

**ASSIGNMENT OF LEASES AND RENTS**

ASSIGNMENT OF LEASES AND RENTS

MADE BY

BORDEN & BYERS PROPERTIES, LLC

TO

FIRST COMMERCIAL BANK

DATED: July 9, 2007

LOCATION OF REAL ESTATE: 404 Saint Annes Drive, Birmingham, County of Shelby, State of Alabama

The real estate subject to this Assignment is also known as:

Lot 3, according to the survey of Heatherwood 2<sup>nd</sup> Sector, as recorded in Map Book 8, page 28, in the Probate Office of Shelby County, Alabama.


RECORD AND RETURN TO:

Russell M. Cunningham, IV  
Cunningham Firm, LLC  
The Steiner Building, Suite 305  
15 Richard Arrington Blvd. N.  
Birmingham, AL 35203-4141

## ASSIGNMENT OF LEASES AND RENTS

THIS ASSIGNMENT is made the 9<sup>th</sup> day of July, 2007 by Borden & Byers Properties, LLC, an Alabama limited liability company having an address at Two Metroplex Drive, Suite 111, Birmingham, AL 35209 (the "Borrower"), to First Commercial Bank (the "Lender").

W I T N E S S E T H:

  
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Shelby Cnty Judge of Probate, AL  
07/10/2007 03:39:14PM FILED/CERT

### SECTION 1 - RECITALS; ASSIGNMENT

WHEREAS, the Borrower is the owner of the fee estate in the property described in Schedule A attached hereto (the "Real Estate"), which is located at 404 Saint Annes Drive, Birmingham, County of Shelby, State of Alabama;

WHEREAS, to evidence indebtedness in the original principal sum of Three Hundred Thousand Dollars (\$300,000) (such original principal sum being called the "Original Principal Amount"), lawful money of the United States of America, to be paid with interest (said indebtedness, interest and all other sums which may or shall become due to the Lender, either pursuant to this Assignment, or in connection with said indebtedness, being hereinafter collectively referred to as the "Indebtedness") the Borrower has executed and delivered to the Lender a certain note, dated the date of this Assignment, made by the Borrower to the Lender (such note, together with each modification, increase, decrease, extension, renewal, replacement, and guarantee thereof, and each advance and readvance thereon, being called the "Note");

WHEREAS, to secure the payment of the Note, the Borrower has executed and delivered to the Lender a mortgage dated the date of this Assignment (such mortgage, together with each modification, increase, decrease, extension, renewal, replacement, and guarantee thereof, and each advance and readvance thereon, being called the "Mortgage");

NOW THEREFORE, the Borrower hereby agrees as follows:

1.1 Assignment. The Borrower, for good and valuable consideration, the receipt and sufficiency whereof is hereby acknowledged, hereby grants, transfers and assigns to the Lender each of the following:

[a] the entire interest of the landlord (and the party granting occupancy rights in the case of an occupancy agreement, and the licensor in the case of a license), and all other interest of the Borrower, in and to each lease, tenancy, occupancy agreement and license (each such lease, tenancy, occupancy agreement, and license being called "Leases"; and each such landlord, party granting occupancy rights, and licensor being called a "Landlord"; and each tenant, occupant, or licensee under each Lease being called a "Tenant"), to the extent such Lease is both in existence on the date of this Assignment, and covers or affects all or any part of that certain lot or piece or parcel of land, or any building or other improvement to such land, such land being more particularly described in Schedule A annexed hereto and made a part hereof



(the said land, together with all buildings and other improvements now or hereafter erected on such land, being hereinafter collectively referred to as the "Real Estate");

[b] the entire interest of the Landlord, and all other interest of the Borrower, in and to each Lease, to the extent such Lease is made after the date of this Assignment, and covers or affects all or any part of the Real Estate;

[c] each modification, extension, renewal, and guarantee of each Lease (all Leases described above in this Assignment, together with each modification, extension, renewal, and guarantee of each such Lease, are collectively called the "Assigned Leases");

[d] all rents, income and profits arising from each Assigned Lease, and all rents, income and profits for the use and occupation of the Real Estate (and each portion of the Real Estate) and all proceeds of such rents, income and profits (all such rents, income, profits, and proceeds specified in this subparagraph being called "Rents"); and

[e] all claims and rights to the payment of money at any time arising in connection with any rejection or breach of any of the Assigned Leases by any Tenant under any Assigned Lease (or any trustee of any such Tenant) under Section 365 of the Bankruptcy Code, 11 U.S.C. § 365 (and any successor or replacement provision), including without limitation, all rights to recover damages arising out of such breach or rejection, all rights to charges payable by such Tenant or trustee in respect of the leased premises following the entry of an order for relief under the Bankruptcy Code in respect of such Tenant and all rentals and charges outstanding under the Assigned Lease as of the date of entry of such order for relief.

1.2 Immediately Effective. This assignment of present and future Assigned Leases is effective immediately without any further or supplemental assignment of any nature whatsoever.

## SECTION 2 - OBLIGATIONS SECURED BY ASSIGNMENT

2.1 This Assignment is made for the purposes of securing each of the following:

[a] the payment of the Note, and all other amounts which are payable pursuant to the Mortgage;

[b] the payment of each other sum, with interest on such sum, becoming due and payable to the Lender under any one or more of the Loan Documents (defined below); and

[c] the performance of each other obligation of the Borrower contained in any one or more of the following documents: this Assignment, the Mortgage, the Note, or any other document or instrument which has been or will be executed and delivered in connection with this Assignment, the Mortgage, or the Note, or which evidences, secures, or guarantees all or part of the Indebtedness, or which relates to the Indebtedness (this Assignment, the Mortgage, the Note, and each such other document or instrument being called the "Loan Documents").



### SECTION 3 - BORROWER'S REPRESENTATIONS AND WARRANTIES

The Borrower warrants and represents to the Lender, in order to induce the Lender both to make the loan which is evidenced by the Note (the "Loan"), and to accept this Assignment, that:

(i) the Borrower is the sole owner and holder of the entire interest of the landlord (and the party granting occupancy rights in the case of an occupancy agreement, and the licensor in the case of a license) in each Assigned Lease,

(ii) each of the Assigned Leases is valid and enforceable and in full force and effect, and has not been altered, modified or amended in any manner whatsoever except as set forth in this Assignment,

(iii) none of the Rents has been assigned, pledged or in any manner transferred or hypothecated, except pursuant to this Assignment, and

(iv) none of the Rents, for any period subsequent to the date of this Assignment, has been collected in advance of the time when such Rents became due under the terms of the Assigned Leases.

The Borrower acknowledges that the Lender will rely on the Borrower's representations, warranties and covenants set forth in this Assignment.

### SECTION 4 - COVENANTS OF BORROWER

The Borrower covenants with the Lender as follows: The Borrower shall observe and perform all the obligations imposed upon the Landlord under each Assigned Lease. The Borrower shall not do, or permit to be done, anything to impair the security of any Assigned Lease. The Borrower shall promptly send to the Lender copies of each notice of default which the Borrower shall send or receive under the Assigned Leases. The Borrower shall enforce, short of termination of the Assigned Leases, the performance and observance of the provisions of each Assigned Lease by each Tenant. The Borrower shall not collect any of the Rents except as set forth in this Assignment. The Borrower shall not: 1) subordinate any Assigned Lease to any mortgage (other than the Mortgage) or other lien or encumbrance, or 2) permit, consent, or agree to any such subordination without the prior written consent of the Lender. The Borrower shall not alter, modify or change the terms of any Assigned Lease, nor give any consent to exercise any option required or permitted by such terms, without the prior written consent of the Lender in each such case. The Borrower shall not cancel or terminate any Assigned Lease, or accept a surrender of any Assigned Lease. The Borrower shall not convey or transfer, and shall not suffer or permit a conveyance or transfer of, the Real Estate, or of any interest in the Real Estate, so as to effect directly or indirectly, approximately or remotely, a merger of the estates and rights of, or a termination or diminution of the obligations of the Tenant under any Assigned Lease. The Borrower shall not alter, modify or change the terms of any guaranty of any Assigned Lease, and shall not cancel or terminate any such guaranty, without the prior written consent of the Lender in each such case. The Borrower shall not consent to any assignment of, or subletting under, any Assigned Lease (to the extent that the Borrower's consent is required, pursuant to such Assigned Lease, to such assignment or subletting), without the prior written consent of the Lender. The Borrower shall not make, or suffer to be made, any Assigned Lease of all or any portion of the Real Estate, nor otherwise let all or any portion of the Real Estate, without the prior written consent of the Lender. At the



Lender's request, the Borrower shall execute any documentation confirming the assignment and transfer to the Lender of each Assigned Lease upon all or any part of the Real Estate. The Borrower shall also execute and deliver, at the request of the Lender, all other further assurances, confirmations and assignments in the Real Estate as the Lender shall, from time to time, reasonably require in order to evidence or secure the rights of the Lender pursuant to this Assignment.

## SECTION 5 - TERMS AND CONDITIONS OF ASSIGNMENT

5.1 Collection of Rents by Borrower. So long as there shall exist no default under any Loan Document following any applicable grace period for curing such default (each such default, following such grace period, being called an "Event of Default"), nor any default by the Borrower in the performance of any obligation of the Borrower contained in any Assigned Lease (each such default under any Assigned Lease being called an "Assigned Lease Default"), then the Borrower may collect each payment of Rent at the time of, but not more than one (1) month prior to, the date provided (in the applicable Assigned Lease) for such payment, and to retain, use and enjoy such payment (subject to the terms of the Loan Documents), and to lease the Real Estate or any part thereof, all subject to the provisions of this Assignment and the Loan Documents. However, in the event of any Event of Default or Assigned Lease Default, then the Borrower's rights, pursuant to this paragraph, to collect, retain, use, and enjoy each payment of Rent, and to lease the Real Estate or any part thereof, shall terminate.

5.2 Borrower's Rights To Take Possession, Collect Rents, Etc. Upon, or at any time after, the occurrence of any Event of Default, or any Assigned Lease Default, and without in any way waiving such Event of Default or Assigned Lease Default, or releasing the Borrower from any obligation under this Assignment, at the Lender's option, without notice and without regard to the adequacy of the Indebtedness, and irrespective of whether the Lender shall have commenced a foreclosure of the Mortgage, then the Lender may revoke the right of the Borrower to lease all or any portion of the Real Estate and collect the Rents; and the Lender may, either in person or by agent, with or without bringing any action or proceeding, or by a receiver appointed by a court, take possession of the Real Estate or the Rents (provided that the Lender shall not be deemed a mortgagee in possession of the Real Estate unless and to the extent that the Lender is required to be characterized as a mortgagee in possession pursuant to applicable laws) and have, hold, manage, lease and operate the Real Estate on such terms and for such period of time as the Lender may in its sole discretion deem proper, and, either with or without taking possession of the Real Estate in the Lender's own name:

[a] make any payment or perform any act which the Borrower has failed to make or perform, in such manner and to such extent as the Lender may deem necessary to protect the security for this Assignment, or otherwise, including without limitation, the right to appear in and defend any action or proceeding purporting to affect the security for this Assignment, or the rights or powers of the Lender;

[b] lease the Real Estate or any portion thereof in such manner and for such Rents as the Lender shall determine in its sole and absolute discretion; or

[c] demand, sue for, or otherwise collect and receive from all persons (including, without limitation, the Borrower, as provided in the Mortgage) all Rents, including those past due and



unpaid, with full power to make from time to time all alterations, renovations, repairs or replacements of and to the Real Estate (or any part thereof) as may seem proper to the Lender and to apply the Rents to the payment of:

[1] all expenses of maintaining the Real Estate,

[2] all taxes, charges, claims, assessments, water rents, sewer rents, and any other liens, and premiums for all insurance which the Lender may deem necessary or desirable, and the cost of all alterations, renovations, repairs, or replacements, and all expenses incidental to taking and retaining possession of the Real Estate, and

[3] all or any portion of the Indebtedness, together with

[4] all costs and attorneys' fees, in such order of priority as to any of the items mentioned in this subparagraph, as the Lender, in its sole discretion, may determine, any statute, law, custom or use to the contrary notwithstanding.

5.3 Lender's Notice of Revocation. The Lender shall give to the Borrower notice of the Lender's revocation (pursuant to Section 5 of this Assignment) of the Borrower's right to lease and collect the Rents. Such notice of revocation shall be given by the Lender to the Borrower within a reasonable time after such revocation by the Lender.

5.4 Lender's Exercise of Rights Not a Waiver. The exercise by the Lender of any rights or powers under Section 5 of this Assignment, including, without limitation, the collection of the Rents, and the application of the Rents as provided in this Assignment, shall not be considered a waiver by the Lender of any default by the Borrower under any Loan Document or any Assigned Lease, notwithstanding any statute, law, custom or use to the contrary.

5.5 Lender Not Liable Except For Its Willful Tortious Misconduct or Bad Faith.  
The Lender shall not be liable for any loss sustained by the Borrower resulting: 1) from the Lender's failure to let the Real Estate after default or 2) from any other act or omission of the Lender in managing the Real Estate after default, unless and to the extent such loss is caused by the willful tortious misconduct or bad faith of the Lender. Nor shall the Lender be obligated to perform or discharge, nor does the Lender hereby undertake to perform or discharge, any obligation, duty or liability under the Assigned Leases or under or by reason of this Assignment, and the Borrower shall, and does hereby agree, to indemnify the Lender for, and to hold the Lender harmless from, any and all liability, loss or damage which may or might be incurred under the Assigned Leases or under or by reason of this Assignment and from any and all claims and demands whatsoever which may be asserted against the Lender by reason of any alleged obligations and undertakings on its part to perform or discharge any of the terms, covenants or agreements contained in the Assigned Leases, unless resulting from the willful tortious misconduct or bad faith of the Lender. Should the Lender incur any such liability (to the extent specified above in this paragraph) under any Assigned Lease, or under or by reason of this Assignment, or in defense of any claims or demands specified above in this paragraph, then the amount of all such liability, including, without limitation, costs, expenses and attorneys' fees, shall be secured by this Assignment and the Borrower shall reimburse the Lender for all such liability immediately upon demand by the Lender. Upon the failure of the Borrower to reimburse the Lender for all such liability, the Lender may, at its option, declare all the Indebtedness, and all other sums secured by the Loan Documents, immediately due and payable. It is further understood that this Assignment shall not operate to place responsibility for the control, care, management or repair of the Real Estate upon the Lender, nor for the



carrying out of any of the terms and conditions of the Assigned Leases; nor shall it operate to make the Lender responsible or liable for any waste committed on the Real Estate by the Tenants or any other parties, nor for any dangerous or defective condition of the Real Estate, nor for any negligence in the management, upkeep, repair or control of the Real Estate resulting in loss, injury or death to any Tenant, employee or stranger, unless and to the extent resulting from the willful tortious misconduct or bad faith of the Lender.

5.6 Termination of Assignment. Upon payment in full by the Borrower of the Indebtedness, and provided that the Lender has no further obligation to the Borrower or otherwise under the Loan Documents, then this Assignment shall become and be void and of no effect, provided, however, 1) this Assignment shall continue to secure the obligations of the Borrower to the Lender pursuant to this Assignment as and to the extent that any payment by the Borrower to the Lender is avoided or is required to be disgorged by the Lender, and 2) the affidavit, certificate, letter or statement of any officer, agent or attorney of the Lender showing any part of the Indebtedness to remain unpaid, or any obligation of the Lender to exist (each such affidavit, certificate, letter or statement being called an "Lender's Certification"), shall be and constitute presumptive evidence of the validity, effectiveness and continuing force of this Assignment, and any person may, and is hereby authorized to, rely on such Lender's Certification.

5.7 Borrower's Authorization to Tenants. The Borrower hereby authorizes and directs each Tenant, upon receipt from the Lender of written notice to the effect that the Lender is then the holder of the Mortgage and that an Event of Default or an Assigned Lease Default exists, to pay over to the Lender all Rents, and to continue to do so until otherwise notified by the Lender.

5.8 Release or Application of Security By Lender. The Lender: 1) may take or release other security for the payment of the Indebtedness, 2) may release any party primarily or secondarily liable for the Indebtedness or any part thereof, and 3) may apply any other security held by the Lender to the satisfaction of the Indebtedness, without, in each case, prejudice to any of the Lender's rights under this Assignment.

5.9 Borrower's Indemnity of Lender. Notwithstanding anything to the contrary in any Loan Document, the Borrower shall indemnify and hold the Lender harmless from, and defend the Lender, at the Borrower's sole cost and expense, against, each loss, liability, cost or expense (including, without limitation, reasonable attorneys' fees and disbursements of the Lender's counsel, whether in-house staff, retained firms or otherwise), claim, action, procedure and suit, arising out of or in connection with:

[a] the Indebtedness, any Loan Document, any Assigned Lease, or any transaction contemplated by any Loan Document or by any Assigned Lease, including, but not limited to, all costs of reappraisal of the Assigned Leases, whether required by law, regulation, the Lender or any governmental or quasi-governmental authority,

[b] each amendment to, or restructuring of, the Indebtedness, any Loan Document or any Assigned Leases,



[c] each lawful action that may be taken by the Lender either 1) in connection with the enforcement of the provisions of any Loan Document or any Assigned Lease, whether or not suit is filed in connection with any such action or enforcement, or 2) in connection with the Borrower, any guarantor of the Indebtedness, or any Tenant, or any member, partner, joint venturer or shareholder of either the Borrower, any such guarantor, or any Tenant, becoming a party to a voluntary or involuntary federal or state bankruptcy, insolvency or similar proceeding, and

[d] the past, current or future sale, or offering for sale, of any partnership interest in the Borrower, including, without limitation, liabilities under any applicable securities or blue sky laws.

All sums expended by the Lender shall be payable by the Borrower to the Lender, on demand by the Lender, and, until reimbursed by the Borrower pursuant to the terms of this Assignment, shall be secured by this Assignment and shall bear interest at the Default Rate, as said term is defined in the Mortgage. The obligations of the Borrower under this Section shall, notwithstanding any exculpatory or other provisions of any nature whatsoever set forth in any of the Loan Documents, constitute the personal recourse undertakings, obligations and liabilities of the Borrower.

5.10 No Waiver By Lender. Nothing contained in this Assignment, and no act done or omitted by the Lender pursuant to the powers and rights granted to it under this Assignment, shall be deemed to be a waiver by the Lender of its rights and remedies under the Loan Documents other than this Assignment. This Assignment is made and accepted without prejudice to any right or remedy of the Lender under the terms of such other Loan Documents.

5.11 Lender's Rights Cumulative And May Be Exercised Separately. The right of the Lender to collect the Indebtedness, and to enforce any other security for the Indebtedness held by the Lender, may be exercised by the Lender either prior to, simultaneously with, or subsequent to any action taken by the Lender under this Assignment.

5.12 Waiver by Borrower. The Borrower hereby absolutely, unconditionally and irrevocably waives any and all right to assert any defense, setoff, counterclaim or crossclaim of any nature whatsoever with respect to each of the obligations of the Borrower under the Loan Documents or otherwise with respect to the Indebtedness in any action or proceeding brought by the Lender to collect the Indebtedness, or any portion thereof, or to enforce, foreclose and realize upon the lien and security interest created by any Loan Document securing repayment of the Indebtedness, in whole or in part (provided, however, that the foregoing shall not be deemed a waiver of the Borrower's right to assert any compulsory counterclaim maintained in a court of the United States, or of the State of {{{87/STATE WHOSE LAW GOVERNS}}}) if such counterclaim is compelled under local law or rule of procedure, nor shall the foregoing be deemed a waiver of the Borrower's right to assert any claim which would constitute a defense, setoff, counterclaim or crossclaim of any nature whatsoever against the Lender in any separate action or proceeding). In the exercise of the powers granted in this Assignment to the Lender, no liability shall be asserted or enforced against the Lender, all such liability being expressly waived and released by the Borrower.



5.13 Lender Not Mortgagee In Possession. Nothing contained in this Assignment shall be construed as constituting the Lender a "mortgagee in possession" in the absence of the taking of actual possession of the Real Estate by the Lender pursuant to this Assignment.

5.14 Inconsistency. In case of any inconsistency or conflict between the terms of this Assignment and the terms of any other Loan Document, then the terms of this Assignment shall in all cases govern and control.

5.15 Cooperation By Borrower. The Borrower will, at the cost of the Borrower, and without expense to the Lender, do, execute, acknowledge and deliver such further acts, conveyances, assignments, notices of assignments, transfers and assurances as the Lender shall, from time to time, require for the better assuring, conveying, assigning, transferring and confirming unto the Lender the property and rights assigned by this Assignment, or intended now or hereafter to be assigned by this Assignment, or which the Borrower may be or may hereafter become bound to convey or assign to the Lender, or for carrying out the intention or facilitating the performance of the terms of this Assignment or for filing, registering or recording this Assignment. On demand, the Borrower will execute and deliver, and hereby authorizes the Lender to execute in the name of the Borrower to the extent the Lender may lawfully do so, one or more financing statements, chattel mortgages or comparable security instruments, to evidence more effectively the lien of this Assignment upon the Assigned Leases.

5.16 Notices. All notices given pursuant to this Assignment shall be given (and deemed received) in the manner set forth in the Mortgage.

5.17 Successors and Assigns. This Assignment, together with the covenants, representations and warranties contained in this Assignment, shall inure to the benefit of the Lender and each subsequent holder of the Mortgage and shall be binding upon the Borrower, and its successors and assigns and any subsequent owner of the Real Estate (or any part thereof or interest therein).

5.18 No Oral Changes. This Assignment may only be modified, amended or changed by an agreement in writing signed by the Borrower and the Lender, and may only be released, discharged or satisfied of record by an agreement in writing signed by the Lender. No waiver of any term, covenant or provision of this Assignment shall be effective unless given in writing by the Lender and if so given by the Lender shall only be effective in the specific instance in which given.

5.19 Severability. Whenever possible, each provision of this Assignment shall be interpreted in such a manner as to be effective and valid under applicable law, but if any provision of this Assignment shall be unenforceable or prohibited by, or invalid under, applicable law, such provision shall be ineffective to the extent of such unenforceability, prohibition or invalidity, without invalidating the remaining provisions of this Assignment.

5.20 Entire Agreement. The Borrower acknowledges that the Loan Documents set forth the entire agreement and understanding of the Borrower and the Lender with respect to



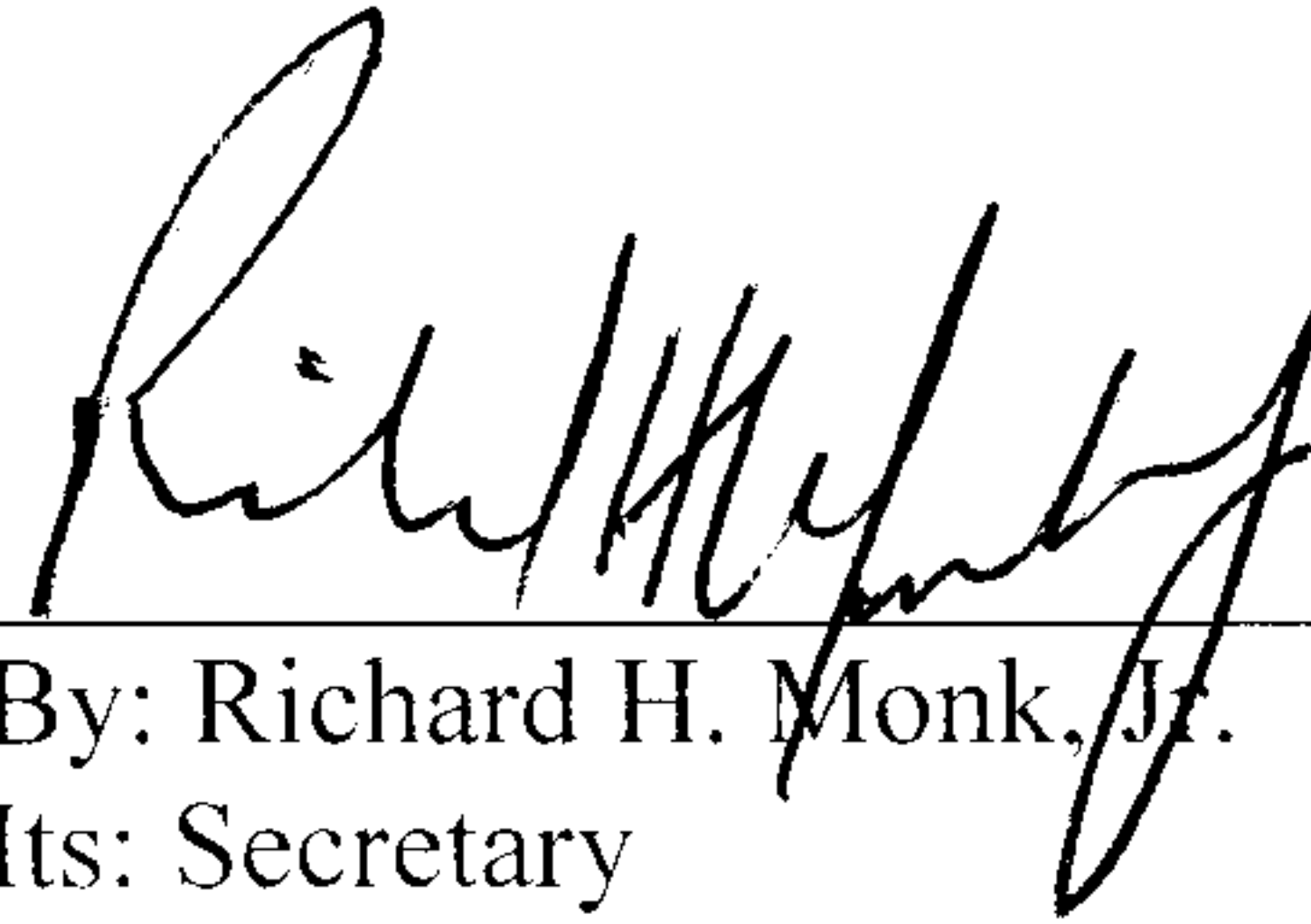
the Indebtedness and that no oral or other agreement, understanding, representation or warranty exists with respect to the Indebtedness other than as set forth in the Loan Documents.

5.21 No Trial By Jury. THE BORROWER HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES, AND THE LENDER (BY ITS ACCEPTANCE OF THE MORTGAGE AND THIS ASSIGNMENT) IRREVOCABLY AND UNCONDITIONALLY WAIVES, ALL RIGHTS TO TRIAL BY JURY IN ANY ACTION, SUIT OR COUNTERCLAIM ARISING IN CONNECTION WITH, OUT OF, OR OTHERWISE RELATING TO, ANY OF THE LOAN DOCUMENTS HERETOFORE, NOW OR HEREAFTER EXECUTED OR DELIVERED, OR IN CONNECTION WITH THE INDEBTEDNESS, OR IN ANY WAY RELATED TO THIS TRANSACTION OR OTHERWISE WITH RESPECT TO THE REAL ESTATE OR ANY OF THE ASSIGNED LEASES.




IN WITNESS WHEREOF, the Borrower has duly executed this Assignment the day and year first above written.

BORDEN & BYERS PROPERTIES, LLC




By: Richard H. Monk, Jr.  
Its: Secretary



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Shelby Cnty Judge of Probate, AL  
07/10/2007 03:39:14PM FILED/CERT



Corporate Acknowledgement

  
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State Of Alabama            )  
County Of Jefferson        )

On the 9<sup>th</sup> day of July, 2007, before me personally came Richard H. Monk, Jr., to me known, who, being by me duly sworn, did depose and say that Richard H. Monk, Jr. resides at resides at 3424 E. Briarcliff Road, Birmingham, AL 35223; that Richard H. Monk, Jr. is Secretary of Borden & Byers Properties, LLC, the corporation described in and which executed the above instrument; and that Richard H. Monk, Jr. signed the above instrument by authority of the Board of Directors of said corporation.



Notary Public


My Commission Expires: 12-26-07



Schedule A

(Description of Real Estate)

Lot 3, according to the survey of Heatherwood 2<sup>nd</sup> Sector, as recorded in Map Book 8, page 28, in the Probate Office of Shelby County, Alabama.

  
20070710000324910 13/13 \$47.00  
Shelby Cnty Judge of Probate, AL  
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