



MISC 2013000635



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This instrument was drafted by and upon  
filing should be returned to:

H. Daniel Smith  
Smith, Gardner, Slasky, Lazer,  
Pohren & Rogers, LLP  
8712 West Dodge Road  
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Omaha, NE 68114  
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Register of Deeds, Douglas County, NE  
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2013000635

### ASSIGNMENT OF LEASES AND RENTS

**THIS ASSIGNMENT** is made as of the 28 day of December, 2012, between **RM10 HOLDINGS, LLC**, a Nebraska limited liability company (the "Borrower"), and **GREAT WESTERN BANK**, a South Dakota corporation (the "Lender"), its successors and assigns.

#### **WITNESSETH:**

**WHEREAS**, the Borrower and the Lender have entered into a Construction Loan Agreement dated of even date herewith (hereinafter called the "Loan Agreement"), pursuant to which the Lender has agreed to lend to the Borrower up to the sum of \$11,383,561.00; and

**WHEREAS**, in accordance with the Loan Agreement, the Borrower has executed and delivered to the Lender a Promissory Note, dated of even date herewith, in the principal amount of \$11,383,561.00 (the "Note"); and

**WHEREAS**, to secure payment and performance of the obligations of the Borrower, the Borrower has made, entered into and delivered to Lender a Deed of Trust, Construction Security Agreement, Security Agreement, Assignment of Leases and Rents and Fixture Filing Statement of even date herewith (the "Mortgage"), covering, inter alia, real estate situated in Elkhorn, County of Douglas, State of Nebraska, legally described on Exhibit A attached hereto and hereby made a part hereof, and the buildings and improvements and certain furniture, fixtures, furnishings, equipment, machinery and personal property owned by the Borrower now or hereafter located thereon (the "Mortgaged Premises"); and

**WHEREAS**, the Note and all other documents and instruments given by Borrower to

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evidence or secure repayment of the loan identified herein, including (without limitation) the Loan Agreement and any Loan Documents as defined therein are referred to in this Assignment as the "Loan Documents"; and

**WHEREAS**, said principal amount, together with interest thereon at the rate or rates provided in the Note, is payable in accordance with the terms of the Note, with the entire unpaid principal balance of Note and any unpaid, accrued interest thereon maturing and being due and payable in full not later than the Maturity Date as set forth in the Note; and

**WHEREAS**, the Lender, as a condition to making the loan evidenced by the Note, has required the execution of this Assignment.

**NOW THEREFORE**, in consideration of the premises, and in further consideration of the sum of One and No/100ths Dollars (\$1.00) paid by the Lender to the Borrower, the receipt and sufficiency of which are hereby acknowledged, the Borrower does hereby grant, transfer, set over, assign and deliver to the Lender all of the Borrower's right, title and interest in, to and under all leases, subleases, licenses, concessions, tenancies, management agreements, operating agreements and any other agreements creating the right of possession or the right of use without a transfer of title, whether written or oral, now or hereafter existing, and covering all or any part of the Mortgaged Premises, together with any and all security deposits made thereunder, all extensions, amendments, modifications, renewals and replacements of any thereof, and any guaranties of the lessees', sublessees', licensees', concessionaires', tenants', users', managers' or operators' (collectively the "Lessees") obligations under any thereof, each of said leases, subleases, licenses, concessions, tenancies and agreements now existing and hereafter executed or entered, together with all such deposits, extensions, amendments, modifications, renewals, replacements and guaranties (collectively the "Leases"). In addition to the foregoing, the Borrower does further hereby presently grant, transfer, set over and assign to the Lender, and does hereby relinquish to the Lender all of the Borrower's right to collect and enjoy all of the rents, income, revenues, royalties, issues and profits, including, without limitation, all amounts payable to the Borrower on account of maintenance, repairs, taxes, insurance and common area or other charges by any other party to any Lease, and all amounts paid in compromise or for cancellation of any Lease by any party thereto other than the Borrower, now or hereafter accruing or owing under or from Leases or otherwise from the Mortgaged Premises or any part thereof, whether accruing before or after foreclosure of the Mortgage (collectively called "Rentals").

A. The assignment herein is granted upon the following terms and conditions:

1. Performance of Obligations Under Leases. The Borrower agrees to (a) promptly, faithfully and diligently observe, perform and discharge each and every term, condition, obligation, covenant and agreement which the Borrower is now, or hereafter becomes, liable to observe, perform or discharge under the Note, the Loan Agreement, the Mortgage and the Leases; and, (b) at the sole cost and expense of the Borrower, and in Borrower's reasonable business judgment, to enforce or secure the performance of each and every obligation, covenant, condition and agreement to be performed by the Lessees under the Leases.

2. Actions Arising Out of Leases. The Borrower shall, at the Borrower's sole cost and expense, appear in and defend any dispute, action or proceeding arising under, growing out of or in any manner connected with or affecting any of the Leases or the obligations, duties or liabilities of the Borrower or any Lessee thereunder, and to pay all costs and expenses of the Lender, including attorneys' fees (prior to trial, at trial and on appeal) ("Costs"), in connection with any such dispute, action or proceeding in which the Lender may appear or with respect to which it may otherwise incur costs or expenses, whether or not the Lender prevails therein. Notwithstanding anything contained in this Assignment to the contrary, Assignor shall not be required to indemnify or defend Lender from or against Losses resulting from (i) the gross negligence or willful misconduct of Lender or any receiver appointed by Lender, or (ii) any occurrence or non-occurrence giving rise to Costs that initially occurs (1) after foreclosure or other taking of title to or possession of the Mortgaged Premises by Lender or other third party; or (2) two (2) years after the date of repayment in full of the Loan in the ordinary course of business.
3. Lender's Right to Perform. Should the Borrower fail to make any payment or to do any act as herein provided, then the Lender may, but without obligation to do so, without notice or demand to or upon the Borrower, and without releasing the Borrower from any obligation hereof, make or do the same in such manner and to such extent as the Lender may deem necessary or desirable to protect the security hereof, including specifically, without limiting its general powers, appearing in and defending any action or proceeding purporting to affect the security hereof or the rights or powers of the Lender, and observing, performing and discharging all or any of the obligations, covenants and agreements of the Borrower in the Leases contained. In exercising any such powers, the Lender may pay its costs and expenses, employ counsel and incur and pay attorneys' fees (prior to trial, at trial and on appeal). The Borrower hereby grants to the Lender an irrevocable power of attorney, coupled with an interest, to perform should the Borrower fail to make any payment or to do any act as herein provided, all of the acts and things provided for in this section and in Section C.2 hereof as the Borrower's agent and in the Borrower's name.
4. Borrower to Reimburse Lender. The Borrower agrees to reimburse the Lender, upon demand, for all sums expended by the Lender under the authority hereof, together with interest thereon at the Default Rate specified in the Note from the date expended, and the same shall be added to the indebtedness evidenced by the Note and shall be secured hereby and by the Mortgage.
5. Non-Merger of Leases. Each Lease shall remain in full force and effect despite any merger of the interest of the Borrower and any Lessee thereunder; the Borrower shall not transfer fee title to the Mortgaged Premises to any Lessee, without the prior written consent of the Lender; and no such transfer shall relieve the Borrower of any liability to the Lender, unless the Lender specifically agrees otherwise in writing.

6. Security Deposits. In the Event of Default, the Borrower, after any notice requirements or cure period provided in the Loan Documents or mandated by law, shall deliver to the Lender, promptly upon request by the Lender, all security deposits held by the Borrower pursuant to the terms of the Leases, which the Lender shall hold and disburse in accordance with the terms of the Leases. Until any such request by the Lender, all security deposits shall be deemed to be held by Borrower in trust for the Lender.

B. The Borrower hereby covenants, represents and warrants to the Lender that:

1. Borrower's Authority. The Borrower has good right and lawful authority to grant, transfer, set over and assign, and, other than the Mortgage, Borrower has not executed any prior assignment or alienation of its rights, title and interest in, to and under the Leases and to and in the Rentals, or otherwise encumbered the same.
2. No Conflicting Agreements. The Borrower has not performed or committed any act or executed any instrument, and is not bound by any law, statute, regulation, order, mortgage, indenture, contract or agreement, which might prevent the Lender from operating under any of the terms and conditions hereof, or which would limit the Lender in such operation.
3. No Other Assignments. The Borrower has not executed or agreed to, shall not execute or agree to, and shall not permit to occur by operation of law any other assignment, alienation, pledge, encumbrance or transfer of any of its right, title or interest in, to or under the Leases or Rentals, except as provided for in the Mortgage.
4. Leases in Effect. The Leases which have been executed on or before the date hereof are in full force and there is no default now existing under the Leases.
5. No Further Subordination of Leases. The Borrower shall not permit any of the Leases to become subordinate to any lien other than the liens hereof and of the Mortgage.

C. It is mutually agreed that:

1. Present Assignment. This is a present, absolute, effective, irrevocable and complete assignment by the Borrower to the Lender of the Leases and Rentals and of the right to collect and apply the same, which is not contingent upon Lender being in possession of the Mortgaged Premises. Lender grants to Borrower a revocable license (the "Rental License") to collect the Rentals, which license shall terminate automatically upon the occurrence of an Event of Default (after any notice requirements or cure period provided in the Loan Documents or mandated by law) under the Note, under the Mortgage, under the Loan Agreement, or under any other instrument which secures or refers to the Note (hereinafter called "Other Security Instrument") (hereinafter called "Event of Default"). So long as the Rental License has not been terminated, the Borrower shall have a conditional

opportunity to collect, but not more than (1) month in advance, all Rentals from the Mortgaged Premises, in trust for the Lender, and to use the same for payment of taxes, assessments, governmental charges, levies, insurance premiums which the Borrower is required to pay under the Mortgage, all other costs and expenses which the Borrower is required to pay under and pursuant to the Note, the Mortgage, under the Loan Agreement, and to this Assignment, as and when due, before using said Rentals for any other purpose, and the excess only shall be the Borrower's absolute property.

2. Lender Rights Upon Default. Upon or at any time after the occurrence of an Event of Default hereunder, under the Note, under the Mortgage, under the Loan Agreement, or under any Other Security Instrument (after any notice requirements or cure period provided in the Loan Documents or mandated by law), or if any representation or warranty made by the Borrower to the Lender in connection with the Loan evidenced by the Note is untrue in any material respect, the Lender may, at its option, but without obligation to do so, without notice to or consent of the Borrower, either in person or by agent, without regard for the adequacy of the security for the indebtedness secured hereby, the commission of waste or the solvency of the Borrower, with or without bringing any action or proceeding, by a receiver or trustee to be appointed by a court, enter upon, take possession of, maintain, manage and operate the Mortgaged Premises, make, execute, enforce, modify, alter, cancel and accept the surrender of Leases (whether or not the same extend beyond the term of the Mortgage), obtain or evict tenants, fix or modify Rentals, refund and collect security deposits, and do any acts which the Lender deems proper to protect the security hereof, and either with or without taking possession of the Mortgaged Premises, in its own name or in the name of the Borrower, sue for or otherwise demand, collect, receive, and give receipts for all Rentals, and apply the same upon the costs of collection thereof, including the fees and costs of agents and attorneys employed by the Lender; upon the costs of managing, operating and leasing the Mortgaged Premises, including taxes, insurance, maintenance, repairs, improvements, the fees of professional managing agents, architects, engineers, and appraisers, license and permit fees, leasing fees and commissions, and Lender's out-of-pocket expenses; and upon any indebtedness secured hereby, in such order as the Lender may determine, subject to applicable statutory requirements, if any, and to the requirements of the Mortgage. The Lender or such a receiver shall be entitled to remain in possession of the Mortgaged Premises and to collect the Rentals throughout any statutory period of redemption from a foreclosure sale. The entering upon and taking possession of the Mortgaged Premises, the collection of Rentals and the application thereof as aforesaid shall not cure or waive any Event of Default or waive, modify or affect any notice of default under the Note, under the Mortgage, the Loan Agreement, or under any Other Security Instrument or hereunder, or invalidate any act done pursuant to such Event of Default or notice of default.

The Lender may, without entering into possession or pursuing any other remedy as provided in this section or at law or in equity, or in conjunction with such possession or pursuit of other remedy, give notice to any or all Lessees



authorizing and directing said Lessees to pay Rentals directly to the Lender. If a Lessee receives such a notice, the Borrower hereby directs such Lessee to make payment pursuant thereto, and it shall be conclusively presumed, as between the Borrower and such Lessee, that the Lessee is obligated and entitled to make such payment to the Lender, and that such payment constitutes payment of Rentals under the Lease in question. Such notice may be given either in the Lender's or in the Borrower's name. The Borrower shall in every way facilitate the payment of Rentals to the Lender when the Lender has the right to receive the same hereunder. The Lender shall be accountable only for Rentals actually delivered to Lender in good funds collected hereunder and not for the rental value of the Mortgaged Premises and shall have no obligation to credit to Borrower any amounts other than those actually collected in good funds. The Lender shall not be liable for any security deposit made by any Lessee unless and until the Lender comes into actual, physical possession and control thereof. Failure of the Lender to collect, or discontinuance by the Lender from collecting, at any time, and from time to time, any Rentals, shall not in any manner affect the rights of the Lender to thereafter collect the same.

Notwithstanding anything to the contrary in this Assignment, to the extent that the default, foreclosure or receiver provisions of this Assignment shall contradict those contained within the Mortgage, the Mortgage shall control, except that under all circumstances this Assignment shall be construed to be present, absolute, effective, irrevocable and complete.

3. Additional Rights of Lender. The Lender shall have the right, under this Assignment, to take possession of and use, subject to the terms of the Leases, without rental or charge, any fixtures, equipment, furniture, appliances, personal property, books of account and records of the Borrower or its agents located in or constituting a part of the Mortgaged Premises in connection with the Lender's occupancy, management and operation of the Mortgaged Premises. The Lender shall be deemed to be the creditor of any Lessee in respect of any assignment for the benefit of creditors and any bankruptcy, arrangement, reorganization, insolvency, dissolution, receivership or other debtor-relief proceeding affecting such Lessee; provided, however, that the Lender shall not be obligated to file timely claims in such proceedings or to otherwise pursue any creditor's rights therein.
4. Lender Not a Partner. The Lender shall not be deemed to be a partner of, or a joint venturer with, the Borrower with respect to the Mortgaged Premises or to be a participant of any kind in the management or operation of the Mortgaged Premises. The Lender shall not be obligated to perform or discharge, nor does it hereby undertake to perform or discharge, any obligation, duty or liability under any Lease, or with respect to the Mortgaged Premises or the inspection, maintenance or repair thereof, under or by reason of this Assignment, and the Borrower shall and does hereby agree to defend and indemnify the Lender against, and to hold it harmless from, any and all liability, loss or damage which the Lender may or might incur under the Leases, by reason of any death, personal

injury or property damage occurring on or about the Mortgaged Premises, or otherwise under or by reason of this Assignment and against and from any and all claims and demands whatsoever which may be asserted against the Lender by reason of any alleged obligation or undertaking on its part to perform or discharge any of the terms, covenants or agreements contained in any Lease, or by reason of any such death, personal injury or property damage. Should the Lender incur any such liability, loss or damage under any Lease, by reason of any such death, personal injury or property damage, or under or by reason of this Assignment, or as a result of or in defending against any such claims or demands, then the amount thereof, including costs, expenses and attorneys' fees (including such costs, expenses and fees prior to trial, at trial and on appeal), together with interest thereon at the Default Rate specified in the Note from the date incurred, shall be secured hereby and by the Mortgage, and the Borrower shall reimburse the Lender therefor immediately upon demand. Neither this Assignment, nor the exercise by the Lender of its rights hereunder, shall be deemed to constitute the Lender a mortgagee in possession of the Mortgaged Premises, unless the Lender elects in writing to be so constituted.

5. Events of Default Under Loan Documents. If any Event of Default shall occur under the Note, under the Mortgage, under the Loan Agreement, or under any Other Security Instrument or hereunder (after any notice requirements or cure period provided in the Loan Documents or mandated by law), or if any representation or warranty made by the Borrower to the Lender in connection with any loan evidenced by the Note is untrue in any material respect, then the Lender may, at its option, exercise any and all rights available to Lender hereunder, under the Mortgage or the other Loan Documents. All such remedies shall be cumulative and the exercise of one shall not preclude or prejudice the exercise of any other.
6. Release Upon Payment in Full. Upon the recording or filing of any instrument of satisfaction or full release of the Mortgage executed by Lender, unless there shall have been recorded another mortgage in favor of the Lender covering all or any portion of the Mortgaged Premises, this Assignment shall become and be void and of no further effect.
7. Construction According to Applicable Law. All rights, powers and remedies provided herein may be exercised only to the extent that the exercise thereof does not violate any applicable law, and they are intended to be limited to the extent necessary so that they will not render this Assignment invalid, unenforceable or not entitled to be recorded, registered or filed under any applicable law. If any term of this Assignment shall be held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the other terms hereof shall be in no way affected thereby. The Lender shall be entitled to all rights and remedies available hereunder, under the Note, under the Mortgage, under the Loan Agreement, or under any Other Security Instrument, at law, in equity or under statute now and/or at the time of exercise thereof, even though such rights and remedies were not available on the date first above written, and all such rights and remedies may be

exercised at any time and from time to time concurrently, separately, successively and in any order of preference, at the Lender's sole discretion.

8. Successors and Assigns. The covenants and agreements herein contained shall bind, and the rights hereunder shall inure to, the respective heirs, executors, administrators, personal representatives, legal representatives, successors and permitted assigns of the Borrower and the Lender; provided, however, that nothing in this section is intended to be or shall be construed as a waiver of the rights of the Lender under the Mortgage.
9. Resort to Remedies. All rights and remedies herein conferred may be exercised whether or not foreclosure proceedings are pending under the Mortgage. The Lender shall not be required to resort first to the rights under this Assignment or of the Mortgage before resorting to the rights of the other, and the Lender may exercise the rights under this Assignment and under the Mortgage concurrently or independently and in any order of preference, all rights and remedies of the Lender set forth herein, in the Note, in the Mortgage, in the Loan Agreement, in the Other Security Instruments, at law, in equity, under statute and by contract being cumulative. No failure by the Lender to avail itself of any of the terms, covenants or conditions of this Assignment for any period of time shall be deemed to constitute a waiver thereof. The Lender shall have the right to assign the Borrower's rights, title and interests in, to and under any Leases and in and to the Rentals to any other or subsequent holders of the Note or any participant therein, or to any person, party or entity which acquires title to the Mortgaged Premises through foreclosure or otherwise, and any such assignees shall have all of the rights, remedies and powers provided to the Lender herein. All words and phrases used herein shall be construed to include the singular or plural number and the masculine, feminine or neuter gender, as may be appropriate under the circumstances.
10. Defined Terms. All capitalized terms not otherwise defined in this Assignment shall have the meanings given to them in the Loan Agreement.
11. Notices. Any notice demand, consent, approval, request, or other communication or document required or permitted to be given by a party hereto to another party shall be deemed to have been given when (i) delivered personally (with written confirmation of receipt); (ii) sent by telefacsimile to a fax number as designated in writing by the party to whom the communication is addressed (with written confirmation of receipt), provided that a confirmation copy also is promptly mailed by certified mail, return receipt requested; (iii) received by the addressee, if sent by a nationally recognized overnight delivery service (receipt requested); or (iv) received by the addressee, if sent by certified mail, return receipt requested, to the address set forth below:



If to Borrower: RM10 Holdings, LLC  
3949 Forest Parkway  
Suite 100  
Wheatfield, New York 14120  
Attn: Kenneth M. Franasiak

If to Lender: Great Western Bank  
14545 W. Center Road  
Omaha, Nebraska 68144  
Attn: Michael T. Phelps

with copy to: Smith, Gardner, Slusky, Lazer,  
Pohren & Rogers, LLP  
8712 West Dodge Road  
Suite 400  
Omaha, NE 68114  
Attn: H. Daniel Smith

Each party may change its address for notice from time to time by delivering written notice as above provided at least ten (10) days prior to the effective date of such change.

12. Governing Law. This Assignment, and the interpretation and enforcement thereof, shall be governed by the laws of the State of Nebraska.
13. Headings. The headings or captions of the sections set forth herein are for convenience only, are not a part of this Assignment and are not to be considered in interpreting this Assignment.

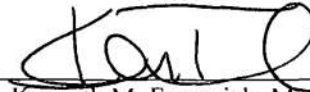
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**IN WITNESS WHEREOF**, the Borrower has caused this Assignment of Leases and Rents to be duly executed as of the day and year first above written.

BORROWER:

RM10 HOLDINGS, LLC, a Nebraska limited liability company:

By:



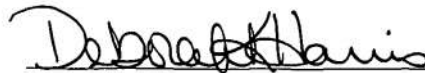
Kenneth M. Franasiak, Manager of RM10 Holdings, LLC

STATE OF NEW YORK )

) ss.

COUNTY OF NIAGARA )

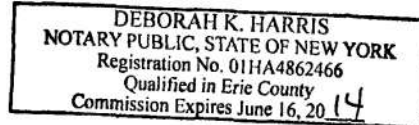
The foregoing instrument was acknowledged before me this 14<sup>th</sup> day of December, 2012, by Kenneth M. Franasiak, personally known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the entity upon behalf of which he acted, executed the instrument. He is the Manager of RM10 Holdings, LLC, for and on behalf of said RM10 Holdings, LLC, and he acknowledged, signed and delivered the instrument as his free and voluntary act, for the uses and purposes therein set forth.



Notary Public

This instrument was drafted by:

H. Daniel Smith  
Smith, Gardner, Slusky, Lazer,  
Pohren & Rogers, LLP  
8712 West Dodge Road  
Suite 400  
Omaha, NE 68114  
(402) 392-0101  
(402) 392-1011  
dsmith@lawsgs.com



Signature Page to Assignment of Leases and Rents  
RM10 Holdings, LLC

S - 1

**EXHIBIT A**

**LEGAL DESCRIPTION**

Mortgaged Premises

Lot 10, in PINEY CREEK REPLAT, a Subdivision, as surveyed, platted and recorded, in Douglas County, Nebraska.

Exhibit Page to Assignment of Leases and Rents  
RM10 Holdings, LLC  
Exhibit A - 1