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This instrument prepared by and
should be returned to:



Doc#: 0411131066
Eugene "Gene" Moore Fee: \$40.50
Cook County Recorder of Deeds
Date: 04/20/2004 01:23 PM Pg: 1 of 9

Meredith E. Level, Esq.
**LOWNDES, DROSDICK, DOSTER,
KANTOR & REED, P.A.**
215 North Eola Drive
P.O. Box 2809
Orlando, Florida 38201
(407) 843-4600

MODIFICATION OF MORTGAGE

THIS MODIFICATION OF MORTGAGE (the "Agreement") is made and entered into as of the 10th day of March, 2004, but effective as of February 1, 2004, by and between **WELLS FARGO BANK, N.A.**, successor by merger to **WELLS FARGO BANK MINNESOTA, NATIONAL ASSOCIATION**, as Collateral Agent and Custodian, having an office at CMBS Mortgage Document Custody, 751 Kasota Avenue, Suite MDC, Minneapolis, Minnesota 55414 ("Lender"); **STEAK AND ALE OF ILLINOIS, INC.**, a Nevada corporation, having an address of 6500 International Parkway, Plano, Texas 75093 ("Borrower").

WITNESSETH:

WHEREAS, Lender is the owner and holder of that certain Promissory Note ("Note") executed by Borrower in favor of Lender dated March 8, 2001, in the original principal amount of **ONE MILLION EIGHT HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS (\$1,850,000.00)** (the "Loan"), which Note is secured by that certain Commercial Mortgage, Assignment of Rents and Security Agreement ("Mortgage") dated March 8, 2001 and recorded in Document No. 0010212279, in the Public Records of Cook County, Illinois, more particularly described in Exhibit "A" attached hereto and by this reference made a part hereof (the "Property"), and assignments thereof, and certain other loan documents in connection with such Loan ("Loan Documents"); and

WHEREAS, Borrower has requested that Lender consent to a modification of the terms of the Mortgage, and Lender has agreed to such request, but only upon the terms and conditions set forth below.

NOW, THEREFORE, in consideration of the premises hereof and the mutual covenants contained herein, and of the sum of TEN AND NO/100 DOLLARS (\$10.00) in hand paid by each party to the other, the receipt and sufficiency of all of which is hereby acknowledged, Lender and Borrower hereby agree as follows:

1. **RECITALS CORRECT.** The foregoing recitals are true, accurate and complete and constitute a part of this Agreement.
2. **SECURITY FOR NOTE.** The Mortgage and all other Loan Documents and agreements that currently provide security for the Note, as may be amended from time to time, shall remain in full force and effect.

0914501-103080/724404
S & A
LMS NO. 2856/Niles, Illinois

04-444

Return Recorded Documents To:
LandAmerica National Commercial Services
450 S. Orange Avenue, Suite 170
Orlando, FL 32801
Attention: **Christi Pawlak**

Lawyers Unit #11344 Case# 04-04696

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3. **OUTSTANDING BALANCE; NO DEFENSES.** Borrower agrees and acknowledges that the outstanding principal balance of the Note as of February 1, 2004 is \$1,673,259.74, and Borrower further agrees and acknowledges that the Note is secured by the referenced Mortgage, UCC Financing Statements, and the other Loan Documents, and that in the event of any default, Borrower has no (and would have no) defense as of the date hereof to the enforcement by Lender of the Loan Documents according to their terms.

4. **MODIFICATION OF MORTGAGE.**

(a) Paragraph 10, of the Mortgage shall be deleted in its entirety and replaced with the following:

“During the term of the Loan:

(i) Guarantor and Borrower shall keep books and records in accordance with generally accepted accounting principles consistently applied, reflecting its financial condition including, but not limited to, the operation of the restaurant located on the Property. Lender shall have the right, at Lender's expense, from time to time and at all times during normal business hours and upon at least forty-eight (48) hours prior notice, to examine such books, records and accounts at the offices of Guarantor and/or Borrower or other entity maintaining such books, records and accounts and to make such copies or extracts thereof as Lender shall desire.

(ii) Guarantor and Borrower must furnish or cause to be furnished to Lender within one hundred twenty (120) days of the close of its fiscal year, a fiscal year end current, signed financial statements (including annual balance sheet, statement of cash flows, profit/loss statements and all supporting schedules, and any footnotes or management reports included in or issued with the financial statements) audited by independent certified public accountants of recognized standing selected by Guarantor and/or Borrower and reasonably acceptable to Lender, all of which shall be certified by the Chief Financial Officer of Guarantor and Borrower. Guarantor and Borrower shall advise Lender of its respective fiscal year end date and shall notify Lender, in writing, of any change in such year end date.

(iii) Guarantor and Borrower must furnish or cause to be furnished to Lender within sixty (60) days of the close of each fiscal quarter, current, internally prepared financial statements (balance sheet, statement of cash flows, profit/loss statements and all supporting schedules) for the Guarantor and Borrower, all of which shall be certified by the Chief Financial Officer of Guarantor and Borrower.

(iv) Borrower and Guarantor shall furnish or cause to be furnished to Lender a profit/loss statement within sixty (60) days of the close of each fiscal quarter for the restaurant located on the Property, all of which shall be certified by the Chief Financial Officer of the Borrower or Guarantor.”

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(b) Paragraph 19(a) of the Mortgage shall be deleted in its entirety and replaced with the following:

“(a) Transfer Event. Except as otherwise provided herein, on sale or transfer of (i) all or any material part of the Property, or any interest therein, or (ii) beneficial interests in Borrower or Guarantor (if Borrower or Guarantor is not a natural person or persons but is a corporation, partnership, trust or other legal entity), Borrower or Guarantor shall be in Default under this Instrument and Lender may, at Lender’s option, declare all of the sums secured by this Instrument to be immediately due and payable, and Lender may invoke any remedies permitted by paragraph 27 of this Instrument. This option shall not apply in case of:

- (a) transfers by devise or descent or by operation of law upon the death of a joint tenant, a member of a limited liability company, or a partner;
- (b) sales or transfers of beneficial interests in Borrower or Guarantor provided that such sales or transfers, together with any prior sales or transfers of beneficial interests in Borrower, but excluding sales or transfers under subparagraph (a) above, do not result in more than twenty-five percent (25%) of the beneficial interests in Borrower or Guarantor having been sold or transferred since the date hereof; and
- (c) sales or transfers of fixtures or any personal property pursuant to the first paragraph of paragraph 6 hereof.”

(c) Paragraphs 27(a) of the Mortgage is deleted in its entirety and replaced with the following:

“Any one or more of the following shall constitute a “Default” under this Instrument:

(a) failure of Borrower to make any payment due under the Note or under Paragraph 2 of this Instrument within ten (10) days from the date such payment became due and payable;”

(d) The definition of “Cross Default” is deleted in its entirety and replaced with the following:

“Cross Default” means the failure of Borrower or the borrower under any Related Note to pay any amount required to be paid by any provision of any Related Note(s), the other Instruments or other Loan Documents which in the case of Payment Default(s) under such Related Notes remains uncured for ten (10) days after the payment due date shall, if not cured in a timely manner, at the sole discretion of Lender, constitute a cross-default

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and a Default under this Instrument and under the other Instruments securing Related Notes.”

5. **WAIVER AND RELEASE.** As a material inducement for Lender to execute this Agreement, Borrower hereby waives and releases, acquits, satisfies and forever discharges Lender and its affiliates and assigns from any and all claims, counterclaims, defenses, actions, causes of action, suits, controversies, agreements, promises and demands whatsoever in law or in equity which Borrower ever had or now has against Lender, or its affiliates and assigns, for, upon or by reason of any matter, cause or thing whatsoever through the date hereof relating to the indebtedness evidenced by the Note and the other Loan Documents. In addition to, and without limiting the generality of the foregoing, and in consideration of Lender's execution of this Agreement, Borrower covenants with and warrants unto Lender, and its affiliates and assigns, that there currently exists no claims, counterclaims, defenses, objections, offsets or claims of offset against Lender for the obligation of Borrower to pay the indebtedness evidenced by the Note to Lender and the Loan Documents when and as the same become due and payable.
6. **NO NOVATION.** It is the intent of the parties hereto, that this Agreement shall not constitute a novation or in any way adversely affect the liens granted under the Loan Documents.
7. **NO OTHER MODIFICATIONS.** Except as expressly modified hereby, all of the terms, covenants and conditions of the Mortgage and Loan Documents shall remain in full force and effect in accordance with their terms and are hereby ratified and confirmed.
8. **BINDING EFFECT.** This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.
9. **GOVERNING LAW.** This Agreement shall be governed by and construed in accordance with the laws of the state where the property is located.
10. **WAIVER OF JURY TRIAL. BY THE EXECUTION HEREOF, BORROWER AND LENDER HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY AGREE, THAT:**

(a) NEITHER THE BORROWER NOR LENDER, NOR ANY ASSIGNEE, SUCCESSOR, HEIR OR LEGAL REPRESENTATIVE OF ANY OF THE SAME SHALL SEEK A JURY TRIAL IN ANY LAWSUIT, PROCEEDING, COUNTERCLAIM, OR ANY OTHER LITIGATION PROCEDURE ARISING FROM OR BASED UPON THIS AGREEMENT OR ANY LOAN DOCUMENT EVIDENCING, SECURING OR RELATING TO THE OBLIGATIONS OR TO THE DEALINGS OR RELATIONSHIP BETWEEN OR AMONG THE PARTIES THERETO;

(b) NEITHER THE BORROWER NOR LENDER SHALL SEEK TO CONSOLIDATE ANY SUCH ACTION, IN WHICH A JURY TRIAL HAS BEEN WAIVED, WITH ANY OTHER ACTION IN WHICH A JURY TRIAL HAS NOT BEEN OR CANNOT BE WAIVED;

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(c) THE PROVISIONS OF THIS PARAGRAPH HAVE BEEN FULLY NEGOTIATED BY THE PARTIES HERETO, AND THESE PROVISIONS SHALL BE SUBJECT TO NO EXCEPTIONS;

(d) NEITHER THE BORROWER NOR LENDER HAS IN ANY WAY AGREED WITH OR REPRESENTED TO ANY OTHER PARTY THAT THE PROVISIONS OF THIS PARAGRAPH WILL NOT BE FULLY ENFORCED IN ALL INSTANCES;

(e) IN NO EVENT SHALL LENDER BE RESPONSIBLE OR LIABLE FOR CONSEQUENTIAL OR PUNITIVE DAMAGES; AND

(f) THIS PROVISION IS A MATERIAL INDUCEMENT FOR LENDER TO ENTER INTO THIS TRANSACTION.

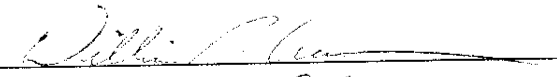
- 11. **MISCELLANEOUS.** Except for the changes and modifications effected hereby, it is expressly agreed that the Mortgage shall remain in full force and effect in strict accordance with the terms thereof, and nothing herein contained shall affect or be construed to affect the lien, charge, or encumbrances effected by the Mortgage or the other Loan Documents, or the priority thereof over other liens, charges, encumbrances, and conveyances, or to release or affect the liability of any party or parties who may now or hereafter be liable under or on account of the Loan Documents. Under no circumstances shall this Agreement or any portion hereof constitute or be deemed to constitute a novation of the Mortgage and Loan Documents. This Agreement shall be binding upon and shall inure to the benefit of, the heirs, executors, administrators, personal representatives, successors and assigns of the parties hereto. Each of the parties hereto represent and declare that such party has carefully read this Agreement and that such party understands the contents thereof and signs the same freely and voluntarily. The parties hereto acknowledge that they had the opportunity to consult with legal counsel of its own choosing concerning this Agreement.
- 12. **COUNTERPARTS.** This Agreement may be executed by facsimile and in counterparts, each of which shall be deemed an original, but all of which together shall constitute one instrument.

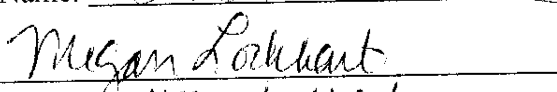
IN WITNESS WHEREOF, the parties hereto have executed this Agreement in manner and form sufficient to bind them as of the day and year first above written.

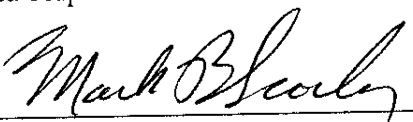
Signed, sealed and delivered
in the presence of:

“BORROWER”

STEAK AND ALE OF ILLINOIS, INC.,
a Nevada corporation


Name: Megan Lockhart

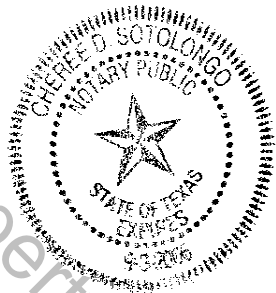

Name: Megan Lockhart

By: 
Mark Scoular, Executive Vice
President

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STATE OF TEXAS
COUNTY OF COLLIN

The foregoing was acknowledged before me this 10th day of March, 2004, by Mark Scoular, as Executive Vice President of **STEAK AND ALE OF ILLINOIS, INC.**, a Nevada corporation, for and on behalf of the corporation.



Cheree D. Sotolongo
Notary Public, State of Texas

Printed Name: Cheree D. Sotolongo
Commission No.: _____
Commission Expires: September 3, 2006

[SIGNATURES CONTINUE ON THE FOLLOWING PAGES]

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“LENDER”

Signed, sealed and delivered in the presence of the following witnesses:

WELLS FARGO BANK, N.A., successor by merger to **WELLS FARGO BANK MINNESOTA, NATIONAL ASSOCIATION**, as Custodian and Collateral Agent

[Signature]
Signature of Witness
[Name]
Printed Name of Witness

BY: **CNL FINANCIAL SERVICES, LP**, a Delaware limited partnership, as Servicer, pursuant to the authority granted under that certain Limited Power of Attorney From Custodian, dated as February 24, 2004, and recorded immediately prior hereto.

[Signature]
Signature of Witness
[Name]
Printed Name of Witness

By: **CNL Financial Services GP Corp.**, a Delaware corporation, as General Partner

By: [Signature]
Kenneth R. Heimlich, Vice President

STATE OF TEXAS
COUNTY OF COLLIN

The foregoing instrument was acknowledged before me this 10th day of March, 2004, by Kenneth R. Heimlich as Vice President of **CNL Financial Services GP Corp.**, a Delaware corporation, as General Partner of **CNL Financial Services, LP**, a Delaware limited partnership, acting under the authority granted pursuant to that certain Limited Power of Attorney From Custodian, dated as of February 24, 2004, executed by **WELLS FARGO BANK, N.A.** successor by merger to **Wells Fargo Bank Minnesota, National Association**. He/She is personally known to me ~~or has produced~~ _____ as identification.



[Signature]
Notary Public, State of Texas
Printed Name: Cheree D. Sotolongo
Commission Number: _____
Commission Expires: September 3, 2006

[SIGNATURES CONTINUE ON THE FOLLOWING PAGES]

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CONFIRMATION OF GUARANTIES

The following Guarantor(s) each (a) hereby acknowledge the obligations under the Guaranty(ies) dated March 8, 2001 (collectively, the Guaranties) shall continue in full force and effect in all respects and are not subject to any offset, defense or counterclaim whatsoever; (b) further acknowledge that the Guaranties are legal, valid, binding and enforceable in all respects; (c) hereby waive any and all claims and defenses of any nature whatsoever, legal, equitable or otherwise, which the Guarantors may now have with respect to the obligations under the Guaranties; (d) hereby consent to the execution and delivery of the Agreement between Borrower and Lender; (e) hereby acknowledge and agree that the Guaranties, as originally executed, shall remain in full force and effect and shall extend to and guarantee all such obligations (as defined in the originally executed Guaranty) of the Borrower; and (f) hereby reaffirm such Guaranties and agrees that they shall continue to bound by such Guaranties, as amended and reaffirmed hereby.

Signed, sealed and delivered
in the presence of:

S&A RESTAURANT CORP.,
a Delaware corporation

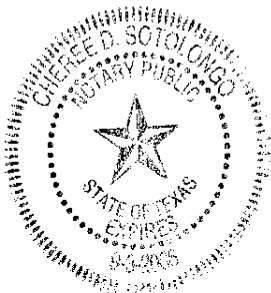
[Signature]
Name: [Name]

By: [Signature]
Mark Scoular, Executive Vice President

[Signature]
Name: [Name]

STATE OF TEXAS
COUNTY OF COLLIN

The foregoing was acknowledged before me this 10th day of March, 2004, by Mark Scoular, as Executive Vice President of **S & A RESTAURANT CORP.**, a Delaware corporation, for and on behalf of the corporation.



[Signature]
Notary Public, State of Texas
Printed Name: Cheree D. Sotolongo
Commission No.: _____
Commission Expires: September 3, 2006

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EXHIBIT "A"

PARCEL 1:

Lot 7 in Pointe Plaza Subdivision, being a subdivision of Lot 2 in Annie Mullen Subdivision, being a subdivision of part of the Southeast $\frac{1}{4}$ of Section 29, Township 41 North, Range 13 East of the Third Principal Meridian, according to the Plat of Pointe Plaza Subdivision aforesaid recorded December 22, 1999 as Document Number 09188471, in Cook County, Illinois.

PARCEL 2:

Non-exclusive easements for access, ingress and egress for the benefit of Parcel 1 as created by Easements with Covenants and Restrictions Affecting Land ("ECR") dated December 30, 1998 and recorded March 18, 1999 as Document Number 99265776 and First Amendment thereto dated March 13, 1999 recorded April 7, 1999 as Document Number 99334830 by and between Wal-Mart Real Estate Business Trust and TDC Niles, L.L.C., over and across the common area as defined and described therein, in Cook County, Illinois.

5650 Touhy Avenue, Niles, Cook County, Illinois
PIN No. 10-29-403-030