UNOFFICIAL COPY



Doc#: 0734826072 Fee: \$50.00 Eugene "Gene" Moore RHSP Fee:\$10.00

Cook County Recorder of Deeds

Date: 12/14/2007 11:32 AM Pg: 1 of 14

, Illinois

COLLATERAL ASSIGNMENT OF RIGHTS IN LEASE

HEARTLAND ILLINOIS FOOD CORP., Lessee,

to

ING CAPITAL LLC, Administrative Agent

Relating to Premises in: Cook County, Illinois

DATED: as of December 28, 2006

Second Lien

This instrument was prepared by and after recording should be returned to:

Virginia M. McGuffey, Esq. King & Spalding LLP 1180 Peachtree Street Atlanta, Georgia 30309

Store Number: 5122

352271-1

0734826072 Page: 2 of 14

UNOFFICIAL COPY

THIS COLLATERAL ASSIGNMENT OF RIGHTS IN LEASE IS SUBJECT TO (A) THE INTERCREDITOR AGREEMENT DATED AS OF DECEMBER 28, 2006 AMONG THE PARTIES HERETO, AND ING CAPITAL LLC, AS FIRST LIEN ADMINISTRATIVE AGENT, AND BURGER KING CORPORATION, AS SET FORTH IN SECTION 16 HEREOF AND (B) THE SECOND LIEN INTERCREDITOR AGREEMENT DATED AS OF DECEMBER 28, 2006 AMONG THE PARTIES HERETO.

COLLATERAL ASSIGNMENT OF RIGHTS IN LEASE

(SECOND LIEN)

THIS COLLATERAL ASSIGNMENT OF RIGHTS IN LEASE (this "Assignment") is made as of the 28th day of December, 2006 by HEARTLAND ILLINOIS FOOD CORP., a Delaware corporation ("Assignor"), to ING CAPITAL LLC, having an address of ING Capital LLC, 1325 Avenue of the Americas, New York, New York 10019, acting in its capacity as Administrative Agent pursuant to the Credit Agreement described below (in such agency capacity, together with its successor, he "Agent") for the Lenders (as defined in the Credit Agreement referred to below).

RECITALS:

- A. Assignor is the lessee under the least described in <u>Exhibit B</u> attached hereto and incorporated herein by reference (said lease, as amended from time to time, being hereinafter referred to as the "Lease") between Assignor and the lesser thereunder ("Lessor"), pertaining to the premises described therein, being a lease of building and improvements located on the real property legally described in <u>Exhibit A</u> attached hereto and incorporated herein by reference (the "Premises").
- The parent of Assignor, Heartland Food Corp., a Delavare corporation (the B. "Borrower"), Agent and Lenders have entered into that certain Second Lie 1 C edit Agreement dated December 28, 2006 (as extended, amended, modified, supplemented or amended and restated from time to time, the "Credit Agreement") together with any and all other notes, loan and security documents and agreements now or hereafter related thereto (the Credit Agreement, the Guaranty as hereinafter described, and each such note, loan and security document or agreement, as extended, amended, modified, increased, supplemented or amended and restated, collectively, the "Loan Documents") by and among Borrower, certain affiliates of Borrower, Agent and Lenders. Assignor has guaranteed the obligations of the Borrower pursuant to that Second Lien Guaranty Agreement by and among the Agent and the Guarantors party thereto (as extended, amended, modified, supplemented or amended and restated from time to time, the "Guaranty"). As a condition to Agent and Lenders agreeing to make loans and other financial accommodations and extensions of credit to Borrower and its affiliates, Agent and Lenders require, among other things, liens on all of the Assignor's personal property located on the Premises and that Assignor enter into this Assignment and grant a collateral assignment of the

0734826072 Page: 3 of 14

UNOFFICIAL COPY

Lease in favor of Agent for the benefit of itself, the Lenders and any Affiliate of any Lender party to a Related Credit Arrangement (collectively, the "Secured Creditors").

C. Assignor has agreed to collaterally assign the Lease to Agent for the benefit of itself and the Secured Creditors as additional security for all of the Obligations (as defined in the Credit Agreement) and for all of Assignor's obligations and the obligations of the Loan Parties (as defined in the Credit Agreement) to Agent and the Secured Creditors arising under or in connection with the Loan Documents (collectively, the "Secured Obligations").

NOW THEREFORE, for and in consideration of the foregoing premises and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

- 1. <u>Definitions</u>. All capitalized terms used but not otherwise defined in this Assignment that are defined in the Credit Agreement shall have the meanings ascribed to such terms in the Credit Agreement.
- 2. The Assignment In order to induce Agent and the Secured Creditors to make the loans, advances and/or other finarcial accommodations to Borrower and its affiliates and as additional security for the payment of the Secured Obligations and for the performance and observance of all the agreements contained herein and in the Loan Documents, Assignor does hereby presently, irrevocably, absolutely and unconditionally assign, set over and transfer to Agent for the benefit of itself and the Secured Creditors, and its successors and assigns, upon the terms and conditions hereinafter contained, and grants to Agent for the benefit of itself and the Secured Creditors a continuing security interest in, the Lease, together with all the right, title and interest of Assignor therein and thereto (including without limitation all purchase options, renewal options and any other options), to have and to hold the same unto Agent for the benefit of itself and the Secured Creditors, its successors and assigns forever, or for such shorter period as hereinafter may be indicated, as additional security for the payment of the Secured Obligations and for the performance and observance of all the agreements contained herein and in the Loan Documents. Lessor, Agent and Assignor have entered into that certain Lessor Consent and Subordination among the Lessor, Assignor and the Agent dated on or about the date hereof (the "Lessor Consent") in connection with this assignment. The Age it's remedies under this Assignment are subject to the Lessor Consent, as set forth in Section 7 below.
- 3. <u>Warranties, Representations and Covenants</u>. Assignor hereby ovenants, represents, warrants and agrees as follows:
- (a) The Lease is, to the best of Assignor's knowledge, in full force and effect, and represents the valid and binding obligation of Assignor enforceable in accordance with its terms except as limited by bankruptcy, insolvency or similar laws affecting the enforcement of creditor's rights generally, and has not been amended or modified except as described herein or therein; Assignor is the lessee under the Lease hereby assigned, is the sole owner of the entire interest of the lessee under the Lease and has good right and authority to collaterally assign its interest in the same, and no other person, firm or corporation has any right, title or interest therein; and Assignor has not previously sold, assigned, transferred, mortgaged, pledged, granted

0734826072 Page: 4 of 14

UNOFFICIAL COPY

a security interest in or otherwise encumbered its interest in the Lease to any other person or entity.

- (b) Assignor will notify Agent promptly of any material default by any party with respect to the Lease, and Assignor will notify Agent promptly of the giving of any notice by the Lessor to Assignor of any default by Assignor in the performance or observance of any of the terms, covenants or conditions of the Lease on the part of Assignor, as tenant under the Lease, to be performed or observed and promptly deliver to Agent a true copy of each such notice.
- (c) Assignor shall observe, perform and discharge, duly and punctually, all and singular, all material obligations, terms, covenants, conditions and warranties of the Lease, on the part of Assignor to be kept, observed and performed, and shall give prompt notice to Agent of any failure on the part of Assignor to observe, perform and discharge same, and shall appear in and defend any action or proceeding arising under, occurring out of, or in any manner connected with the Lease, or the obligations, duties or liabilities of Assignor and/or the Lessor thereunder, and, upon request by Agent, will do so in the name and behalf of Agent but at the expense of Assignor, and shall pay an costs and expenses of Agent, including reasonable attorneys' and paralegals' fees in any action or proceeding in which Agent may appear.
- (d) Assignor hereby agrees that neither Agent nor any Secured Creditor shall be deemed to have assumed any obligation, duty or inhibity under the Lease by reason of this Assignment.
- (e) Assignor shall indemnify the Agera and each Secured Creditor (each such Person being called an "Indemnitee") against, and hold each Indemnitee harmless from, any and all losses, claims, damages, liabilities and related expenses (including the fees, charges and disbursements of any counsel for any Indemnitee), incurred by any Indemnitee or asserted against any Indemnitee by any third party or by the Assignor, the Borrower or any other Loan Party arising out of, in connection with, or as a result of (i) the execution or delivery of this Assignment, the performance by the parties hereto of their respective obligations hereunder, the enforcement of any remedies upon default hereunder, the enforcement of any remedies upon default hereunder or the consummation of the transactions contemplated hereby, (ii) any actual or alleged presence or release of Hazardous Materials on or from the Premises or on or from any property owned or operated by the Assignor, Borrower or any of its Subsidiaries, or any Environmental Liability related in any way to the Assignor, Borrower or any or its Subsidiaries, or (iii) any actual or prospective claim, litigation, investigation or proceeding relating to any of the foregoing, whether based on contract, tort or any other theory, whether brought by a third party or by the Assignor, the Borrower or any other Loan Party, and regardless of whether any Indemnitee is a party thereto; provided that such indemnity shall not, as to any Indemnitee, be available to the extent that such losses, claims, damages, liabilities or related expenses (x) are determined by a court of competent jurisdiction by final and nonappealable judgment to have resulted from the gross negligence or willful misconduct of such Indemnitee or (y) result from a claim brought by the Assignor against an Indemnitee for breach in bad faith of such Indemnitee's obligations hereunder or under any other Loan Document, if the Assignor has obtained a final and nonappealable judgment in its favor on such claim as determined by a court of competent jurisdiction.

0734826072 Page: 5 of 14

- (f) The failure of Agent to avail itself of any of the terms, covenants and conditions of this Assignment for any period of time or at any time or times, shall not be construed or deemed to be a waiver by Agent or any Secured Creditor of any of its rights and remedies hereunder. The rights and remedies of Agent and the Secured Creditors under this Assignment are and shall be cumulative and in addition to any and all rights and remedies available to Agent and the Secured Creditors under the Loan Documents.
- (g) Upon payment in full of all of the Secured Obligations, termination of all the obligations of Agent and the Secured Creditors under the Credit Agreement and the occurrence of the Facility Termination Date, or the satisfaction of the conditions set forth in the Credit Agreement for release of this assignment, this Assignment shall be terminated and shall be of no further effect, and Agent shall, upon demand by Assignor, execute a release to be filed of record at Assignor's so'e cost and expense.
- Section 7.05 of the Credit Agreement, Assignor shall not sell, assign, pledge, transfer, mortgage, grant a security interest in or otherwise encumber the Lease or Assignor's interest therein. Except for any termination, amortument or modification to the extent expressly permitted under Sections 6.14 of the Credit Agreement, Assignor shall not terminate, cancel, subordinate, amend, supplement, extend or otherwise modify or surrender the Lease or the terms thereof or agree to any termination, cancellation, surrender, subordination, compromise or settlement or material amendment, supplement or other modification of any kind or nature of or with respect to the Lease or the terms thereof, or exercise any purchase option or option to extend any Lease without Agent's prior written consent, which consent will not be unreasonably withheld.
- 5. Power of Attorney. Assignor further irrevocably appoints Agent as Assignor's attorney in fact to exercise, upon the occurrence and during the continuance of an Event of Default hereunder, any or all of Assignor's rights in, to, and ur der the Lease and to do any or all other acts, in Assignor's name or in Agent's own name, that Assignor's could do under the Lease, with the same force and effect as if this Assignment had not been made. Third parties shall be entitled to rely on Agent's representation that an Event of De auit has occurred and is continuing empowering Agent to exercise its rights and remedies contained herein.
- 6. Event of Default. The occurrence of an Event of Default under the Credit Agreement shall constitute an Event of Default ("Event of Default") hereunder.
- 7. Exercise of Rights. Agent, on behalf of itself and the Secured Creditors, hereby confers upon Assignor a license to possess and operate the Premises and to exercise the rights and remedies provided to Assignor under the Lease so long as there shall exist no Event of Default. Although it is the intent of the parties that this Assignment is a present assignment, it is expressly understood and agreed, notwithstanding anything to the contrary herein contained, that Agent shall not exercise any of the rights and powers conferred upon it hereunder unless and until there shall have occurred and be continuing an Event of Default hereunder. Assignor agrees, by executing this Assignment, that Agent does not assume any obligations of Assignor under the Lease unless and until Agent shall exercise its rights and remedies hereunder and take possession of the Premises. Subject to provisions set forth in the Lessor Consent, upon the occurrence of an Event of Default hereunder and during the continuation thereof, Agent, in its

0734826072 Page: 6 of 14

UNOFFICIAL COPY

sole election and in its sole discretion, may do any one or more of the following, subject to the terms and conditions contained in the Lease:

- (a) Enter upon, take possession of, manage and operate the Premises or any part thereof pursuant to the terms and conditions of the Lease, and Assignor agrees to surrender possession of the same to Agent.
- (b) To the extent permitted by applicable law, foreclose this instrument as an assignment of an interest in real property in any court of competent jurisdiction.
- (c) Exercise any and all rights and remedies afforded to Agent under the Loan Documents and the Uniform Commercial Code and any and all other applicable provisions of law, including the right to sell Assignor's interest in the Lease at a public or private sale.

In addition to the foregoing, and notwithstanding anything to the contrary in the other provisions of this Assignment or in the Loan Documents, in the event of the occurrence of a breach, default or event of default by Assignor under the Lease which has not been cured within any applicable cure period therefor, Agent may but shall not be required to, cure said breach, default or event of default under the Lease within the carative times provided in said Lease or pursuant to the terms and conditions agreed to by Lessor.

- 8. <u>Nature of Remedies</u>. The rights and remedies of Agent hereunder are cumulative and are in addition to, and not in lieu of, any rights and remedies that Agent may have under the Loan Documents, or at law or in equity, which rights and remedies may be exercised by Agent either prior to, simultaneously with, or subsequent to any action taken hereunder. The rights and remedies of Agent may be exercised from time to time and as often as such exercise is deemed expedient and the failure of Agent to avail itself of any of the terms, provisions and conditions of this Assignment for any period of time or times, shall not be construed or deemed to be a waiver of any rights under the terms hereof.
- 9. No Mortgagee-in-Possession. It is understood and agreed that neither the assignment of the Lease to the Agent for the benefit of itself and the Secured Creditors nor the exercise by the Agent of any of its rights or remedies under this Assignment anall be deemed to make the Agent or any Secured Creditor a "mortgagee-in-possession" or otherwise responsible or liable in any manner with respect to the Lease or the Premises or the use, occupancy, enjoyment or operation of all or any portion thereof except as provided in Lessor Consent unless and until the Agent, in person or by its agent, assumes actual possession thereof, nor shall appointment of a receiver by any court at the request of the Agent or by agreement with Assignor or the entering into possession of the Premises or any part thereof by such receiver be deemed to make the Agent a "mortgagee-in-possession" or otherwise responsible or liable in any manner with respect to the Lease, the Premises or the use, occupancy, enjoyment or operation of all or any portion thereof.
- 10. <u>Notices</u>. Any notice or other communication required or permitted to be given shall be in writing addressed and served as provided in the Credit Agreement.
- 11. <u>Interpretation and Definitions</u>. The captions and headings contained herein are for convenience only and are not intended, nor shall they be considered, to limit in any way the

0734826072 Page: 7 of 14

UNOFFICIAL COPY

provisions hereof. Whenever herein the context so requires, the singular number shall be deemed to include the plural and vice versa and any gender herein shall be deemed to include the masculine, feminine or neuter.

- 12. <u>Separability</u>. Each provision of this Assignment shall be deemed to be separable, and if for any reason any one or more of the provisions hereof is determined to be invalid under any law or decision now or hereafter existing, such invalidity shall not impair the operation or effect of any provisions hereof.
- 13. Successors and Assigns. Whenever the term "Assignor" is used herein, it is hereby understood that the same includes and shall be binding on successors, assigns and legal representatives of Assignor, including successors by consolidation, and any party or parties holding title by, through or under Assignor. This Assignment shall be assignable by Agent and all of the representations, warranties, covenants, agreements, rights, powers, privileges and immunities herein contained or granted and assigned to Agent hereunder shall also inure to its successors, assigns and legal representatives.
- 14. Governing Lav. It is Assignment shall be governed and controlled in all respects by the internal laws and decisions of the State of New York without reference to principles of choice of law, except to the extent that it is mandatory that the laws of the respective states in which the Premises is located apply to the creation, priority, perfection and maintenance of the lien and security interest hereof and to the conforcement of the foreclosure remedies of Agent and any of its successors and assigns.
- 15. <u>Waivers.</u> To the fullest extent permitted by applicable Laws, Assignor hereby irrevocably and unconditionally WAIVES and RELEASES (a) all benefits that might accrue to Assignor by virtue of any present or future law exempting the Premises from attachment, levy or sale on execution or providing for any appraisement, valuation, homestead exemption, stay of execution, exemption from civil process, redemption or extension of time for payment; (b) except as otherwise provided in the Loan Documents, all notices of any demand, presentment, Event of Default, intent to accelerate or acceleration or the election by Agent to exercise or the actual exercise of any right, remedy or recourse provided for under the Loan Documents; and (c) any right to a marshalling of assets or a sale in inverse order of alienation. The Assignor expressly waives and relinquishes any right or remedy that it may have or be able to assert by reason of the provisions of the laws of the state in which the Premises is located permining to the rights and remedies of sureties.
- 16. <u>Intercreditor Agreement</u>. The security interest of Agent in favor of Lenders and the assignment granted hereunder and the rights of such parties in respect thereof shall be subject to and entitled to the benefits of the terms of the Intercreditor Agreement. In the event of any conflict between the terms of the Intercreditor Agreement and the terms of this Agreement, the terms of the Intercreditor Agreement shall govern. Prior to the Discharge of First Lien Obligations (as defined in the Intercreditor Agreement), in the event that any obligation of Assignor hereunder conflicts with an obligation of Assignor under any Assignment of Leases (referred to in Article 1 of the First Lien Credit Agreement), Assignor will first comply with its obligation under any Assignment of Leases (referred to in Article 1 of the First Lien Credit Agreement), and then, to the extent possible, comply with its obligations hereunder and any

0734826072 Page: 8 of 14

UNOFFICIAL COPY

failure to so comply hereunder, due to compliance with any Assignment of Leases (referred to in Article 1 of the First Lien Credit Agreement) shall not be a Default or Event of Default hereunder.

Property of Cook County Clark's Office

0734826072 Page: 9 of 14

UNOFFICIAL COPY

IN WITNESS WHEREOF, this Assignment has been duly executed effective as of the day and year first above written.

ASSIGNOR:

HEARTLAND ILLINOIS FOOD CORP., a

Delaware corporation

By: <u>II (Max. M. W.)</u>
Name: Steven M. Wiboro

Name: Steven M. Wiborg Title: President and CEO

ACKNOWLEDGMENT

STATE OF <u>Illinois</u>

COUNTY OF COOK

SS

On December 21, 2006, before me, the indersigned, a Notary Public in and for said State personally appeared Stull Work known to be to be the Work to me that such individual executed the within instrument on behalf of said Corporation.

WITNESS my hand and official seal.

"OFFICIAL SEAL"
Lisa M. Schmidt
Notary Public, State of Illinois
My Commission Expires September 7, 2010

Notary Public in and for said County and State

[SEAL]

0734826072 Page: 10 of 14

15901 Kedzie Avenue

Markham, Illinois

PIN: 28-24-101-039-000 LEGAL DESCRIPTION

PARCEL ONE (LEASED PREMISES)

THAT PART OF OUTLOT "A" IN CANTERBURY GARDENS UNIT NO. 1, BEING A SUBDIVISION OF PART OF THE NORTHWEST 1/4 OF SECTION 24, TOWNSHIP 36 NORTH, RANGE 13, EAST OF THE THIRD PRINCIPAL MERIDIAN, BOUNDED AND

COMMENCING AT THE INTERSECTION OF A LINE 50.00 FEET EAST OF THE WEST LINE OF THE NORTHWEST 1/4 OF SECTION 24, TOWNSHIP 36 NORTH, RANGE 13, EAST OF THE THIRD PRINCIPAL MERIDIAN, AND A LINE 50.00 FEET SOUTH OF THE NORTH LINE OF THE NORTHWEST 1/4 OF SAID SECTION 24, SAID POINT OF COMMENCING ALSO BEING THE INTERSECTION OF THE SOUTH LINE OF 159TH STREET AND THE EAST LINE OF REDEIE AVENUE, AND ALSO THE NORTHWEST CORNER OF SAID OUTLOT "A"; THENCE SOUTH A -12'-33" WEST ALONG THE EAST LINE OF REDEIR AVENUE, SAID LINE A SO BEING THE WEST LINE OF SAID CUTLOT "A" A DISTANCE OF 12.00 PLOT AS MEASURED AT RIGHT ANGLES TO THE NORTH LINE OF OUTLOT "A", ALSO BEING THE SOUTH LINE OF 159TH STREET TO THE POINT OF BEGIN-NING. THENCE NORTH 90° EAST ALONG A LINE BEING 12.00 FEET SOUTH "A", ALOO BEING THE SOUTH LINE OF 159TH STREET A DISTANCE OF "A", ALOO BEING THE SOUTH LINE OF 159TH STREET A DISTANCE OF "A", ALOO BEING THE SOUTH LINE OF 159TH STREET A DISTANCE OF "A", ALOO BEING THE SOUTH 0°-12'-33" WEST A DISTANCE OF 123.50 WEST ITHENCE SOUTH 0°-12'-33" WEST A DISTANCE OF 123.50 WEST ITHENCE SOUTH 0°-12'-33" BEING THE EAST LINE OF KEDSIE AVENUE; THENCE SOUTH 0°-12'-33" EAST ALONG THE WEST LINE OF SAID OUTLOT "A", ALSO BEING THE WEST LINE OF SAID OUTLOT "A", ALSO SING THE WEST LINE OF SAID OUTLOT "A", ALSO SING THE WEST LINE OF SAID OF 123.50 FEET TO THE FOINT OF BEGINNING, ALL IN COOK COUNTY, OF 123.50 FEET TO THE FOINT OF BEGINNING, ALL IN COOK COUNTY,

PARCEL TWO (SHOPPING CENTUR PASEMENTS)

THE ABOVE-DESCRIBED LEASED PREMISES IS A PART OF THE CANTERBURY THE ABOVE-DESCRIBED LEASED PREMISES IS A PART OF THE CANTERBURY SHOPPING CENTER (THE "SHOPPING (ENTER") WHICE IS MORE PARTICULARLY DESCRIBED ON PAGE 2 OF THIS EXHIGIT "A." THE LEASE GRANTS THE FOLLOWING NON-EXCLUSIVE EASEMENTS WHICE ARE APPURTENANT TO THE LEASED PREMISES, WHICH APPECT THE SHOPPING CENTER AND WHICH ARE COTERMINOUS. WITH THE LEASE AND ANY EXTENSIONS. AD REOF:

- (a) THE RIGHT AND EASEMENT TO THE IMPO AND USE EXISTING UTILITIES.
- AN EASEMENT FOR VEHICULAR AND PEDESTRIPS INGRESS AND EGRESS TO AND FROM THE LEASED PREMISES TO THE SHOP IN CHITER, OVER, UPON AND ACROSS THE PARKING AREAS, DRIVEWAYS, LAIVE AND ENTRANCES OF THE SHOPPING CENTER AS THEY MAY EXIST FROM TIME TO TIME.
- AN EASEMENT FOR VEHICULAR PARKING OVER THE PARKING AREAS OF THE SHOPPING CENTER AS THEY MAY EXIST FROM TIME TO TIME

LEGAL DESCRIPTION OF CANTERBURY SHOPPING CENTER

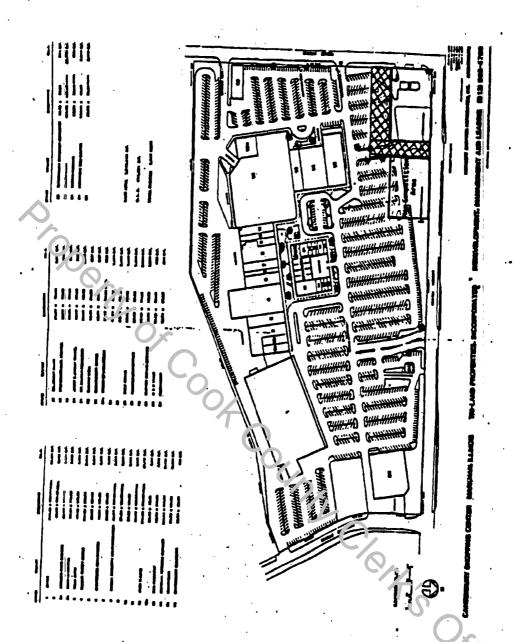
OUT-LOT "A" IN CANTERBURY GARDENS UNIT NO. 1, A SUBDIVISION OF PART OF THE NORTHWEST 1/4 OF SECTION 24, TOWNSHIP 36 NORTH, RANGE 13 EAST OF THE THIRD PRINCIPAL MERIDIAN, ACCORDING TO THE PLAT THEREOF JUNE 16, 1955 AS DOCUMENT 16271151, IN COOK COUNTY,

PIN: 28 24 101 031 0000 28 24 101 038 0000

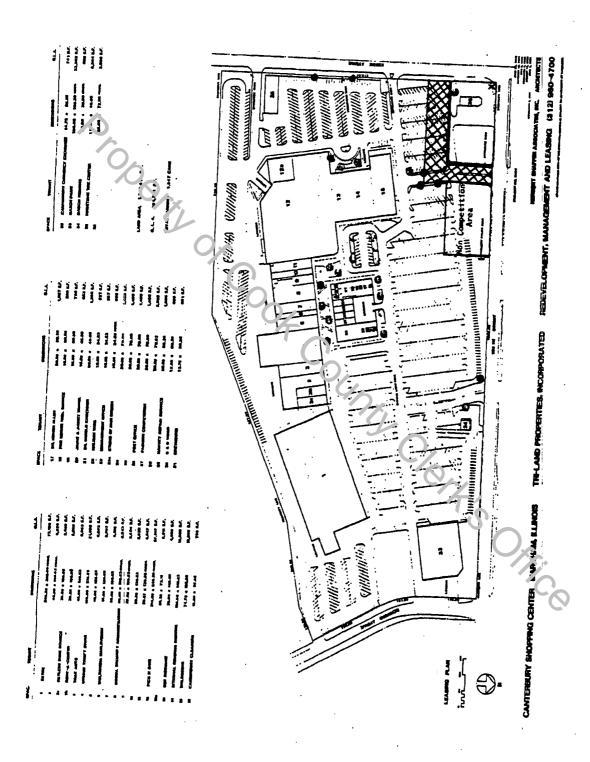
Subject to any and all reservations, restrictions, easements, rights-of-way, limitations and conditions of record.

AAH: af 180. #5122 5/7/87

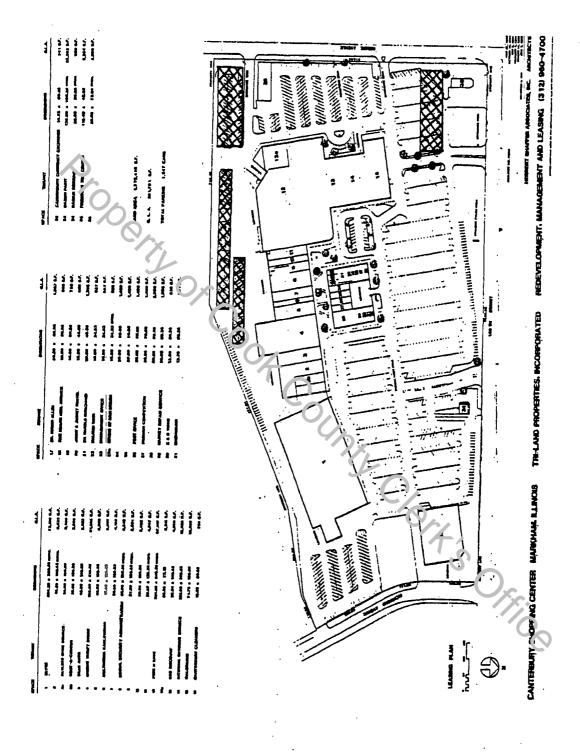
0734826072 Page: 11 of 14



0734826072 Page: 12 of 14



0734826072 Page: 13 of 14



0734826072 Page: 14 of 14

UNOFFICIAL COPY

EXHIBIT B

- A. That certain Lease or Sublease Agreement, dated June 1, 1987, by and between Burger King Corporation, a Florida corporation ("Lessor"), and Heartland Illinois Food Corp., a Delaware corporation ("Lessee"); a direct or indirect assignee of Antonio Desantis.
- B. For a Term expiring on July 28, 2006 as now or hereinafter extended.

Property of County Clark's Office