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Lancaster County, NE Assessor/Register of Deeds Office ASLERE

Pages: 12

**RECORDING REQUESTED BY:**

LANDMARK TITLE ASSURANCE AGENCY  
OF ARIZONA LLC

**AND WHEN RECORDED MAIL TO:**

ESCROW NO.: 6177749D

14/24

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**ASSIGNMENT OF LEASES AND RENTS**

This instrument was prepared by and after recording should be returned to Dennis A. Johnson, Attorney at Law, BARNES & THORNBURG LLP  
11 South Meridian Street  
Indianapolis, Indiana 46204

### **ASSIGNMENT OF LEASES AND RENTS**

#### **Project Commonly Known As "SouthPointe Pavilions"**

THIS ASSIGNMENT OF LEASES AND RENTS (this "Assignment") made as of the 31<sup>st</sup> day of March, 2017, is by RED CAPITAL MANAGEMENT, LLC, a Kansas limited liability company having an office at One East Washington Street, Suite 300, Phoenix, AZ 85004 ("Assignor"), in favor of KEYBANK NATIONAL ASSOCIATION, a national banking association, having an office at 4910 Tiedeman Road, 3<sup>rd</sup> Floor, Mail Code OH-01-51-0311, Brooklyn, Ohio 44144, its successors and assigns, as agent for the Lenders (as defined in the Loan Agreement hereinafter defined) (KeyBank National Association, in its capacity as agent for the Lenders, being referred to herein as "Agent").

#### **RECITALS**

A. Assignor and KeyBank National Association, as agent and as a lender, First Financial Bank, as a lender, and Union Bank & Trust, as a lender, entered into that certain Loan Agreement, dated of even date herewith (such Loan Agreement, as the same may be amended, restated or modified, being referred to herein as the "Loan Agreement"), whereby Lenders have agreed to make a secured loan available to the Assignor in the maximum aggregate amount at any time outstanding not to exceed the sum of Seventy-Four Million Dollars (\$74,000,000) (the "Loan"). Capitalized terms used and not otherwise defined herein shall have the meanings given to them in the Loan Agreement.

B. The Loan is evidenced by the Notes outstanding from time to time.

C. The Notes are secured, in part, by (i) that certain Deed of Trust, Assignment of Rents, Security Agreement and Fixture Filing of even date herewith made by Assignor in favor of KeyBank National Association, as Trustee, for the benefit of Agent encumbering the Project (the "Security Instrument"), and (ii) the other Loan Documents.

D. The Project is legally described in Exhibit A attached hereto and made a part hereof.

E. Assignor is desirous of further securing to Agent for the benefit of Lenders the performance of the terms, covenants and agreements hereof and of the Notes, the Security Instrument and the other Loan Documents.

### AGREEMENTS

NOW, THEREFORE, in consideration of the making of the Loan evidenced by the Notes and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Assignor hereby irrevocably, absolutely and unconditionally GRANTS, BARGAINS, SELLS, and CONVEYS to Agent for the benefit of Lenders all of the right, title and interest of Assignor in and to:

(a) any and all leases, licenses, rental agreements and occupancy agreements of whatever form (including any use or occupancy arrangements created pursuant to Section 365(d) of Title 11 of the United States Code (the "Bankruptcy Code") or otherwise in connection with the commencement or continuance of any bankruptcy, reorganization, arrangement, insolvency, dissolution, receivership or similar proceedings, or any assignment for the benefit of creditors, in respect of any tenant or occupant of any portion of the Project) now or hereafter affecting all or any part of the Project and any and all guarantees, extensions, renewals, replacements and modifications thereof (collectively, the "Leases"); and

(b) all issues, profits, security or other deposits, revenues, royalties, accounts, rights, benefits and income of every nature of and from the Project, including, without limitation, minimum rents, additional rents, percentage rents, payments in lieu of rent, tenant contributions and reimbursements, termination payments, bankruptcy claims (including any payments received pursuant to Section 502(b) of the Bankruptcy Code or otherwise in connection with the commencement or continuance of any bankruptcy, reorganization, arrangement, insolvency, dissolution, receivership or similar proceedings, or any assignment for the benefit of creditors, in respect of any tenant, licensee, lessee, user or occupant of any portion of the Project (including any portion of the Project used for parking) (any such tenant, licensee, lessee, user or occupant being referred to herein as a "Tenant") and all claims as a creditor in connection with any of the foregoing), forfeited security deposits, damages following default and all proceeds payable under any policy of insurance covering loss of rents resulting from untenability due to destruction or damage to the Project, together with the immediate and continuing right to collect and receive the same, whether now due or hereafter becoming due, and together with all rights and claims of any kind that Assignor may have against any Tenant, lessee or licensee under the Leases or against any other occupant of the Project (collectively, the "Rents").

TO HAVE AND TO HOLD the same unto Agent, its successors and assigns, for the benefit of Lenders.

IT IS AGREED that, notwithstanding that this instrument is a present, absolute and executed assignment of the Rents and of the Leases and a present, absolute and executed grant of the powers herein granted to Agent for the benefit of Lenders, Assignor is hereby permitted, at the sufferance of Agent and at its discretion, and is hereby granted a license by Agent, to retain possession of the Leases, and to collect and retain the Rents unless and until there shall be an "Event of Default" (as defined herein) under the terms of this Assignment or any of the other Loan Documents. Upon an Event of Default, the aforementioned license granted to Assignor shall automatically terminate without notice to Assignor, and Agent may thereafter, without taking possession of the Project, take possession of the Leases and collect the Rents. Further, from and after such termination, Assignor shall be the agent of Agent in collection of the Rents, and any Rents so collected by Assignor shall be held in trust by Assignor for the sole and exclusive benefit of Agent for the benefit of the Lenders and Assignor shall, within one (1) business day after receipt of any Rents, pay the same to Agent to be applied by Agent as hereinafter set forth. Furthermore, from and after such Event of Default and termination of the aforementioned license, Agent shall have the right and authority, without any notice whatsoever to Assignor and without regard to the adequacy of the security therefor: (a) to make application to a court of competent jurisdiction for appointment of a receiver for all or any part of the Project, as particularly set forth in the Security Instrument; (b) to manage and operate the Project, with full power to employ agents to manage the same; (c) to demand, collect, receive and sue for the Rents, including those past due and unpaid; and (d) to do all acts relating to such management of the Project, including, but not limited to, negotiation of new Leases, making adjustments of existing Leases, contracting and paying for repairs and replacements to the Improvements and to the fixtures, equipment and personal property located in the Improvements or used in any way in the operation, use and occupancy of the Project as in the sole subjective judgment and discretion of Agent may be necessary to maintain the same in a tenable condition, purchasing and paying for such additional furniture and equipment as in the sole subjective judgment of Agent may be necessary to maintain a proper rental income from the Project, employing necessary managers and other employees, purchasing fuel, providing utilities and paying for all other expenses incurred in the operation of the Project, maintaining adequate insurance coverage over hazards customarily insured against and paying the premiums therefor. Agent shall apply the Rents received by Assignor from the Project, after deducting the reasonable costs of collection thereof, including, without limitation, attorneys' fees and a management fee for any management agent so employed, against amounts expended for repairs, upkeep, maintenance, service, fuel, utilities, taxes, assessments, insurance premiums and such other expenses as Agent incurs in connection with the operation of the Project and against interest, principal, required escrow deposits and other sums which have or which may become due, from time to time, under the terms of the Loan Documents, in such order or priority as to any of the items so mentioned as Agent, in its sole subjective discretion, may determine. The exercise by Agent of the rights granted Agent in this paragraph, and the collection of, the Rents and the application thereof as herein provided, shall not be considered a waiver by Agent or the Lenders of any Event of Default under the Loan Documents or prevent foreclosure of any liens on the Project nor shall such exercise make Agent or the Lenders liable under any of the Leases,

Agent hereby expressly reserving all of its rights and privileges under the Security Instrument and the other Loan Documents as fully as though this Assignment had not been entered into.

Without limiting the rights granted hereinabove, upon the occurrence of an Event of Default, then Agent may, but shall not be obligated to, without prior notice to or demand on Assignor, and without releasing Assignor from any obligation hereof, make or perform the same in such manner and to such extent as Agent may deem necessary to protect the security hereof, including specifically, without limitation, appearing in and defending any action or proceeding purporting to affect the security hereof or the rights or powers of Agent, performing or discharging any obligation, covenant or agreement of Assignor under any of the Leases, and, in exercising any of such powers, paying all necessary reasonable costs and expenses, employing counsel and incurring and paying attorneys' fees. Any sum advanced or paid by Agent for any such purpose, including, without limitation, attorneys' fees, together with interest thereon at the Default Rate from the date paid or advanced by Agent until repaid by Assignor, shall immediately be due and payable to Agent by Assignor on demand and shall be secured by the Security Instrument and by all of the other Loan Documents securing all or any part of the indebtedness evidenced by the Notes or any other Loan Document.

IT IS FURTHER AGREED that this Assignment is made upon the following terms, covenants and conditions:

1. This Assignment shall not operate to place responsibility for the control, care, management or repair of the Project upon Agent or the Lenders, nor for the performance of any of the terms and conditions of any of the Leases, nor shall it operate to make Agent or the Lenders responsible or liable for any waste committed on the Project by any Tenant or any other party or for any dangerous or defective condition of the Project or for any negligence in the management, upkeep, repair or control of the Project. Agent and the Lenders shall not be liable for any loss sustained by Assignor resulting from Agent's or any Lender's failure to let the Project or from any other act or omission of Agent or the Lenders in managing the Project. Assignor shall and does hereby indemnify and hold Agent and the Lenders harmless from and against any and all liability, loss, claim, demand or damage which may or might be incurred by reason of this Assignment, including, without limitation, claims or demands for security deposits from Tenants deposited with Assignor, and from and against any and all claims and demands whatsoever which may be asserted against Agent or the Lenders by reason of any alleged obligations or undertakings on its or their part to perform or discharge any of the terms, covenants or agreements contained in any of the Leases. Should Agent or any Lender incur any liability by reason of this Assignment or in defense of any claim or demand for loss or damage as provided above, the amount thereof, including, without limitation, reasonable costs, expenses and attorneys' fees, together with interest thereof at the Default Rate from the date paid or incurred by Agent or such Lender until repaid by Assignor, shall be immediately due and payable to Agent or such Lender, as applicable, by Assignor upon demand and shall be secured by the Security Instrument and by all of the other Loan Documents securing all or any part of the indebtedness evidenced by the Notes or any other Loan Documents.

2. This Assignment shall not be construed as making Agent or any Lender a mortgagee in possession.

3. Agent is obligated to account to Assignor only for such Rents as are actually collected or received by Agent.

4. Assignor hereby further presently and absolutely assigns to Agent subject to the terms and provisions of this Assignment: (a) any award or other payment which Assignor may hereafter become entitled to receive with respect to any of the Leases as a result of or pursuant to any bankruptcy, insolvency or reorganization or similar proceedings involving any Tenant under such Leases; and (b) any and all payments made by or on behalf of any Tenant of any part of the Project in lieu of Rent. Assignor hereby irrevocably appoints Agent as Assignor's attorney-in-fact to appear in any such proceeding and to collect any such award or payment, which power of attorney is coupled with an interest by virtue of this Assignment and is irrevocable so long as any sums are outstanding under the Loan evidenced by the Notes. All awards or payments so collected shall be applied to the indebtedness secured hereby in such order as Agent shall elect.

5. Assignor represents, warrants and covenants to and for the benefit of Agent: (a) that Assignor now is (or with respect to any Leases not yet in existence, will be immediately upon the execution thereof) the absolute owner of the landlord's interest in the Leases, with full right and title to assign the same and the Rents due or to become due thereunder; (b) that, other than this Assignment and any assignment to Agent pursuant to the Security Instrument or other agreement, there are no outstanding assignments of the Leases or Rents; (c) that, except as set forth in the Loan Agreement, no Rents have been anticipated, discounted, released, waived, compromised or otherwise discharged except for prepayment of rent of not more than one (1) month prior to the accrual thereof; (d) that, to the best of Assignor's knowledge, there are no material defaults now existing under any of the Leases by the landlord or any Tenant, and there exists no state of facts which, with the giving of notice or lapse of time or both, would constitute a default under any of the Leases by the landlord or any Tenant, except as disclosed in writing to Agent; (e) that Assignor has and shall duly and punctually observe and perform all covenants, conditions and agreements in the Leases on the part of the landlord to be observed and performed thereunder and (f) the Leases are in full force and effect and are the valid and binding obligations of Assignor, and, to the knowledge of Assignor, are the valid and binding obligations of each Tenant thereto.

6. Assignor covenants and agrees that Assignor shall, at its sole cost and expense, appear in and defend any action or proceeding arising under, growing out of, or in any manner connected with the Leases or the obligations, duties or liabilities of the landlord or any Tenant thereunder, and shall pay on demand all reasonable costs and expenses, including, without limitation, attorneys' fees, which Agent may incur in connection with Agent's appearance, voluntary or otherwise, in any such action or proceeding, together with interest thereon at the Default Rate from the date incurred by Agent until repaid by Assignor. As used herein the term "attorneys' fees" shall mean all legal fees and expenses of Agent whether incurred in connection with litigation, mediation, arbitration, other alternative dispute processes, administrative proceedings and bankruptcy proceedings and all appeals from any of the foregoing.

7. At any time, Agent may, at its option, notify any Tenant and Assignor or other parties of the existence of this Assignment. Assignor does hereby specifically authorize, instruct and direct each and every present and future tenant, lessee and licensee of the whole or any part of the Project to pay all unpaid and future Rents to Agent upon receipt of demand from Agent to

so pay the same and Assignor hereby agrees that each such present and future Tenant, lessee and licensee may rely upon such written demand from Agent to so pay said Rents without any inquiry into whether there exists an Event of Default hereunder or under the other Loan Documents or whether Agent is otherwise entitled to said Rents. Assignor hereby waives any right, claim or demand which Assignor may now or hereafter have against any present or future tenant, lessee or licensee by reason of such payment of Rents to Agent, and any such payment shall discharge such tenant's, lessee's or licensee's obligation to make such payment to Assignor.

8. Agent and Lenders may take or release any security for the indebtedness evidenced by the Notes or the other Loan Documents, may release any party primarily or secondarily liable for the indebtedness evidenced by the Notes or the other Loan Documents, may grant extensions, renewals or indulgences with respect to the indebtedness evidenced by the Notes or the other Loan Documents and may apply any other security therefor held by Agent to the satisfaction of any indebtedness evidenced by the Notes or the other Loan Documents without prejudice to any of its rights hereunder.

9. The acceptance of this Assignment and the collection of the Rents in the event Assignor's license is terminated, as referred to above, shall be without prejudice to Agent and Lenders. The rights of Agent hereunder are cumulative and concurrent, may be pursued separately, successively or together and may be exercised as often as occasion therefor shall arise, it being agreed by Assignor that the exercise of any one or more of the rights provided for herein shall not be construed as a waiver of any of the other rights or remedies of Agent or the Lenders, at law or in equity or otherwise, so long as any obligation under the Loan Documents remains unsatisfied.

10. All rights of Agent hereunder shall inure to the benefit of its successors and assigns, and all obligations of Assignor shall bind its successors and assigns and any subsequent owner of the Project. All rights of Agent in, to and under this Assignment shall pass to and may be exercised by any assignee of such rights of Agent. Assignor hereby agrees that if Agent gives notice to Assignor of an assignment of said rights, upon such notice the liability of Assignor to the assignee of the Agent shall be immediate and absolute. Assignor will not set up any claim against Agent or any intervening assignee as a defense, counterclaim or setoff to any action brought by Agent or any intervening assignee for any amounts due hereunder or for possession of or the exercise of rights with respect to the Leases or the Rents.

11. An Event of Default under any of the other Loan Documents, entitling Agent to exercise any or all rights and remedies available to Agent under the terms hereof or of any or all of the other Loan Documents shall be deemed an Event of Default hereunder subject to no grace or cure period, entitling Agent to exercise any or all rights provided for herein.

12. It shall be an "Event of Default" hereunder (a) if any representation or warranty made herein by Assignor is determined by Agent to have been false or misleading in any material respect at the time made, provided that if such breach is reasonably susceptible of cure, then no Event of Default shall exist so long as Assignor cures said breach (i) within ten (10) days after the date due for a breach that can be cured by the payment of money, or (ii) within thirty (30) days after written notice from Assignee for any other breach, or (b) upon any failure by

Assignor in the performance or observance of any other covenant or condition hereof and the continuance of such failure for thirty (30) days after written notice thereof from Agent to Assignor. Any such default not so cured shall be an "Event of Default" under each of the other Loan Documents, entitling Agent to exercise any or all rights and remedies available to Agent under the terms hereof or of any or all of the other Loan Documents, and any Event of Default under the other Loan Documents, or any default under any other Loan Document which is not cured within any applicable grace or cure period, shall be deemed an Event of Default hereunder subject to no grace or cure period, entitling Agent to exercise any or all rights provided for herein.

13. If any provision under this Assignment or the application thereof to any entity, person or circumstance shall be invalid, illegal or unenforceable to any extent, the remainder of this Assignment and the application of the provisions hereof to other entities, persons or circumstances shall not be affected thereby and shall be enforced to the fullest extent permitted by law.

14. This Assignment may not be amended, modified or otherwise changed except by a written instrument duly executed by Assignor and Agent.

15. This Assignment shall be in full force and effect continuously from the date hereof to and until the payment, discharge, and performance of any and all indebtedness and obligations evidenced by the Notes and the other Loan Documents or secured or guaranteed by any of the Loan Documents, and the release of the Security Instrument shall, for all purposes, automatically terminate this Assignment and render this Assignment null and void and of no effect whatsoever.

16. In case of a conflict between any provision of this Assignment and any provision of the other Loan Documents, the provision selected by Agent in its sole subjective discretion shall prevail and be controlling.

17. All notices, demands, requests or other communications to be sent by one party to the other hereunder or required by law shall be given and become effective as provided in the Loan Agreement.

18. THIS ASSIGNMENT SHALL BE GOVERNED BY, AND BE CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEBRASKA WITHOUT REGARD TO CONFLICT OF LAW PROVISIONS THEREOF.

19. This Assignment may be executed in any number of counterparts, each of which shall be effective only upon delivery and thereafter shall be deemed an original, and all of which shall be taken to be one and the same instrument, for the same effect as if all parties hereto had signed the same signature page. Any signature page of this Assignment may be detached from any counterpart of this Assignment without impairing the legal effect of any signatures thereon and may be attached to another counterpart of this Assignment identical in form hereto but having attached to it one or more additional signature pages.



20. In addition to, but not in lieu of, any other rights hereunder, Agent shall have the right to institute suit and obtain a protective or mandatory injunction against Assignor to prevent a breach or default, or to reinforce the observance, of the agreements, covenants, terms and conditions contained herein, as well as the right to damages occasioned by any breach or default by Assignor.

21. Assignor hereby covenants and agrees that Agent shall be entitled to all of the rights, remedies and benefits available by statute, at law, in equity or as a matter of practice for the enforcement and perfection of the intents and purposes hereof. Agent shall, as a matter of absolute right, be entitled, upon application to a court of applicable jurisdiction, to the appointment of a receiver to obtain and secure the rights of Agent hereunder and the benefits intended to be provided to Agent hereunder.

IN WITNESS WHEREOF, Assignor has executed this Assignment as of the day and year first above written.

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**SIGNATURE PAGE OF ASSIGNOR TO ASSIGNMENT OF LEASES AND RENTS**

**“ASSIGNOR”**

RED CAPITAL MANAGEMENT, LLC, a Kansas limited liability company

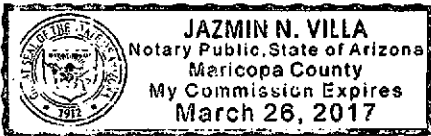
By: RED Development, LLC, a Missouri limited liability company, its Manager

By: *[Signature]*  
Steven M. Maun, President

STATE OF ARIZONA     )  
  ) SS:  
COUNTY OF MARICOPA )

Before me, a Notary Public in and for said County and State, personally appeared Steven M. Maun, known to be the President of RED Development, LLC, a Missouri limited liability company, the Manager of RED CAPITAL MANAGEMENT, LLC, a Kansas limited liability company, and acknowledged the execution of the foregoing for and on behalf of said limited liability company.

Witness my hand and Notarial Seal, this 24<sup>th</sup> day of March, 2017.



*Jazmin N. Villa*  
Notary Public - Signature  
Jazmin N. Villa  
Notary Public - Printed

My Commission Expires:  
3-26-17

My County of Residence:  
Maricopa

EXHIBIT A

Tract I:

Parcel 1:

Lot 5, Block 1, South Pointe Pavilions 1st Addition, Lincoln, Lancaster County, Nebraska.

Parcel 2:

Lot 6, Block 1, South Pointe Pavilions 1st Addition, Lincoln, Lancaster County, Nebraska.

Parcel 3:

Lot 7, Block 1, South Pointe Pavilions 1st Addition, Lincoln, Lancaster County, Nebraska.

Parcel 4:

Lot 8, Block 1, South Pointe Pavilions 1st Addition, Lincoln, Lancaster County, Nebraska.

Parcel 5:

Non-exclusive easements for pedestrian and vehicular ingress and egress, parking, utilities, drainage and encroachment as created by that certain Construction, Operation and Reciprocal Easement Agreement recorded June 3, 1998 as Instrument No. 98-26882, and as amended by Amendment and Release of Initial REA, filed July 9, 1999, as Instrument No. 99-38139, and further as amended by Amendment to Construction, Operation and Reciprocal Easement Agreement recorded August 16, 2002 as Instrument No. 2002-054426.

Parcel 6:

Together with non-exclusive easements for parking, vehicular and pedestrian ingress and egress, signs, utilities and storm drainage as contained in Declaration of Reciprocal Easements, Covenants and Restrictions, filed as Inst. No. 99-38137.

Parcel 7:

Together with a perpetual non-exclusive easement to dispose of storm water as created by that certain Southpointe Pavillion Drainage Easement and Covenants, filed as Instrument No. 98-26883.

Tract II:

Parcel 1:

Outlots A, B, and C, and Lot 3, Block 1, Southpointe Pavilions 3rd Addition, Lincoln, Lancaster County, Nebraska.

Parcel 2:

Lot 2, Block 1, Southpointe Pavilions 5th Addition, Lincoln, Lancaster County, Nebraska.

Parcel 3:

Lot 2, Block 1, Southpointe Pavilions 3rd Addition, Lincoln, Lancaster County, Nebraska.

1 SOPOPA1

1 SOPOPA3  
1 SOPOPA5

Parcel 4:

Lot 1 and Outlot A, Southpointe Pavilions 6th Addition, Lincoln, Lancaster County, Nebraska.

Parcel 5:

Together with non-exclusive easements for parking, vehicular and pedestrian ingress and egress, signs, utilities and storm drainage as contained in Declaration of Reciprocal Easements, Covenants and Restrictions, filed as Inst. No. 99-38137.

Parcel 6:

Non-exclusive easements for pedestrian and vehicular ingress and egress, parking, utilities, drainage and encroachment as created by that certain Construction, Operation and Reciprocal Easement Agreement recorded June 3, 1998 as Instrument No. 98-26882, and as amended by Amendment and Release of Initial REA, filed July 9, 1999, as Instrument No. 99-38139, and further as amended by Amendment to Construction, Operation and Reciprocal Easement Agreement recorded August 16, 2002 as Instrument No. 2002-054426.