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INSTRUMENT NUMBER

2013-06475

2013 Mar 04 01:47:39 PM

Stacy J. Dowling

REGISTER OF DEEDS



**SECOND MORTGAGE LOAN EXTENSION AND MODIFICATION AGREEMENT
(Settler's Creek)**

THIS SECOND MORTGAGE LOAN EXTENSION AND MODIFICATION AGREEMENT ("Agreement") is executed effective as of the 1st day of January, 2013, by and between PAPILLION DEVELOPMENT SETTLER'S CREEK, LLC, a Nebraska limited liability company ("Borrower"), and FIRST NATIONAL BANK OF OMAHA, a national banking association ("Lender").

Preliminary Matters

1. **Original Loan.** On or about the 29th day of August, 2006, Borrower secured a loan from Lender in the original amount of Five Million Nine Hundred Twenty Five Thousand and 00/100 Dollars (\$5,925,000.00) (the "Loan"), as evidenced by Borrower's Promissory Note to Lender dated August 29, 2006, in the amount of \$5,925,000.00 (the "Original Promissory Note"). The Original Promissory Note is secured by a Deed of Trust, as hereinafter described, on the real estate in Sarpy County, Nebraska, as legally described on Exhibit "A" attached hereto (the "Mortgaged Property"). The Loan was modified by a Change in Terms Agreement between Borrower and Lender, dated August 31, 2010, which modified the principal amount of the Loan to \$4,803,933.00, and extended the Maturity Date to November 1, 2010, was modified by a Mortgage Loan Extension and Modification Agreement dated November 1, 2010 filed with the Sarpy County Register of Deeds on January 24, 2011, as Instrument No. 2011-02589, and Modified Promissory Note dated November 1, 2010, in the principal amount of \$4,727,319.39 (the "Modified Promissory Note") that replaced the Original Promissory Note, and extended the Maturity Date to November 1, 2012, and was modified by two Change in Terms Agreements that extended the Maturity Date of the Loan to January 1, 2013. Lender and Borrower have agreed to extend the term of the Loan and effect certain other modifications of the Loan. The parties agree that the unpaid principal balance presently advanced and outstanding on the Loan and Original Promissory Note is the sum of \$4,052,522.85 as of the date hereof.

2. **Loan Documents.** The obligations of Borrower in connection with the Loan are evidenced, secured and/or guaranteed by documents and agreements executed contemporaneously with the closing of the Loan and execution of the Original Promissory Note which, as heretofore amended and modified, are hereinafter referred to as the "Loan Documents", that include the following:

- i. Deed of Trust, Security Agreement and Assignment of Rents from Borrower to Lender dated August 29, 2006, and recorded with the Sarpy County, Nebraska Register of Deeds on August 31, 2006, as Instrument No. 2006-30028 (the "Deed of Trust");
- ii. Assignment of Rents and Leases from Borrower to Lender dated August 29, 2006, and recorded with the Sarpy County, Nebraska Register of Deeds on August 31, 2006, as Instrument No. 2006-30029 (the "Assignment of Rents");
- iii. UCC-1 Financing Statement filed with the Nebraska Secretary of State;
- iv. Environmental Indemnity Agreement from Borrower to Lender;
- v. Guaranty of Payment of 50% of the Secured Obligations by RED Papillion Settler's Creek, LLC, Michael L. Ebert, Scott Rehorn and Daniel Lowe dated August 29, 2006; and
- vi. Guaranty of Payment of 50% of the Secured Obligations by Papillion Settlers Creek LLC, Jay R. Lerner and Salvadore Carta dated August 29, 2006.

3. **Present Ownership.** Borrower represents, covenants and warrants to Lender that it remains the owner of fee title to the Mortgaged Property, subject only to the liens and security interests arising out of the Loan Documents and the exceptions to title set forth in Commonwealth Land Title Insurance Company ALTA Loan Policy of Title Insurance (Policy Number H55-0147890) issued at the Loan closing and any subsequent endorsements thereto.

4. **Modification of Loan.** The parties hereto have agreed to modify the Loan terms as follows:

a. The maturity date of the Loan shall be extended from January 1, 2013 to November 1, 2013.

b. Borrower shall make monthly interest only payments commencing February 1, 2013, with principal and accrued and unpaid interest due at maturity.

c. Borrower shall make a principal reduction payment in the amount of \$1,501,840.00 upon closing of the loan from Lender to Borrower for financing construction of the Settler's Creek Hobby Lobby improvements (the "Required Principal Reduction Payment").

d. Lender will provide releases of lots included in the Mortgaged Property upon Borrowers payment to Lender of eighty percent (80%) of the "net sale receipts" (as defined in the Modified Promissory Note) which Lender shall apply against principal.

e. The Loan interest rate shall be modified to be a fixed rate of 3.5%.

Now, therefore, it is hereby agreed by and among the parties as follows:

5. **Incorporation of Preliminary Matters.** All of the provisions and statements in the foregoing Preliminary Matters are affirmed by Lender and Borrower.

6. **Modified Promissory Note.** Concurrently with the execution hereof, Borrower has executed and delivered to Lender a Second Modified Promissory Note in the amount of \$4,052,522.85 (the "Second Modified Note"), which the parties agree represents the unpaid principal balance advanced under the Loan and which the parties agree shall be substituted for the Modified Promissory Note, which shall be cancelled and returned to Borrower. Borrower hereby acknowledges and agrees that the Second Modified Note, and the repayment thereof, shall continue to be secured by the Loan Documents, as amended by this Agreement.

7. **Loan Document Modifications.** Effective upon the execution hereof:

a. All references in the Loan Documents to the Original Promissory Note shall be modified to mean the Second Modified Note;

b. The reference to the scheduled Maturity Date of the Promissory Note as set forth in the Deed of Trust is hereby modified to November 1, 2013;

c. All references in the Loan Documents to the Loan amount shall be modified from \$4,727,319.39 to \$4,052,522.85.

d. Except as modified herein, all of the terms, conditions and provisions of the Loan Documents are hereby ratified and confirmed and shall remain in full force and effect.

8. **Representations and Warranties.**

Borrower hereby represents and warrants to Lender that:

a. to Borrower's knowledge, each of the representations and warranties set forth in this Agreement and in the Loan Documents amended hereby are true and correct as of the date hereof;

b. this Agreement constitutes the legal, valid and binding obligation of Borrower and is enforceable in accordance with its terms; and

c. as of the date hereof, Borrower is not aware of any default or event of default under the Second Modified Note or any of the other Loan Documents executed by Borrower in connection with the Loan, as amended by this Agreement.

9. **Conflict.** In the event of any conflict or inconsistency between the provisions of this Agreement or any of the other Loan Documents heretofore executed by Borrower in connection with the Loan, the provisions of this Agreement shall govern.

10. **Successors and Assigns.** This Agreement shall be binding upon, and inure to the benefit of Borrower, Lender and their respective successors and assigns.

11. **Notices.** All notices, demands, requests, consents, approvals or communications required under the Loan Documents shall be in writing and shall be deemed to have been properly given if sent by hand delivery, overnight courier or certified mail, postage prepaid, addressed to the parties at the following addresses:

If to Borrower: Papillion Settlers Creek LLC
Attn: Salvadore Carta
c/o The Lerner Company
10855 West Dodge Road, Suite 270
Omaha, Nebraska 68154

RED Papillion Settler's Creek, LLC
Attn: Michael L. Ebert
6263 North Scottsdale Road, Suite 330
Scottsdale, Arizona 85250

With a copy to: James Kirkland
Kuckelman, Torlini, Kirkland and Lewis
10740 Nall, Suite 250
Overland Park, Kansas 66211

CDK Realty Advisors, LP
4100 Harry Hines Blvd., 4th Floor
Dallas, Texas 75219
Attn: Brent W. Kroener

Clark Law Firm
4100 Harry Hines Blvd, Suite 300A
Dallas, Texas 75219
Attn: Charles T. Clark

If to Lender: First National Bank of Omaha
1620 Dodge Street
Omaha, Nebraska 68102
ATTN: Senior Officer, Mortgage Loan Department

With a copy to: James D. Buser, Esquire
PANSING HOGAN ERNST & BACHMAN LLP
10250 Regency Circle, Suite 300
Omaha, Nebraska 68114

or to such other addresses as are designated by notice pursuant to this Section. Notices shall be deemed to have been received upon delivery if hand delivered or if sent by overnight courier, or if sent by certified mail, three (3) days following the day of deposit in the U.S. Mail.

12. **Nonwaiver.** Borrower hereby acknowledges and agrees that:

a. except as specifically set forth herein, Lender's execution and performance of this Agreement is not, and shall not be construed to be, a waiver, release, amendment or modification of, or to any rights or remedies which Lender currently has, or may hereafter acquire, with respect to any of the obligations owed to Lender by Borrower by virtue of any documents or instruments evidencing, securing, guaranteeing or relating to such obligations; nor shall it be deemed to be an agreement to forebear from exercising any rights or remedies which Lender currently has or may hereafter acquire.

b. Lender's agreement herein shall not be construed as, or be deemed to create, any course of dealing between Borrower and Lender, nor shall it be deemed to require or imply any future settlements; nor shall it be construed as a waiver of any defaults of Lender's rights or

remedies with regard thereto, or as an amendment to any other agreements, except as expressly set forth herein.

13. **Additional Covenants and Provisions.**

a. Borrower agrees to pay or reimburse Lender for any and all fees, costs and expenses incurred by Lender relating to the Agreement including, without limitation, title expenses, recording fees and reasonable attorney fees.

b. Borrower agrees that Borrower has no defense to the payment of the Second Modified Note and Borrower has no defenses to the terms or provisions of the Deed of Trust or other Loan Documents, as amended herein, or right of offset to claim against Lender. Borrower specifically acknowledges and agrees that Lender has performed each and all of its obligations, commitments and agreements under the Loan Documents and all other agreements related to the indebtedness up to and including the date of this Agreement and further agrees that Lender is not in default in the observance or performance of any obligation, commitment, agreement or covenant, express or implied, including, but not limited to, covenants of good faith and fair dealing, to be observed or performed by Lender and that no fact exists and that no event has occurred which now or hereafter will authorize Borrower to fail or refuse to abide by the terms of the Loan Documents or form the basis, in whole or in part, for a claim of any kind against Lender.

c. This Agreement contains the entire agreement between the parties with respect to the modification of the Loan Documents modified herein and that no statement, promise or inducement made by any party, or the agent of any party, that is not contained in this Agreement shall be valid or binding upon Lender.

d. Borrower agrees that time is of the essence with respect to all dates for payment and performance, as set forth in the Loan Documents, as amended herein.

e. Invalidity of any of the provisions of this Agreement or any paragraph, sentence, clause, phrase or word herein, or the application thereof to any given circumstance, shall not affect the validity of the remainder of this Agreement.

f. This Agreement shall be construed in accordance with the laws of the State of Nebraska. Borrower hereby irrevocably submits to the jurisdiction of the courts of the State of Nebraska in any suit, action or proceeding. Borrower agrees that any and all service of process and any such suit, action or proceeding mailed or delivered in the manner provided for the delivery of notices in the Deed of Trust, as amended herein, shall be deemed in every respect effective service of process upon Borrower.

14. **Loan Participation.** Lender hereby discloses to Borrower and Borrower hereby acknowledges and agrees that Lender may sell participation interests in the Loan, and in conjunction with such Loan participations may furnish any information concerning Borrower or guarantors in its possession from time to time to participants and prospective participants and may furnish information in response to credit inquiries consistent with general banking practices and applicable laws.

15. **Counterparts.** This Agreement and the Consent and Agreement of Guarantors affixed hereto and made a part hereof may be executed in any number of counterpart originals, each of which, when taken together, shall be deemed one and the same instrument.

16. **Credit Agreement.** A CREDIT AGREEMENT MUST BE IN WRITING TO BE ENFORCEABLE UNDER NEBRASKA LAW. TO PROTECT YOU (BORROWER) AND US (LENDER) FROM ANY MISUNDERSTANDINGS OR DISAPPOINTMENTS, ANY CONTRACT, PROMISE, UNDERTAKING, OR OFFER TO FOREBEAR REPAYMENT OF MONEY OR TO MAKE ANY OTHER FINANCIAL ACCOMMODATION IN CONNECTION WITH THIS LOAN OF MONEY OR GRANT OR EXTENSION OF CREDIT, OR ANY AMENDMENT OF, CANCELLATION OF, WAIVER OF, OR SUBSTITUTION FOR ANY OR ALL OF THE TERMS OR PROVISIONS OF ANY INSTRUMENT OR DOCUMENT EXECUTED IN CONNECTION WITH THIS LOAN OF MONEY OR GRANT OR EXTENSION OF CREDIT, MUST BE IN WRITING TO BE EFFECTIVE.

[Space Below Intentionally Left Blank –
Signature Page to Follow]

IN WITNESS WHEREOF, the undersigned have executed and delivered this Agreement to be effective as of the day and year first above written.

BORROWER:

PAPILLION DEVELOPMENT SETTLER'S CREEK, LLC, a Nebraska limited liability company

By: RED Papillion Settler's Creek, LLC, a Missouri limited liability company, Manager

By: RED Consolidated Holdings, LLC, a Delaware limited liability company, Its Managing Member

By: Michael L. Ebert
Michael L. Ebert, Vice President

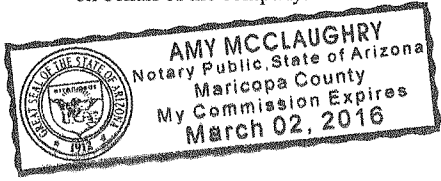
LENDER:

FIRST NATIONAL BANK OF OMAHA, a national banking association

By: Eric W. Musgaard
Title: Vice President

STATE OF Arizona)
) ss.
COUNTY OF Maricopa)

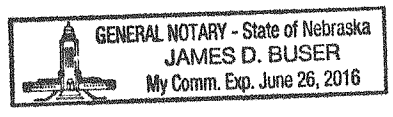
The foregoing instrument was acknowledged before me this 20 day of February, 2013, by Michael L. Ebert, as Vice President of RED Consolidated Holdings, LLC, a Delaware limited liability company, Managing Member of RED Papillion Settler's Creek, LLC, a Missouri limited liability company, Manager of Papillion Development Settler's Creek, LLC, a Nebraska limited liability company, on behalf of the company.



[Signature]
Notary Public

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

The foregoing instrument was acknowledged before me this 14 day of January, 2013, by Eric W. Musgaard, Vice President of FIRST NATIONAL BANK OF OMAHA, a national banking association, on behalf of the association.



[Signature]
Notary Public

CONSENT AND AGREEMENT OF GUARANTORS

The undersigned, as Guarantors, hereby consent to the foregoing Mortgage Loan Extension and Modification Agreement, and hereby ratify and confirm their respective Guaranty and agree that their Guaranty remains in full force and effect.

Dated effective January 1, 2013.

RED PAPILLION SETTLER'S CREEK, LLC, a Missouri limited liability company

By: RED Consolidated Holdings, LLC, a Delaware limited liability company, Its Managing Member

By: Michael L. Ebert
Michael L. Ebert, Vice President

Michael L. Ebert
Michael L. Ebert, Guarantor

Scott Rehorn
Scott Rehorn, Guarantor

Daniel Lowe, Guarantor

PAPILLION SETTLERS CREEK LLC, a Nebraska limited liability company

By: Jay R. Lerner, Manager

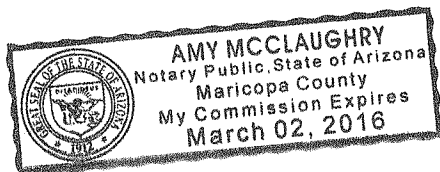
Salvadore Carta, Guarantor

Jay R. Lerner, Guarantor

STATE OF Arizona)
) ss.
COUNTY OF Maricopa)


The foregoing instrument was acknowledged before me this 27 day of February, 2013, by Michael L. Ebert, as Vice President of RED Consolidated Holdings, LLC, a Delaware limited liability company, Managing Member of RED Papillion Settler's Creek, LLC, a Missouri limited liability company, on behalf of the company.

[Signature]
Notary Public



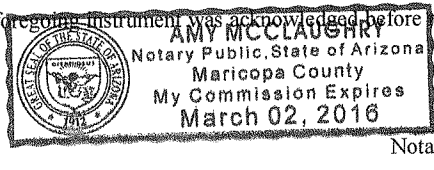
STATE OF Arizona)
) ss.
COUNTY OF Maricopa)

The foregoing instrument was acknowledged before me this 26 day of February, 2013, by Michael L. Ebert.

 _____
Notary Public

STATE OF Arizona)
) ss.
COUNTY OF Maricopa)

The foregoing instrument was acknowledged before me this 26 day of February, 2013, by Scott Rehorn.

 _____
Notary Public

STATE OF _____)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this ___ day of February, 2013, by Daniel Lowe.

Notary Public

STATE OF _____)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this ___ day of February, 2013, by Jay R. Lerner, as Manager of Papillion Settlers Creek LLC, a Nebraska limited liability company, on behalf of the company.

Notary Public

STATE OF _____)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this ___ day of February, 2013, by Salvadore Carta.

Notary Public

STATE OF _____)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this ___ day of February, 2013, by Michael L. Ebert.

Notary Public

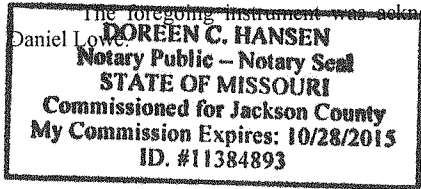
STATE OF _____)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this ___ day of February, 2013, by Scott Rehorn.

Notary Public

STATE OF Missouri)
) ss.
COUNTY OF Jackson)

The foregoing instrument was acknowledged before me this 1 day of February, 2013, by Daniel L. Neuh



Doreen C. Hansen
Notary Public

STATE OF _____)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this ____ day of February, 2013, by Jay R. Lerner, as Manager of Papillion Settlers Creek LLC, a Nebraska limited liability company, on behalf of the company.

Notary Public

STATE OF _____)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this ___ day of February, 2013, by Salvadore Carta.

Notary Public

STATE OF _____)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this ____ day of February, 2013, by Michael L. Ebert.

Notary Public

STATE OF _____)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this ____ day of February, 2013, by Scott Rehorn.

Notary Public

STATE OF _____)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this ____ day of February, 2013, by Daniel Lowe.

Notary Public

STATE OF NEBRASKA)
) ss.
COUNTY OF Douglas)

The foregoing instrument was acknowledged before me this 28th day of February, 2013, by Jay R. Lerner, as Manager of Papillion Settlers Creek LLC, a Nebraska limited liability company, on behalf of the company.



Dee Muesel
Notary Public

STATE OF NEBRASKA)
) ss.
COUNTY OF Douglas)

The foregoing instrument was acknowledged before me this 28th day of February, 2013, by Salvadore Carta.



Dee Muesel
Notary Public

STATE OF NEBRASKA)
) ss.
COUNTY OF Douglas)

The foregoing instrument was acknowledged before me this 28th day of February, 2013, by Jay R. Lerner.



Dee Muesel
Notary Public

EXHIBIT "A"
LEGAL DESCRIPTION

Outlot A, Settler's Creek Replat 2, a subdivision in Sarpy County, Nebraska.

And

Lots 1 through 6, inclusive, and Outlot A, Settlers Creek Replat 3, a subdivision in Sarpy County, Nebraska.