

✓ This Instrument Prepared By:

Claude McCain Moncus, Esq.
CORLEY, MONCUS & WARD, P.C.
400 Shades Creek parkway
Suite 100
Birmingham, Alabama 35209
(205) 879-5959

Inst # 2001-25874

06/22/2001-25874
03:53 PM CERTIFIED
SHELBY COUNTY JUDGE OF PROBATE
006 10 29.00

STATE OF ALABAMA)
JEFFERSON COUNTY)

ASSUMPTION AGREEMENT AND AMENDMENT TO LOAN DOCUMENTS
[Lots 1006, 1007, 1016, 1017 and 1019, The Arborea of Forest Parks]

THIS ASSUMPTION AGREEMENT AND AMENDMENT TO LOAN DOCUMENTS (this "Agreement"), made and entered into as of the 31st day of May, 2001, is by and among FIRST COMMERCIAL BANK, a State Bank (the "Lender") and SIMIAN ENTERPRISES, INC., an Alabama Corporation (the "Borrower").

RECITALS:

A. Lender is the owner and holder of that certain Promissory Note dated as of December 17, 1999, in the original principal sum of One Hundred Seventy-Six Thousand Five Hundred and No/100 Dollars (\$176,500.00), (the "Note"), which instrument was executed and delivered to Lender by Borrower in order to evidence a loan from Lender to Borrower in said principal amount (the "Loan"). The Loan is secured by the following:

1. Mortgage and Security Agreement filed with the Probate Court of Shelby County, Alabama, at Instrument Number 1999-35470 (the "Mortgage"); and
2. Amendment to Mortgage and Security Agreement dated December 17, 1999 and filed with the Probate Court of Shelby County, Alabama, at Instrument Number 1999-51414 (the "Amendment to Mortgage"); and
3. UCC-1 Financing Statement filed with the Probate Court of Shelby County, Alabama, at Instrument Number 1999-35472 and UCC-1 Financing Statement filed with the Alabama Secretary of State at Instrument Number B 1999-35460 FS (collectively, the "Financing Statements"); and
4. UCC-3 Amendment to UCC-1 Financing Statement filed with the Probate Court of Shelby County, Alabama, at Instrument Number 1999-51416 and UCC-3 Amendment to UCC-1 Financing Statement filed with the Alabama Secretary of State at Instrument Number B 1999-35460 AM (collectively, the "Amendments to Financing Statements"); and
5. Assignment of Rents and Leases filed with the Probate Court of Shelby County, Alabama, at Instrument Number 1999-35471 (the "Assignment"); and
6. Amendment to Assignment of Rents and Leases filed with the Probate Court of Shelby County, Alabama, at Instrument Number 1999-51415 (the "Amendment to Assignment"); and
7. Construction Loan Agreement between Lender and Borrower dated as of August 19, 1999 (the "Loan Agreement"); and

8. Amendment to Construction Loan Agreement between Lender and Borrower dated as of December 17, 1999 (the "Amendment to Loan Agreement").

The Note, the Loan Agreement, the Mortgage, the Assignment, the Financing Statements and all amendments thereto, together with all other instruments or documents evidencing, securing or otherwise executed in connection with the Loan, as any of the same may have heretofore been modified, amended, extended or renewed, are collectively referred to herein as the "Loan Documents." All capitalized terms used herein and not otherwise defined shall have the meanings set forth in the Note.

B. Borrower desires to purchase the real property and improvements described in and encumbered by the Mortgage and the Assignment (collectively, the "Premises"), subject to the lien thereof, and has requested that Lender consent to such acquisition and permit the assumption, by Borrower of the Loan and the obligations of Borrower under the Loan Documents. Lender has agreed to permit such acquisition and assumption pursuant to the terms of this Agreement. All obligations of Borrower under the Loan Documents are collectively referred to herein as the "Loan Obligations."

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing, and the representations, warranties, covenants and agreements herein set forth, the parties hereby agree as follows:

1. **Affirmation of Recitals; Definitions.** The parties hereby acknowledge the foregoing Recitals to be true and correct. Borrower confirms that it has received copies of the Loan Documents, and has had full and fair opportunity to review the same with independent legal counsel of Borrower's choosing.

2. **Outstanding Principal Balance of Loan; No Default.** The parties hereby acknowledge and agree that all accrued interest on the outstanding principal balance of the Loan has been paid current as of the date hereof, and that the outstanding principal balance of the Loan as of the date of this Agreement is \$176,500.00, which balance is hereby assumed by Borrower as more particular set forth in the Promissory Note dated of even date herewith (hereinafter referred to as the "Note"). The parties hereby further acknowledge and agree that, to the best of their knowledge and belief, there presently exists no Event of Default under the Loan Documents, nor any event which, upon the giving of any required notice or the expiration of any stipulated grace or cure period, would constitute an Event of Default under the Loan Documents.

3. **Assumption of Loan Obligations.** Borrower hereby assumes and agrees to be fully bound by the Loan Obligations as stated in the Loan Documents, including all covenants, agreements and waivers therein set forth, and shall be unaffected by any offset, defense or defect in enforceability of any of the Loan Documents against Borrower, all of which are hereby expressly waived by Borrower. Any and all references to the "Borrower" contained in any Loan Document, other than the Notes, shall hereafter be deemed to refer to SIMIAN ENTERPRISES, INC., an Alabama Corporation with full and equal force and effect.

4. **Amendment to Mortgage.** Section 1.20 of the Mortgage is hereby amended by deleting the contents thereof in its entirety and inserting the following in lieu thereof:

1.20 **Conveyance of Premises.** Borrower shall not directly or indirectly encumber (by lien, junior mortgage, or otherwise), pledge, convey, transfer or assign any or all of its interest in the Premises or any ownership interests of Borrower without the prior written consent of Lender. Lender's consent to such a transfer, if given in Lender's sole discretion, shall not release or alter in any manner the liability of Borrower or anyone who has assumed or guaranteed the payment of the Secured Indebtedness or any portion thereof. At the option of Lender the Secured Indebtedness shall be immediately due and payable in the event that Borrower conveys all or any portion of the Premises or any interest therein, or in the event that Borrower's equitable title thereto or interest therein shall be assigned, transferred or conveyed in any manner, without obtaining Lender's prior written consent

thereto, and any waiver or consent for any prior transfer shall not preclude Lender from declaring the Secured Indebtedness due and payable for any subsequent transfer. Borrower shall be entitled to a one time transfer of the Loan and the Property to SIMIAN ENTERPRISES, INC.; provided, however, that prior to and as a condition to the allowance of the transfer, Borrower must provide Lender with a commitment from the Title Company to endorse the title policy insuring the Mortgage to cover any assumption documents to be recorded contemporaneously with the assumption with no new exceptions.

5. **Representations and Warranties.** Borrower confirms that it has reviewed the covenants, representations and warranties contained in the Loan Documents, and that upon substituting itself for Borrower all such covenants, representations and warranties, to the extent applicable, shall remain true and correct as of the date hereof unless specifically modified in writing by agreement of the parties. As a material inducement to Lender's agreement to permit the assumption of the Loan Obligations by Borrower, Borrower hereby further represent and warrant to Lender as follows:

(a) Borrower is a duly organized and validly existing Alabama Corporation, having full power and authority to consummate the transactions contemplated by this Agreement and to perform the Loan Obligations.

(b) There are no actions, suits, or proceedings pending or, to the best of Borrower's knowledge, threatened, which might materially and adversely affect the financial condition of Borrower or which might materially impair the value of any collateral taken or to be taken by Lender in connection with the transactions contemplated hereby. Borrower is not in violation of any agreement the violation of which might reasonably be expected to have a materially adverse effect on Borrower's business or assets, and Borrower is not in violation of any order, judgment, or decree of any court, or any statute or governmental regulation to which Borrower is subject. Neither the execution and performance of this Agreement or of any of the Loan Documents will result in any breach of any mortgage, security deed, lease, credit or loan agreement or any other instrument which may bind or affect Borrower.

(c) All financial statements of Borrower heretofore given and hereafter to be given to Lender are and will be true and complete in all respects as of their respective dates and prepared in accordance with generally accepted accounting principles consistently applied, and fairly represent the financial conditions of the Borrower as of the date thereof, and no materially adverse change shall have occurred in the financial conditions reflected therein during the period between the date thereof and the date of delivery of such financial statements to Lender.

(d) There are no proceedings pending, or to the best of Borrower's knowledge, threatened, to acquire by power of condemnation or eminent domain any portion of the Premises, or any interest therein, or to enjoin or similarly prevent the use of any of the Premises for the purposes contemplated by Borrower.

(g) All documents furnished to Lender by or on behalf of the Borrower as part of or in support of the Borrower's application to assume the Loan are true, correct, complete and accurately represent the matters to which they pertain in all material respects.

(h) The Premises will at all times be maintained in substantial compliance with all applicable laws, ordinances, rules and regulations, including, without limitation, the Americans with Disabilities Act and regulations thereunder, and all laws, ordinances, rules and regulations relating to zoning, building codes, setback requirements and environmental matters.

6. **Address for Notices.** The address for notices to the Borrower contained in each of the Loan Documents is hereby amended to read as follows:

12 Office Park Circle
Suite 12
Birmingham, AL 35223

7. **Consent to Assumption.** In consideration of the representations, warranties and agreements of Simian Land, L.L.C. and Borrower as herein set forth, Lender does hereby (a) consent to the transfer of the Premises from SIMIAN LAND, L.L.C. to SIMIAN ENTERPRISES, INC., and (b) consent to the assumption of the Loan Obligations by SIMIAN ENTERPRISES, INC.

8. **Recording; Title Insurance.** Borrower agrees that it shall cause this Agreement to be duly recorded in the Office of the Judge of Probate Court of Shelby County, Alabama, and shall pay all recording fees, or other taxes in connection therewith. Borrower further agrees that, at Borrower's sole cost and expense, it shall cause an endorsement to be issued to Lender's existing title insurance policy insuring the Mortgage (First American Title Insurance Company, Policy No. FA-31-497425, as heretofore endorsed), which endorsement shall (i) change the effective date of such policy to the date and time of recording of this Agreement, without the addition of exceptions for intervening matters deemed unsatisfactory by Lender, and (ii) amend the description of the insured instrument to include this Agreement, as recorded, and (iii) insure that fee simple title to the Premises has fully vested in Borrower, subject to the lien of the Mortgage as amended hereby. Any failure by Borrower to deliver such endorsement in a timely manner shall, at the discretion of Lender, constitute an Event of Default under the Loan Documents.

9. **Further Assurances.** Upon request by the Lender, the Borrower will make, execute and deliver or cause to be made, executed and delivered, to the Lender and, where appropriate, to cause to be recorded and/or filed and from time to time thereafter to be re-recorded and/or refiled at such time and in such offices and places as shall be deemed reasonably necessary by the Lender, any and all such instruments of further assurance, certificates and other documents as may, in the reasonable opinion of the Lender, be necessary or desirable in order to effectuate, complete, or perfect, or to continue and preserve the Loan Obligations of the Borrower assumed hereby, and the lien and security title of the Loan Documents as a first and prior lien upon and security interest in all of the Premises.

10. **Miscellaneous.**

(a) This Agreement shall be governed by, and construed in accordance with, the laws of the State of Alabama.

(b) Any provision in this Agreement which may be unenforceable or invalid under any law shall be ineffective to the extent of such unenforceability or invalidity without affecting the enforceability or validity of any other provision hereof; provided, however, that if the assumption of the Loan Obligations by Borrower set forth herein shall be unenforceable or invalid, then this Agreement shall be deemed null and void *ab initio*.

(c) Section headings are inserted for convenience of reference only and shall be disregarded in the interpretation of this Agreement. The provisions of this Agreement shall be construed without regard to the party responsible for the drafting and preparation hereof.

(d) Time is of the essence of this Agreement and the performance of each of the covenants and agreements contained herein and in the Loan Documents.

(e) This Agreement and the obligations of the parties hereunder shall be binding upon and enforceable against, and shall inure to the benefit of, the parties and their respective heirs, executors, administrators, successors and assigns.

No modification, amendment, waiver or release of any provision of this Agreement or of any right, obligation, claim or cause of action arising hereunder shall be valid or binding for any purpose whatsoever unless in writing and duly executed by the party against whom the same is sought to be asserted.

(g) This Agreement may be executed in any number of counterparts bearing the original signatures of one or more of the parties hereto, each of which shall constitute an original, but all of which, taken together, shall evidence but one and the same Agreement.

(h) THE PARTIES HERETO HEREBY MUTUALLY WAIVE ANY RIGHT TO A TRIAL BY JURY ON ANY CLAIM, COUNTERCLAIM, SETOFF, DEMAND, ACTION OR CAUSE OF ACTION ARISING OUT OF OR IN ANY WAY PERTAINING OR RELATING TO THIS AGREEMENT, ANY DEALINGS OF THE PARTIES HERETO WITH RESPECT TO THIS AGREEMENT, OR IN CONNECTION WITH ANY OF THE TRANSACTIONS RELATED HERETO OR CONTEMPLATED HEREBY, OR THE EXERCISE OF ANY PARTY'S RIGHTS OR REMEDIES HEREUNDER, IN ALL OF THE FOREGOING CASES WHETHER NOW EXISTING OR HEREAFTER ARISING, AND WHETHER SOUNDING IN CONTRACT, TORT OR OTHERWISE. A COPY OF THIS PARAGRAPH MAY BE FILED WITH ANY COURT AS WRITTEN EVIDENCE OF THE KNOWING, VOLUNTARY AND BARGAINED AGREEMENT AMONG THE PARTIES IRREVOCABLY TO WAIVE TRIAL BY JURY, AND THAT ANY DISPUTE OR CONTROVERSY WHATSOEVER BETWEEN THEM SHALL INSTEAD BE TRIED IN A COURT OF COMPETENT JURISDICTION BY A JUDGE SITTING WITHOUT A JURY. NONE OF THE PARTIES HERETO HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT IT WOULD NOT, IN THE EVENT OF SUCH DISPUTE OR CONTROVERSY, SEEK TO ENFORCE THE PROVISIONS OF THIS PARAGRAPH.

IN WITNESS WHEREOF, the parties have caused this instrument to be properly executed as of the day and year first above written.

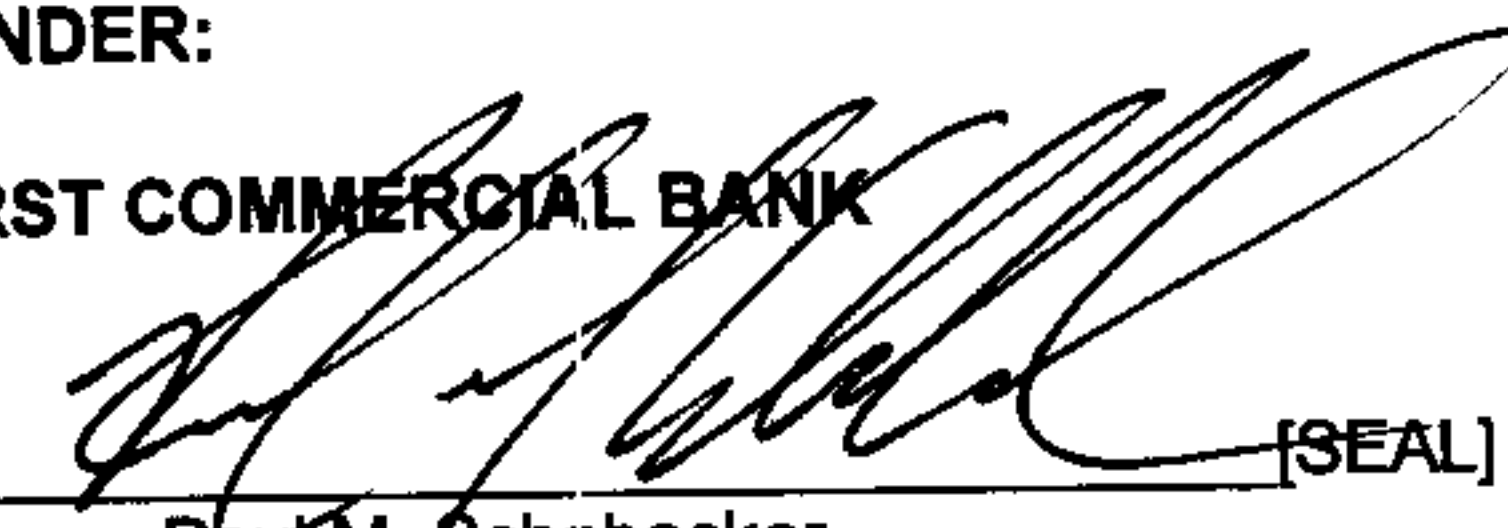
BORROWER:

SIMIAN ENTERPRISES, INC.

By:  [SEAL]
Walter Wilson
Its President

LENDER:

FIRST COMMERCIAL BANK

By:  [SEAL]
Paul M. Schabacker
Its First Vice President

STATE OF ALABAMA)
JEFFERSON COUNTY)

I, the undersigned notary public, in and for said County and State, hereby certify that Walter Wilson, whose name as President of **SIMIAN ENTERPRISES, INC.**, an Alabama Corporation, is signed to the foregoing instrument and who is known to me, acknowledged before me on this day that, being informed of the contents of said instrument, he as such officer and with full authority, executed the same voluntarily as the act of said corporation.

Given under my hand and seal this 31st day of May, 2001.


NOTARY PUBLIC - Cheryl A. Robinson
My Commission Expires: 7/10/03

[NOTARIAL SEAL]

STATE OF ALABAMA)
JEFFERSON COUNTY)

I, the undersigned notary public, in and for said County and State, hereby certify that Paul M. Schabacker, whose name as First Vice President of **FIRST COMMERCIAL BANK**, a State Bank, is signed to the foregoing instrument and who is known to me, acknowledged before me on this day that, being informed of the contents of said instrument, he in his capacity as such officer and with full authority, executed the same voluntarily for and as the act of said bank.

Given under my hand and seal this 31st day of May, 2001.


NOTARY PUBLIC - Cheryl A. Robinson
My Commission Expires: 7/10/03

[NOTARIAL SEAL]

Inst # 2001-25874

6

06/22/2001-25874
03:53 PM CERTIFIED

SHELBY COUNTY JUDGE OF PROBATE

006 NB 29.00