender of its intent to bring such action, and Lender may, in Lender's sole discretion, require Borrower to post a bond or other collateral satisfactory to Lender (and acceptable to the title company insuring this Deed of Trust) as a result of Borrower's act.

## **PAYMENT OF JUNIOR ENCUMBRANCES**

6. To permit no default or delinquency under any other lien, imposition, charge or encumbrance against the Property, even though junior and inferior to the lien of this Deed of Trust; provided however, the foregoing shall not be construed to permit any additional lien or encumbrance against the Property, other than the Permitted Exceptions.

## **PAYMENT OF MORTGAGE TAXES**

7. To pay any and all taxes which may be levied or assessed directly or indirectly upon the Note and/or this Deed of Trust (except for income taxes payable by Lender) or the Loan secured hereby, without regard to any law which may be hereafter enacted imposing payment of the whole or any part thereof upon Lender, its successors or assigns. Upon violation of this agreement to pay such taxes levied or assessed upon the Note and/or this Deed of Trust, or upon the rendering by any court of competent jurisdiction of a decision that such an agreement by Borrower is legally inoperative, or if any court of competent jurisdiction shall render a decision that the rate of said tax when added to the rate of interest provided for in the Note exceeds the then maximum rate of interest allowed by law, then, and in any such event, the debt hereby secured shall, at the option of Lender, its successors or assigns, become immediately due and payable, anything contained in this Deed of Trust or in the Note secured hereby notwithstanding, without the imposition of a Prepayment Premium (as defined in the Note). The additional amounts which may become due and payable hereunder shall become a part of the Loan secured by this Deed of Trust.

## HAZARD INSURANCE

8. To continuously, during the term of this Deed of Trust, keep the Improvements, the Fixtures and Personal Property, now or hereafter existing, erected, installed and located in or upon the Real Property, insured with extended coverage insurance against loss or damage resulting from fire, windstorm, flood, sinkhole and such other hazards, casualties, contingencies and perils (excluding earthquake) including, without limitation, other risks insured against by persons operating like properties in the locality of the Property, or otherwise deemed necessary or advisable by Lender, on such forms and with such deductibles as may be required by Lender, covering the Property in the amount of the full replacement cost thereof, less excavating and foundation costs, and covering all loss or abatement of rental or other income, without a provision for co-insurance, in an amount equal to the scheduled rental income of the Property for at least twelve (12) months, or if applicable, business interruption insurance in an amount sufficient to pay debt service on the Note, operating expenses, taxes and insurance on the Property for a period of twelve (12) months, and covering loss by flood (if the Property lies in a Special Flood Hazard Area as designated on the Department of Housing and Urban Development's Maps, or other flood prone designation) in an amount equal to the outstanding principal balance of the Loan secured hereby or such other amount as approved by Lender. All such insurance shall be carried with a company or companies licensed to do business in the state where the property is located, which is acceptable to Lender, which company or companies shall have a rating at the time this Deed of Trust is executed equivalent to at least A:X as shown in the most recent Best's Key Rating Guide. The original policy or policies and renewals thereof (or, at the sole option of Lender, duplicate originals or certified copies thereof), together with receipts evidencing payment of the premium therefor, shall be deposited with, held by and are hereby assigned to, Lender as additional security for the Loan secured hereby. Each such policy of insurance obtained by Borrower with respect to the Property shall contain a non-contributing loss payable clause in favor of and in a form acceptable to Lender, and shall provide for not less than thirty (30) days prior Written Notice to Lender of any intent to modify, non-renew, cancel or terminate the policy or policies, or the expiration of such policies of insurance. If the insurance required under this Paragraph 8 or any portion thereof is maintained pursuant to a blanket policy, Borrower shall furnish to Lender a certified copy of such policy, together with an original Evidence of Insurance Certificate (Acord Form 27) for hazard insurance indicating that Lender is an insured under such policy in regard to the Property and showing the amount of coverage apportioned to the Property, which coverage shall be in an amount sufficient to satisfy the requirements hereof. Not less than fifteen (15) days prior to the expiration dates of each policy required of Borrower hereunder, Borrower will deliver to Lender a renewal policy or policies marked "premium paid" or accompanied by other evidence of payment and renewal satisfactory to Lender. In the event of foreclosure of this Deed of Trust or other transfer of title to the Property in extinguishment of the Loan secured hereby, all right, title and interest of Borrower, in and to any insurance policies then in force including any rights to unearned

premiums, and in and to insurance proceeds then payable, shall pass to the purchaser or grantee.

In the event of loss by reason of hazards, casualties, contingencies and perils for which insurance has been obtained with respect to the Property, Borrower shall give immediate notice thereof to Lender. Lender is hereby irrevocably appointed attorney-in-fact coupled with an interest, for Lender to, at its option, make proof of loss and/or to file a claim thereunder. Each insurance company concerned is hereby notified, authorized and directed to make payment for such loss directly to Lender, instead of to Borrower and Lender jointly, and Borrower hereby authorizes Lender to adjust and compromise any losses for which insurance proceeds are payable under any of the aforesaid insurance policies and, after deducting the costs of collection, to apply the proceeds of such insurance, at its option either: (a) to the restoration or repair of the insured Improvements, and the Fixtures and Personal Property, provided that, in the opinion and sole discretion of Lender, such restoration or repair is reasonably practical and, provided further, that, in the opinion and sole discretion of Lender, either: (i) the insurance proceeds so collected are sufficient to cover the cost of such restoration or repair of the damage or destruction with respect to which such proceeds were paid; or (ii) the insurance proceeds so collected are not sufficient alone to cover the cost of such restoration or repair, but are sufficient therefor when taken together with funds provided and made available by Borrower from other sources; in which event Lender shall make such insurance proceeds available to Borrower for the purpose of effecting such restoration or repair; but Lender shall not be obligated to see to the proper application of such insurance proceeds nor shall the amount of funds so released or used be deemed to be payment of or on account of the Loan secured hereby, or (b) to the reduction of the Loan secured hereby, notwithstanding the fact that the amount owing thereon may not then be due and payable or that said Loan is otherwise adequately secured, in which event such proceeds shall be applied at par against the Loan secured hereby and the monthly payment due on account of such Loan shall be reduced accordingly. None of such actions taken by Lender shall be deemed to be or result in a waiver or impairment of any equity, lien or right of Lender under and by virtue of this Deed of Trust, nor will the application of such insurance proceeds to the reduction of the Loan serve to cure any default in the payment thereof. In the event of foreclosure of this Deed of Trust or other transfer of title to the Property in extinguishment of the Loan secured hereby, all right, title and interest of Borrower in and to any insurance policies then in force including any rights to unearned premiums and in and to insurance proceeds then payable, shall pass to the purchaser or grantee.

In case of Borrower's failure to keep the Property properly insured as required herein, Lender, its successors or assigns, may, at its option (but shall not be required to) acquire such insurance as required herein at Borrower's sole expense.

Notwithstanding anything set forth in this Paragraph 8 to the contrary, in the event of loss or damage to the Property by fire or other casualty for which insurance has been required

by Lender and provided by Borrower, and the amount of such loss or damage does not exceed fifty percent (50%) of the unpaid principal balance of the Note, Lender hereby agrees to allow the proceeds of insurance to be used for the restoration of the Property and to release such insurance proceeds to Borrower as such restoration progresses, provided:

(a) Borrower is not in default under any of the terms, covenants and conditions of this Deed of Trust, the Note or any of the other Loan Documents;

(b) The Improvements, after such restoration, shall be at least eighty percent (80%) leased pursuant to leases approved in writing by Lender;

(c) The plans and specifications for the restoration of the Property are approved in writing by Lender in advance;

(d) At all times during such restoration, Borrower has deposited with Lender funds which, when added to the insurance proceeds received by Lender, are sufficient to complete the restoration of the Property in accordance with the approved plans and specifications, and all applicable building codes, zoning ordinances, regulations and Accessibility Laws, and further, that the funds retained by Lender are sufficient to complete the restoration of the Property as certified to Lender by Lender's inspecting architect/engineer;

(e) Borrower provides suitable completion, payment and performance bonds, builders' all risk insurance, and all necessary licenses and permits for such restoration in form and amount acceptable to Lender;

(f) The insurer under such policies of fire or other casualty insurance does not assert any defense to payment under such policies against Borrower, any tenant, or third party of Borrower with regard to of the Property;

(g) Lender shall have the option, upon the completion of such restoration of the Property, to apply any surplus insurance proceeds remaining after the completion of such restoration, at par, to the reduction of the outstanding principal balance of the Note; notwithstanding the fact that the amount owing thereon may not then be due and payable or that said Loan is otherwise adequately secured;

(h) The funds held by Lender shall be disbursed no more often than once per month and in not more than five (5) increments of not less than Fifty Thousand and 00/100 Dollars (\$50,000.00) each, except the final disbursement of such funds which may be in an amount less than Fifty Thousand and 00/100 Dollars (\$50,000.00);

(i) Lender's obligation to make any such disbursement shall be conditioned upon Lender's receipt of written certification from Lender's inspecting architect/engineer

(whose fees shall be reimbursed to Lender by Borrower) that all construction and work for which such disbursement is requested has been completed in accordance with the approved plans and specifications and in accordance with all applicable building codes, zoning ordinances and all other local, state or federal laws, codes, ordinances, statutes, rules and regulations, and, further, that Borrower has deposited with Lender sufficient funds to complete such restoration in accordance with subparagraph 8(d) above; and

(j) Lender shall be entitled to require and to impose such other conditions to the release of such funds as would be customarily or reasonably be required and imposed by local construction lenders for a project of similar nature and cost.

### **LIABILITY INSURANCE**

9. To carry and maintain such commercial general liability insurance as may from time to time be required by Lender, taking into consideration the type of property being insured and the corresponding liability exposure, on forms, with deductibles, in amounts and with such company or companies licensed to do business in the state where the Property is located and as may be acceptable to Lender. All such commercial general liability insurance shall be carried with a company or companies which have a rating at the time this Deed of Trust is executed equivalent to at least A:X as shown in the most recent Best's Key Rating Guide. The original policy or policies and all renewals thereof (or, at the sole option of Lender, duplicate originals or certified copies thereof), together with a Certificate of Insurance (Acord Form 25S) and receipts evidencing payment of the premium therefor, shall be deposited with, held by and are hereby assigned to, Lender as additional security for the Loan secured hereby. Such policy or policies of insurance shall name Lender as an additional insured and shall provide for not less than thirty (30) days prior Written Notice to Lender of any intent to modify, cancel, non-renew, or terminate the policy or policies or the expiration of such policy or policies of insurance. Not less than fifteen (15) days prior to the expiration dates of each policy or policies required of Borrower hereunder, Borrower will deliver to Lender a renewal policy or policies marked "premium paid" or accompanied by other evidence of payment and renewal satisfactory to Lender. In the event of foreclosure of this Deed of Trust or other transfer of title to the Property in extinguishment of the Loan secured hereby, all right, title and interest of Borrower, in and to any insurance policies then in force including any rights to unearned premiums, and in and to insurance proceeds then payable, shall pass to the purchaser or grantee.

In case of Borrower's failure to keep the Property properly insured as required herein, Lender, its successors or assigns, may, at its option (but shall not be required to) acquire such insurance as required herein at Borrower's sole expense.

## **COMPLIANCE WITH LAWS**

10. To observe, abide by and comply with all federal, regional, state and local laws, codes, ordinances, statutes, rules, regulations, decisions, orders, requirements or decrees relating to the Property enacted, promulgated or issued by any federal, state, county or local governmental or quasi-governmental authority or any agency or subdivision thereof having jurisdiction over Borrower or the Property (hereinafter collectively referred to as "Laws"), and to observe and comply with all conditions and requirements necessary to preserve and extend any and all rights, licenses, permits (including, but not limited to, zoning, variances, special exceptions and nonconforming uses), privileges, franchises and concessions which are applicable to the Property, or which have been granted to or contracted for by Borrower in connection with any existing, presently contemplated or future uses of the Property.

## **MAINTENANCE OF PERMITS**

11. To obtain, keep and constantly maintain in full force and effect during the entire term of this Deed of Trust, all certificates, licenses and permits necessary to keep the Property operating as a office project and, except as specifically provided for in this Deed of Trust, not to assign, transfer or in any manner change such certificates, licenses or permits without first receiving the written consent of Lender.

## **OBLIGATIONS OF BORROWER AS LESSOR**

12. To perform every obligation of Borrower (as the lessor) and to enforce every obligation of the lessee in any and every lease, license or other occupancy agreement of or affecting the Property or any part thereof (hereinafter referred to as the "Occupancy Leases"), and not to modify, alter, waive or cancel any such Occupancy Leases or any part thereof or rights thereunder, without the prior written consent of Lender (but such consent shall not be required for such action as to Occupancy Leases of 10,000 square feet or less if such action is in the ordinary course of business of owning and operating the Property in a prudent and business-like manner), nor collect for more than thirty (30) days in advance of the date due any rents that may be collectible under any such Occupancy Leases and, except as provided for in this Deed of Trust, not to assign any such Occupancy Lease(s) or any such rents relating thereto, to any party other than Lender, without the prior written consent of Lender. In the event of default under any such Occupancy Lease by reason of failure of the Borrower to keep or perform one or more of the covenants, agreements or conditions thereof, Lender is hereby authorized and empowered, and may, at its sole option, remedy, remove or cure any such default, and further, Lender may, at its sole option and in its sole discretion but without obligation to do so, pay any sum of money deemed necessary by Lender for the performance of said covenants, agreements and conditions, or for the curing or removal of any such default, and incur all expenses and obligations which Lender may consider necessary or reasonable in connection therewith, and Borrower shall repay on demand all such sums so paid or advanced

by Lender together with interest thereon until paid at the lesser of either: (i) the highest rate of interest then allowed by the laws of the State of California, or, if controlling, the laws of the United States, or (ii) the then applicable interest rate of the Note plus five hundred (500) basis points; all of such sums, if unpaid, shall be added to and become part of the Loan secured hereby. All such Occupancy Leases hereafter made shall be subject to the approval of Lender and: (i) shall be at competitive market rental rates then prevailing in the geographic area for office project comparable to the Property; (ii) shall have lease terms of not less than three (3) years; and (iii) at Lender's option, shall be superior or subordinate in all respects to the lien of this Deed of Trust. Provided, however, that Lender shall not require approval in advance of any Occupancy Leases which conform to the Borrower's Form Lease (as hereinafter defined) as previously approved by Lender, except as set forth below. Neither the right nor the exercise of the right herein granted unto Lender to keep or perform any such covenants, agreements or conditions as aforesaid shall preclude Lender from exercising its option to cause the whole Loan secured hereby to become immediately due and payable by reason of Borrower's default in keeping or performing any such covenants, agreements or conditions as hereinabove required.

Lender has heretofore approved a form of Occupancy Lease to be used by Borrower in connection with the Property (hereinafter referred to as the "Form Lease"). Borrower shall not, without the prior written consent of Lender, modify or alter the Form Lease in any material respect. In addition, Borrower shall not, without the prior written consent of Lender, surrender or terminate, either orally or in writing, any Occupancy Lease now existing or hereafter made with any Major Tenant (as hereinafter defined) for all or part of the Property, permit an assignment or sublease of any such Occupancy Lease, or request or consent to the subordination of any Occupancy Lease to any lien subordinate to this Deed of Trust. Borrower shall furnish Lender with copies of all executed Occupancy Leases of all or any part of the Property now existing or hereafter made, and Borrower shall assign to Lender (which assignment shall be in form and content acceptable to Lender), as additional security for the Note and the Loan, all Occupancy Leases now existing or hereafter made for all or any part of the Property. Additionally, if any Occupancy Lease contains a provision allowing the tenant to terminate their lease upon payment of a lease termination fee, Borrower agrees that all such sums shall constitute rent, and shall be paid to Lender so long as this Deed of Trust is in effect.

Notwithstanding the foregoing approval by Lender of Borrower's Form Lease, Lender hereby specifically reserves the right to approve all prospective tenants under all Occupancy Leases hereafter proposed to be made if either: (i) the term thereof, excluding options to renew the same, exceeds five (5) years; or (ii) the net rentable area to be occupied thereunder, including expansion options, exceeds ten percent (10%) of the net leasable area of each of the buildings comprising the Improvements (the tenants under such leases being hereinafter referred to as "Major Tenants"). Borrower shall notify Lender in writing of all prospective Major Tenants, and shall deliver to Lender, at Borrower's sole cost and expense, a copy of the



prospective Major Tenant's current financial statement and the most recent Dun & Bradstreet credit report on said prospective Major Tenant. The financial statement delivered to Lender hereunder shall be certified as true and correct by the Major Tenant, or, if available, by a certified public accountant.

#### **MAINTENANCE OF PARKING & ACCESS; PROHIBITION AGAINST ALTERATION**

13. To construct, keep and constantly maintain, as the case may be, all curbs, drives, parking areas and the number of parking spaces heretofore approved by Lender, or heretofore or hereafter required by any Laws or any governmental body, agency or authority having jurisdiction over Borrower or the Property, and as required by the terms of the Occupancy Leases, and not to alter, erect, build or construct upon any portion of the Property, any building, structure or improvement of any kind whatsoever, the erection, building or construction of which has not been previously approved by Lender in writing, which approval shall be at the sole discretion of Lender.

#### **EXECUTION OF ADDITIONAL DOCUMENTS**

14. To do, make, execute, acknowledge, witness and deliver all deeds, conveyances, mortgages, assignments, estoppel certificates, subordination non-disturbance and attornments, notices of assignments, transfers, assurances, security agreements, financing statements and renewals thereof, and all other instruments or other acts necessary, as Lender shall from time to time require for the purpose of better assuring, conveying, assigning, transferring, securing and confirming unto Lender the Property and rights hereby encumbered, created, conveyed, assigned or intended now or hereafter so to be encumbered, created, conveyed or assigned, or which Borrower may now be or may hereafter become bound to encumber, create, convey or assign to Lender, or for the purpose of carrying out the intention or facilitating the performance of the terms of this Deed of Trust, or for filing, registering or recording this Deed of Trust, and to pay all filing, registration or recording fees and all taxes, costs and other expenses, including Reasonable Attorneys' Fees, incident to the preparation, execution, acknowledgment, delivery and recordation of any of the same. By signing this Deed of Trust, Borrower authorizes Lender to file such financing statements, with or without the signature of Borrower, as Lender may elect, as may be necessary or desirable to perfect the lien of Lender's security interest in the Fixtures and Personal Property. Borrower further authorizes Lender to file, with or without any additional signature from Borrower, as Lender may elect, such amendments and continuation statements as Lender may deem necessary or desirable from time to time to perfect or continue the lien of Lender's security interest in the Fixtures and Personal Property. Borrower hereby expressly ratifies any financing statements that may have been filed by Lender in advance of the date hereof to perfect Lender's security interest in the Fixtures and Personal Property.

### **AFTER-ACQUIRED PROPERTY SECURED**

15. To subject to the lien of this Deed of Trust all right, title and interest of Borrower in and to all extensions, improvements, betterments, renewals, substitutions and replacements of, and all additions and appurtenances to, the Property hereinabove described, hereafter acquired by or released to Borrower, or constructed, assembled or placed by Borrower on the Real Property, and all conversions of the security constituted thereby, immediately upon such acquisition, release, construction, assembling, placement or conversion, as the case may be, and in each such case, without any further mortgage, encumbrance, conveyance, assignment or other act by Borrower, as fully, completely and with the same effect as though now owned by Borrower and specifically described herein, but at any and all times, Borrower will execute and deliver to Lender any and all such further assurances, mortgages, conveyances, security agreements, financing statements or assignments thereof or security interests therein as Lender may reasonably require for the purpose of expressly and specifically subjecting the same to the lien of this Deed of Trust.

### **PAYMENTS BY LENDER ON BEHALF OF BORROWER**

16. To make payment of any taxes, assessments or public charges on or with respect to the Property before the same shall become delinquent, or to make payment of any insurance premiums or other charges, impositions, or liens herein or elsewhere required to be paid by Borrower, or if Borrower shall fail so to do, then Lender, at its sole option, but without obligation to do so, may make payment or payments of the same and also may redeem the Property from tax sale without any obligation to inquire into the validity of such taxes, assessments and tax sales, charges, impositions or liens. In the case of any such payment by Lender, Borrower agrees to reimburse Lender, upon demand therefor, the amount of such payment and of any fees and expenses attendant in making the same, together with interest thereon at the lesser of either: (i) the highest rate of interest then allowed by the laws of the State of California or, if controlling, the laws of the United States or (ii) the then applicable interest rate of the Note plus five hundred (500) basis points; and until paid such amounts and interest shall be added to and become part of the Loan secured hereby to the same extent that this Deed of Trust secures the repayment of the Loan evidenced by the Note. In making payments authorized by the provisions of this Paragraph 16, Lender may do so whenever, in Lender's sole judgment and discretion, such advance or advances are necessary or desirable to protect the full security intended to be afforded by this Deed of Trust. Neither the right nor the exercise of the rights herein granted to Lender to make any such payments as aforesaid shall preclude Lender from exercising its option to cause the Loan secured hereby to become immediately due and payable by reason of Borrower's default in making such payments as hereinabove required.

**FUNDS HELD BY LENDER FOR TAXES, ASSESSMENTS, INSURANCE  
PREMIUMS, AND OTHER CHARGES**

17. In order to more fully protect the security of this Deed of Trust, Borrower shall deposit with Lender, together with and in addition to each monthly payment due on account of the Loan evidenced by the Note, an amount equal to one-twelfth (1/12) of the annual total of such taxes, assessments, insurance premiums and other charges (all as estimated by Lender in its sole discretion) so that, at least thirty (30) days prior to the due date thereof, Lender shall be able to pay in full all such taxes, assessments, insurance premiums and other charges as the same shall become due. Lender may hold the sums so deposited without paying interest, commingle same with its general funds and/or apply the same to the payment of said taxes, assessments, insurance premiums or other charges as they become due and payable. If at any time the funds so held by Lender are insufficient to pay such taxes, assessments, insurance premiums or other charges as they become due and payable, Borrower shall immediately, upon notice and demand by Lender, deposit with Lender the amount of such deficiency. The failure on the part of Borrower to do so shall entitle Lender, at Lender's sole option, to make such payments in accordance with the rights and pursuant to the conditions elsewhere provided in this Deed of Trust. Borrower grants to Lender a security interest in all funds deposited with Lender, and such funds are pledged by Borrower to Lender, for the purpose of securing all indebtedness and obligations secured by this Deed of Trust. Whenever any default exists under this Deed of Trust, Lender may, at Lender's sole option but without an obligation so to do, apply any funds so held by Lender pursuant to this Paragraph 17 toward the payment of the Loan secured hereby, notwithstanding the fact that the amount owing thereon may not then be due and payable or that the Loan may otherwise be adequately secured, in such order and manner of application as Lender may elect.

**CONDEMNATION; EMINENT DOMAIN**

18. All claims and rights of action for, and all awards and other compensation heretofore or hereafter made to Borrower and all subsequent owners of the Property in any taking by eminent domain, recovery for inverse condemnation or by deed in lieu thereof, whether permanent or temporary, of all or any part of the Property or any easement or any appurtenance thereto, including severance and consequential damages and change in grade of any way, street, avenue, road, alley, passage or public place are hereby assigned to Lender. Borrower hereby irrevocably appoints Lender as its attorney-in-fact, coupled with an interest, and authorizes, directs and empowers Lender, at the option of Lender as said attorney-in-fact, on behalf of Borrower, its successors and assigns, to adjust or compromise the claim for any such award, and alone to collect and receive the proceeds thereof, to give proper receipts and acquittances therefor and, after deducting any expenses of collection, at Lender's sole option either:

(a) to apply the net proceeds as a credit upon any portion of the Loan secured hereby, as selected by Lender, notwithstanding the fact that the amount owing thereon may not then be due and payable, or that the Loan is otherwise adequately secured. In the event Lender applies such awards to the reduction of the outstanding Loan evidenced by the Note, such proceeds shall be applied at par, and the monthly installments due and payable under the Note shall be reduced accordingly; however no such application shall serve to cure an existing default in the payment of the Note; or

(b) to hold said proceeds without any allowance of interest, and make the same available for restoration or rebuilding of the Improvements. In the event that Lender elects to make said proceeds available to reimburse Borrower for the cost of the restoration or rebuilding of the Improvements on the Real Property, such proceeds shall be made available in the manner and under the same conditions as required under Paragraph 8 hereof. If the proceeds are made available by Lender to reimburse Borrower for the cost of said restoration or rebuilding, any surplus which may remain out of said award after payment of such cost of restoration or rebuilding, shall be applied on account of the Loan secured hereby at par notwithstanding the fact that the amount owing thereon may not then be due and payable or that the Loan may otherwise be adequately secured.

Borrower further covenants and agrees to give Lender immediate notice of the actual or threatened commencement of any proceedings under eminent domain, and to deliver to Lender copies of any and all papers served in connection with any such proceedings. Borrower further covenants and agrees to make, execute and deliver to Lender, at any time or times, upon request, free, clear and discharged of any encumbrance of any kind whatsoever, any and all further assignments and/or other instruments deemed necessary by Lender for the purpose of validly and sufficiently assigning all such awards and other compensation heretofore or hereafter made to Lender (including the assignment of any award from the United States government at any time after the allowance of the claim therefor, the ascertainment of the amount thereof and the issuance of the warrant for payment thereof).

It shall be a default hereunder if either: (i) any part of any of the Improvements situated on the Real Property shall be condemned by any governmental authority having jurisdiction; or (ii) lands constituting a portion of the Real Property shall be condemned by any governmental authority having jurisdiction, such that the remaining Property is in violation of applicable parking, zoning, platting, or other ordinances, or fails to comply with the terms of the Occupancy Leases with Major Tenants. In either of said events, Lender shall be entitled to exercise any or all remedies provided or referenced in this Deed of Trust, including the application of condemnation proceeds to the outstanding principal balance of the Note at par, and the right to accelerate the maturity date of the Note and require payment in full without the imposition of a Prepayment Premium.

Borrower hereby specifically, unconditionally and irrevocably waives all rights of a property owner granted under California Code of Civil Procedure Section 1265.225(a), which provides for allocation of condemnation proceeds between a property owner and a lienholder, and any other law or successor statute of similar import.

### **COSTS OF COLLECTION**

19. In the event that the Note secured hereby is placed in the hands of an attorney for collection, or in the event that Lender shall become a party either as plaintiff or as defendant, in any action, suit, appeal or legal proceeding (including, without limitation, foreclosure, condemnation, bankruptcy, administrative proceedings or any proceeding wherein proof of claim is by law required to be filed), hearing, motion or application before any court or administrative body in relation to the Property or the lien and security interest granted or created hereby or herein, or for the recovery or protection of said Loan or the Property, or for the foreclosure of this Deed of Trust, or for the enforcement of the terms and conditions of the Loan Documents, Borrower shall indemnify, save, defend and hold Lender harmless from and against any and all costs and expenses incurred by Lender on account thereof, including, but not limited to, Reasonable Attorneys' Fees, title searches and abstract and survey charges, at all trial and appellate levels, and Borrower shall repay, on demand, all such costs and expenses, together with interest thereon until paid at the lesser of either (i) the highest rate of interest then allowed by the laws of the State of California, or, if controlling, the laws of the United States, or (ii) the then applicable rate of interest of the Note plus five hundred (500) basis points; all of which sums, if unpaid, shall be added to and become a part of the Loan secured hereby.

### **DEFAULT RATE**

20. Any sums not paid when due, whether maturing by lapse of time or by reason of acceleration under the provisions of the Note or this Deed of Trust, and whether principal, interest or money owing for advancements pursuant to the terms of this Deed of Trust or any other Loan Document, shall bear interest until paid at the lesser of either (i) the highest rate of interest then allowed by the laws of the State of California, or, if controlling, the laws of the United States, or (ii) the then applicable rate of interest of the Note plus five hundred (500) basis points; all of which sums shall be added to and become a part of the Loan secured hereby.

### **SAVINGS CLAUSE**

21. Notwithstanding any provisions in the Note or in this Deed of Trust to the contrary, the total liability for payments in the nature of interest, including but not limited to Prepayment Premiums, default interest and late payment charges, shall not exceed the limits imposed by the laws of the State of California or, if controlling, the laws of the United States,

relating to maximum allowable charges of interest. Lender shall not be entitled to receive, collect or apply, as interest on the Loan evidenced by the Note, any amount in excess of the maximum lawful rate of interest permitted to be charged by the Laws. In the event Lender ever receives, collects or applies as interest any such excess, such amount which would be excessive interest shall be applied to reduce the unpaid principal balance of the Loan evidenced by the Note. If the unpaid principal balance of such Loan has been paid in full, any remaining excess shall be forthwith returned to Borrower.

### **BANKRUPTCY, REORGANIZATION OR ASSIGNMENT**

22. It shall be a default hereunder if Borrower or any guarantor or indemnitor of the Loan shall: (i) elect to dissolve and liquidate its business organization and wind up its business affairs without receiving the prior written approval of Lender; (ii) consent to the appointment of a receiver, trustee or liquidator of all or a substantial part of Borrower's assets or the assets of such guarantor or indemnitor; (iii) be adjudicated as bankrupt or insolvent, or file a voluntary petition in bankruptcy, or admit in writing its inability to pay its debts as they become due; (iv) make a general assignment for the benefit of creditors; (v) file a petition under or take advantage of any insolvency law; (vi) file an answer admitting the material allegations of a petition filed against Borrower or any guarantor or indemnitor of the Loan in any bankruptcy, reorganization or insolvency proceeding, or fail to cause the dismissal of such petition within thirty (30) days after the filing of said petition; (vii) take action for the purpose of effecting any of the foregoing; or (viii) if any order, judgment or decree shall be entered upon an application of a creditor of Borrower or any guarantor or indemnitor of the Loan by a court of competent jurisdiction approving a petition seeking appointment of a receiver or trustee of all or a substantial part of Borrower's assets or the assets of such guarantor or indemnitor and such order, judgment or decree shall continue unstayed and in effect for a period of thirty (30) days.

### **TIME IS OF THE ESSENCE; MONETARY AND NON-MONETARY DEFAULTS**

23. It is understood by Borrower that time is of the essence hereof in connection with all obligations of Borrower herein, in the Note, the Assignment and any of the other Loan Documents.

Lender, at its sole option, may declare the Loan evidenced by the Note, as well as all other monies secured hereby, including, without limitation, all Prepayment Premiums (to the extent permitted by the laws of the State of California) and late payment charges, to be forthwith due and payable, in the event:

(i) Borrower defaults in the payment of any monthly installment of the Note, whether of principal or interest, or both, or in the payment of any other sums of

money referred to herein or in the Note, promptly and fully when the same shall be due, without notice or demand from Lender to Borrower in regard to such Monetary Default (as hereinafter defined);

(ii) Borrower breaches or defaults on any one of the terms, covenants, conditions and agreements of the Note, this Deed of Trust, the Assignment or any other Loan Documents evidencing or securing the Note or the Loan; or in the event that each and every one of said terms, covenants, conditions and agreements is not otherwise either duly, promptly and fully discharged or performed, and any such Non-Monetary Default (as hereinafter defined) remains uncured for a period of thirty (30) days after Written Notice thereof has been delivered from Lender to Borrower; unless such Non-Monetary Default cannot be cured within said thirty (30) day period, in which event Borrower shall have an extended period of time to complete cure, provided that action to cure such Non-Monetary Default is promptly commenced within said thirty (30) day period, and Borrower is, in Lender's sole judgment, not diminishing or impairing the value of the Property, and is diligently pursuing a cure to completion, but in no event longer than ninety (90) days.

(iii) Any default occurs in the performance of any covenant or obligation of Borrower or any other party under any indemnity or guaranty delivered to Lender in connection with the Loan and such default continues beyond the expiration of applicable notice and cure periods.

Upon the occurrence of any one of the above events, and at the option of Lender, the principal of and the interest accrued on the Loan (as evidenced by the Note) and all other sums secured by this Deed of Trust, at the option of Lender, the Deed of Trust shall immediately become due and payable as if all of said sums of money were originally stipulated to be paid on such day. In addition, Lender may avail itself of all rights and remedies provided in this Deed of Trust or by law and may foreclose or prosecute a suit at law or in equity as if all monies secured hereby had matured prior to its institution, anything in this Deed of Trust or in the Note to the contrary notwithstanding. Lender shall have no obligation to give Borrower notice of, or any period to cure, any Monetary Default or any Incurable Default (as hereinafter defined) prior to exercising its rights, powers, privileges and remedies to accelerate the maturity of the Loan secured hereby.

As used herein, the term "Monetary Default" shall mean any default which can be cured by the payment of money such as, but not limited to, the payment of principal and interest due under the Note, taxes, assessments and insurance premiums when due as provided in this Deed of Trust. As used herein, the term "Non-Monetary Default" shall mean any default that is not a Monetary Default or an Incurable Default. As used herein, the term "Incurable Default" shall mean either: (i) any voluntary or involuntary sale, assignment, mortgaging, encumbering or transfer in violation of the covenants contained herein; or (ii) if

Borrower, or any person or entity comprising Borrower or any guarantor or indemnitor of the Loan, should make an assignment for the benefit of creditors, become insolvent, or file a petition in bankruptcy (including but not limited to, a petition seeking a rearrangement or reorganization) which is not dismissed within thirty (30) days after the filing of same.

The failure or omission on the part of Lender to exercise the option for acceleration of maturity of the Note and foreclosure of this Deed of Trust following any default as aforesaid or to exercise any other option or remedy granted hereunder to Lender when entitled to do so in any one or more instances, or the acceptance by Lender of partial payment of the Loan secured hereby, whether before or subsequent to Borrower's default hereunder, shall not constitute a waiver of any such default or the right to exercise any such option or remedy, but such option or remedy shall remain continuously in force. Acceleration of the maturity of the Note, once claimed hereunder by Lender, at the option of Lender, may be rescinded by written acknowledgment to that effect by Lender, but the tender and acceptance of partial payments alone shall not in any way either affect or rescind such acceleration of maturity, nor act as a waiver, accord and satisfaction, modification, novation or similar defense.

If any such default under this Deed of Trust occurs and Lender declares all indebtedness secured hereby to be immediately due and payable as aforesaid, then Lender shall have the following remedies:

(a) Lender shall have the right, either in person or by agent, with or without bringing any action or proceeding, or by a receiver appointed by a court and without regard to the adequacy of the security, to enter upon and take possession of the Property, or any part thereof, in its own name or in the name of Trustee, and do any acts which Lender deems necessary or desirable to preserve the value, marketability or rentability of the Property or increase the income therefrom or protect the security hereof, and, with or without taking possession of the Property, to sue for or otherwise collect the rents and profits of the Property, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including, without limitation, Reasonable Attorneys' Fees, upon any indebtedness secured hereby, all in such order as Lender may determine. The entering upon and taking possession of the Property, the collection of the rents and profits, and the application thereof as aforesaid shall not cure or waive any default or notice of default hereunder or invalidate any act done in response to such default or pursuant to such notice of default and, notwithstanding the continuance in possession of the Property or the collection, receipt and application of the rents and profits, Trustee or Lender shall be entitled to exercise every right or remedy provided for in any of the Loan Documents or by law upon the occurrence of any such event of default under this Deed of Trust, including the right to exercise the power of sale.

(b) Lender shall have the right to commence an action to foreclose this Deed of Trust as a mortgage, appoint a receiver, or specifically enforce any of the covenants hereof.



(c) Lender shall have the right to exercise and enforce any or all of the rights and remedies available to a secured party under the Uniform Commercial Code of California.

(d) Lender shall have the right to deliver to Trustee a written declaration of default and demand for sale pursuant to the power of sale in this Deed of Trust. If Lender elects to foreclose this Deed of Trust by exercise of the power of sale in this Deed of Trust, Lender shall notify Trustee and shall deposit with Trustee such written notice of default and election to sell and such receipts or evidence of expenditures made and secured hereby as Trustee may require. Upon receipt of such notice from Lender, Trustee shall cause to be recorded, published and delivered to Borrower such notice of default and election to sell as may then be required by law and by this Deed of Trust. Trustee shall, without demand on Borrower, after lapse of such time as may then be required by law after recordation of such notice of default and election to sell, and after notice of sale has been given as may then be required by law, sell the Property (including the Fixtures and Personal Property, if requested by Lender, as agent for Lender) at the time and place of sale fixed by Trustee in such notice of sale, either as a whole or in separate lots or parcels or items, and in such order as Lender may determine, at public auction to the highest bidder for cash in lawful money of the United States, payable at the time of sale. Trustee shall deliver to such purchaser or purchasers Trustee's deed or deeds (and, if applicable, bill of sale or bills of sale) conveying the property so sold, but without any covenant or warranty, express or implied. The recitals in such deed or bill of sale of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including, without limitation, Borrower, Trustee or Lender, may purchase at such sale and Borrower hereby covenants to warrant and defend the title of such purchaser or purchasers. After deducting all costs, fees and expenses of Trustee and of this trust, including costs of evidence of title in connection with the sale, Trustee shall apply the proceeds of sale to payment of: all sums expended under this Deed of Trust, not then repaid, with interest thereon as provided herein; all indebtedness and other obligations secured hereby; and the remainder, if any, to the person or persons legally entitled thereto. Trustee may postpone sale of all or any portion of the Property by public announcement at the time and place of sale, and from time to time thereafter may postpone such sale by public announcement at the time and place fixed by the preceding postponement or subsequently noticed sale, and without further notice make such sale at the time and place fixed by the last postponement, or may, in its discretion, give a new notice of sale. The power of sale under this Deed of Trust shall not be exhausted by any one or more sales (or attempts to sell) as to all or any portion of the Property remaining unsold, but shall continue unimpaired until all of the Property has been sold by exercise of the power of sale in this Deed of Trust and all indebtedness and obligations secured by this Deed of Trust have been paid and discharged in full.

(e) Lender, as a matter of right and without notice to Borrower or anyone claiming under Borrower, and without regard to the adequacy of the security or the then value of the Property or the interest of Borrower therein, shall have the right to have a receiver or

receivers of the Property appointed by any court having jurisdiction, and Borrower hereby irrevocably consents to such appointment. Any such receiver or receivers shall have all the usual powers and duties of receivers in like or similar cases and all the powers of Lender in case of entry as provided herein and shall continue as such and exercise all such powers until the date of confirmation of sale of the Property unless such receivership is sooner terminated.

Every right, power and remedy granted to Trustee or Lender in this Deed of Trust shall be cumulative and not exclusive, and in addition to all rights, powers and remedies granted at law or in equity or by statute, and each such right, power and remedy may be exercised from time to time and as often and in such order as may be deemed expedient by Trustee or Lender, and the exercise of any such right, power or remedy shall not be deemed a waiver of the right to exercise, at the same time or thereafter, any other right, power or remedy.

#### **PROTECTION OF LENDER'S SECURITY**

24. At any time after default hereunder, Lender, or Lender's agents or contractors, is authorized, without notice and in Lender's sole discretion, to enter upon and take possession of the Property or any part thereof, and to perform any acts which Lender deems necessary or proper to conserve the security interest herein intended to be provided by the Property, to operate any business or businesses conducted thereon, and to collect and receive all rents, license fees, issues, profits and income, including termination fees and taking proceeds, thereof and therefrom, including those past due as well as those accruing thereafter.

#### **APPOINTMENT OF RECEIVER**

25. If, at any time after a default hereunder, Lender deems, in Lender's sole discretion, that a receivership may be necessary to protect the Property or its rents, license fees, issues, profits or income, including termination fees and taking proceeds, whether before or after maturity of the Note and whether before or at the time of or after the institution of suit to collect such Loan or to enforce this Deed of Trust, Lender, as a matter of strict right and regardless of the value of the Property or the amounts due hereunder or secured hereby, or of the solvency of any party bound for the payment of such indebtedness, shall have the right, upon ex parte application and without notice to anyone, and by any court having jurisdiction, to the appointment of a receiver to take charge of, manage, preserve, protect and operate the Property, to collect the Rents thereof, to make all necessary and needful repairs, and to pay all taxes, assessments, insurance premiums and other such charges against and expenses of the Property, and to do such other acts as may by such court be authorized and directed, and after payment of the expenses of the receivership and the management of the Property, to apply the net proceeds of such receivership in reduction of the Loan secured hereby or in such other manner as the said court shall direct notwithstanding the fact that the amount owing thereon may not then be due and payable or the said Loan is otherwise adequately secured. Such receivership shall, at the option of Lender, continue until full payment of all sums hereby

secured or until title to the Property shall have passed by sale under this Deed of Trust. Borrower hereby specifically waives its right to object to the appointment of a receiver as aforesaid, and hereby expressly agrees that such appointment shall be made as an admitted equity and as a matter of absolute right to Lender.

#### **RIGHTS AND REMEDIES CUMULATIVE; FORBEARANCE NOT A WAIVER**

26. The rights and remedies herein provided are cumulative, and Lender, as the holder of the Note and of every other obligation secured hereby, may recover judgment thereon, issue execution therefor and resort to every other right or remedy available at law or in equity, without first exhausting any right or remedy available to Lender and without affecting or impairing the security of any right or remedy afforded hereby, and no enumeration of special rights or powers by any provisions hereof shall be construed to limit any grant of general rights or powers, or to take away or limit any and all rights granted to or vested in Lender by law. Borrower further agrees that no delay or omission on the part of Lender to exercise any rights or powers accruing to it hereunder shall impair any such right or power, or shall be construed to be a waiver of any such event of default hereunder or an acquiescence therein; and every right, power and remedy granted herein or by law to Lender may be exercised from time to time as often as may be deemed expedient by Lender. Notwithstanding the existence of any other liens or security interests in the Property held by Lender or by any other party, Lender shall have the right to determine the order in which any or all of the Property shall be subjected to the remedies provided herein. Lender shall have the right to determine the order in which the indebtedness secured hereby is satisfied from the proceeds realized upon the exercise of the remedies provided herein. Borrower, any party who consents to this Deed of Trust, and any party who now or hereafter acquires a lien or security interest in the Property and who has actual or constructive notice of this Deed of Trust hereby expressly waives and relinquishes any and all rights to demand or require the marshaling of liens or the marshaling of assets by Lender in connection with the exercise of any of the remedies provided herein or permitted by applicable law. Borrower expressly waives and relinquishes any and all rights and remedies Borrower may have or be able to assert by reason of laws relating to the rights and remedies of sureties or guarantors.

#### **MODIFICATION NOT AN IMPAIRMENT OF SECURITY**

27. Lender, without notice and without regard to the consideration, if any, paid therefor, and notwithstanding the existence at that time of any inferior deeds of trust or mortgages or other liens thereon, may release any part of the security described herein, or may release any person or entity liable for the Loan secured hereby without in any way affecting the priority of this Deed of Trust, to the full extent of the Loan remaining unpaid hereunder, upon any part of the security not expressly released. Lender may, at its option and within Lender's sole discretion, also agree with any party obligated on the Loan, or having any interest in the security described herein, to extend the time for payment of any part or all of the Loan secured

hereby, and such agreement shall not, in any way, release or impair this Deed of Trust, but shall extend the same as against the title of all parties having any interest in said security, which interest is subject to this Deed of Trust. At any time, and from time to time, without liability therefor and without notice, upon written authorization and request of Lender and without affecting the personal liability of any person for payment of the indebtedness secured hereby or the effect of this Deed of Trust upon the remainder of the Property, Trustee may (a) reconvey any part of the Property, (b) consent in writing to the making of any map or plat of the Property, (c) join in granting any easement thereon, or (d) join in any extension agreement or any agreement subordinating the lien of this Deed of Trust.

### **PROPERTY MANAGEMENT AND LEASING**

28. The exclusive manager of the Property shall be Borrower, or such other manager as may be first approved in writing by Lender. The exclusive leasing agent of the Property, if other than Borrower or the foregoing party, shall be first approved in writing by Lender. The management and leasing contracts (or in the absence of any such written contract, a letter so stating and further identifying the name of the person or entity charged with the responsibility for managing and/or leasing the Property) shall be subordinate to this Deed of Trust, and satisfactory to and subject to the prior written approval of Lender throughout the term of the Loan secured hereby. Upon default in either of these requirements, then the whole of the Loan hereby secured shall, at the election of Lender, become immediately due and payable, together with any default premium, late payment charges and all other sums required by the Note, and Lender shall be entitled to exercise any or all remedies provided for or referenced in this Deed of Trust.

### **MODIFICATION NOT A WAIVER**

29. In the event Lender (a) releases, as aforesaid, any part of the security described herein or any person or entity liable for any Loan secured hereby; (b) grants an extension of time for the payment of the Note; (c) takes other or additional security for the payment of the Note; or (d) waives or fails to exercise any rights granted herein, in the Note, or any of the other Loan Documents, any said act or omission shall not release Borrower, subsequent purchasers of the Property or any part thereof, or makers, sureties, endorsers or guarantors of the Note, if any, from any obligation or any covenant of this Deed of Trust, the Note or any of the other Loan Documents, nor preclude Lender from exercising any right, power or privilege herein granted or intended to be granted in the event of any other default then made, or any subsequent default.

**TRANSFER OF PROPERTY OR CONTROLLING INTEREST IN BORROWER;  
ASSUMPTION**

30. Except as set forth in Paragraph 36(b) hereof, without the prior written consent of Lender, the sale, transfer, assignment or conveyance of all or any portion of the Property, whether voluntary or by operation of law, without the prior written consent of Lender, shall constitute a default under the terms of this Deed of Trust, and entitle Lender, at Lender's sole option, to accelerate all sums due on the Note, together with any Prepayment Premiums (to the extent permitted by the laws of the State of California), late payment charges or any other amounts secured hereby. Lender may, however, elect to waive the option to accelerate granted hereunder if, prior to any such sale, transfer, assignment or conveyance of the Property, the following conditions shall be fully satisfied: (a) Lender acknowledges in writing that, in Lender's sole discretion, the creditworthiness of the proposed transferee and the ability and experience of the proposed transferee to operate the Property are satisfactory to Lender; (b) Lender and the proposed transferee shall enter into an agreement in writing that (i) the rate of interest payable on the Loan secured hereby shall be at such rate as Lender shall determine, (ii) the repayment schedule as set forth in the Note shall be modified by Lender, in Lender's sole discretion, to initiate amortization or modify the existing amortization schedule in order to amortize the then remaining unpaid principal balance of the Note secured hereby over a period of time as determined by Lender, in Lender's sole discretion, without a change in the maturity date of the Note, and (iii) the proposed transferee shall assume all obligations of Borrower under the Note, this Deed of Trust and the other Loan Documents in writing and an assumption fee, to be determined by Lender in Lender's sole discretion, may be charged by Lender; (c) Lender shall receive, for Lender's review and approval, copies of all transfer documents; and (d) Borrower or the transferee shall pay all costs and expenses in connection with such transfer and assumption, including, without limitation, all fees and expenses incurred by Lender.

Borrower, or any subsequent owner of the Property or any portion thereof, shall do all things necessary to preserve and keep in full force and effect its and their legal existence, franchises, rights and privileges as a corporation or partnership, as the case may be, under the laws of the state of its formation and its right to own property and transact business in the State of California. It shall be a default hereunder if Borrower, or any subsequent owner of the Property or any portion thereof, shall amend, modify, transfer, assign or terminate the partnership agreement, certificate of partnership, operating agreement, articles of organization or articles of incorporation, as the case may be, of Borrower or such subsequent owner without the prior written consent of Lender and, in the reasonable determination of Lender, such amendment, modification, transfer, assignment or termination shall have a material adverse effect on Lender, the Property or the security value thereof. Borrower, or such subsequent owner of the Property, shall provide Lender with copies of any proposed amendment to its partnership agreement, certificate of partnership or articles of incorporation, as the case may be, so that Lender may, in Lender's sole discretion, determine whether such amendment

adversely affects Lender, the Property or the security value thereof. Provided, however, that any amendment, modification, transfer, assignment or termination of Borrower's partnership agreement or any other action pursuant to which the current managing general partner of Borrower shall either: (a) cease to be the managing general partner of Borrower; or (b) except to the extent permitted herein, cease to own or maintain a partnership interest in Borrower equal to or greater than its partnership interest at the time this Deed of Trust is executed, shall be deemed to have a material adverse effect upon Lender and the Property, and shall be a default hereunder.

Borrower shall not change its name or identity in any manner which may make any financing or continuation statement filed in connection with the Loan seriously misleading within the meaning of Section 9-507 of the UCC (or any other then applicable provision of the UCC) enacted in the State unless Borrower shall have delivered to Lender written notice thereof not less than thirty (30) days before the effective date of such change and shall have taken all action which Lender determines to be reasonably necessary or desirable to amend such financing statement or continuation statement so that it is not seriously misleading. Borrower will not change its principal places of business unless it shall have given the Lender prior written notice of its intent to do so not less than thirty (30) days in advance of the effective date of such change. Borrower shall bear all costs incurred by Lender in connection with any such change in, including, without limitation Reasonable Attorney's Fees.

In the event the ownership of the Property, or any part thereof, shall become vested in a person or entity other than Borrower, whether with or without the prior written consent of Lender, Lender may, without notice to Borrower, deal with such successor or successors in interest with reference to the Property, this Deed of Trust and the Note, in the same manner and to the same extent as with Borrower without in any way vitiating or discharging Borrower's liability hereunder or under the Note. No sale, transfer or conveyance of the Property, no forbearance on the part of Lender and no extension of time given by Lender to Borrower for the payment of the Note hereby secured shall operate to release, discharge, modify, change or affect the original liability of Borrower, either in whole or in part, unless expressly set forth in writing executed by Lender. Notwithstanding anything contained herein to the contrary, Borrower hereby waives any right it now has or may hereafter have to require Lender to prove an impairment of its security as a condition to the exercise Lender's rights under this Paragraph 30.

A sale, transfer, assignment or conveyance within the meaning of this Paragraph shall be deemed to include, but not be limited to, (a) an installment sales agreement wherein Borrower agrees to sell the Property or any part thereof for a price to be paid in installments; (b) an agreement by Borrower leasing all or a substantial part of the Property for other than actual occupancy by a tenant under an Occupancy Lease or a sale, assignment or other transfer of, or the grant of a security interest in, Borrower's right, title and interest in and to any leases or any rents; (c) if Borrower, any guarantor, any indemnitor, or any general partner of

Borrower, any guarantor or indemnitor is a corporation, the voluntary or involuntary sale, conveyance, transfer or pledge of such corporation's stock (or the stock of any corporation directly or indirectly controlling such corporation by operation of law or otherwise), or the creation or issuance of new stock by which an aggregate of more than ten percent (10%) of such corporation's stock shall be vested in a party or parties who are not now stockholders; and (d) if Borrower, any guarantor or indemnitor or any general partner of Borrower, any guarantor or indemnitor is a limited partnership, general partnership, limited liability partnership, limited liability company, or joint venture, the change, removal or resignation of a general partner, managing partner, or member, or the transfer or pledge of the interest of any general partner, managing partner, or member or any profits or proceeds relating to such interest.

#### **FURTHER ENCUMBRANCE PROHIBITED; SUBROGATION**

31. So long as the Note remains unpaid, Borrower shall not, either voluntarily or involuntarily, permit the Property or any part thereof to become subject to any secondary lien, mortgage, security interest or encumbrance of any kind whatsoever without the prior written consent of Lender, and the imposition of any such secondary lien, mortgage, security interest or encumbrance without the approval of Lender shall constitute an event of default hereunder, and entitle Lender, at Lender's sole option, to declare the outstanding principal balance of the Note, all accrued and unpaid interest thereon, Prepayment Premiums (to the extent permitted by the laws of the State of California, late payment charges and any other amounts secured hereby to be and become immediately due and payable in full. In the event that Lender shall hereafter give its written consent to the imposition of any such secondary lien, mortgage, security interest or other encumbrance upon the Property, Lender, at Lender's sole option, shall be entitled to accelerate the maturity of the Note and exercise any and all remedies provided and available to Lender hereunder and in the other Loan Documents in the event that the holder of any such secondary lien or encumbrance shall institute foreclosure or other proceedings to enforce the same; it being understood and agreed that a default under any instrument or document evidencing, securing or secured by any such secondary lien or encumbrance shall be and constitute an event of default hereunder. In the event all or any portion of the proceeds of the Loan secured hereby are used for the purpose of retiring debt or debts secured by prior liens on the Property, Lender shall be subrogated to the rights and lien priority of the holder or holders of the lien or liens so discharged.

Notwithstanding the above, Lender hereby acknowledges that the Borrower has obtained a loan from the City of Oakland in the original principal amount of \$12,000,000.00 (the "Oakland Loan"). The Oakland Loan is evidenced by a Promissory Note Secured by Deed of Trust, dated October 20, 1999 in favor of the City of Oakland, a public body corporate and politic in the original principal amount of \$12,000,000.00 (the "Oakland Note"). The Oakland Note is secured by a Subordinated Deed of Trust and Fixture Filing

dated October 20, 1999 in favor of the City of Oakland, a public body corporate and politic and certain other documents (collectively, the "Oakland Loan Documents"). Lender hereby consents to Oakland Loan and the encumbrance of the Property by the Oakland Loan Documents, provided that such documents are and shall at all times remain subject and subordinate to the lien of and Lender's rights under this Deed of Trust.

Lender acknowledges that Borrower has sold to Banc America Historic Ventures ("BAHV") approximately \$9,000,000.00 of Historical Tax Credits with respect to the Property. In connection with such sale and transfer, Borrower has entered into an Assignment, Pledge and Security Agreement, dated October 4, 1999 an Option Agreement dated October 4, 1999 and a Tax Credit Guaranty dated October 4, 1999 (collectively, the "Tax Credit Finance Documents"). By acceptance of this Deed of Trust, Lender acknowledges the existence of the Tax Credit Finance documents and agrees that their existence does not constitute an a default hereunder.

#### **CONVEYANCE OF MINERAL RIGHTS PROHIBITED**

32. Borrower agrees that the making of any oil, gas or mineral lease, or the sale or conveyance of any mineral interest or right to explore for minerals under, through or upon the Property, would impair the value of the Property securing the Note, and that Borrower shall have no right, power or authority to lease the Property, or any part thereof, for oil, gas or other mineral purposes, or to grant, assign or convey any mineral interest of any nature, or the right to explore for oil, gas and other minerals, without first obtaining Lender's express written permission therefor, which permission shall not be valid until recorded among the Public Records of Alameda, California. Borrower further agrees that if Borrower shall make, execute, or enter into any such lease or attempt to grant any such mineral rights without such prior written permission of Lender, then Lender shall have the option, without notice, to declare the same to be a default hereunder, and to declare the Loan hereby secured immediately due and payable in full. Whether or not Lender shall consent to such lease or grant of mineral rights, Lender shall receive the entire consideration to be paid for any such lease or grant of mineral rights, with the same to be applied to the Loan hereby secured notwithstanding the fact that the amount owing thereon may not then be due and payable or that the said Loan is otherwise adequately secured; provided, however, that the acceptance of such consideration shall in no way impair the lien of this Deed of Trust on the Property or cure any existing Monetary Default.

#### **ESTOPPEL CERTIFICATION BY BORROWER**

33. Borrower, upon request of Lender therefor made either personally or by mail, shall certify in writing to Lender (or any party designated by Lender), in a form satisfactory to Lender or such designee, the amount of principal and interest then outstanding under the terms of the Note and any other sums due and owing under this Deed of Trust or any of the other



Loan Documents, and whether any offsets or defenses exist against the Loan. Such certification shall be made by Borrower within ten (10) days if the request is made personally, or within twenty (20) days if the request is made by mail.

### **CROSS-DEFAULT**

34. The Note is also secured by the terms, conditions and provisions of the Assignment recorded among the Public Records of Alameda, California and, additionally, may be secured by contracts or agreements of guaranty or other security instruments. The terms, covenants, conditions and agreements of each security instrument shall be considered a part hereof as fully as if set forth herein verbatim. Any default under this Deed of Trust or the Note secured hereby shall constitute an event of default under the Assignment and any of the other Loan Documents, and any default under the Assignment or other Loan Documents shall likewise constitute a default hereunder and under the Note. Notwithstanding the foregoing, the enforcement or attempted enforcement of this Deed of Trust or any of the other Loan Documents now or hereafter held by Lender, shall not prejudice or in any manner affect the right of Lender to enforce any other Loan Document; it being understood and agreed that Lender shall be entitled to enforce this Deed of Trust and any of the other Loan Documents now or hereafter held by it in such order and manner as Lender, in its sole discretion, shall determine.

### **EXAMINATION OF BORROWER'S RECORDS**

35. Borrower will maintain complete and accurate books and records showing in detail the income and expenses of the Property, and will permit Lender and its agents, contractors or representatives, to examine said books and records and all supporting vouchers and data during normal business hours and from time to time upon request by Lender, in such place as such books and records are customarily kept. Borrower will furnish to Lender, within one hundred twenty (120) days after the close of each respective fiscal period annual and semi-annual financial statements (income statements and a balance sheet) for the Borrower and the Property. These statements shall be in form acceptable to Lender, shall be prepared in accordance with generally accepted accounting principles, and shall include a rent roll, certified as true and correct by Borrower. The statements shall show in detail all income derived from and expenses incurred in connection with the ownership of the Property, including current annual sales figures for all Major Tenants of the Property if required under the Major Tenant leases or if such financial information is otherwise available. In the event Borrower fails to provide such statements to Lender within the time prescribed above, Borrower shall pay Lender the sum of Two Hundred and No/100 Dollars (\$200.00) in administrative expenses for each successive month for which the statements are delinquent. In the event of a default hereunder, Lender shall have the right to require that said financial statements be audited and certified by a certified public accountant acceptable to Lender, at the sole cost and expense of Borrower.

In addition, at the request of Lender, but in no case more often than once a quarter or more than three times during the term of the Loan, Borrower shall furnish to Lender (i) unaudited financial statements (balance sheet, income statement, cash flow statement and current rent roll) covering operation of the Property for periods other than those set forth in the preceding paragraph; (ii) unaudited financial statements (balance sheets, income statements, and cash flow statements) for the Borrower, its general partner(s), shareholder(s) or member(s) (whichever is applicable) and for such other principals of the Borrower as designated by Lender; and (iii) a portfolio analysis showing annualized cash flow statements (including debt service payments) for all real properties owned by Borrower, its general partner(s), shareholder(s), member(s) (whichever is applicable) and for such designated principals. All such statements shall be certified to Lender to be complete, correct, and accurate by the individual (for an individual's statements) or by an authorized representative of the entity (if such statements are for a partnership, corporation or limited liability company) signing such statements.

#### **ALTERATION, REMOVAL AND CHANGE IN USE OF PROPERTY PROHIBITED**

36. Borrower covenants and agrees to permit or suffer none of the following without the prior written consent of Lender:

(a) Any structural alteration of, or addition to, the Improvements now or hereafter situated upon the Real Property, or the addition of any new buildings or other structure(s) thereto, other than the erection or removal of non-load bearing interior walls; or

(b) The removal, transfer, sale or lease of the Property, except that the renewal, replacement or substitution of fixtures, equipment, machinery, apparatus and articles of personal property (replacement or substituted items must be of like or better quality than the removed items in their original condition) encumbered hereby may be made in the normal course of business; or

(c) The use of any of the Improvements now or hereafter situated on the Real Property for any purpose other than as a office project and related facilities.

#### **FUTURE ADVANCES SECURED**

37. This Deed of Trust shall secure not only existing indebtedness, but also future advances, whether such advances are obligatory or to be made at the option of Lender. Upon the request of Borrower, and at Lender's option prior to release of this Deed of Trust, Lender may make future advances to Borrower. All future advances with interest thereon shall be secured by this Deed of Trust to the same extent as if such future advances were made on the

date of the execution of this Deed of Trust unless the parties shall agree otherwise in writing, but the total secured indebtedness shall not exceed at any one time a maximum principal amount equal to double the face amount of the Note plus interest, and costs of collection including court costs and Reasonable Attorneys' Fees. Any advances or disbursements made for the benefit or protection of or the payment of taxes, assessments, levies or insurance upon the Property, with interest on such disbursements as provided herein, shall be added to the principal balance of the Note and collected as a part thereof. To the extent that this Deed of Trust may secure more than one mortgage note, a default in the payment of any such mortgage note shall constitute a default in the payment of all such mortgage notes.

### **EFFECT OF SECURITY AGREEMENT**

38. Borrower does hereby grant, and this Deed of Trust is and shall be deemed to create, grant, give and convey, a Deed of Trust of, a lien and encumbrance upon, and a present security interest in, both real and personal property, including all improvements, goods, chattels, furniture, furnishings, fixtures, equipment, apparatus, appliances and other items of tangible or intangible personal property, hereinabove particularly or generally described and conveyed, whether now or hereafter affixed to, located upon, necessary for or used or useful, either directly or indirectly, in connection with the operation of the Property as a office project, and this Deed of Trust shall also serve as a "security agreement" as that term is defined and used in the Uniform Commercial Code as adopted and in force from time to time in the State of California, and shall be operative and effective as a security agreement in addition to, and not in substitution for, any other security agreement executed by Borrower in connection with the extension of credit transaction secured hereby. Borrower agrees to, and shall upon the request of Lender, execute and deliver to Lender, in form and content satisfactory to Lender, such financing statements, descriptions of property and such further assurances as Lender, in Lender's sole discretion, may from time to time consider necessary to create, perfect, continue and preserve the lien and encumbrances hereof, and the security interest granted herein, upon and in such real and personal property and fixtures described herein, including all buildings, improvements, goods, chattels, furniture, furnishings, fixtures, equipment, apparatus, appliances, and other items of tangible and intangible personal property herein specifically or generally described and intended to be the subject of the security interest, lien and encumbrance hereby created, granted and conveyed. Without the prior written consent of Lender, Borrower shall not create or suffer to be created, pursuant to the Uniform Commercial Code, any other security interest in such real and personal property and fixtures described herein. Upon the occurrence of a default hereunder or Borrower's breach of any other covenants or agreements between the parties entered into in conjunction herewith, Lender shall have the remedies of a secured party under the Uniform Commercial Code and, at Lender's option, the remedies provided for in this Deed of Trust. Lender, at the expense of Borrower, may cause such statements, descriptions and assurances, as herein provided in this Paragraph 38, and this Deed of Trust, to be recorded and re-recorded, filed and refiled, at

such times and in such places as may be required or permitted by law to so create, perfect and preserve the lien and encumbrance hereof upon all of the Property.

### TERMS OF CONTRACT SURVIVE CLOSING

39. The terms and provisions of the Application/Contract for Mortgage Loan dated March 13, 2002, and any subsequent amendments thereto (hereinafter referred to as the "Contract"), executed by and between Borrower and Lender, are incorporated herein by reference. All terms, covenants, conditions and agreements of the Contract not expressly set forth in this Deed of Trust, the Note, the Assignment and any of the other Loan Documents additionally securing the Note shall survive the execution and delivery hereof, and remain in full force and effect. In the event any conflict exists between the terms, covenants, conditions and agreements of the Contract and the Loan Documents, the terms, covenants, conditions and agreements of the Loan Documents shall prevail.

### SUCCESSORS AND ASSIGNS; TERMINOLOGY

40. The provisions hereof shall be binding upon Borrower and the heirs, personal representatives, trustees, successors and assigns of Borrower, and shall inure to the benefit of Lender, its successors and assigns. Where more than one Borrower is named herein, the obligations and liabilities of said Borrower shall be joint and several.

Wherever used in this Deed of Trust, unless the context clearly indicates a contrary intent or unless otherwise specifically provided herein: (i) the word "Borrower" shall mean Borrower and/or any subsequent owner or owners of the Property; (ii) the word "Lender" shall mean Lender or any subsequent holder or holders of this Deed of Trust; (iii) the word "Trustee" shall mean Trustee or any successor Trustee under this Deed of Trust; (iv) the word "Note" shall mean the Note(s) secured by this Deed of Trust; and (v) the word "person" shall mean an individual, trustee, trust, corporation, partnership, limited liability corporation, limited liability partnership, joint venture or unincorporated association. As used herein, the phrase "Reasonable Attorneys' Fees" shall mean fees charged by attorneys selected by Lender based upon such attorneys' then prevailing hourly rates as opposed to any statutory presumption specified by any statute then in effect in the State of California.

### NOTICES

41. All notices, reports, requests or other written instruments required or permitted hereunder, shall be in writing, signed by the party giving or making the same, and shall be sent hand-delivered, effective upon receipt, sent by United States Express Mail or by a nationally recognized overnight courier, effective upon receipt, or sent by United States registered or certified mail, postage prepaid, with return receipt requested, deemed effective on the earlier of the day of actual delivery as shown by the addressee's return receipt or the expiration of

three (3) business days after the date of mailing, addressed to the party intended to receive the same at the address set forth below or at such other address as shall be given in writing by any party to another (herein referred to as "Written Notice"):

If to Borrower:      ROTUNDA PARTNERS II, LLC  
300 Frank H. Ogawa Plaza - Suite 340  
Oakland, California 94612  
Attention: Mark A. Moss

With a copy to:      Bank of America  
Bank of America Plaza  
101 South Tryon Street  
Charlotte, North Carolina 28255-0001  
Mail Code: NCI-002-18-02  
Attention: Z. Yolanda Johnson-Gess  
Equity Portfolio Manager

If to Lender:      NATIONWIDE LIFE INSURANCE COMPANY  
One Nationwide Plaza  
Columbus, Ohio 43215-2220  
Attention: Real Estate Investment Department

42.      GROUND LEASE

(a)      Borrower represents and warrants that: (i) the Ground Lease is in full force and effect and a true and complete copy of the Ground Lease (including all amendments thereto) has been delivered to Lender; (ii) there are no existing defaults under the Ground Lease or in the performance of the terms thereof by either Borrower or the lessor thereunder; and (iii) all rents and other charges reserved in the Ground Lease have been paid to the extent they were due and payable prior to the date hereof.

(b)      Borrower shall: (i) pay all rent, additional rent and other sums required to be paid by Borrower, as lessee, under and pursuant to the provisions of the Ground Lease as and when such rents or other charges are payable, (ii) diligently perform and observe all of the terms, covenants and conditions of the Ground Lease on the part of Borrower, as lessee thereunder, to be performed and observed as and when required thereunder, and (iii) promptly notify Lender of the giving of any notice by the lessor under the Ground Lease to Borrower of any default by Borrower, as lessee thereunder, to be performed or observed, and immediately deliver to Lender a true copy of each such notice.

(c)      Borrower shall not, without the prior consent of Lender, surrender the Leasehold Estate created by the Ground Lease or terminate, cancel, modify, change,

supplement, alter or amend the Ground Lease, in any respect, either orally or in writing, without Lender's prior written consent, which may be granted or withheld in Lender's sole discretion.

(d) If Borrower shall default in the performance or observance of any term, covenant or condition of the Ground Lease on the part of Borrower, as lessee thereunder, to be performed or observed, then, without limiting the generality of the other provisions of this Mortgage, and without waiving or releasing Borrower from any of its obligations hereunder, Lender shall have the right, without notice to Borrower at any time thereafter, but shall be under no obligation, to pay any sums and to perform any act or take any action as may be appropriate to cause all of the terms, covenants and conditions of the Ground Lease on the part of Borrower, as lessee thereunder, to be performed or observed or to be promptly performed or observed on behalf of Borrower, to the end that the rights of Borrower in, to and under the Ground Lease shall be kept unimpaired and free from default. Borrower hereby grants to Lender and any person designated by Lender, the right to enter upon the Property at any time and from time to time for the purpose of taking any such action. If the lessor under the Ground Lease shall deliver to Lender a copy of any notice of default sent to Borrower, as lessee under the Ground Lease, such notice shall constitute full protection to Lender for any action taken or omitted to be taken by Lender, in good faith, in reliance thereon. All costs and expenses incurred by Lender in remedying such default under the Ground Lease shall bear interest until paid at the lesser of either (i) the highest rate of interest then allowed by the laws of the State of Connecticut, or, if controlling, the laws of the United States, or (ii) the then applicable interest rate of the Note plus five hundred (500) basis points for the period after notice from Lender that such cost or expense was incurred to the date of payment to Lender. All such costs and expenses incurred by Lender together with interest thereon shall be deemed to constitute a portion of the indebtedness and be secured by this Mortgage and the other Loan Documents and shall be immediately due and payable upon demand by Lender therefor.

(e) So long as any portion of the indebtedness evidenced by the Note shall remain unpaid, unless Lender shall otherwise consent, the fee title to the Leasehold Real Estate and the Leasehold Estate created pursuant to the provisions of the Ground Lease shall not merge but shall always be kept separate and distinct, notwithstanding the union of such estates in Borrower, or in any other person by purchase, operation of law or otherwise.

(f) So long as any portion of the indebtedness evidenced by the Note remains unpaid, if Borrower shall be the owner and holder of the fee title to that portion of the Property subject to the Ground Lease the lien of this Mortgage shall be spread to cover Borrower's fee title to such Property and said fee title shall be deemed to be included in the Property. Borrower agrees, at its sole cost and expense, including, without limitation, Lender's Reasonable Attorney's Fees, to (i) execute any and all documents or instruments necessary or desirable to subject its fee title to the Property to the lien of this Mortgage; and

(ii) provide a title insurance policy which shall insure that the lien of this Mortgage is a first lien on Borrower's fee title to the Property.

(g) So long as any portion of the indebtedness evidenced by the Note remains unpaid, if any additional land and/or Improvements become part of the leased premises under the Ground Lease, the lien of this Mortgage shall be spread to cover Borrower's leasehold estate in such land and/or Improvements and such additional land and/or Improvements shall be deemed to be included in the Property. Borrower agrees to execute any and all documents or instruments necessary or desirable to subject its leasehold title to such additional land and/or Improvements to the lien of this Mortgage, in form and substance reasonably satisfactory to Lender.

(h) Borrower hereby unconditionally assigns, transfers and sets over to Lender all of Borrower's claims and rights to the payment of damages arising from any rejection by the owner of the Ground Lease under the Bankruptcy Code. Lender shall have the right to proceed in its own name or in the name of Borrower in respect of any claim, suit, action or proceeding relating to the rejection of the Ground Lease, including, without limitation, the right to file and prosecute, any proofs of claim, complaints, motions, applications, notices and other documents, in any case in respect of the owner under the Bankruptcy Code. This assignment constitutes a present, irrevocable and unconditional assignment of the foregoing claims, rights and remedies, and shall continue in effect until the Loan has been satisfied and discharged in full. Any amounts received by Lender as damages arising out of the rejection of the Ground Lease as aforesaid shall be applied first to all costs and expenses of Lender (including, without limitation, attorneys' fees and disbursements) incurred in connection with the exercise of any of its rights or remedies under this paragraph.

(i) Borrower shall not, without Lender's prior written consent, elect to treat the Ground Lease as terminated under Section 365(h)(1) of the Bankruptcy Code. Any such election made without Lender's prior written consent shall be void.

(j) If pursuant to Section 365(h)(1) of the Bankruptcy Code, Borrower seeks to offset against the rent reserved in the Ground Lease the amount of any damages caused by the non-performance by the owner of any of the owner's obligations under the Ground Lease after the rejection by the owner of the Ground Lease under the Bankruptcy Code, Borrower shall, prior to effecting such offset, notify Lender of its intention to do so, setting forth the amounts proposed to be so offset and the basis therefor. Lender shall have the right, within ten (10) days after receipt of such notice from Borrower, to reasonably object to all or any part of such offset, and, in the event of such reasonable objection, Borrower shall not effect any offset of the amounts so objected to by Lender for a period of thirty (30) days after Lender has delivered its objection notice to Borrower during which time Lender shall have the right to bring its objections to the attention of any court supervising the bankruptcy of the owner of the Ground Lease and both Lender and Borrower agree to abide by the decision of any such court.

If (A) Lender has failed to object as aforesaid within ten (10) days after notice from Borrower, or (B) the court fails to render its decision within the above-mentioned thirty (30) day period, Borrower may proceed to effect such offset in the amounts set forth in Borrower's notice. Neither Lender's failure to object as aforesaid nor any objection or other communication between Lender and Borrower relating to such offset shall constitute an approval of any such offset by Lender.

(k) If any action, proceeding, motion or notice shall be commenced or filed in respect of Borrower or the Property in connection with any case under the Bankruptcy Code (other than a case under the Bankruptcy Code commenced with respect to Borrower), Lender shall have the option, to the exclusion of Borrower, exercisable upon notice from Lender to Borrower, to conduct and control any such litigation, and Borrower agrees to execute any and all powers, authorizations, consents and other documents reasonably required by Lender in connection therewith. Borrower shall pay to Lender all reasonable costs and expenses (including, without limitation, reasonable attorneys' fees and disbursements) paid or incurred by Lender in connection with the prosecution or conduct of any such proceedings within five (5) days after notice from Lender. Any such costs or expenses not paid by Borrower as aforesaid shall be secured by the lien of this Mortgage and shall be added to the principal amount of the indebtedness secured hereby. Borrower shall not commence any action, suit, proceeding or case, or file any application or make any motion, in respect of the Ground Lease in any such case under the Bankruptcy Code (other than a case under the Bankruptcy Code commenced with respect to Borrower) without the prior written consent of Lender, which consent shall not be unreasonably withheld.

(l) Borrower shall promptly, after obtaining knowledge thereof, notify Lender of any filing by or against the owner of the Ground Lease Real Property or the lessor under the Ground Lease, of a petition under the Bankruptcy Code, setting forth any information available to Borrower as to the date of such filing, the court in which such petition was filed, and the relief sought therein. Borrower shall promptly deliver to Lender following receipt of any and all notices, summonses, pleadings, applications and other documents received by Borrower in connection with any such petition and any proceedings relating thereto.

(m) If there shall be filed by or against Borrower a petition under the Bankruptcy Code, and Borrower, as the lessee under the Ground Lease, shall determine to reject the Ground Lease pursuant to Section 365(a) of the Bankruptcy Code, then Borrower shall give Lender not less than ten (10) days prior written notice of the date on which Borrower shall apply to the bankruptcy court for authority to reject the Ground Lease. Lender shall have the right, but not the obligation, to serve upon Borrower within such ten (10) day period a notice stating that (i) Lender demands that Borrower assume and assign the Ground Lease to Lender pursuant to Section 365 of the Bankruptcy Code, and (ii) Lender covenants to cure or provide adequate assurance of prompt cure of all defaults and provide adequate assurance of



future performance of Borrower's obligations under the Ground Lease. If Lender serves upon Borrower the notice described in the preceding sentence, Borrower shall not seek to reject the Ground Lease and shall seek court approval to comply with the demand provided for in clause (i) of the preceding sentence within thirty (30) days after the notice shall have been given, subject to the performance by Lender of the covenant provided for in clause (ii) of the preceding sentence.

(n) Effective upon the entry of an order for relief in respect of Borrower under the Bankruptcy Code, Borrower hereby assigns and transfers to Lender a non-exclusive right to apply to the bankruptcy court under Section 365(d)(4) of the Bankruptcy Code for an order extending the period during which the Ground Lease may be rejected or assumed.

### **GOVERNING LAW; SEVERABILITY**

43. This Deed of Trust is to be governed by and construed in accordance with the laws of the State of California, if controlling, by the laws of the United States. If any clauses or provisions herein contained shall operate or would prospectively operate to invalidate this Deed of Trust, then such clauses or provisions only shall be held for naught, as though not herein contained, and the remainder of this Deed of Trust shall remain operative and in full force and effect.

### **RIGHTS OF LENDER CUMULATIVE**

44. The rights of Lender arising under the terms, covenants, conditions and agreements contained in this Deed of Trust shall be separate, distinct and cumulative, and none of them shall be in exclusion of the others. No act of Lender shall be construed as an election to proceed under any one provision herein to the exclusion of any other provisions, anything herein or otherwise to the contrary notwithstanding. If the Borrower hereunder is comprised of more than one person or entity, then the liability of each such person and entity hereunder shall be joint and several.

### **MODIFICATIONS**

45. This Deed of Trust cannot be changed, altered, amended or modified except by an agreement in writing and in recordable form, executed by both Borrower and Lender.

### **EXCULPATION**

46. Notwithstanding anything contained herein to the contrary, the liability of Borrower is subject to the limited recourse provisions contained in the Exculpation section of the Note, which are incorporated herein and made a part hereof by reference as if fully set forth herein.

### **FULL RECOURSE**

47. Notwithstanding any provisions in this Deed of Trust to the contrary, including, without limitation the provisions set forth in the section captioned "Exculpation" hereinabove, Borrower shall be personally liable, jointly and severally, for the entire Loan secured by this Deed of Trust (including all principal, interest and other charges) in the event (i) Borrower violates the covenant governing the placing of subordinate financing on the Property as set forth in Paragraph 31 of this Deed of Trust; (ii) Borrower violates the covenant restricting transfers of interest in the Property or transfers of ownership interests in Borrower as set forth in Paragraph 30 of this Deed of Trust; or (iii) there is filed against Borrower or any guarantor or indemnitor of the Loan, a petition in bankruptcy or for the appointment of a receiver, or there commences under any bankruptcy or insolvency law, proceedings for Borrower's relief, or for the compromise, extension, arrangement or adjustment of Borrower's obligations which is not dismissed within thirty (30) days after the filing of same.

### **CAPTIONS**

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

This Deed of Trust may be executed in several counterparts, each of which when executed and delivered shall be deemed a duplicate original, but all of which when taken together shall constitute one and the same instrument.

Upon written request of Lender stating that all sums secured hereby have been paid, and upon surrender of this Deed of Trust and the Note to Trustee for cancellation and retention, and upon payment by Borrower of Trustee's fees, Trustee shall reconvey to Borrower, or the person or persons legally entitled thereto, without warranty, any portion of the Property then held hereunder. The recitals in such reconveyance of any matters or facts shall be conclusive proof of the truthfulness thereof. The grantee in any reconveyance may be described as "the person or persons legally entitled thereto."

Trustee accepts this trust when this Deed of Trust, duly executed and acknowledged, is made a public record as provided by law. The trust hereby created shall be irrevocable by Borrower.

Lender may, from time to time, by a written instrument executed and acknowledged by Lender and recorded in the county in which the Real Property is located, and by otherwise complying with applicable law, substitute a successor or successors to the Trustee named herein or acting hereunder.

### **REQUEST FOR NOTICE**

49. Borrower hereby requests that a copy of any notice of default and of any notice of sale under this Deed of Trust be mailed to Borrower at the address of Borrower set forth in Paragraph 41 of this Deed of Trust as required by applicable law.

### **CHARGES FOR STATEMENTS**

50. Borrower agrees to pay Lender's charge, up to the maximum amount permitted by law, for any statement regarding the obligations secured by this Deed of Trust requested by Borrower or on its behalf.

ATTENTION: COUNTY RECORDER -- THIS INSTRUMENT COVERS GOODS THAT ARE OR WILL BECOME FIXTURES ON THE DESCRIBED REAL PROPERTY AND SHOULD BE FILED FOR RECORD IN THE REAL PROPERTY RECORDS WHERE DEEDS OF TRUST ON REAL ESTATE ARE RECORDED. THIS INSTRUMENT SHOULD ALSO BE INDEXED AS A UNIFORM COMMERCIAL CODE FINANCING STATEMENT COVERING GOODS THAT ARE OR WILL BECOME FIXTURES ON THE DESCRIBED REAL PROPERTY. THE MAILING ADDRESSES OF THE SECURED PARTY AND THE DEBTOR ARE WITHIN.

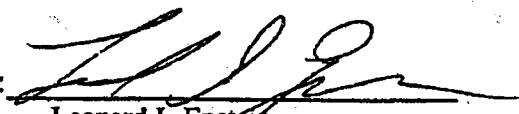
*[The remainder of this page has been intentionally left blank]*

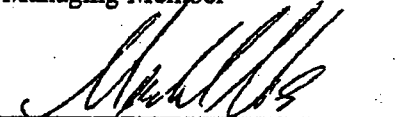
IN WITNESS WHEREOF, Borrower has caused this Deed of Trust to be executed as of the day and year first above written.

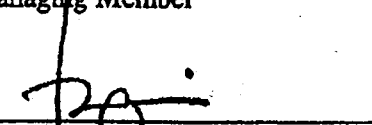
**BORROWER:**

**ROTUNDA PARTNERS II, LLC,**  
a California limited liability company

By: **Rotunda Partners I, LLC**  
a California limited liability company  
Its Managing Member

By:   
Leonard I. Epstein  
Managing Member

By:   
Mark A. Moss  
Managing Member

By:   
Phillip H. Tagami  
Managing Member

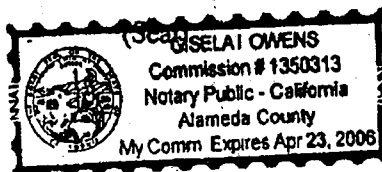
STATE OF California )  
COUNTY OF Alameda )

SS.

On 4-30, 2002, before me, Gisela I. Owens, a Notary Public in and for the State of California, personally appeared Leonard I. Epstein, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the within instrument in his authorized capacity and that, by his signature on the within instrument, the person or entity upon behalf of which he acted executed the within instrument.

WITNESS my hand and official seal.

Signature: \_\_\_\_\_



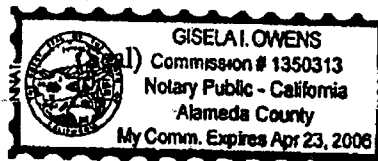
STATE OF California )  
COUNTY OF Alameda )

SS.

On 4-30, 2002, before me, Gisela I. Owens, a Notary Public in and for the State of California, personally appeared Mark A. Moss, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the within instrument in his authorized capacity and that, by his signature on the within instrument, the person or entity upon behalf of which he acted executed the within instrument.

WITNESS my hand and official seal.

Signature: \_\_\_\_\_



STATE OF California )  
COUNTY OF Alameda )

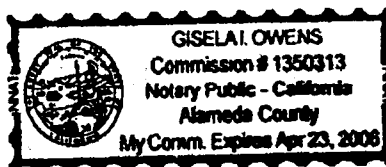
ss.

On 4-30, 2002, before me, Giselai Owens, a Notary Public in and for the State of California, personally appeared **Phillip H. Tagami**, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the within instrument in his authorized capacity and that, by his signature on the within instrument, the person or entity upon behalf of which he acted executed the within instrument.

WITNESS my hand and official seal.

Signature: \_\_\_\_\_

(Seal)



# Exhibit A

## CITY OF OAKLAND

### PARCEL ONE:

BEGINNING AT A POINT IN THE WESTERN LINE OF BROADWAY, FORMERLY TELEGRAPH AVENUE, DISTANT THEREON 100 FEET SOUTHERLY FROM THE SOUTHERN LINE OF 16TH STREET; RUNNING THENCE SOUTHERLY ALONG THE WESTERN LINE OF BROADWAY 130 FEET; THENCE NORTH 78° 48' WEST 103.95 FEET; THENCE SOUTH 75° 36' WEST 102.44 FEET TO THE EASTERN LINE OF SAN PABLO AVENUE; THENCE NORTHERLY ALONG SAID EASTERN LINE OF SAN PABLO AVENUE 130 FEET; THENCE NORTH 75° 33' EAST 90 FEET; THENCE NORTH 14° 24' WEST 5.72 FEET; THENCE NORTH 11° 11' EAST 112.89 FEET TO THE SOUTHERN LINE OF 16TH STREET; THENCE ALONG THE SOUTHERN LINE OF 16TH STREET SOUTH 78° 48' EAST 74 FEET; THENCE SOUTH 11° 12' WEST 100 FEET; THENCE SOUTH 78° 48' EAST 100 FEET TO THE POINT OF BEGINNING.

### PARCEL TWO:

BEGINNING AT A POINT ON THE WESTERN LINE OF BROADWAY, FORMERLY TELEGRAPH AVENUE, DISTANT THEREON 230 FEET SOUTHERLY FROM THE POINT OF INTERSECTION THEREOF WITH THE SOUTHERN LINE OF 16TH STREET; THENCE SOUTH 11° 12' WEST ALONG SAID WESTERN LINE OF BROADWAY 20 FEET; THENCE NORTH 78° 48' WEST 99.41 FEET; THENCE SOUTH 75° 36' WEST 97.90 FEET TO A POINT ON THE EASTERN LINE OF SAN PABLO AVENUE, DISTANT THEREON 315.00 FEET SOUTHERLY FROM THE POINT OF INTERSECTION THEREOF WITH THE SOUTHERN LINE OF 16TH STREET; THENCE NORTH 14° 24' WEST ALONG SAID LINE OF SAN PABLO AVENUE 20 FEET; THENCE NORTH 75° 36' EAST 102.44 FEET; THENCE SOUTH 78° 48' EAST 103.95 FEET TO THE POINT OF BEGINNING.

EXCEPTING THEREFROM THE INTEREST TAKEN BY THE CITY OF OAKLAND IN THE CONDEMNATION PROCEEDINGS AND IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA, ENTITLED CITY OF OAKLAND, VS. SAN PABLO CO., ET AL., CASE #74496, A CERTIFIED COPY OF FINAL JUDGMENT WAS RECORDED SEPTEMBER 23, 1924, IN BOOK 803, OFFICIAL RECORDS, AT PAGE 245, BEING AN INTEREST IN A PARCEL OF UNIFORM WIDTH OF 18 FEET EXTENDING FROM THE WEST LINE OF BROADWAY TO THE EASTERN LINE OF SAN PABLO AVENUE.

### PARCEL THREE:

BEGINNING AT THE POINT OF INTERSECTION OF THE WESTERN LINE OF TELEGRAPH AVENUE WITH THE SOUTHERN LINE OF 16TH STREET; RUNNING THENCE SOUTHERLY ALONG SAID LINE OF TELEGRAPH AVENUE 100 FEET; THENCE AT RIGHT ANGLES WESTERLY 100 FEET; THENCE AT RIGHT ANGLES NORTHERLY 100 FEET TO THE SOUTHERN LINE OF 16TH STREET; AND THENCE EASTERLY ALONG SAID LAST NAMED LINE 100 FEET TO THE POINT OF BEGINNING.

BEING LOTS 1, 2, 3 AND 4, IN BLOCK "A", AS SAID LOTS AND BLOCK ARE SHOWN ON THE "MAP OF SURVEY MADE FOR G.C. POTTER, MARCH 28, 1877, BY T.J. ARNOLD, C.E.", ETC., FILED APRIL 23, 1877, IN THE OFFICE OF THE COUNTY RECORDER OF ALAMEDA COUNTY, MAP BOOK 2, PAGE 14.

ASSESSOR'S PARCEL NO. 008-0619-004-01

### PARCEL FOUR:

ALL RIGHT, TITLE AND INTEREST OF ROTUNDA PARTNERS II, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY AS LESSEE UNDER: (i) THAT CERTAIN PARKING LEASE (DALZIEL GARAGE) ENTERED INTO BETWEEN ROTUNDA PARTNERS II, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY AND THE CITY OF OAKLAND, A PUBLIC BODY, CORPORATE AND POLITIC, WHICH PARKING LEASE (DALZIEL GARAGE) WAS RECORDED OCTOBER 20, 1999, SERIES NO. 99394066, OF THE

OFFICIAL RECORDS OF ALAMEDA COUNTY, CALIFORNIA; AND (ii) THAT CERTAIN PARKING LEASE (SURFACE PARKING) ENTERED INTO BETWEEN ROTUNDA PARTNERS II, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY AND THE REDEVELOPMENT AGENCY OF THE CITY OF OAKLAND, A PUBLIC BODY CORPORATE AND POLITIC, WHICH PARKING LEASE (SURFACE PARKING) WAS RECORDED ON OCTOBER 20, 1999, SERIES NO. 99394067, OF OFFICIAL RECORDS OF ALAMEDA COUNTY, CALIFORNIA.