


This instrument prepared by  
and to be returned to:

Ray D. Gibbons, Esq.  
Gibbons Graham LLC  
100 Corporate Parkway, Suite 125  
Birmingham, Alabama 35242

  
20121009000385280 1/8 \$33.00  
Shelby Cnty Judge of Probate, AL  
10/09/2012 08:06:00 AM FILED/CERT

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

**THIS ASSIGNMENT OF RENTS AND LEASES** (this "Assignment") is made and entered into as of September 21, 2012, by **DANIELS REAL ESTATE, L.L.C.**, an Alabama limited liability company (the "Borrower"), whose address is 1621 Panorama Drive, Birmingham, Alabama 35216, Attention: David B. Daniels, in favor of **SERVISFIRST BANK**, an Alabama banking corporation (the "Bank"), whose address is 850 Shades Creek Parkway, Birmingham, Alabama 35209, Attention: Chris Robbins. Capitalized terms used herein but not defined shall have the meaning ascribed to such terms in that certain Promissory Note of even date herewith, executed and delivered by Borrower in favor of Bank in the original principal amount of \$399,500.00 (as amended from time to time, the "Alabama Note").

**FOR VALUE RECEIVED**, to secure the Obligations, including, but not limited to, the obligation to pay the principal of and interest on the Alabama Note in accordance with the terms thereof (including any and all extensions, modifications, and renewals thereof and substitutions therefor) and Borrower's obligations under this Assignment (hereinafter collectively referred to as the "Secured Obligations"), Borrower hereby sells, assigns, transfers and sets over unto Bank, its successors and assigns, all of Borrower's right, title and interest of whatever kind, nature and description, whether now owned or hereafter acquired (hereinafter referred to as "Borrower's Interest"), in and to the Alabama Lease and all other leases presently existing or hereafter made, whether written or verbal, or any letting of, or agreement for the use or occupancy of, any part of the property described in Exhibit "A" attached hereto, and the improvements located or to be located thereon (collectively, the "Mortgaged Property"), and each modification, extension, renewal and guarantee thereof (collectively, the "Assigned Leases"), including, without limitation, all the rents, issues, and profits now due and which may hereafter become due (collectively, the "Rents") under or by virtue of the Assigned Leases, together with 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 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 a tenant or trustee in respect of the leased premises following the entry of an order for relief under the Bankruptcy Code in respect of a tenant and all rentals and charges outstanding under the Assigned Lease as of the date of entry of such order for relief.

#### **I. BORROWER'S REPRESENTATIONS AND WARRANTIES**

Borrower warrants and represents to Bank, in order to induce Bank both to make the Alabama Loan and to accept this Assignment, that:



1.1 Borrower is (or, with respect to any Assigned Leases hereafter made, will be) the sole owner and holder of Borrower's Interest in each Assigned Lease,

1.2 Each of the Assigned Leases is (or, with respect to any Assigned Leases hereafter made, will be) valid and enforceable and in full force and effect, and has not been (or, with respect to any Assigned Leases hereafter made, will not be) altered, modified or amended in any manner whatsoever except as set forth in this Assignment,

1.3 None of the Rents has been or will be assigned, pledged or in any manner transferred or hypothecated, except pursuant to this Assignment, and

1.4 None of the Rents, for any period subsequent to the date of this Assignment, has been or will be collected in advance of the time when such Rents become due under the terms of the Assigned Leases.

## **II. COVENANTS OF BORROWER**

Borrower covenants with Bank that Borrower shall (a) observe and perform all the obligations imposed upon Borrower under each Assigned Lease; (b) not do, or permit to be done, anything to impair the security of any Assigned Lease; (c) promptly send to Bank copies of each notice of default which Borrower shall send or receive under the Assigned Leases; (d) enforce the performance and observance of the provisions of each Assigned Lease; (e) not collect any of the Rents except as set forth in this Assignment; (f) not subordinate any Assigned Lease to any mortgage or other Lien, or permit, consent, or agree to any such subordination without the prior written consent of Bank; (g) 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 Bank in each such case; (h) not cancel or terminate any Assigned Lease, or accept a surrender of any Assigned Lease; (i) not convey or transfer, and shall not suffer or permit a conveyance or transfer of, the Mortgaged Property, or of any interest in the Mortgaged Property, 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 any other party to and under any Assigned Lease; (j) 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 Bank in each such case; (k) not consent to any assignment of, or subletting under, any Assigned Lease without the prior written consent of Bank; (l) not lease or otherwise let all or any portion of the Mortgaged Property, without the prior written consent of Bank; (m) at Bank's request, execute any documentation confirming the assignment and transfer to Bank of each Assigned Lease upon all or any part of the Mortgaged Property; and (n) execute and deliver, at the request of Bank, all other further assurances, confirmations and assignments in the Mortgaged Property as Bank shall, from time to time, reasonably require in order to evidence or secure the rights of Bank pursuant to this Assignment.

## **III. TERMS AND CONDITIONS OF ASSIGNMENT**

3.1 Borrower's Rights Prior to Default. So long as there shall not exist any default by Borrower in the performance of any covenant or agreement of Borrower in any Assigned Lease, nor any Event of Default under and as defined in the Alabama Note or the Florida Note, nor any



default by Borrower in the performance of any covenant, agreement or obligation of Borrower contained herein (each of the foregoing herein being called an "Event of Default"), then Borrower shall have the right to continue to exercise all its rights and perform its obligations under the Assigned Leases, including the right to 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 Mortgaged Property or any part thereof, all subject to the provisions of this Assignment and the Loan Documents. However, upon any Event of Default, Borrower's rights pursuant to this paragraph to collect, retain, use and enjoy each payment of Rent, and to lease the Mortgaged Property or any part thereof, shall terminate.

3.2 Bank's Remedies Upon Default Upon, or at any time after, the occurrence of any Event of Default, and without in any way waiving such Event of Default or releasing Borrower from any obligation under this Assignment, at Bank's option and in its discretion, and irrespective of whether Bank shall have commenced any other remedy under applicable law or any other Loan Document, then Bank may, without notice and with or without bringing any action or proceeding except as required by applicable law, (i) exercise any and all rights available under applicable law, (ii) revoke the rights of Borrower as set forth in Section 3.1, (iii) proceed to perform any and all of the duties and obligations and exercise all the rights and remedies of Borrower contained in the Assigned Leases as fully as Borrower could itself, (iv) lease all or any portion of the Mortgaged Property and collect the Rents, and/or (v) take possession of the Mortgaged Property or the Rents and have, hold, manage, lease and operate the Mortgaged Property on such terms and for such period of time as Bank may in its discretion deem proper, and, either with or without taking possession of the Mortgaged Property in Bank's own name:

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

(b) lease Mortgaged Property or any portion thereof in such manner and for such Rents as Bank shall determine in its sole and absolute discretion; or

(c) demand, sue for, or otherwise collect and receive from all persons 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 Mortgaged Property (or any part thereof) as may seem proper to Bank and to apply the Rents to the payment of (in such order of priority as Bank, in its sole discretion, may determine):

(1) all expenses of managing the Mortgaged Property, including, without limitation, the salaries, fees and wages of a managing agent and such other employees as Bank may deem necessary or desirable;

(2) all taxes, charges, claims, assessments, water rents, sewer rents, and any other liens, and premiums for all insurance which Bank 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 Mortgaged Property;

- (3) all or any portion of the Alabama Loan; and/or
- (4) all costs and Attorneys' Fees incurred in connection therewith.

Borrower hereby specifically authorizes Bank, and hereby constitutes and appoints Bank as Borrower's agent and attorney-in-fact, in Borrower's name or in Bank's name, to do any of the foregoing. The foregoing power of attorney is coupled with an interest and cannot be revoked by insolvency, Bankruptcy, death, dissolution or otherwise. The foregoing remedies are cumulative of and in addition to, and not restrictive of or in lieu of, the rights and remedies provided for or allowed by any one or more of the Loan Documents, or provided for or allowed by law or in equity.

3.3 Bank's Exercise of Rights Not a Waiver. The exercise by Bank of any rights or powers under Section 3.2 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 Bank of any default by Borrower under any Loan Document.

3.4 Bank Not Liable Except For Its Willful Tortious Misconduct or Bad Faith. Bank shall not be liable for any loss sustained by Borrower resulting from (1) Bank's failure to let the Mortgaged Property, or (2) any act or omission of Bank in exercising its rights and remedies hereunder, unless and to the extent such loss is caused by the willful tortious misconduct or bad faith of Bank. Nor shall Bank be obligated to perform or discharge, nor does Bank hereby undertake to perform or discharge, any obligation, duty or liability under the Assigned Leases or under or by reason of this Assignment, and Borrower shall, and does hereby agree, to indemnify Bank for, and to hold Bank 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 Bank 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 Bank. Should Bank incur any such liability 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 Borrower shall reimburse Bank for all such liability immediately upon demand by Bank. This Assignment shall not operate to place responsibility for the control, care, management or repair of the Mortgaged Property upon Bank, nor for the carrying out of any of the terms and conditions of the Assigned Leases; nor shall it operate to make Bank responsible or liable for any waste committed on the Mortgaged Property by the tenants or any other parties, nor for any dangerous or defective condition of the Mortgaged Property, nor for any negligence in the management, upkeep, repair or control of the Mortgaged Property resulting in loss, injury or death to any tenant, employee or others, unless and to the extent resulting from the willful tortious misconduct or bad faith of Bank.



3.5 Termination of Agreement. Upon payment in full by Borrower of the Secured Obligations, and provided that Bank has no further obligation to Borrower or otherwise under the Loan Documents, then this Assignment shall become and be void and of no effect, provided, however, that (1) this Assignment shall continue to secure the obligations of Borrower to Bank pursuant to this Assignment as and to the extent that any payment by Borrower to Bank is avoided or is required to be disgorged by Bank, and (2) the affidavit, certificate, letter or statement of any officer, agent or attorney of Bank showing any part of the Alabama Loan to remain unpaid, or any obligation of Bank to exist (each such affidavit, certificate, letter or statement being called an "Bank'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 Bank's Certification.

3.6 Borrower's Authorization With Respect to Other Parties. Borrower hereby authorizes and directs each party to any Assigned Lease (other than Borrower), upon receipt from Bank of written notice to the effect that an Event of Default exists, to perform all of its obligations under the Assigned Lease as directed by Bank (including, if so directed, the payment of all Rents to Bank), and to continue to do as so directed until otherwise notified by Bank.

3.7 Release or Application of Security by Bank. Bank may (1) take or release other security for the payment of the Alabama Loan, (2) release any party primarily or secondarily liable for the Alabama Loan or any part thereof, and (3) apply any other security held by Bank to the satisfaction of the Alabama Loan, without, in each case, prejudice to any of Bank's rights under this Assignment.

3.8 Borrower's Indemnity of Bank. Notwithstanding anything to the contrary in any Loan Document, Borrower shall indemnify and hold Bank harmless from, and defend Bank, at Borrower's sole cost and expense, against all Indemnified Losses arising out of or in connection with this Assignment, and all Indemnified Losses shall be payable by Borrower to Bank, on demand by Bank, and, until reimbursed by Borrower pursuant to the terms of this Assignment, shall be secured by this Assignment and shall bear interest at the Default Rate.

3.9 No Waiver by Bank. Nothing contained in this Assignment, and no act done or omitted by Bank pursuant to the powers and rights granted to it under this Assignment, shall be deemed to be a waiver by Bank 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 Bank under the terms of such other Loan Documents.

3.10 Bank's Rights Cumulative And May Be Exercised Separately. The right of Bank to collect the Alabama Loan, and to enforce any of its rights and remedies under any Loan Document, may be exercised by Bank either prior to, simultaneously with, or subsequent to any action taken by Bank under this Assignment.

3.11 Cooperation By Borrower. Borrower will, at the cost of Borrower, and without expense to Bank, do, execute, acknowledge and deliver such further acts, conveyances, assignments, notices of assignments, transfers and assurances as Bank shall, from time to time, reasonably require for the better assuring, conveying, assigning, transferring and confirming unto Bank the property and rights assigned by this Assignment, or intended now or hereafter to be



assigned by this Assignment, or which Borrower may be or may hereafter become bound to convey or assign to Bank, 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, Borrower will execute and deliver, and hereby authorizes Bank to execute in the name of Borrower to the extent Bank 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.

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

3.13 Successors and Assigns. This Assignment, together with the covenants, representations and warranties contained in this Assignment, shall inure to the benefit of Bank and each subsequent holder of the Secured Obligations and shall be binding upon Borrower, and its successors and assigns and any subsequent owner of the Mortgaged Property (or any part thereof or interest therein).

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

3.15 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.

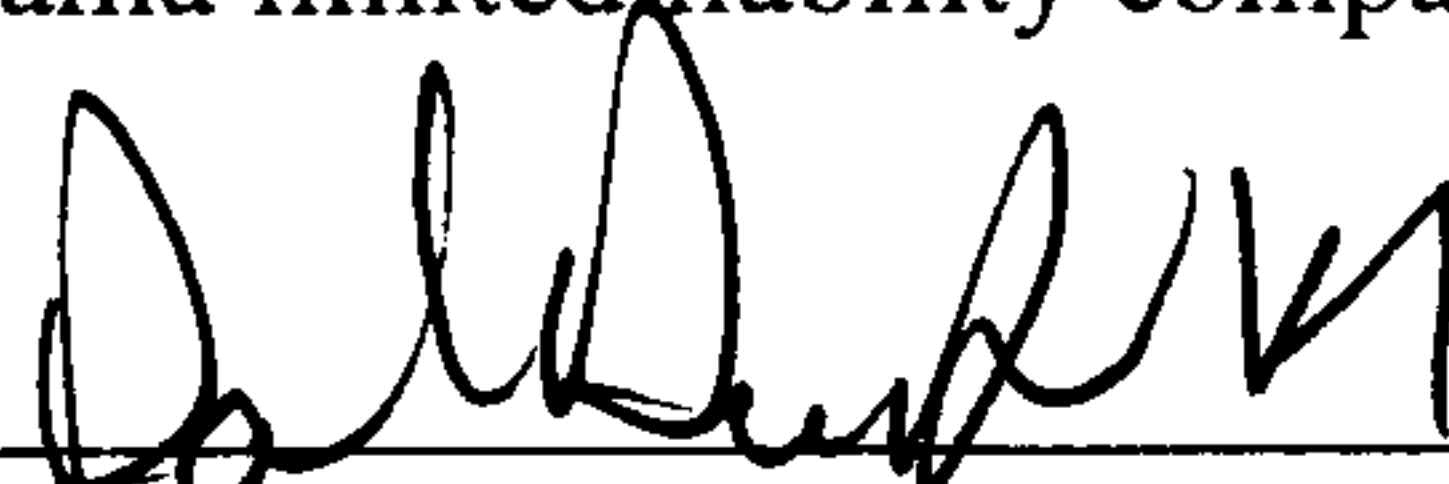
3.16 Entire Agreement. Borrower acknowledges that the Loan Documents set forth the entire agreement and understanding of Borrower and Bank with respect to the Alabama Loan and that no oral or other agreement, understanding, representation or warranty exists with respect to the Alabama Loan other than as set forth in the Loan Documents.

3.17 No Trial By Jury. **BORROWER HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES, AND BANK (BY ITS ACCEPTANCE OF 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 ALABAMA LOAN, OR IN ANY WAY RELATED TO THIS TRANSACTION OR OTHERWISE WITH RESPECT TO THE MORTGAGED PROPERTY OR ANY OF THE ASSIGNED LEASES.**

\* \* \* \* \*

IN WITNESS WHEREOF, Borrower has caused these presents to be properly executed as of the day and year first above written.

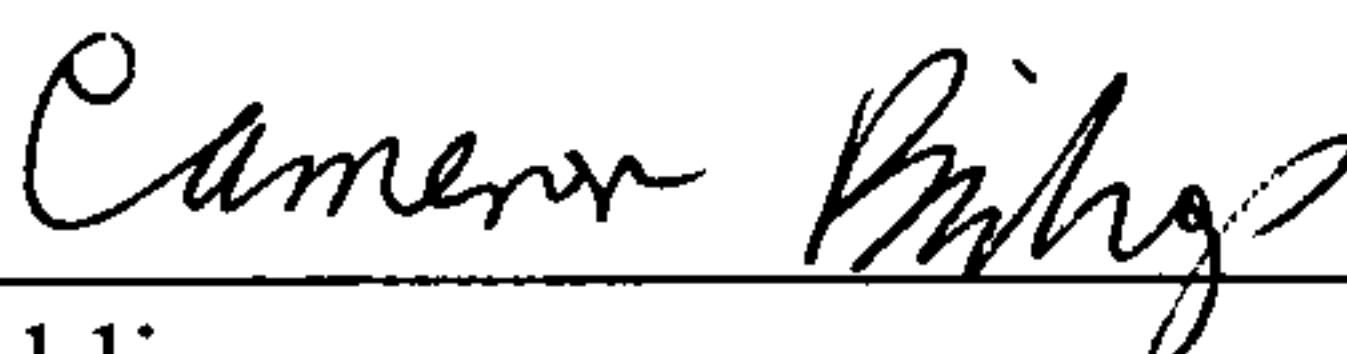
DANIELS REAL ESTATE, L.L.C.,  
an Alabama limited liability company

By:   
David B. Daniels, its Member

STATE OF ALABAMA  
COUNTY OF Jefferson

I, the undersigned, a Notary Public in and for said County in said State, hereby certify that David B. Daniels, whose name as a Member of Daniels Real Estate, L.L.C., an Alabama limited liability company, is signed to the foregoing instrument, and who is known to me, acknowledged before me that, being informed of the contents of such instrument, he, as such Member and with full authority, executed the same voluntarily for and as the act of such limited liability company.

Given under my hand and official seal, this the 21 day of September, 2012.

 [SEAL]  
Notary Public  
My Commission Expires: 3/16/14

## **EXHIBIT "A"**

### **DESCRIPTION OF LAND**

A part of the SE 1/4 of the NE 1/4 of the NE 1/4 of Section 36, Township 19 South, Range 3 West, being more particularly described as follows:

Beginning at the NE corner of the NE Quarter of the NE Quarter of Section 36, Township 19 South, Range 3 West, and run South along the east line of said Section, 984.0 feet to the Point of Beginning; thence continue South along the east line of said Section, 216.0 feet to the east right of way line of Birmingham-Montgomery Highway; thence Northwest along the east right of way line of said Highway, 265.0 feet; thence in a Easterly direction, 240.0 feet to the point of beginning and situated in the NE Quarter of the NE Quarter of Section 36, Township 19 South, Range 3 West, Shelby County, Alabama.