

IN THE CIRCUIT COURT OF THE 13TH
JUDICIAL CIRCUIT IN AND FOR
HILLSBOROUGH COUNTY, FLORIDA

CASE NO. 07-014284

M.A.M.C. INCORPORATED, etc., et al.,

Plaintiffs,

vs.

**MEMORANDUM OF GILES
CONSTRUCTION GROUP, INC., IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

PROFESSIONAL STAFFING - A.B.T.S.,
INC., etc., et al.,

Defendants.

The Defendant herein, GILES CONSTRUCTION GROUP, INC., a Florida corporation, (GILES) files this Memorandum in Opposition to the Motion for Partial Summary Judgment filed on behalf of the Plaintiff, M.A.M.C. INCORPORATED.

I. The Motion for Partial Summary Judgment is defective on its face.

1. The Motion for Partial Summary Judgment recites the existence of a series of notes and recites, at Paragraph 9:

The lien of the Lenders' Mortgage and Future Advances through October 6, 2006 in the principal amount of \$3,200,000.00, is superior to the interests of any and all DEFENDANTS named in this action, whose interests should be foreclosed by operation of this action.

2. Other than the factual recitations - and the recitations of Paragraph 9 - there is no citation to either statute or case law contained in any portion of the Verified Motion for Partial Summary Judgment.

3. Florida Rules of Civil Procedure 1.510, in establishing the summary judgment motion and proceedings thereon, states, at subsection (c).

The motion shall state with particularity the grounds upon which it is based and the substantial matters of law to be argued. . .

The failure to state any substantial matters of law to be argued, as required in the Rule, constitutes a legal defect in the Motion. City of Brooksville v. Hernando County, 424 So.2d 846 (5th DCA 1983)

The partial summary judgment entered by the trial court clearly is not in conformity with this rule. The motion itself was based solely on recorded testimony and evidence received at the trial and failed to state 'the substantial matters of law to be argued'. City of Brooksville, at 848. (Emphasis added)

The requirement that the facts, and the relevant law, be articulated in the Motion for Summary Judgment is directed to the salutary purpose of preventing "ambush" at the hearing on Summary Judgment by allowing the non-moving party to be prepared for the issues that will be argued. Deluxe Motel, Inc. v. Petel, 727 So.2d 299 (5th DCA 1999). (See also Locke v. State Farm Fire and Casualty Company, 509 So.2d 1375 (1st DCA 1987).

To the same effect is Lee v. Treasure Island Marina, Inc., 620 So.2d 1295 (1st DCA 1993): "the obvious purpose of this rule is to eliminate surprise and to provide the parties with a full and fair opportunity to argue the issues". *Id* at 1297.

II. The Movant has failed to conclusively rebut the affirmative defenses interposed by GILES.

4. In responding to the Plaintiff's Complaint, GILES has filed an Answer and interposed two affirmative defenses, indicating:

- A. A pending foreclosure action previously filed by GILES in this same Circuit Court; and
- B. A violation of the First Mortgage asserted against the Second Mortgage Holders and Movants in this action.

5. While the failure to conclusively rebut the affirmative defenses raised by GILES, results in GILES not being required to file any proof at all in opposition to the Motion, Hamilton v. Bank of Palm Beach and Trust Company, 348 So.2d 1190 (4th DCA 1977).

6. In addition to the foregoing, other than the bare assertion in Paragraph 9 that the Movant's interests are superior to the interests of all Defendants, there is a complete failure to conclusively refute the affirmative defenses asserted by GILES. A movant for summary judgment must conclusively refute affirmative defenses asserted by the non-movant. No such

proof was presented in support of the motion for summary judgment.

Fischer v. Rodriguez-Capriles, 472 So.2d 1315, 1317 (3d DCA 1985).

7. GILES has asserted, relative to both affirmative defenses, that the First Mortgage relevant to this action (the Plaintiff and Movant is attempting to assert foreclosure of a Second Mortgage in the amount of \$3,200,000.00), contains a restriction, at Section 8 of such Mortgage which limits any future advances to \$800,000.00. These affirmative defenses, which would have the effect of, at worst, limiting this Partial Summary Judgment to \$800,000.00, has never been addressed or conclusively rebutted in the Movant's Motion for Partial Summary Judgment. Thus, such affirmative defenses create a question of both fact and law for disposition by the Court in proceedings other than this Motion for Partial Summary Judgment.

8. The First Mortgage relevant to this action is a public record recorded in Official Records Book 14318, at Page 0658 of the Public Records of Hillsborough County, Florida. A copy of such Mortgage and Security Agreement is attached hereto as Exhibit "A".

WHEREFORE, having responded to the Plaintiff's Motion for Partial Summary Judgment, GILES CONSTRUCTION GROUP, INC., prays that same be denied as to this Defendant.

I HEREBY CERTIFY that a copy of the foregoing was faxed and mailed this 6th day of March, 2009, to: R. Marshall Rainey, Esquire, One Tampa City Center, Tampa, Florida 33602 and mailed to all parties on the attached service list.

LAW OFFICES OF
NORMAN MALINSKI, P.A.
2875 Northeast 191st Street
Suite 508
Aventura, Florida 33180
Telephone: (305) 937-4242

By: NORMAN MALINSKI
Norman Malinski
Florida Bar ID# 182344

Clerk, Circuit Court
George E. Edgecomb Courthouse
800 East Twiggs Street
Tampa, Florida 33602

James D. Gassenheimer, Esquire
307 Continental Plaza
3250 Mary Street
Coconut Grove, Florida 33133

CT Corporation System
RA for Wesco Distribution, Inc.
1200 South Pine Island Road
Plantation, Florida 33324

All Florida Firm, Inc.
RA for A. Williams Electrical & Controls, Inc.
813 Deltona Boulevard, Suite A
Deltona, Florida 32725

DB Tampa, LLC
c/o Mr. Dana Berman, Owner
501 Continental Plaza
3250 Mary Street
Coconut Grove, Florida 33133

Andrea M. Fair, Esquire
RA for Residential Drywall, Inc.
1010 N. Florida Avenue
Tampa, Florida 33602

Barry Logan, Managing Agent for
Coastline Distribution LLC
2665 S. Bayshore Drive, Suite 901
Coconut Grove, Florida 33133

Sembler Investments Real Estate Services
RA for Skilled Services of Tampa Bay, LLC
11300 4th Street North, Suite 200
St. Petersburg, Florida 33716

Gary Janowsky
RA for Florida's Finest Landscape Services, Inc.
11530 66th Avenue North
Seminole, Florida 34642

Timothy F. Pickles
RA for Flooring America of Tamp, Inc.
1970 Michigan Avenue, Building C
Cocoa, Florida 32922
Jacqueline M. Dorman, VP
RA for JD Welding and Fabrication, Inc.
5436 Ingraham Street
Tampa, Florida 33616

Corporate Service Company
RA for Sherwin-Williams Company
1201 Hays Street
Tallahassee, Florida 32301

David Lamont
RA for Professional Staffing - A.B.T.S., Inc.
3040 Gulf To Bay Boulevard
Clearwater, Florida 33759

George W. Liniley
RA for Rinker Materials of Florida, Inc.
1501 Belvedere Road
West Palm Beach, Florida 33406

CT Corporation System
RA for Graybar Electric Company, Inc.
1200 South Pine Island Road
Plantation, Florida 33324

Marc Jeffrey Glogower
RA for Danielle Fence Manufacturing Company, Inc.
4855 State Road 60 West
Mulberry, Florida 33860

CT Corporation System
RA for Waste Management National Services
2394 E. Camelback Road
Phoenix, AZ 85016

CT Corporation System
RA for Sunbelt Rentals, Inc.
1200 South Pine Island Road
Plantation, Florida 33324

George M. Adams

RA for Electric Supply of Tamp, Inc.
2401 Ardson Place, #903B
Tampa, Florida 33629

CT Corporation System
RA for APAC-Southeast, Inc.
1200 South Pine Island Road
Plantation, Florida 33324

John R. Garrison
RA for Quality Roofing of Florida, Inc.
11812 Shadow Run Boulevard
Riverview, FL 33569

10/16/2004 11:55:45 AM

Record and Return to:
Balcer & Craig LLP.
307 Continental Plaza
3250 Mary Street
Coconut Grove, Florida 33133
Prepared by and Return To:
Joseph M. Balocco, Esq.
Joseph M. Balocco, P.A.
1323 SE Third Avenue
Ft. Lauderdale, FL 33316

INSTR # 2004405304

O BK 14318 PG 0658

Pgs 0658 - 666: (9pgs)

RECORDED 10/16/2004 11:55:45 AM
RICHARD AKE CLERK OF COURT
HILLSBOROUGH COUNTY
DOC. TAX PD (F.S. 201.08) 8,960.00
INT. TAX PD (F.S. 199) 5,120.00
DEPUTY CLERK B Loggans

THIS IS NOT A CERTIFIED COPY

MORTGAGE AND SECURITY AGREEMENT

This Mortgage and Security Agreement, made this 13th day of October, 2004, between DB Tampa, LLC, a Florida limited liability company ("Mortgagor"), whose address is 501 Continental Plaza, 3250 Mary Street, Coconut Grove, FL 33133 and Great Florida Bank, whose address is 15050 NW 79th Court, Miami Lakes, FL 33016, ("Mortgagee").

Mortgagor is indebted to Mortgagee pursuant to and as evidenced by that certain Secured Promissory Note dated October 13, 2004, executed by Mortgagor and delivered to Mortgagee, (as amended, modified, renewed, extended or altered, the "Note"), in the original principal amount of Two Million Five Hundred Sixty Thousand and 00/100 (\$2,560,000.00) Dollars with a maturity date of October 13, 2007.

To secure the payment and performance by Mortgagor of all covenants and conditions of the Note, this Mortgage, and all other instruments relating to the Note, including all future advances, (obligatory and otherwise), expenses incurred or disbursements made under the Note or this Mortgage (hereafter referred to as the "Obligations"), Mortgagor does hereby mortgage and assign to Mortgagee and, where applicable, grant a security interest in, the property described in clauses (A) through (E) below:

- (A) All the estate, right and title of the Mortgagor in, to and under: (i) the land in the County of Hillsborough, State of Florida, described on Exhibit "A" attached hereto and made a part hereof (the "Land"), and (ii) any and all buildings and other improvements now or hereafter located thereon (the "Improvements"), to have and to hold the same, together with each and every tenement, hereditament, easement, right-of-way, right, power, privilege, immunity and appurtenance thereunto belonging or in anywise appertaining thereto.
- (B) (i) All property and fixtures now or hereafter affixed to or located on the Land which is deemed to be fixtures and a part of the real property under applicable law; (ii) all articles of personal property and all materials owned by Mortgagor and located on the Land for use in any way thereon; (iii) all contract rights, general intangibles, actions and rights in action, insurance policies (and unearned premiums therefor), utility deposits and lease deposits; and (iv) All equipment and machinery, including parts, accessories, attachments and special tools.
- (C) All of Mortgagor's rights and interests in, to and under any leases, now or hereafter existing, with respect to all or any part of the Mortgaged Property, and all renewals, extensions, subleases or assignments thereof.
- (D) All rents, issues, profits, business or other revenues, income, proceeds, and other benefits flowing or derived from any of the foregoing and the operations on the Land; provided however, that permission is hereby given to Mortgagor so long as no default has occurred hereunder, to collect, receive, and use such benefits from the foregoing as they become due and payable, but not in advance thereof.
- (E) All proceeds (including without limitation, insurance proceeds), products, extensions, replacements, improvements, additions, substitutions, renewals and accessions of any of the foregoing items.

Everything referred to in paragraphs (A), (B), (C), (D) and (E) hereof and any additional property hereafter acquired by Mortgagor and subject to the lien of this Mortgage or any part thereof is herein referred to as the "Mortgaged Property."

This Mortgage constitutes a security agreement with respect to the above personal property, but Mortgagor agrees to execute and deliver on demand such other agreements and instruments as Mortgagee may request in order to further document or perfect its security interest upon any of such property. Mortgagee shall have all the rights and remedies of a secured party under the Uniform Commercial Code in effect in the State where the Land is located, in addition to any other rights and remedies specified herein.

10401-001

THIS IS NOT A

If all of the Obligations shall be fully and completely satisfied, paid and performed, then all rights and obligations hereunder shall terminate, except certain rights and indemnifications as set forth herein, and the Mortgaged Property shall become wholly released and free of the liens, security interests, conveyances and assignments evidenced hereby. (In such event Mortgagee shall, at the request and expense of Mortgagor, promptly deliver to Mortgagor, in recordable form, all such documents as shall be necessary to release the Mortgaged Property from the liens, security interests, conveyances and assignments created or evidenced hereby.

The Mortgagor also agrees as follows:

- 1. Compliance with Note and Mortgage; Warranty of Title.** Mortgagor shall comply with all provisions hereof, of the Note and of every other instrument securing the Note, and will promptly pay to Mortgagee the principal, together with interest thereon, and all other sums required to be paid by Mortgagor under the Note, this Mortgage and all other instruments securing the Note. Mortgagor is indefeasibly seized of the Mortgaged Property in fee simple, has good title free and clear of all liens whatsoever to all of the personal property becoming a part thereof, and Mortgagor has lawful authority to mortgage, assign and encumber the same as provided by this Mortgage, and does hereby so warrant and will forever warrant and defend such title.
- 2. Payment of Taxes and Liens.** Mortgagor shall pay all taxes, assessments, liens, levies, liabilities, obligations and encumbrances of every nature and kind whether now or hereafter imposed, levied or assessed on the Mortgaged Property, this Mortgage or the obligations secured hereby. All such payments shall be made when due insofar as any such lien or encumbrance is of record the same shall be promptly satisfied or released and evidence of such satisfaction or release shall be given to Mortgagee. Mortgagor shall deposit with Mortgagee on the first day of each month, in addition to making payments of principal and interest, until the Note is fully paid, an amount equal to one-twelfth (1/12) of the annual taxes and assessments payable with respect to the Mortgaged Property. Such deposits shall not be, nor be deemed to be, trust funds, but may be commingled with the general funds of Mortgagee and no interest shall be payable in respect thereof. Upon demand by Mortgagee, Mortgagor shall deliver to Mortgagee such additional monies as are necessary to make up any deficiencies in the amounts necessary to pay such taxes and assessments when due. Upon an Event of Default (hereinafter defined), Mortgagee may apply to the reduction of the Obligations secured hereby, in such manner as Mortgagee shall determine, any amount under this Section remaining to Mortgagor's credit.
- 3. Insurance.** Mortgagor shall keep the Mortgaged Property insured against loss by fire or other casualty and contingency, including flood insurance, as required by Federal law (including business interruption and all risk extended coverage if required by Mortgagee) for the term hereof in amounts not less than the original principal amount of the Note. Mortgagee shall be named as additional insured and as mortgagee and loss payee on said policies, copies of which shall be delivered to Mortgagee immediately upon issuance thereof. Mortgagor shall also obtain and maintain comprehensive general liability insurance in amounts required by Mortgagee. Mortgagor shall pay promptly, when due, all premiums for such insurance. All such insurance shall be carried with companies approved by Mortgagee and the policy and renewals thereof shall be held by Mortgagee and shall name Mortgagee and its Assignees as additional insureds. In event of loss, Mortgagor shall give immediate notice by mail to Mortgagee and Mortgagee may make proof of loss if not made promptly by Mortgagor, and each insurance company concerned is hereby authorized and directed to make payments for such loss directly to Mortgagee. Such insurance proceeds or any part thereof may be applied by Mortgagee at its option, after deducting therefrom all its expenses including attorney's fees, either to reduction of the Obligations in such order as Mortgagee shall determine or to the restoration or repair of the property damaged. Mortgagee is hereby authorized, at its option, to settle and compromise any claims, awards, damages, rights of action and proceeds, and any other payment or relief under any insurance policy. In the event of foreclosure of this Mortgage or other transfer of title in the Mortgaged Property in extinguishment of the Obligations, all right, title, and interest of Mortgagor in and to any insurance policies then in force shall pass to the purchaser or grantee. Mortgagor shall deposit with Mortgagee on the first day of each month, in addition to making payments of principal and interest until the Note is fully paid, an amount equal to one-twelfth (1/12) of the annual premiums for all insurance. Such deposits shall not be, nor be deemed to be, trust funds, but may be commingled with the general funds of Mortgagee, and no interest shall be payable in respect thereof. Upon demand by Mortgagee, Mortgagor shall deliver to Mortgagee such additional monies as are necessary to make up any deficiencies in the amounts necessary to pay such premiums when due. Upon an Event of Default, Mortgagee may apply to the reduction of the Obligations in such manner as Mortgagee shall determine, any amount under this Section remaining to Mortgagor's credit and any return premium received from cancellation of any insurance policy by Mortgagee upon foreclosure of this Mortgage.

THIS IS NOT A COPY

4. **Condemnation.** If all or any material part of the Mortgaged Property shall be damaged or taken (temporarily or permanently) through condemnation (including any damage or taking by any governmental or other authority authorized by law to so damage or take, and any transfer by private sale in lieu thereof); then the entire amount of the Obligations shall, at the option of Mortgagee, become immediately due and payable. Mortgagor hereby assigns to Mortgagee and Mortgagee shall be entitled to, all compensation awards, damages, claims, rights of actions, and proceeds of, or on account of, any such damage or taking ("Awards"), and Mortgagee is hereby authorized, at its option, to commence, appear in and prosecute, in its own or Mortgagor's name, any action or proceeding relating to any condemnation, and to settle or compromise any claim in connection therewith. Mortgagee, after deducting therefrom all its expenses including attorney's fees, may release any monies so received by it without affecting the lien of this Mortgage or may apply the same, in such manner as Mortgagee shall determine, to the reduction of the Obligations. Any balance of such monies then remaining shall be paid to Mortgagor. Mortgagor agrees to execute such further assignments of any Awards as the Mortgagee may require.

5. **Care of Mortgaged Property.** Mortgagor shall not remove or demolish any of the improvements without the written consent of Mortgagee, or permit, commit, or suffer any waste, impairment or deterioration of any part of the Mortgaged Property, and shall keep the same in good condition and repair. Mortgagor shall notify Mortgagee in writing within five (5) days of any injury, damage, or impairment of, or occurring on, the Mortgaged Property, including, but not limited to, serious injury or loss, by death or otherwise. Mortgagee may, at Mortgagee's discretion, have the Mortgaged Property inspected at any time and Mortgagor shall pay all costs incurred by Mortgagee in executing such inspection.

6. **Lease Covenants.** The Mortgagor shall comply with all of its obligations as landlord under all leases affecting the Mortgaged Property or any part thereof. The Mortgagor as required by the Mortgagee shall furnish promptly to the Mortgagee executed copies of all such leases now existing or hereafter created, all of which shall be in form and substance subject to the approval of the Mortgagee. The Mortgagor shall not, without the express written consent of the Mortgagee, modify, surrender, terminate, or extend any such lease now existing or hereafter created, or permit or suffer an assignment or sublease. Mortgagor shall promptly notify Mortgagee of any material default by Mortgagor or any tenant under the leases affecting the Mortgaged Property. Notwithstanding the foregoing, Mortgagee's consent shall not be required with respect to any lease provided that the term of said lease does not exceed thirteen (13) months including all options and extensions.

7. **No Transfer.** Mortgagor covenants and agrees not to sell, convey, transfer, lease or further encumber any interest in all or any part of the Mortgaged Property without the prior written consent of Mortgagee, and any such sale, conveyance, transfer, lease or encumbrance made without Mortgagee's prior written consent shall be void. If any person should obtain or be discovered to have an interest in all or any part of the Mortgaged Property, whether pursuant to the execution or enforcement of any lien, or security interest or otherwise, whether superior, equal or subordinate to this Mortgage or the lien hereof, such event shall be deemed to be a transfer by Mortgagor and an Event of Default hereunder. For purposes of this Section, any merger of Mortgagor or change in ownership of any of the outstanding shares thereof (if a corporation) or transfer of any partnership interests (if a partnership), from and after the date hereof shall be deemed to be a transfer of the Mortgaged Property.

8. **Additional Indebtedness.** Mortgagor covenants and agrees, from and after the date hereof, not to incur any additional debts or other obligations for the payment of money, either direct or indirect, contingent or otherwise (including, without limitation, guaranty obligations or other credit support for third parties), except for indebtedness for trade credit in the ordinary course of Mortgagor's business as now being conducted and the loan from Berman Mortgage Corporation, a Florida corporation, dba BMC Loan Servicing for the benefit of and as attorney in fact for the Lenders identified in that certain Promissory Note dated October 13, 2004, in the original principal amount of Eight Hundred Thousand (\$800,000.00) Dollars being closed simultaneously herewith, which mortgage is subordinate and inferior to this Mortgage.

9. **Compliance with Laws.** The Mortgagor at its own expense will promptly cure all violations of law affecting the Mortgaged Property and the use and operation thereof and will comply, or cause to be complied with, all present and future laws, ordinances, rules, regulations of all governmental authorities having or claiming jurisdiction over the Mortgaged Property, and all restrictive covenants and easements applicable thereto.

10. **Financial Statements.** Mortgagor will furnish to Mortgagee signed annual statements of financial condition, including profit and loss statements, and such other business or financial information as Mortgagee may require, in form and substance satisfactory to Mortgagee, of Mortgagor and of all guarantors of the Note, and will permit Mortgagee through any means deemed appropriate by Mortgagee to verify the correctness of such statements. The annual statements and any other requested information, shall be delivered to Mortgagee immediately

THIS IS NOT A

upon filing after the close of the applicable fiscal year or within 30 days of Mortgagee's request therefore, respectively.

11. **Appraisal.** Upon request, in writing, by Mortgagee which request shall state that Mortgagee has reason to believe that the Mortgaged Property has declined substantially in value since the date hereof, Mortgagor at its expense shall cause an appraisal of the Mortgaged Property to be performed and delivered to Mortgagee by an appraiser acceptable to Mortgagee.

12. **Environmental Representations, Covenants and Indemnity.**

(a) **Representations and Warranties.** Mortgagor represents and warrants to Mortgagee that,

(i) Hazardous Materials have not at any time been generated, used, treated or stored on, or transported to or from, or released or disposed of, on any of the Mortgaged Property or any property adjoining or in the vicinity of any of the Property; (ii) Mortgagor is now and always has been in compliance in all material respects with all applicable Environmental Laws with respect to the Mortgaged Property, and the operations thereon; (iii) there are no past, pending or threatened Environmental Claims and there is no condition or occurrence on the Mortgaged Property or any property adjoining or in the vicinity of the Mortgaged Property that could reasonably be anticipated to form the basis of an Environmental Claim or to cause the Mortgaged Property to be subject to any restrictions on the ownership, occupancy, use or transferability under any Environmental Law; and (iv) there are not now and never have been any underground storage tanks located on the Mortgaged Property or any property adjoining or in the vicinity of the Mortgaged Property.

(b) **Covenants.**

Mortgagor will, and will cause all tenants to, comply with all Environmental Laws applicable to ownership or use of the Mortgaged Property, and will keep or cause to be kept the Mortgaged Property free and clear of any liens imposed pursuant to such Environmental Laws.

Neither Mortgagor nor any tenants will generate, use, treat, store, release or dispose of Hazardous Materials on the Mortgaged Property, or transport hazardous Materials to or from the Mortgaged Property, except for limited quantities used or stored in compliance with all applicable Environmental Laws as required in connection with the normal operation and maintenance of the Mortgaged Property.

(i) Mortgagor will immediately advise Mortgagee in writing of any of the following: (A) any pending or threatened Environmental Claim; (B) any condition or occurrence on the Mortgaged Property that results in noncompliance with any applicable Environmental Law or that could reasonably be anticipated to form the basis of an Environmental Claim; (C) any pending or threatened Environmental Claim, or any occurrence or condition constituting a violation of any Environmental Law, in respect of any property adjoining or in the vicinity of the Mortgaged Property; and (D) the taking of any removal or remedial action in response to the actual or alleged presence of any Hazardous Material on the Mortgaged Property or on any property adjoining or in the vicinity thereof.

(ii) Without the Mortgagee's prior written consent, Mortgagor will not change or permit to be changed the present use of the Mortgaged Property by it or any of its tenants.

(c) **Indemnity.**

(i) Mortgagor agrees to defend, protect, indemnify and hold harmless Mortgagee and its officers, directors, employees, attorneys and agents (collectively called the "Indemnitees") from and against all liabilities, obligations, (including removal and remedial actions), losses, damages (including foreseeable and unforeseeable consequential damages and punitive damages), penalties, actions, judgments, rights, claims, costs, expenses and disbursements (including reasonable attorneys' and consultants' fees and disbursements) of any kind or nature whatsoever that may at any time be incurred by, imposed on, or asserted against, such Indemnitees directly or indirectly based on, or arising, or resulting from (A) the actual or alleged presence or Release of Hazardous Materials on the Mortgaged Property, (B) any Environmental Claim or (C) the exercise of Mortgagee's rights under any of the provisions of this Section (the "Indemnified Matters") regardless of when such Indemnified Matters arise.

(ii) To the extent that the undertaking in the preceding paragraph may be unenforceable because it is violative of any law or public policy, Mortgagor will contribute the maximum portion that it is permitted to pay and satisfy under applicable law to the payment and satisfaction of all Indemnified Matters incurred by the Indemnitees.

(iii) All sums paid and costs incurred (including attorneys' fees) by Mortgagee with respect to any Indemnified Matter shall bear interest at the Default Rate from the date so paid or incurred until reimbursed by Mortgagor and all such sums and costs shall be added to the Obligations secured hereby, shall be guaranteed by the guarantors and shall be immediately due and payable on demand.

(d) **Access to Mortgaged Property.** Mortgagor shall grant Mortgagee and its agents access to the Mortgaged Property and each hereby specifically grants Mortgagee an irrevocable, non-exclusive license to do whatever is necessary to cause the Mortgaged Property to so comply

THIS IS NOT A

with all Environmental Laws, including, without limitation, to enter the Mortgaged Property and remove therefrom any Hazardous Materials.

(e) **Survival.** The representations, warranties, covenants and indemnity set forth in this Section shall survive the repayment of the Note, the release of the lien of this Mortgage, any foreclosure of this Mortgage or delivery of a deed or assignment in lieu of foreclosure or otherwise, and the transfer of any or all right, title and interest in and to the Mortgaged Property by Mortgagor.

(f) **Definitions.**

(i) **"Hazardous Materials"** means (A) any petroleum or petroleum products, radioactive materials, asbestos in any form that is or could become friable, urea formaldehyde foam insulation, transformers or other equipment that contain dielectric fluid containing levels of polychlorinated biphenyls, and radon gas; (B) any chemicals, materials or substances defined as, or included in the definition of "hazardous substances," "hazardous wastes," "toxic substances," "contaminants" or "pollutants" or words of similar import, under any Environmental Law; and (C) any other chemical, material or substance, exposure to which is prohibited, limited or regulated by any governmental authority.

(ii) **"Environmental Law"** means any federal, state or local statute, law, rule, regulation, ordinance, code, policy or rule of common law now or hereafter in effect, and any judicial or administrative interpretation thereof, relating to the environment, health, safety or Hazardous Materials, including without limitation; the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 49 U.S.C. Section 1801 et seq.; the Resource Conservation and Recovery Act, as amended, 42 U.S.C. Section 9601 et seq.; the Hazardous Materials Transportation Act, as amended, 49 U.S.C. Section 6901 et seq.; the Resource Conservation and Recovery Act, as amended, 42 U.S.C. Section 1251 et seq.; the Federal Water Pollution Control Act, as amended, 33 U.S.C. Section 1251 et seq.; the Toxic Substances Control Act, 15 U.S.C. Section 2601 et seq.; the Clean Air Act, 42 U.S.C. Section 7401 et seq.; the Safe Drinking Water Act, 42 U.S.C. Section 3803 et seq.; Chapter 376, Florida Statutes; Chapter 252, Part II, Florida Statutes; the Florida Air and Water Pollution Control Act, Section 403.011 et seq., Florida Statutes; the Environmental Protection Act of 1971, Section 403.412, Florida Statutes; and Chapter 403, Part IV, Florida Statutes.

(iii) **"Environmental Claims"** means, with respect to either the Mortgagor or the Mortgaged Property, any and all administrative, regulatory or judicial actions, suits, demands, demand letters, claims, liens, notices of noncompliance or violation, investigations or proceedings relating in any way to any Environmental Law (hereafter "Claims") or any permit issued under any such Law, including without limitation any and all Claims by governmental authorities for enforcement, cleanup, removal, response, remedial, protective or other actions or damages pursuant to any applicable Environmental Law, and any Claim by any third party seeking damages, contribution, indemnification, cost recovery, compensation or injunctive relief resulting from Hazardous Materials or arising from alleged injury or threat of injury to health, safety or the environment.

(iv) **"Release"** means disposing, discharging, injecting, spilling, leaking, leaching, dumping, emitting, escaping, emptying, seeping, placing and the like, into or upon any land or water or air, or otherwise entering into the environment.

13. **Mortgagee's Right to Perform Covenants.** In the event Mortgagor fails to perform fully any of the covenants set forth herein for the protection of Mortgagee's interest in the Mortgaged Property, Mortgagee is hereby authorized at its election to perform and/or discharge any of such covenants without any obligation on its part to determine the validity and/or necessity thereof, and without Mortgagee waiving or affecting any default, option, remedy, lien, equity or right under or by virtue of this Mortgage. The full amount of each and every such payment made or expense incurred by Mortgagee hereunder shall be immediately due and payable by Mortgagor and shall bear interest from the date thereof until paid at the Default Rate, and together with such interest, shall be secured by the lien of this Mortgage. For purposes of this Mortgage, the Default Rate shall mean interest at 25% per annum, or if less, the maximum rate permitted by applicable law, whether now or hereafter in effect. Nothing herein contained shall be construed as requiring Mortgagee to advance or expend monies for any of the purposes mentioned in this paragraph.

14. **Events of Default.** The occurrence of any of the following specified events shall be an Event of Default hereunder:

- (a) failure by Mortgagor to pay as and when due and payable, any installments of principal or interest due under the Note or any escrow amounts for taxes and assessments or for insurance premiums due hereunder, or any other sums to be paid by Mortgagor under the Note, hereunder, or any other instrument securing the Note;
- (b) for non-monetary defaults, failure by Mortgagor to duly keep, perform and observe any covenant, condition or agreement in the Note, this Mortgage, or any other instrument securing the Note for a period of thirty (30) days after Mortgagee gives written notice thereof specifying.

THIS IS NOT A

copy of the original document. If the default cannot be cured within thirty (30) days, Mortgagor shall commence to cure same within thirty (30) days and shall diligently prosecute compliance;

(c) Mortgagor or any guarantor of the Note dies;

(d) if either Mortgagor or any guarantor or endorser of the Note: (i) files a voluntary petition in bankruptcy or (ii) is adjudicated as a bankrupt or insolvent, or (iii) files any petition or answer seeking or acquiescing in any reorganization, management, composition, readjustment, liquidation, dissolution or similar relief for itself under any law relating to bankruptcy, insolvency or other relief for debtors, or (iv) seeks, consents to or acquiesces in the appointment of any trustee, receiver, master or liquidator of itself or of all or any part of the Mortgaged Property, or

(v) makes any general assignment for the benefit of creditors; or (vi) makes any admission in writing of its inability to pay its debts generally as they become due, or (vii) has entered against

it, by a court of competent jurisdiction, an order, judgment or decree approving a petition filed against it seeking any reorganization, arrangement, composition, readjustment, liquidation,

dissolution or similar relief under any present or future federal, state, or other statute, law or regulation relating to bankruptcy, insolvency or other relief for debtors, which order, judgment or

decree remains unvacated and unstayed for an aggregate of sixty (60) days whether or not consecutive from the date of entry thereof;

(e) any trustee, receiver or liquidator for the Mortgagor, any guarantor or endorser of the Note or of any part of the Mortgaged Property is appointed without the prior written consent of

Mortgagee which appointment shall remain unvacated and unstayed for an aggregate of sixty (60) days whether or not consecutive;

(f) any breach of any warranty or material untruth of any representation of Mortgagor contained in the Note, this Mortgage, any other instrument securing the Note or in any document provided to Mortgagee in connection herewith;

(g) an event of default under any existing or future notes, loans, advances, guaranties, or other indebtedness owed to the Mortgagee or otherwise by the Mortgagor or by any endorser or guarantor of the Note, or any or either of them, or under any instrument securing such

indebtedness;

(h) any change in the financial condition of Mortgagor or any endorser or guarantor of the Note, which, in Mortgagee's sole determination, is material and adverse.

(i) A default under any other Mortgages encumbering the subject property.

15. **Acceleration.** If an Event of Default shall have occurred and be continuing, Mortgagee may terminate any commitment to advance funds under the Note, and the entire unpaid principal amount together with accrued interest thereon, and all other Obligations, shall be immediately due and payable without demand, presentment, protest or notice of any kind, all of which are waived by Mortgagor.

16. **Other Remedies.** If an Event of Default shall have occurred, Mortgagee may proceed by suit or suits at law or in equity or by any other appropriate proceeding or remedy: (a) to enforce payment of the Note or the performance of any term thereof or hereof or any other right; (b) to foreclose this Mortgage and to sell, as an entirety or in separate lots or parcels, the Mortgaged Property under the judgment or decree of a court or courts of competent jurisdiction for the Obligations or for any portion of such Obligations which are then due and payable, subject to the continuing lien of this Mortgage for the balance of the Obligations not then due, (c) to collect all rents, issues, profits, business or other revenues, income, proceeds or other benefits from the Mortgaged Property, (d) to seek appointment of a receiver to enter upon, take possession of and operate the Mortgaged Property and to collect all rents, issues, profits, business or other revenues, income or other benefits thereof and apply the same as the court may direct and such receiver shall have all rights and powers permitted under law, (e) to cause an appraisal of the Mortgaged Property to be performed for the benefit of Mortgagee, at the sole cost and expense of Mortgagor and (f) to pursue any other remedy available to it, including, but not limited to, taking possession of the Mortgaged Property without notice or hearing to Mortgagor. Mortgagee shall take action either by such proceedings or by the exercise of its power with respect to entry or taking possession, or both as Mortgagee may determine.

17. **No Waiver; Non-Exclusive Remedies.** No delay or omission of Mortgagee or of any holder of the Note and Mortgage to exercise any right, power or remedy accruing upon any Event of Default shall exhaust or impair any such right, power or remedy or be construed as a waiver of any such default or constitute acquiescence therein. No right, power or remedy conferred upon or reserved to Mortgagee by this Mortgage or any other instrument securing the Note is exclusive of any other right, power or remedy, but each and every such right, power and remedy shall be cumulative and concurrent and shall be in addition to any other right, power or remedy given hereunder or under the Note, or any other instrument securing the Note, or now or hereafter existing at law, in equity or by statute.

18. **Payment of Expenses.** Mortgagor shall pay all the costs, charges and expenses, including reasonable attorney's fees, whether incurred at the trial or appellate level, disbursements and costs of abstracts of title, incurred or paid at any time by Mortgagee in

THIS IS NOT A

connection with enforcing the Note or this Mortgage, protesting or preserving its lien on the Mortgaged Property, or because of or upon an Event of Default. Such costs, charges and expenses shall be immediately due and payable, without notice, demand, attempt to collect or suit pending. The full amount of each and every such payment shall bear interest from the date thereof until paid at the Default Rate. All such costs, charges and expenses so incurred or paid together with such interest shall be secured by the lien of this Mortgage.

19. **Future Advances.** This Mortgage is given to secure not only existing indebtedness, but also such future advances, whether such advances are obligatory or are to be made at the option of Mortgagee, or otherwise, as are made within twenty years from the date hereof, to the same extent as if such future advances are made on the date of execution of this Mortgage. The total amount of indebtedness that may be so secured may decrease or increase from time to time, but the total unpaid balance so secured at one time shall not exceed twice the face amount of the Note plus interest thereon and any disbursements made pursuant hereto, with interest on such disbursements at the Default Rate.

20. **After-Acquired Property.** The lien of this Mortgage will automatically attach, without further act, to all after-acquired property located in or on, or attached to, or used or intended to be used in connection with the operation of the Mortgaged Property.

21. **Indemnification.** In addition to the indemnification provisions contained elsewhere herein, Mortgagor will protect and save harmless and indemnify Mortgagee, its directors, officers, employees and agents from and against any and all claims, liabilities, costs and expenses, of whatever nature (including court costs and attorneys' fees) which may arise or result, directly or indirectly, by reason of the use, occupancy or operation of the Mortgaged Property or any part thereof, or of any violation of any covenant contained herein.

22. **Successors and Assigns; Joint and Several Obligations.** Whenever one of the parties hereto is named or referred to herein, the heirs, personal representatives, successors and assigns of such party shall be included and all covenants and agreements contained in this Mortgage, by or on behalf of Mortgagor or Mortgagee shall bind and inure to the benefit of their respective heirs, personal representatives, successors and assigns. If more than one person or entity is a Mortgagor hereunder each such person or entity is jointly and severally obligated to keep all of the covenants and agreements of this Mortgage, and is jointly and severally liable for any breach of any warranty or the untruth of any representation contained herein or made to Mortgagee in connection herewith.

23. **Additional Documents.** At any time and from time to time, upon Mortgagee's request, Mortgagor shall make, execute and deliver or cause to be made, executed and delivered to Mortgagee and, where appropriate, shall record or file or cause to be recorded or filed at such time and in such offices and places as shall be deemed desirable by Mortgagee any and all such further mortgages, instruments of further assurance, certificates and other documents as Mortgagee may consider necessary or desirable in order to effectuate, complete, enlarge or perfect, or to continue and preserve the obligations of Mortgagor under the Note and this Mortgage, or the lien of this Mortgage as a first and prior lien upon all of the Mortgaged Property, whether now owned or hereafter acquired by Mortgagor. Upon any failure by Mortgagor to do so, Mortgagee may make, execute, record or file any and all such mortgages, instruments, certificates and documents for and in the name of Mortgagor and Mortgagee hereby irrevocably appoints Mortgagee agent and attorney-in-fact of Mortgagor to do so.

24. **Invalid or Unenforceable.** In the event that any of the covenants, agreements, terms or provisions contained in the Note, this Mortgage or any other instruments securing the Note shall be invalid, illegal or unenforceable in any respect, the validity of the remaining covenants, agreement, terms or provisions contained herein, and in the Note or any other instrument securing the Note shall be in no way affected, prejudiced or disturbed thereby.

25. **Acceleration of Maturity.** If an Event of Default shall have occurred and be continuing, the Mortgagee may, at its sole option, declare the entire principal amount of the Note then unpaid, and the interest accrued thereon, to be due and payable immediately, and upon such declaration, such principal and interest shall forthwith become and be due and payable, as fully and to the same effect as if the date of such declaration were the date originally specified for the maturity of the unpaid balance of the Note.

26. **Waiver of Trial by Jury.** Mortgagor and Mortgagee hereby knowingly, voluntarily, intentionally and with the advise of independent counsel waives the right, it may have to a trial by jury in respect to any litigation based hereon, or arising out of, under, or in connection with, this Mortgage and any document contemplated to be executed in conjunction herewith or any course of conduct, course of dealing, statements (whether verbal or written), or actions of either or any party. This provision is a material inducement for the Mortgagee entering into this Mortgage.

IN WITNESS WHEREOF, the undersigned has executed this instrument the day and year above first written.

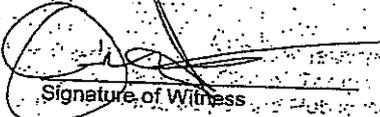
THIS IS NOT A
CERTIFIED COPY

EXHIBIT "A"
Lots 3 and 4, in Block 1, P.H. COLLIN'S SUBDIVISION, less the East 15 feet of Lot 4 and Less the West 15 feet of Lot 3, deed to City of Tampa, according to the Plat thereof, as recorded in Plat Book 2, at Page 50, of the Public Records of Hillsborough County, Florida.

THIS IS NOT A CERTIFIED COPY

Signed, sealed and delivered
in the presence of:

DB Tampa, LLC, a Florida limited
liability company By: DBT Manager
Incorporated, a Florida corporation,
its Manager


Signature of Witness

OMAR FIGUERAS
Printed Name of Witness


Signature of Witness

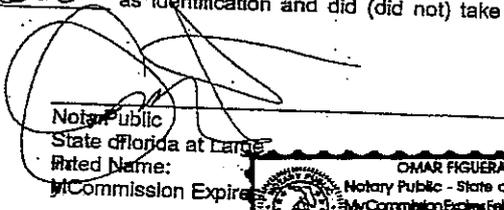
Paula Gait
Printed Name of Witness

BY:  (SEAL)
Dana J. Berman, President

Corporate Seal)

STATE OF FLORIDA
COUNTY OF MIAMI-DADE

The foregoing instrument was acknowledged before me this 12th day of October, 2004 by Dana J. Berman, President of DBT Manager Incorporated, a Florida corporation, Manager of DB Tampa, LLC, a Florida limited liability company. She is personally known to me or has produced a Florida drivers license as identification and did (did not) take an oath.


Notary Public
State of Florida at Large
Printed Name:
Commission Expires:

