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FILED SARPY COUNTY NEBRASKA
INSTRUMENT NUMBER

2014-17343

08/08/2014 9:25:19 AM

Clay J. Dowling

REGISTER OF DEEDS



WHEN RECORDED, PLEASE RETURN TO:

Mortgage Loan Department
First National Bank of Omaha
Third Floor, First National Plaza
11404 West Dodge Road
Omaha, Nebraska 68154

**ASSIGNMENT OF RENTS AND LEASES
(Settler's Creek Lot 5)**

THIS ASSIGNMENT OF LEASES AND RENTS is made effective as of the 7th day of August, 2014, by PAPHILLION DEVELOPMENT SETTLER'S CREEK, LLC, a Nebraska limited liability company ("Borrower") to and for the benefit of FIRST NATIONAL BANK OF OMAHA, a national banking association ("Lender").

1. **Assignment.** In consideration of Lender's agreement to issue the Loan, as described below, and for other valuable consideration, receipt and adequacy of which is acknowledged by Borrower, Borrower grants and assigns to Lender:
 - (a) all of Borrower's right, title and interest in, to and under and with respect to any and all existing leases, licenses and other agreements of any kind relating to the use or occupancy of any of the property described in Exhibit A (the "Property"), as such documents are described in Exhibit B (collectively, "Existing Leases"); and
 - (b) all of Borrower's right, title and interest in, to and under and with respect to any and all leases, licenses and other agreements of any kind relating to any use or occupancy of all or any portion of the Property entered into after the date of this Assignment (collectively, "Future Leases"); and
 - (c) all rents (or payments in lieu of rents), payments and liabilities at any time payable under any and all of the Existing Leases or Future Leases, any and all security deposits received or to be received by Borrower pursuant to any and all Existing Leases or Future Leases and all rights and benefits accrued to or to accrue to Borrower under any and all of the Existing Leases or Future Leases (the "Collateral"). The Existing Leases, Future Leases and Collateral are collectively referred to as the "Leases," and a reference to Existing Leases, Future Leases, Collateral or Leases shall be a reference to the same as amended, extended, renewed or modified from time to time.
2. **Obligation Secured.** Borrower makes the foregoing grant and assignment to Lender for the purpose of securing:
 - (a) payment to Lender of all indebtedness evidenced by and arising under the Promissory Note (the "Note") executed by Borrower in the principal amount of Three Million Two Hundred Eighty Thousand and no/100 Dollars (\$3,280,000.00), payable to Lender or its order, and dated as of the date of this Assignment as the same may be amended, extended, renewed or modified from time to time; and

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- (b) the payment of all indebtedness and the performance of all obligations of Borrower to Lender now existing or arising after the date of this Assignment in connection with the loan evidenced by the Note (the "Loan"), including without limitation, all indebtedness and obligations secured by or arising under the Deed of Trust, Security Agreement and Assignment of Rents (hereinafter "Security Instrument") on the Property dated as of the date hereof and securing the Note, and all of the other documents evidencing or securing the Loan (collectively, the "Loan Documents"), as all of the same may be amended, extended, renewed or modified from time to time; and
- (c) the payment of all indebtedness and the performance of all obligations, which recite that they are secured by this Assignment, of Borrower to Lender now existing or arising after the date of this Assignment under this Assignment, as the same may be amended, extended, renewed or modified from time to time.

3. **Interpretation.** It is the intention of the Borrower that this Assignment shall constitute a present and absolute Assignment to Lender. However, so long as there shall exist no Default by Borrower in the payment of any sum due to Lender under the Loan Documents, or in the performance of any obligation, covenant or agreement contained in this Assignment, the Loan Documents or the Leases, as the same are to be performed by Borrower, Borrower shall have the right to collect at the time of, but not more than one (1) month prior to, the date provided for payment, all rents, income and profits arising under the Leases and to retain and use the same.

4. **Covenants.** Borrower covenants and agrees as follows:

- (a) to perform all of the covenants, representations and agreements of the lessor, and not to violate any of the warranties of the lessor, under the Leases; not to suffer or permit any release, abatement or reduction of liability of any of the lessees; not to create any right or excuse for any of the lessees to withhold payment of rent or fail to comply with any other liability under any of the Leases or to otherwise cease performance of any of lessee's obligations under the Leases; and
- (b) to give prompt notice to Lender of any notice of default with respect to any of the Leases, whether the default be of the lessees or Borrower, and to furnish Lender with complete copies of said notices; and
- (c) not to terminate, modify or amend any of the terms of the Leases in any material manner except as may be required under the express terms of any of such Leases, or grant any concession or waive, excuse or condone any failure of lessees under the Leases, or in any manner release or discharge the lessees from any material obligations, covenants, conditions or agreements to be performed by the lessees under the Leases, including, without limitation, the obligation to pay rent, or give any consent to exercise any option required or permitted by the terms of any of the Leases, either orally or in writing, without the prior written consent of Lender, which may be withheld in Lender's reasonable discretion, or to accept the surrender of any of the Leases without the prior written consent of Lender, which may be withheld in Lender's reasonable discretion, and that any attempted termination, modification or amendment of any of the Leases, or any other action which requires Lender's consent, without such consent, shall be null and void; and
- (d) not to collect any of the rent, income or other liabilities arising or accruing under the Leases more than one (1) month in advance of the time when the same become due except for the collection of damages in the event of a default under any such Leases and provided Borrower gives Lender prior notice thereof; and
- (e) not to discount any future accruing rents or other liabilities in connection with any of the Leases except for the collection of damages in the event of a default under any such Leases and provided Borrower gives Lender prior notice thereof; and
- (f) not to execute any other assignment of any of the Leases, any interest in any of the Leases or any of the rents or payments due or to become due in connection with the Leases; and

- (g) to, in accordance with good business practice, enforce, or secure the performance by the lessees of, the covenants, representations, warranties and agreements contained in the leases, and to enforce and secure all remedies available to Borrower against the lessees, in case of default under any of the Leases by the lessees; and
- (h) not to alter, modify or change the terms of any guaranty of any of the Leases or cancel or terminate any such guaranty without the prior written consent of Lender, which may be withheld in Lender's sole discretion, and that any such action without such consent shall be null and void; and
- (i) not to consent to any termination, assignment or subletting by any lessee without the prior written consent of Lender; provided that the foregoing shall not be construed to place Borrower in default under this Assignment in the case of any termination, assignment or subletting, which, under the terms of a particular Lease, does not require the consent of the lessor; and provided further, that where the terms of the Lease require the lessor not to unreasonably withhold its consent to any assignment or subletting, lessor may consent to such assignment or subletting, provided, however, in the event Lender fails to provide a written response to Borrower within ten (10) days after Lender's receipt of a request for assignment or subletting, Lender shall be deemed to have approved such request as to such assignment or subletting; and
- (j) not to subordinate, or agree or consent to subordinate, any of the Leases to any security instrument or other encumbrance without Lender's prior written consent, which may be withheld in Lender's sole discretion; and provided further, that any such subordination or agreement or consent to subordinate without such consent shall be null and void; and to deliver to Lender, from time to time, upon Lender's request, an executed counterpart of each and every Lease; and to execute and record such additional assignments, in form and substance acceptable to Lender, as Lender may request, covering any and all of the Leases, and to pay all costs incurred in connection with the preparation, execution and recording of all such assignments; and
- (k) not to exercise any right of election, whether specifically set forth in any of the Leases or otherwise, which would in any way materially diminish any obligation or liability of any of the lessees or which would have the effect of shortening the stated term of any of the Leases; and at Borrower's sole cost, to prosecute and defend any legal action, arbitration or other controversy relating to any of the Leases or to Borrower's interest in any of the Leases and to pay all costs and expenses (including, without limitation, attorneys' fees and court costs) actually incurred by Lender in connection with any such action, arbitration or controversy; and
- (l) not to enter into any Leases after the date of this Assignment unless such Leases are in form and content satisfactory to Lender, provided, that so long as no Event of Default is existing, Lender will use reasonable discretion and diligence in approving Leases and Lender agrees that Leases submitted in the form of the Existing Leases and on terms that are in line with the existing market will be approved. In the event Lender fails to provide a written response to Borrower within ten (10) days after Lender's receipt of a Lease for its review and approval, Lender shall be deemed to have approved such Lease; and
- (m) to use commercially reasonable efforts to lease all portions of the Property which, from time to time, are not subject to a Lease at rentals not less than the market rent for such Leases.

5. **Representations and Warranties.** In order to induce Lender to make the Loan to Borrower, Borrower represents and warrants to Lender that:

- (a) the Existing Leases are in full force and effect and are enforceable in accordance with their respective terms, and that no breach or default, or event which would constitute such a breach or default after notice or the passage of time, or both, of

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any of the terms, covenants or conditions exists with respect to any of the Existing Leases; and

- (b) no rent payment or other payment under any of the Existing Leases has been paid by any lessee for more than one (1) month in advance; and
- (c) the Existing Leases constitute all the Leases existing with respect to the Property as of the date of this Assignment; and
- (d) each of the Existing Leases constitutes the entire agreement between the respective lessees and Borrower, and there are no other agreements, undertakings or representations, either written or oral, with respect to the Property; and
- (e) none of the lessor's interest under any of the Leases has been transferred or assigned to any person or entity other than Lender.

6. **Defaults and Remedies.**

- (a) **Definition.** "Default" shall mean a default in payment of any of the indebtedness secured by this Assignment or the Loan Documents, after giving effect to any express curative provisions set forth herein or therein or a default in the performance of any obligation, covenant or agreement of Borrower contained in this Assignment or any of the Loan Documents or any of the Leases after giving effect to any express curative provisions set forth herein or therein; provided, however, that in the case of any default other than a monetary default for which there is no specific cure period specified, and such default shall not have been cured within thirty (30) days after written notice from Lender of such default unless (a) such default, but its nature, is not capable of being cured within such period, and (b) within such period, Borrower commences to cure such failure and thereafter diligently prosecutes the cure thereof, and (c) subject to Force Majeure (as defined in the Promissory Note), Borrower causes such default to be cured no later than one hundred twenty (120) days after the date of such notice from Lender.
- (b) **Loan Documents.** A default under this Assignment which is not cured within any applicable grace or cure periods shall be a default under each and every one of the Loan Documents.
- (c) **Remedies.** In addition to any and all remedies contained in the other Loan Documents, in the event of a Default, Lender shall, and without regard to the adequacy of the security for the indebtedness and obligations secured by this Assignment and by the Loan Documents, either in person or by its agent, and with or without bringing any action or proceeding or obtaining a receiver appointed by a court, and without notice to or demand on Borrower, and without releasing Borrower from any obligations under this Assignment, have the following rights and remedies, each of which shall be exercisable in Lender's sole discretion:
 - (i) to receive directly from the lessees under the Leases all rents, income, liabilities and other amounts arising or accruing under the Leases or from the Property and to so continue until Borrower is otherwise notified by Lender; and
 - (ii) to collect, sue for, settle, compromise and give acquittances for all of the rents and other payments that may become due under the Leases and avail Lender of and pursue all remedies for the enforcement of the Leases as Borrower's rights in and under the Leases as Borrower might have pursued but for this Assignment, all at Borrower's sole cost and expense; and
 - (iii) to take possession of the Property, and to have, hold, manage, lease and operate the same on such terms and for such period of time as Lender may deem proper and, either with or without taking possession of the Property in its own name, make, from time to time, all alterations, renovations, repairs or replacements thereto or thereof as may seem proper to Lender.

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Nothing set forth in this Section shall be deemed to limit or otherwise alter the rights of Lender at law or in equity in the event of a Default, nor shall Lender be obligated to exercise any of its rights in this Section.

- (d) **Notice.** Lessees under the Leases are hereby irrevocably authorized and notified by Borrower to rely upon and comply with (and shall be fully protected in so doing) any notice or demand by Lender for the payment to Lender of any rental or other sums which may be, or hereafter become, due under the Leases, or for the performance of any of such lessees' undertakings under the Leases, and such lessees shall have no right or duty to inquire as to whether any Default has actually occurred or is then existing.
- (e) **Proceeds.** Lender shall have the right to apply all such rents, income and profits received from the lessees under the Leases to the payment of any of the following in such amounts and in such order as Lender shall deem appropriate in Lender's sole discretion;
- (i) the indebtedness secured by this Assignment and by the Loan Documents, together with all reasonable costs and attorneys' fees of Lender incurred in attempting to enforce Lender's rights hereunder or thereunder, in such order or priority as Lender, in Lender's sole discretion, may determine; any statute, law, or custom to the contrary notwithstanding; and
 - (ii) all expenses of managing the Property, including, without limitation, the salaries, fees and wages of a managing agent and such other employees or independent contractors as Lender may deem necessary or desirable, and all expenses of operating and maintaining the Property, including, without limitation, all taxes, charges, claims, assessments, water rents, sewer rents, any other liens, premiums for all insurance which Lender may deem reasonably necessary or desirable, the cost of all alterations, renovations, repairs or replacements, and all reasonable expenses incident to taking and retaining possession of the Property.
- (f) **Relationship.** Nothing contained in this Assignment shall be construed as constituting Lender as trustee or "mortgagee in possession."

7. **Exculpation.** Lender shall not directly or indirectly be liable to Borrower or any other person as a consequence of the exercise of the powers granted to Lender in this Assignment, or as a result of Lender's exercise of Lender's rights in the event of a Default, and no such liability shall be asserted or enforced against Lender, all such liability being expressly waived and released by Borrower, and Borrower indemnifies Lender and holds Lender harmless from and against all such liability except for liability that a court of competent jurisdiction determines arises from the gross negligence or willful misconduct of Lender or any party acting for or on behalf of Lender.

Lender shall not be obligated to perform or discharge any obligation, duty, or liability of Borrower under the Leases, or by reason of this Assignment. Borrower hereby indemnifies and holds Lender harmless from and against any and all liability, loss, damage, cost or expense (including attorneys' fees) which Lender might incur or suffer under the Leases or by reason of this Assignment, and of and from any and all claims and demands whatsoever which may be asserted against Lender by reason of any alleged obligation or undertaking on Lender's part to perform or discharge any of the terms, covenants or agreements contained in any of the leases except for liability, loss, damage, cost or expense (including attorney fees) that a court of competent jurisdiction determines arises from the gross negligence or willful misconduct of Lender or any party acting for or on behalf of Lender.

Lender shall not be liable for any loss sustained by Borrower or any third party resulting from Lenders' failure to lease the Property after a Default or from any other act or omission of Lender in managing the Property after Default. Should Lender incur or suffer any liability, loss, damage, cost or expense (including attorneys' fees) under the Leases or by reason of this Assignment, or in the defense of any such claims or demands,

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the amount of such liability, loss, damage, cost, expense, and attorneys' fees, shall be secured by this Assignment and the Loan Documents, and Borrower shall pay the same to Lender upon demand by Lender except as to any loss, damage, cost or expense that a court of competent jurisdiction determines arises from the gross negligence or willful misconduct of Lender or any party acting for or on behalf of Lender. Upon failure of Borrower to so pay Lender, Lender may, at Lender's option, declare all sums secured by this Assignment and the Loan Documents immediately due and payable and exercise any other remedy available at law or in equity.

It is further understood that this Assignment shall not operate to place responsibility for the control, care, management or repair of the Property upon Lender, nor for the carrying out of any of the terms and conditions of the Leases; nor shall it operate to make Lender responsible or liable for any waste committed on the Property by the lessees or any other parties, or for any dangerous or defective condition of the Property, or for any negligence in the management, upkeep, repair or control of the Property resulting in loss or injury or death of any lessee, licensee, employee, invitee or other person.

- 8. **Foreclosure.** Upon issuance of a deed or deeds pursuant to any judicial or non-judicial foreclosure of the Security Instrument, all right, title and interest of Borrower in and to the Leases shall, by virtue of this Assignment, vest in and become the absolute property of the grantee or grantees of such deed or deeds without any further act or assignment by Borrower. Borrower hereby irrevocably appoints Lender, and its successors and assigns, as its attorney in fact, to execute all instruments of assignment or further assurance in favor of such grantee or grantees of such deed or deeds, as may be necessary or desirable for such purpose.

Nothing contained in this Assignment shall prevent Lender from terminating any subordinate Lease through such foreclosure, subject to any written agreement now or hereafter made by Lender in Lender's discretion to recognize the rights of any lessee if such lessee is not in default under its Lease.

- 9. **Loan Documents.** This Assignment is supplementary to, and not in substitution or derogation of, any of the provisions of the other Loan Documents. To the extent that this Assignment is inconsistent with the provisions of the other Loan Documents, such other Loan Documents shall control; and in particular, to the extent that this Assignment is inconsistent with the terms of the Security Instrument, the Security Instrument shall control. Lender may enforce any of the provisions of this Assignment prior to, simultaneously with, or subsequent to any of the rights or remedies under the other Loan Documents.

- 10. **Notices.** All notices, demands, requests, consents, approvals or communications required under this Assignment 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 Settler's 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

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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 68114-3728

or to such other addresses as are designated by notice pursuant to this Section. Notices shall be deemed to have been received upon receipt 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.

11. **Attorneys' Fees.** If any legal action or proceeding is brought by either Borrower or Lender in order to enforce or construe a provision of this Assignment, the unsuccessful party in such action or proceeding, whether such action or proceeding is settled or prosecuted to final judgment, shall pay all of the reasonable attorneys' fees and costs incurred by the prevailing party. If Borrower shall become subject to any case or proceeding under the Bankruptcy Reform Act, as amended or recodified from time to time, Borrower shall pay to Lender on demand all reasonable attorneys' fees, costs and expenses which Lender may incur in order to obtain relief from any provision of the Act which delays or otherwise impairs Lender's exercise of any right or remedy under this Assignment or any of the Loan Documents, or in order to obtain adequate protection for any of Lender's rights or collateral.
12. **Heirs, Successors and Assigns.** Subject to the limitations elsewhere contained in this Assignment, the terms of this Assignment shall be binding upon and inure to the benefit of the heirs, successors and assigns of Borrower and Lender, including, without limitation, any subsequent owner of the Property. There shall be no third party beneficiaries of this Assignment.
13. **Time.** Time is of the essence of each term of this Assignment.
14. **Headings.** All headings appearing in this Assignment are for convenience only and shall be disregarded in construing the substantive provisions of this Assignment.
15. **Law.** This Assignment shall be governed by and construed in accordance with the Laws of the State in which Property is located, except to the extent that Federal laws or the rules and regulations of the Office of Thrift Supervision, or its successor, preempt the laws of the State in which Property is located, in which case, Lender shall be entitled to such Federal rights and remedies without regard to conflicting limitation imposed by State law.
16. **Severability.** In the event any one of the provisions contained in this Assignment shall for any reason be held to be invalid, illegal or unenforceable in any respect under applicable law, such invalidity, illegality or unenforceability, at the option of Lender, shall not effect any other provision of this Assignment, but this Assignment shall be construed as if such invalid, illegal or unenforceable provision has never been contained herein.

- 17. **Waiver.** Nothing contained in this Assignment, and no act done or omitted by Lender pursuant to the powers and rights granted Lender, shall be deemed to be a waiver by Lender of its rights and remedies under the other Loan Documents; and this Assignment is made and accepted without prejudice to any of the rights and remedies possessed by Lender under the terms of the other Loan Documents. The rights and remedies of Lender under this Assignment are cumulative, and no exercise of any right or remedy shall preclude the exercise of any other right or remedy or the later exercise of the same right or remedy. Waivers and approvals under this Assignment must be in writing to be effective; and, unless expressly stated, waivers and approvals shall apply only to the specific circumstances addressed. No waiver under this Assignment shall operate under any of the other Loan Documents.
- 18. **Satisfaction.** Upon payment in full of all indebtedness secured by this Assignment, this Assignment shall terminate and be of no further effect; but the affidavit of any officer of Lender showing that any part of said indebtedness and continuing force of this Assignment; and any person may, and is hereby authorized to rely upon any such affidavit.
- 19. **Interest.** In the event Lender expends funds on behalf of Borrower in exercising any of Lender's rights or remedies under this Assignment, such sums, including attorneys' fees, shall be secured by this Assignment and the other Loan Documents, and any such sums shall bear interest at the default rate specified in the Note until reimbursed by Borrower to Lender.
- 20. **Other Security.** Lender may take or release other security for the payment of the indebtedness secured by this Assignment, and Lender may release any party primarily or secondarily liable for the payment of any such indebtedness and may apply any other security held by Lender to the satisfaction of such indebtedness without prejudice to any of Lender's rights under this Assignment.
- 21. **Definition.** The terms "lessor" and "lessors" as used in this Assignment shall include all landlords, licensors and other parties in a similar position with respect to the Leases. The term "lessee" and "lessees" shall include any tenants and licensees and any other parties in a similar position, and shall also include any guarantors or other obligors of the Leases.
- 22. **SNDA's and Estoppel Certificate.** Within thirty (30) days after request by Lender, Borrower shall use commercially reasonable efforts to deliver, in recordable form, to Lender and to any party designated by Lender, subordination, nondisturbance and attornment agreements and/or estoppel certificates executed by Borrower and lessees', the forms to be provided to Borrower by Lender.

Borrower's or any lessee's failure to deliver any such certificate in time shall be conclusive upon Borrower that: (i) this Assignment and such lessee's Lease are in full force and effect, without modification; (ii) there are no uncured defaults in Borrower's performance under this Assignment or in Borrower's and such lessee's performance under such lessee's lease; (iii) neither Borrower nor such lessee have any right of offset, counterclaim or deduction under this Assignment or such lessee's lease; and (iv) no more than one (1) months' rent has been paid in advance under such lessee's Lease.
- 23. **Plural Borrower's, Other Obligors.** All persons and entities identified by the designation "Borrower," including, without limitation, all general partners or joint ventures (if any) of Borrower, are jointly and individually bound to perform each and every obligation of Borrower under this Assignment and are jointly and individually liable to Lender for such performance.
- 24. **Incorporation.** Exhibit A and Exhibit B, as attached to this Assignment, are incorporated into and made a part of this Agreement.

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

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EXHIBIT A

Legal Description

Lot 5, Settler's Creek Replat 6, an Addition to the City of Papillion, as surveyed, platted and recorded in Sarpy County, Nebraska.

EXHIBIT B

Existing Leases

1. Shopping Center Lease dated December 30, 2013, by and between Papillion Development Settler's Creek, LLC, a Nebraska limited liability company, as Landlord, and Nebraska JMS05, LLC, a Nebraska limited liability company, as Tenant.
2. Lease Agreement dated April 21, 2014, by and between Papillion Development Settler's Creek, LLC, a Nebraska limited liability company, as Landlord, and Chipotle Mexican Grill, Inc., a Delaware corporation, as Tenant.