

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

September 22, 2023

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

PSF No.:23KD-044

Kauai

Cancellation of General Lease No. S-4023 to The Kauai Food Bank, Inc., dba Kauai Independent Food Bank, and Issuance of Direct Lease to The Kauai Food Bank, Inc., dba Kauai Independent Food Bank, for Business Purposes; Request to Consent to Sublease to (i) Sutada Hesse, dba Hesse Flooring, and (ii) Eyes Wide Open Productions LLC, Lihue, Kauai, Tax Map Key: (4) 3-2-004:011.

APPLICANT:

The Kauai Food Bank, Inc., dba Kauai Independent Food Bank (KFB), a Hawaii non-profit corporation and an Internal Revenue Code Section 501(c)(3) qualified nonprofit entity.

LEGAL REFERENCE:

Section 171-43.1, Hawaii Revised Statutes (HRS), as amended.

LOCATION:

Portion of Government lands of Nawiliwili situated at Nawiliwili Town Lots, Lihue, Kauai, identified by Tax Map Key: (4) 3-2-004:011, as shown on the attached maps labeled **Exhibit A**.

AREA:

0.618 acre, more or less.

ZONING:

State Land Use District: Urban  
County of Kauai CZO: IG, General Industrial

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act.

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: NO

CURRENT USE STATUS:

Parcel is currently encumbered under General Lease (GL) S-4023 to KFB from November 17, 1966, through November 16, 2031.

LEASE CHARACTER OF USE:

Business Purposes.

LEASE TERM:

Forty- Years (40) years.

SUBLEASE CHARACTER OF USE:

Sutada Hesse dba Hesse Flooring: Warehouse and storage.

Eyes Wide Open Productions LLC: Media productions.

TERM OF SUBLEASES:

Sutada Hesse, dba Hesse Flooring:

Commencing on September 1, 2022, and ending on December 31, 2027. **See Attached Exhibit B.**

Eyes Wide Open Productions LLC:

Commencing on June 1, 2023, and ending on May 31, 2025. **See Attached Exhibit C.**

CANCELLATION DATE OF GL S-4023:

To be determined by Chairperson, but no later than the date prior to the commencement date of the new lease to KFB.

LEASE COMMENCEMENT DATE:

To be determined by the Chairperson.

ANNUAL LEASE RENT:

\$480 per annum (Minimum Rent Policy for New Dispositions, May 13, 2005).

ANNUAL SUBLEASE RENT

Sutada Hesse, dba Hesse Flooring: \$34,560.00 Base Rent.

Eyes Wide Open Productions LLC: \$15,240.00 Base Rent.

RECOMMENDED ADJUSTMENT TO LEASE RENTAL:

Based on a review of the lease and subleases, staff has applied the sublease rent participation policy, approved by the Board on May 26, 2000, Item D-24, and amended January 26, 2012, Item D-14, as follows:

If the lessee subleases improvements not owned by the State, the Board shall not receive any portion of sublease rents from subleasing improved space unless: (i) that right and method of calculation are specifically stated in the lease, or (ii) participation in sublease rents is warranted considering the age of the improvements (including but not limited to the extent to which the improvements have been depreciated or amortized), lessee's expenditures to maintain the same in relation to sublease revenues, and the extent to which the lessee actually occupies and uses the lease premises for its own business.

Staff had reviewed GLS-4023 and did not find any provision stating a specific right and method of calculation. KFB will continue to occupy a significant portion of the lease property for its own business. Staff's position on sublease rent participation is due in part on KFB's commitment to converting the current cesspools on the property to septic within two (2) years (well ahead of the Department of Health deadline for all cesspools to be converted by 2050).

METHOD OF LEASE RENT PAYMENT:

Semi-annual payments, in advance.

LEASE RENTAL REOPENINGS:

The annual rent shall be reopened and redetermined at the 10<sup>th</sup>, 20<sup>th</sup> and 30<sup>th</sup> years of the lease term based on the Board's then-prevailing Minimum Rent Policy for eleemosynary organizations.

LEASE PERFORMANCE BOND:

Twice the annual rental amount.

PROPERTY CHARACTERISTICS:

Legal access to property – Staff has verified that there is legal access to the property off Kailikea St.

Subdivision – Staff has verified that the subject property is a legally subdivided lot.

Encumbrances – Parcel is currently encumbered under GL-4023 to KFB.

Improvements – 3920 sq ft warehouse and 16700 sq ft asphalt parking.

#### CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

In accordance with Hawaii Administrative Rules (HAR) § 11-200.1-16 and the Exemption List for the Department of Land and Natural Resources reviewed and concurred on by the Environmental Council on November 10, 2020, the improvements proposed by KFB for an Individual Waste System, are exempt from the preparation of an environmental assessment pursuant to General Exemption Type 1 that states, “Operations, repairs or maintenance of existing structures, facilities, equipment, or topographical features, involving minor expansion or minor change of use beyond that previously existing,” and Part 1, Item 40 that states, “Leases of state land involving negligible or no expansion or change of use beyond that previously existing,” and Type 2 that states, “Replacement or reconstruction of existing structures and facilities where the new structure will be located generally on the same site and will have substantially the same purpose, capacity, density, height, and dimensions as the structure replaced,” and Part 1, Item 7 that states, “ 7. Replacement of cesspools with individual wastewater systems located generally on the same site with substantially the same purpose and capacity.” See attached **Exhibit D**.

#### DCCA VERIFICATION:

##### The Kauai Food Bank, Inc.:

Place of business registration confirmed: YES  
Registered business name confirmed: YES  
Applicant in good standing confirmed: YES

##### Eyes Wide Open Productions LLC:

Place of business registration confirmed: YES  
Registered business name confirmed: YES  
Applicant in good standing confirmed: YES

As a natural person, Sutada Hesse, dba Hesse Flooring is not required to register with the DCCA.

#### REMARKS:

GLS-4023 was issued to Tetsuro Maeda and Yoshio Hiranaka dba, T & Y Partners (T&Y) for fifty-five (55) years, commencing on November 17, 1966, and expiring on November

16, 2021. The character of use was for business purposes.

At its meeting on October 24, 1969, under agenda item F-18, the Board of Land and Natural Resources (Board) approved the extension of construction deadline under GLS-4023.

Construction of the building was later completed in 1971.

At its meeting on May 14, 1982, under agenda item F-17, the Board consented to a sublease from T&Y, sublessor, to Interisland Distributors, as sublessee, and a sub-sublease between Interisland Distributors, as sub-sublessor, and Waialele Wine Company, as sub-sublessee. The staff submittal recommended no participation in sublease rents noting, “the sub-sublessor is merely meeting expenses and is not making any sandwich profits and, therefore, staff recommends that no [rent] increase occur.”

At its meeting on February 26, 1999, under agenda Item D-3, the Board consented to subleases from T&Y, sublessor, to KFB and Hesse Carpets, Inc., sublessees. Land Division’s staff appraiser at the time conducted a sandwich profit analysis of the sublease rent and found that operating expenses and allowances exceeded the sublease income. As a result, there was no sublease rent participation by the State. The sublease to KFB expired April 31, 2003, while the sublease to Hesse Carpets, Inc. expired on July 31, 2006.

At its meeting on August 26, 2011, under agenda Item D-2, the Board consented to assignment of GLS-4023 from Tetsuro Maeda and Yoshio Hiranaka dba T&Y Partners, assignor, to T&Y, LLC, assignee.

On March 8, 2013, under Item D-2, the Board consented to a 10-year extension of lease term for GLS-4023. T&Y, requested an extension of lease to amortize the expense of replacing the entire warehouse roof with new metal roofing and several walls that were corroded at a cost of \$50,000.00.

On October 12, 2020, Kauai District Land Office (KDLO) sent a letter to T&Y requesting information on potential Large Capacity Cesspools (LCCs) on the leased property. T&Y responded that there were two (2) cesspools on the property; each cesspool is six (6) feet in diameter and ten (10) feet in depth. There are ten (10) persons who use the restrooms per day. According to the Environmental Protection Agency (EPA), a non-residential LCC is one that discharges sanitary waste with human waste and serves a non-residential location with the capacity to serve 20 or more persons per day. Capacity is determined by design and construction of the cesspool and the potential usage of the infrastructure it serves. Determining the potential usage of a non-residential cesspool is highly fact-specific and must be done on a case-by-case basis. Therefore, the cesspools might not qualify as LCCs under the EPA’s criteria.

On July 26, 2021, T&Y applied to KDLO requesting consent to the assignment of General Lease No. S-4023 from T&Y, assignor, to KFB, assignee. It was also brought to the KDLO staff’s attention that T&Y required an after-the-fact consent to sublease to KFB and Hesse

Flooring (former sublessees). In addition, an after the fact consent to sublease was required for Eyes Wide Open Productions LLC.

At its meeting on October 8, 2021, under Agenda Item D-2, the Board approved the assignment of GLS-4023 from T&Y to KFB. At the time of the Board action, the total annual rent amount for GLS-4023 was \$53,600.00. KFB had been paying \$34,560.00 per annum in rent to T&Y. KFB paid \$275,020 to T&Y as consideration for the lease assignment. KFB paid the consideration in hopes of gaining control of the lease so that it may eventually secure from the Board the cancellation of GLS-4023 and issuance of a new lease at the eleemosynary rate. Furthermore, there was a rental reopening of GLS-4023 on April 1, 2023. The rent was adjusted as of April 1, 2023, to \$66,975.00 per annum.

KFB is a Hawaii non-profit corporation that receives donated food which is inspected, sorted, and stored on the subject lease property. KFB distributes the donated food to food pantries, homeless shelters, soup kitchens, domestic abuse shelters and rehabilitation centers. KFB distributes over 220,000 pounds of food annually to feed roughly 100,000 meals and snacks to those in need. KFB has applied for a 40-year direct lease at nominal rent for business purposes. KFB is an Internal Revenue Code Section 501(c)(3) non-profit, tax exempt organization. See **Exhibit E**.

The intention of this submittal is to acknowledge the work done in the Kauai community by KFB and its status as a non-profit corporation and recommend the cancellation of GLS-4023 and issuance of a new direct lease to KFB as an eleemosynary organization rather than a commercial business. The new direct lease will begin upon the cancelation of GLS-4023. Upon cancellation of the lease, the improvements constructed thereon will be owned by the State. KFB, for its part, intends to address the cesspools with a conversion to an Individual Wastewater System (IWS). See proposed plans attached as **Exhibit F**. KFB has obtained an estimate for installation of the new IWS, costing between \$120,000.00 and \$150,000.00 as shown in attached **Exhibit G**. KFB has obtained financing for this project through an Office of Community Service Grant-In-Aid. KFB has committed to closing the cesspools and installing the new IWS within 24 months.

The Land Board is authorized to lease State lands to qualifying eleemosynary (charitable) organizations at nominal rent. The statutory authority is as follows:

**§171-43.1 Lease to eleemosynary organizations.** The Board may lease, at a nominal consideration, by direct negotiation and without recourse to public auction, public lands to an eleemosynary organization which has been certified to be tax exempt under sections 501(c)(1) or 501(c)(3) of the Internal Revenue Code of 1986, as amended. The lands shall be used by such eleemosynary organizations for the purposes for which their charter was issued and for which they were certified by the Internal Revenue Service. [L 1970, c 83, §5; am L 1971, c 100, §1; am L 1982, c 202, §1; am L 1991, c 212, §3].

A section 501(c)(1) organization must be both organized by an Act of Congress and be an instrumentality of the United States, while a section 501(c)(3) organization is a privately organized charitable organization.

When considering lease dispositions to, or rental reopening's for, eleemosynary organizations, the Land Board may therefore set the rent by direct negotiation at an amount below fair market rental (i.e., nominal rent).

On May 13, 2005, the Land Board established a Minimum Rent Policy that stated, among other things, that the minimum rent for a lease to a charitable organization be no less than \$480 per year. Staff believes "nominal rent" under Section 171-43.1, Hawaii Revised Statutes ought to be anywhere between fair market rent and the minimum rent of \$480 per year. In order to have a standard nominal rent for qualifying non-profit tenants, staff generally recommends rent be set at \$480 per year.

KFB is also requesting that it be allowed to continue collecting the sublease rents currently in the amount of \$49,800.00 per year. The Board's policy on sublease rent participation provides that in the situation where a non-profit lessee subleases improvements owned by the State, 100% of sublease rents collected by the lessee, less lease rent paid to the State (and a few other allowances under the policy<sup>1</sup>) should be paid to the State. In this case, however, KFB plans on using the monies collected to purchase more food for distribution, which will allow it to offer even more outreach to the community. The public welfare benefit is a greater benefit to the public than collection of rent monies. KFB will not be making a profit on these proceeds as the monies are going to be used to increase KFB's public services. KFB will continue to maintain and comply with the Internal Revenue's 501(c)(3) Code of 1986, as amended. In view of this and KFB's commitment to close the existing cesspools on the property and install an IWS at an approximate cost of \$120,000.00 to \$150,000.00, staff is recommending a departure from the policy and allow KFB to retain all sublease rents (attached as **Exhibit H** is a sublease rent participation calculation showing the sublease rents the State would collect if KFB were not granted an exception under the policy<sup>2</sup>). Staff is further recommending that a condition be included in the lease to the effect that non-compliance by KFB with the cesspool closure and IWS installation deadline may result in the rescission of the lease.<sup>3</sup>

Applicant has not had a lease, permit, easement, or other disposition of State lands

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1 Allowances under the sublease rent participation policy include General Excise Tax, management and vacancy loss, repair and maintenance costs, real property tax and insurance.

2 The calculation attached as Exhibit H shows that KFB would normally have to remit to the State \$23,063.23 in sublease rents based on the current subleases of the premises.

3 The standard form for a direct lease to non-profit entity includes restrictions against assignment so that only KFB will benefit from the Board's exception to the sublease rent policy. If the Board were ever to consent to an assignment of the lease to another eleemosynary organization, it could re-evaluate the nominal rent sublease rent participation at that time.

terminated within the last five years due to non-compliance with such terms and conditions.

Various government agencies were solicited for comments.

AGENCIES	COMMENTS
<b>County of Kauai:</b>	
Public Works Department	No Response by Suspense Date
Planning Department	No Objections
<b>State of Hawaii:</b>	
Department of Health	No Response by Suspense Date
Historic Preservation	No Response by Suspense Date
Office of Hawaiian Affairs	No Response by Suspense Date

Staff believes that the proposed use would involve negligible or no expansion or change in use of the subject area beyond that previously existing.

**RECOMMENDATION:** That the Board:

1. Declare that, after considering the potential effects of the proposed disposition as provided by Chapter 343, HRS, and Chapter 11-200.1, HAR, this project will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment as a de minimis action.
2. Authorize the mutual cancellation of GLS-4023 to The Kauai Food Bank, Inc. under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
  - A. The standard terms and conditions of the most current mutual cancellation of lease document form, as may be amended from time to time;
  - B. Review and approval by the Department of the Attorney General; and
  - C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
3. Authorize the issuance of a direct lease to The Kauai Food Bank, Inc., dba Kauai Independent Food Bank, covering the subject area under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
  - A. The standard terms and conditions of the most current non-profit lease document form, as may be amended from time to time; provided that the lease document shall require the lessee to substantially complete the proposed improvements and submit receipts or other acceptable evidence



of the total cost to staff within 24 months from lease execution, or the lease shall be subject to rescission; and provided further that lease shall allow for subleasing by KFB with the prior approval of the Board, subject to Section 171-36(a)(6), as may be amended from time to time;

- B. Review and approval by the Department of the Attorney General; and
  - C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
4. Consent to the sublease between Kauai Food Bank, as Sublessor, and (i) Sutada Hesse, dba Hesse Flooring, and (ii) Eyes Wide Open Productions LLC, as Sublessees, subject to any applicable conditions cited above which are by this reference incorporated herein and further subject to the following terms and conditions:
- A. The Lessee shall submit construction plans of the sublessees' improvements to the Land Division for the Chairperson's approval prior to constructing any improvements on the demised premises;
  - B. The standard terms and conditions of the most current consent to sublease form, as may be amended from time to time;
  - C. Review and approval by the Department of the Attorney General; and
  - D. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,



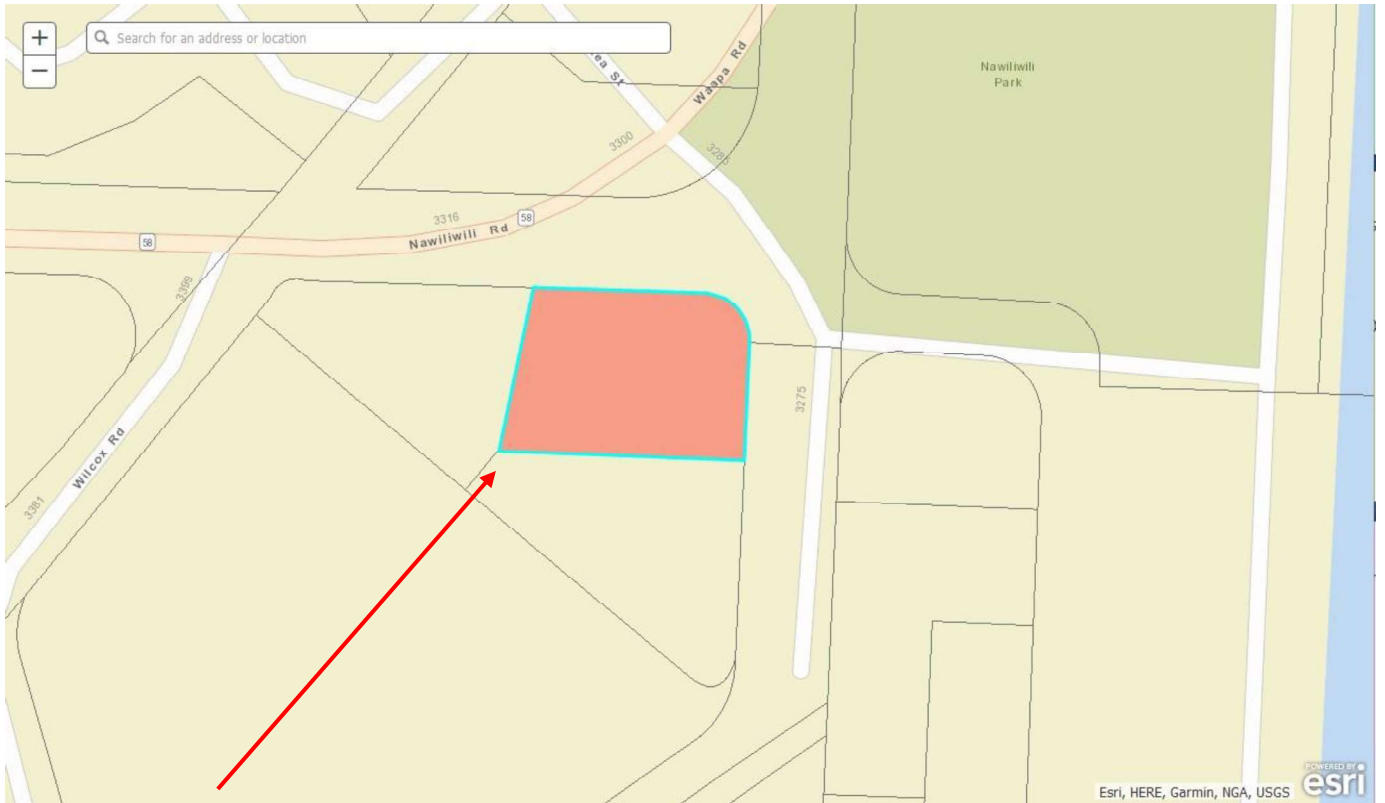
James C. Turner  
Land Agent

APPROVED FOR SUBMITTAL:



Dawn N.S. Chang, Chairperson

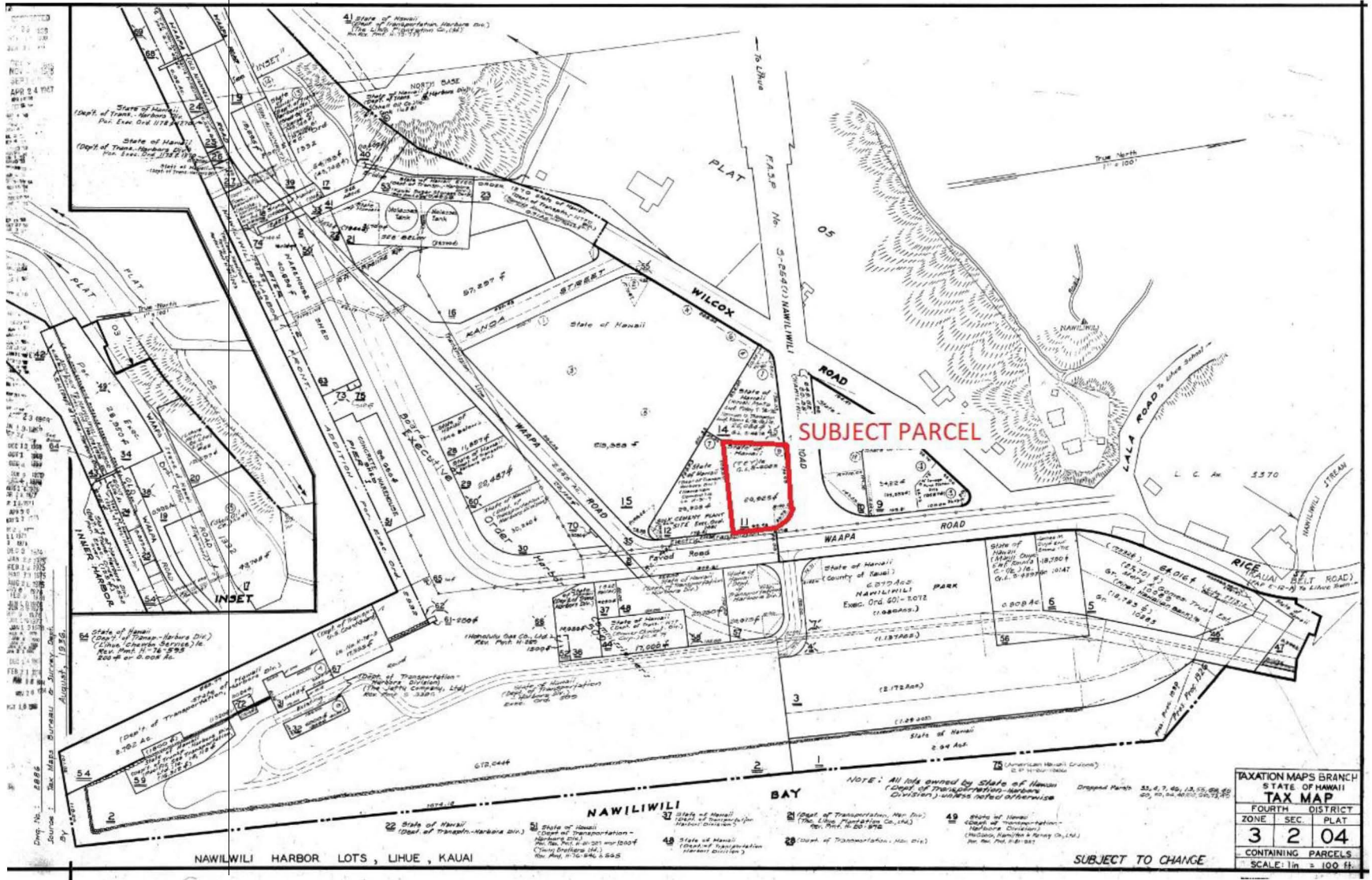




## SUBJECT PARCEL



## EXHIBIT A



NOTE: All lots owned by State of Hawaii (Dept. of Transportation - Harbors Division) unless noted otherwise

TAXATION MAPS BRANCH		
STATE OF HAWAII		
TAX MAP		
FOURTH	DISTRICT	
3	2	04
CONTAINING PARCELS		
SCALE: 1 in = 100 ft.		

SUBJECT TO CHANGE



**COMMERCIAL LEASE  
(MULTI-TENANT LEASE)**

**Hawaii Association of REALTORS® Standard Form  
Revised 12/17 (NC) For Release 5/22**



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**COMMERCIAL  
LEASE  
(Multi-Tenant Lease)**

**By and Between**

**Landlord: KAUAI INDEPENDENT FOOD BANK**

**and**

**Tenant: SUTADA HESSE**

**Dated: August 25, 2022**

**Premises: 3285 Waapa Rd, Lihue, HI 96766-8614**



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COMMERCIAL LEASE (MULTI-TENANT LEASE)

Hawaii Association of REALTORS® Standard Form Revised 12/17 (NC) For Release 11/21



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Reviewed by: Clifton Kukino, Principal Broker Signature Kauai Realty, Inc. Brokerage Firm

PART A. SPECIFIC CONDITIONS.

1. Parties. This Lease ("Lease"), dated for reference purposes only on September 1, 2022, is made by and between Landlord and Tenant.

Landlord: KAUI INDEPENDENT FOOD BANK ("Landlord")

Landlord's Address for Notice: Landlord's Address for Rent Payments:

[Redacted address lines]

Telephone No. ( ) - Telephone No. [Redacted] Fax No. ( ) - Fax No. [Redacted]

E-mail Address: Attention: [Redacted]

Tenant: SUTADA HESSE ("Tenant"), with Federal I.D./Social Security No. [Redacted]

Tenant's Trade Name: HESSE FLOORING

Tenant's Address for Notice: Notices shall be sent to Tenant at the following address:

3285 Waapa Rd, Suite B, Lihue, HI 96766-8614 Attention: Sutada Thongkul Hesse

2. Tenant's Address in Project. 3285 Waapa Road, Suite B, Lihue, Hawaii 96766

3. Premises. Space B, with approximately 4,000 square feet of floor space as depicted on the plan attached hereto as Exhibit A, being the square footage of the Premises, and being part of the 3285 Waapa Road, Lihue, HI 96766 (the "Project"), situated upon the property described in Exhibit B. Exhibit A sets forth the general layout of the Project, but shall not be deemed to be a warranty, representation or agreement on the part of Landlord that the Project or the Premises be exactly as indicated.

In addition to Tenant's rights to use and occupy the Premises as hereinafter specified, Tenant shall have non-exclusive rights to the Common Areas (as defined in Section 1.5 below), but shall not have any rights to the roof or exterior walls of the building containing the Premises (the "Building") or to any other buildings in the Project. (See also PART C, Section 1)

4. Parking. 2 unreserved, currently \$ no charge per month, as may be adjusted by Landlord from time to time, reserved, currently \$ per month, as may be adjusted by Landlord from time to time, vehicle parking spaces as shown on Exhibit B-1, if any. (See also PART C, Section 1.4)

5. Term. [ ] 5 years and 4 months, [X] 5 years less 1 day ("Original Term") commencing September 1, 2022 ("Commencement Date") and ending December 31, 2027 ("Expiration Date"). (See also PART C, Section 2)

6. Rent Due Date. Base Rent shall be due and payable, in advance, on or before the 1st day of each calendar month during the Term. If the Rent Commencement Date is a date other than the first day of a calendar month, there shall be due on such date a sum equal to that proportion of the Base Rent specified for the first full calendar month in which a monthly payment of Base Rent is due, which the number of days from the Rent Commencement Date to the end of the calendar month during which the Rent Commencement Date shall fall bears to the total number of days in such month. Under such circumstances, the next occurring monthly installment of Base Rent shall be paid by application of the Advance Deposit.

7. Base Rent. Rent Commencement Date: [X] September 1, 2022 or [ ] The earliest to occur of (a) ; (b) days after the Commencement Date, or (c) the date upon which actually opens the Premises to the public for business. If Tenant fails to commence operations from the Premises on the Rent Commencement Date, liquidated damages shall be assessed at the rate that is two (2) times the daily Base Rent per day from the Rent Commencement Date until the date upon which Tenant commences operations from the Premises. Rent shall accrue hereunder from the Rent Commencement Date. The Rent Commencement Date shall be adjusted in accordance with Part C, Section 2.2 if Landlord is unable to deliver possession of the Premises before the Rent Commencement Date.



The following amounts for the following periods of time:

Time Period [MM/DD/YYYY to MM/DD/YYYY]		Base Rent Per Month
09/01/2022	12/31/2022	\$2,880.00
01/01/2023	12/31/2025	2,880 + CAM + GET
01/01/2026	12/31/2027	3,168 + CAM + GET

8. **Tenant's Share of Common Area Expenses.** Forty percent ( 40.323 %) ("Tenant's Share") (currently \$ 0.18 per square foot). Tenant's Share is calculated by dividing the area of the Premises by the gross area of the Building as follows:

Area of the Premises:	<u>4,000</u>	=	<u>40.323%</u>	(multiply by 100 to obtain percentage)
Area of the Building:	<u>9,920</u>			

9. **Base Rent and Other Monies Paid Upon Execution.**

- (a) **Base Rent:** \$ 2,880.00 for the period 9/1/2022 to 12/31/2022
- (b) **Common Area Expenses:** \$ 720.00 for the period starting 1/1/2023 and subject to change.
- (c) **Other:** \$ \_\_\_\_\_ for \_\_\_\_\_
- (d) **General Excise Tax:** \$ 169.63
- Total** \$ 3,769.63
- (e) **Security Deposit:** \$ ON ACCOUNT ("Security Deposit"). (See also PART C, Section 4)
- (f) **Parking: Reserved:** \$ \_\_\_\_\_
- Unreserved:** \$ \_\_\_\_\_
- (g) **Total Due Upon Execution of this Lease:** \$ 3,769.63

10. **Security Deposit:** 1 month(s) gross rent.

11. **Permitted Use (to the extent permitted by Law).** Warehouse and storage.

(See also PART C, Section 5)

12. **Guarantor.** The obligations of the Tenant under this Lease are to be guaranteed by Sutada Thongkkul Hesse ("Guarantor"). (See also PART C, Section 43)

13. **General.** Each of the foregoing definitions and basic provisions shall be construed in conjunction with and limited by references thereto in other provisions of this Lease. Additionally, the following terms shall have the following meaning: "Laws" means all federal state and local laws, rules and regulations, ordinances, all court orders, all governmental directives and governmental orders and requirements, and all restrictive covenants affecting the Project, including, but not limited to, disability laws, and "Law" means any of the foregoing; "Tenant Party" shall include Tenant, any assignees claiming by, through, or under Tenant, any subtenants claiming by, through or under Tenant, and any agents, contractors, employees, invitees, licensees, or concessionaires of the foregoing parties; and "including" means, including, without limitation.

14. **Attachments.** Attached hereto are the following, all of which constitute a part of this Lease:

- Exhibit A - a site plan depicting the Premises;
- Exhibit B - a site plan depicting the Project;
- Exhibit B-1 - Parking Plan;
- Exhibit C - a current set of the Rules and Regulations for the Project;
- Exhibit D - a Work Letter;
- Exhibit E - Ground Lease;
- Exhibit F - Option to Extend;
- Exhibit G - Guaranty;
- Exhibit H - Percentage Rent.
- Exhibit \_\_\_\_\_
- Exhibit \_\_\_\_\_

END OF PART A



**PART B. SPECIAL CONDITIONS.**

In addition to the specific provisions of this Lease set forth in Part A and the more general provisions of this Lease set forth in Part C, Landlord and Tenant have agreed to certain additional provisions set forth in this Part B. Please number each Special Condition.

1). Lessors and Lessees acknowledge and agree that this is a sublease subject to the master lease between Lessor and the State of Hawaii.

END OF PART B

**PART C. GENERAL CONDITIONS.**

**SECTION 1. PREMISES.**

1.1 **Granting Clause.** In consideration of the obligation of Tenant to pay Rent as herein provided, and the other terms, covenants and conditions of this Lease, the receipt and sufficiency of which are hereby acknowledged, Landlord hereby leases to Tenant, and Tenant hereby leases from Landlord, the Premises TO HAVE AND TO HOLD for the Term, all upon the terms and conditions set forth in this Lease. Landlord has not made, and does not hereby make, any representation or warranty, express or implied, as to the physical condition of the Premises, the uses to which the Premises may be put, the suitability of the Premises for Tenant's intended purposes, compliance of the improvements within Premises with existing building codes or other laws or the ability of Tenant to use the Premises for Tenant's intended uses.

1.2 **Condition.** Landlord shall deliver the Premises to Tenant broom clean and free of debris on the Commencement Date ("**Start Date**"). Tenant accepts the existing electrical, plumbing, fire sprinkler, lighting, ventilating and air conditioning systems ("**HVAC**"), loading doors, sump pumps, if any, and all other such elements in the Premises in their current AS-IS condition without warranty.

1.3 **Acknowledgements.** Tenant acknowledges that: (a) it has been given an opportunity to inspect and measure the Premises, (b) it has been advised by Landlord to satisfy itself with respect to the size and condition of the Premises (including but not limited to the electrical, HVAC and fire sprinkler systems, security, environmental aspects, and compliance with Laws and the Americans with Disabilities Act), and their suitability for Tenant's intended use, (c) it has made such investigation and assumes all responsibility therefor relating to the zoning of the Project and Premises and that Tenant's proposed use is permitted within such zoning, (d) it has made such investigation and assumes all responsibility therefor that all utilities within the Premises are of sufficient capacity for Tenant's use; (e) Tenant has made such investigation as it deems necessary with reference to such matters and assumes all responsibility therefor as the same relates or may relate to its occupancy of the Premises, (f) it is not relying on any representation as to the size of the Premises made by Landlord, (g) the square footage of the Premises was not material to Tenant's decision to lease the Premises and pay the Rent stated herein, and (h) neither Landlord or Landlord's agents have made any oral or written representations or warranties with respect to such matters other than as set forth in this Lease. In addition, Landlord acknowledges that: (i) Landlord's agents have made no representations, promises or warranties concerning Tenant's ability to honor the Lease or suitability to occupy the Premises, and (ii) it is Landlord's sole responsibility to investigate the financial capability and/or suitability of all proposed tenants. Tenant further acknowledges that the Rent payable to Landlord hereunder does not include the cost security of the Premises, and that Landlord shall have no obligation whatsoever to provide the same. Tenant assumes all responsibility for the protection of the Premises, Tenant, its agents and invitees and their property from the acts of third parties.

1.4 **Vehicle Parking.** Tenant shall be entitled to use the number of parking spaces specified in PART A, Section 4 on those portions of the Common Areas designated from time to time by Landlord for parking. Tenant shall not use more parking spaces than the stated number. The parking spaces shall be for parking by vehicles no larger than full-size passenger automobiles or pick-up trucks, herein called "**Permitted Size Vehicles.**" Landlord may regulate the loading and unloading of vehicles by adopting Rules and Regulations as provided in PART C, Section 1.7. No vehicles other than operational Permitted Size Vehicles may be parked in the Common Areas without the prior written permission of Landlord. In addition:

(a) Tenant shall not permit or allow any vehicles that belong to or are controlled by Tenant or Tenant's employees, suppliers, shippers, customers, contractors or invitees to be loaded, unloaded, or parked in areas other than those designated by Landlord for such activities.

(b) Tenant shall not service or store any vehicles in the Common Areas or in any parking spaces.

(c) If Tenant permits or allows any of the prohibited activities described in this PART C, Section 1.4, the Landlord shall have the right, without notice, in addition to such other rights and remedies that it may have, to remove or tow away the vehicle involved and charge the cost to Tenant, which cost shall be immediately payable upon demand by Landlord.

1.5 **Common Areas - Definition.** As used herein, the "**Common Areas**" shall mean that part of the Project designated by Landlord from time to time for the common use of all tenants, including equipment, signs, parking areas, sidewalks, landscaping, curbs, loading areas, private streets and alleys, lighting facilities, hallways, elevators, escalators, stairs, other access-ways, malls, restrooms, and all other areas and improvements provided by Landlord for the common use of all tenants, all of which shall be subject to Landlord's sole management and control and shall be operated and maintained in such manner as Landlord, in its discretion, shall determine.

1.6 **Common Areas - Tenant's Rights.** Landlord grants to Tenant, for the benefit of Tenant and its employees, suppliers, shippers, contractors, customers and invitees, during the term of this Lease, the non-exclusive right to use, in common with others entitled to such use, the Common Areas as they exist from time to time, subject to any rights, powers, and privileges reserved by Landlord under the terms hereof or under the terms of any rules and regulations or restrictions governing the use of the Project. Under no circumstances shall the right herein granted to use the Common Areas be deemed to include the right to store any property, temporarily or permanently, in the Common Areas. Any such storage shall be permitted only by the prior written consent of Landlord or Landlord's designated agent, which consent may be revoked at any time. In the event that any unauthorized storage shall occur then Landlord shall have the right, without notice, in addition to such other rights and remedies that it may have, to remove the property and charge the cost to Tenant, which cost shall be immediately payable upon demand by Landlord.

1.7 **Common Areas - Rules and Regulations.** Landlord or other person(s) as Landlord may appoint shall have the exclusive control and management of the Common Areas and shall have the right, from time to time, to establish, modify, amend and enforce reasonable rules and regulations ("**Rules and Regulations**") for the management, safety, care, and cleanliness of the grounds, the parking and unloading of vehicles and the preservation of good order, as well as for the convenience of other occupants or tenants of the Building and the Project and their invitees. Tenant agrees to abide by and conform to all such Rules and Regulations, and shall use its best efforts to cause its employees, suppliers, shippers, customers, contractors and invitees to so abide and conform. Landlord shall not be responsible to Tenant for the non-compliance with such Rules and Regulations by other tenants of the Project.

1.8 **Common Areas - Changes.** Landlord shall have the right, in Landlord's sole discretion, from time to time: (a) To make changes to the Common Areas, including, without limitation, changes in the location, size, shape and number of driveways, entrances, parking spaces, parking areas, loading and unloading areas, ingress, egress, direction of traffic, landscaped areas, walkways and lighting facilities; (b) To close temporarily any of the Common Areas for maintenance purposes so long as reasonable access to the Premises remains available; (c) To designate other land outside the boundaries of the Project to be a part of the Common Areas; (d) To add additional buildings and improvements to the Common Areas; (e) To use the Common Areas while engaged in making additional improvements, repairs or alterations to the Project, or any portion thereof; and (f) To do and perform such other acts and make such other changes in, to or with respect to the Common Areas and Project as Landlord may, in the exercise of sound business judgment, deem to be appropriate.

## SECTION 2. TERM.

2.1 **Term.** The Commencement Date, Expiration Date and Original Term of this Lease are as specified in PART A, Section 5.

2.2 **Delay in Possession.** Landlord agrees to use commercially reasonable efforts to deliver possession of the Premises to Tenant by the Commencement Date. If Landlord is unable to tender possession of the Premises to Tenant before the Rent Commencement Date, then (a) Tenant's obligation to pay Rent hereunder shall be waived until Landlord tenders possession of the Premises to Tenant and any period of rent abatement that Tenant would have otherwise have enjoyed shall run from the date of delivery of possession and continue for a period equal to what Tenant would otherwise have enjoyed under the terms hereof, but minus any days of delay caused by the acts or omissions of Tenant, (b) the Term shall be extended by the time between the scheduled Rent Commencement Date and the date on which Landlord tenders possession of the Premises to Tenant, Landlord shall not be in default hereunder or be liable for damages therefor, and (c) Tenant shall accept possession of the Premises when Landlord tenders possession thereof to Tenant. If possession is not delivered within sixty (60) days after the Commencement Date, as the same may be extended under the terms of any Work Letter executed by Landlord and Tenant, Tenant may, at its option, by notice in writing within ten (10) days after the end of such sixty (60) day period, cancel this Lease, in which event the parties shall be discharged from all obligations hereunder. If such written notice is not received by Landlord within such ten (10) day period, Tenant's right to cancel shall terminate. If possession of the Premises is not delivered within one hundred twenty (120) days after the Commencement Date, this Lease shall terminate unless other agreements are reached between Landlord and Tenant, in writing.

2.3 **Tenant Compliance.** Landlord shall not be required to deliver possession of the Premises to Tenant until Tenant complies with its obligation to provide evidence of insurance (PART C, Section 7.5). Pending delivery of such evidence, Tenant shall be required to perform all of its obligations under this Lease from and after the Start Date, including the payment of Rent, notwithstanding Landlord's election to withhold possession pending receipt of such evidence of insurance. Further, if Tenant is required to perform any other conditions prior to or concurrent with the Start Date, the Start Date shall occur but Landlord may elect to withhold possession until such conditions are satisfied.

## SECTION 3. RENT.

3.1 **Rent Defined.** All monetary obligations of Tenant to Landlord under the terms of this Lease (except for the Security Deposit) are deemed to be rent ("**Rent**").

3.2 **Common Area Expenses.** Tenant shall pay to Landlord during the term hereof, in addition to the Base Rent, Tenant's Share (as specified in PART A, Section 8) of all Common Area Expenses, as hereinafter defined, during each calendar year of the term of this Lease, in accordance with the following provisions:

(a) "**Common Area Expenses**" are defined, for purposes of this Lease, as all costs incurred by Landlord relating to the ownership and operation of the Project, including, but not limited to, the following: (i) The operation, repair and maintenance, in neat, clean, good order and condition, and if necessary the replacement, of the following: (aa) The Common Areas and Common Area improvements, including but not limited to parking areas, loading and unloading areas, trash areas, roadways, parkways, walkways, driveways, landscaped areas, bumpers, irrigation systems, Common Area lighting facilities, fences and gates, elevators; (bb) Exterior signs and any tenant directories; (cc) Any fire sprinkler systems; (dd) All other areas and improvements that are within the exterior boundaries of the Project but outside of the Premises and/or any other space occupied by a tenant; (ii) The cost of repair and maintenance (but not replacement) of the roofs and roof drainage systems; (iii) The cost of water, gas, electricity and telephone to service the Common Areas and any utilities not separately metered; (iv) The cost of trash disposal, pest control services, property management, security services, owners' association dues and fees; (v) Reserves set aside for maintenance, repair and/or replacement of Common Area improvements and equipment; (vi) Real Property Taxes (as defined in PART C, Section 9); (vii) The cost of the premiums for the insurance maintained by Landlord pursuant to PART C, Section 7; (viii) Any deductible portion of an insured loss concerning the Building or the Common Areas; (ix) Auditors', accountants' and attorneys' fees and costs related to the operation, maintenance, repair and replacement of the Project; (x) The cost of any capital improvement to the Building or the Project (excluding those that are Landlord's sole responsibility under PART C, Section 6.2), provided; however, that Landlord shall amortize the cost of any such capital improvement over the useful life of the improvement as reasonably determined by Landlord; and (xi) The cost of any other services to be provided by Landlord that are stated elsewhere in this Lease to be a Common Area Operating Expense.

(b) The inclusion of the improvements, facilities and services set forth in Subsection 3.2(a) shall not be deemed to impose an obligation upon Landlord to either have such improvements or facilities or to provide those services unless the Project already has the same, Landlord already provides the services, or Landlord has agreed elsewhere in this Lease to provide the same or some of them.

(c) Tenant's Share of Common Area Expenses is payable monthly on the same day as the Base Rent is due hereunder. The amount of such payments shall be based on Landlord's estimate of the annual Common Area Expenses. Within ninety (90) days after the end of each calendar year Landlord shall deliver to Tenant a reasonably detailed statement showing Tenant's Share of the actual Common Area Expenses for the preceding year. If Tenant's payments during such year exceed Tenant's Share, Landlord shall credit the amount of such over-payment against Tenant's future payments. If Tenant's payments during such year were less than Tenant's Share, Tenant shall pay to Landlord the amount of the deficiency within ten (10) days after delivery by Landlord to Tenant of the statement. While Landlord will endeavor to provide such annual statement to Tenant within ninety (90) days after the end of each calendar year, Tenant's liability for any deficiency and Landlord's obligation to provide a credit for any excess shall not be affected by the issuance of such statement after such ninety (90) day period.

(d) Common Area Expenses shall not include any expenses paid by any tenant directly to third parties, or as to which Landlord is otherwise reimbursed by any third party, other tenant, or insurance proceeds.

3.3 **Payment.** Tenant shall cause payment of Rent to be received by Landlord in lawful money of the United States, without offset or deduction (except as specifically permitted in this Lease), on or before the day on which it is due. In the event that any invoice prepared by Landlord is inaccurate such inaccuracy shall not constitute a waiver and Tenant shall be obligated to pay the amount set forth in this Lease. Rent for any period during the term hereof which is for less than one full calendar month shall be prorated based on a 30-day month. Payment of Rent shall be made to Landlord at its address stated herein or to such other persons or place as Landlord may from time to time designate in writing. Acceptance of a payment which is less than the amount then due shall not be a waiver of Landlord's rights to the balance of such Rent, regardless of Landlord's endorsement of any check so stating. In the event that any check, draft, or other instrument of payment given by Tenant to Landlord is dishonored for any reason, Tenant agrees to pay to Landlord the sum of \$50 in addition to any Late Charge, as defined in PART C, Section 12.12, and Landlord, at its option, may require all future Rent be paid by cashier's check. Payments will be applied first to accrued late charges and attorney's fees, second to accrued interest, then to Base Rent and Common Area Expenses, and any remaining amount to any other outstanding charges or costs.

3.4 **Tax on Rent and Other Payments.** In addition to Base Rent, Tenant shall also pay to Landlord, as additional rent, with each payment of Rent, an amount equal to any state or county general excise or gross income tax assessed against Landlord and attributable to such payment, including the amount paid by Tenant to Landlord under this Section. Tenant shall pay any and all increases in such taxes. Tenant shall also

pay, as additional rent, any and all other taxes or duties levied or assessed by the federal government, the state, and the county in which the Premises are located, or any other political entity now or hereafter having power to levy taxes or duties which are attributable to any payments made by Tenant under the terms of this Lease. It is the intent of this Section and of the other provisions of this Lease to insure that the Rent (including additional rent) paid to Landlord by Tenant will be received by Landlord without diminution by any tax, assessment, charge or levy of any nature whatever, except United States and state net income taxes, and the terms and conditions of this Lease shall be liberally construed to effect such purpose.

**3.5 Conveyance Tax.** Any conveyance tax imposed by law due to this Lease and any amendment to this Lease shall be paid by Tenant.

**SECTION 4. SECURITY DEPOSIT.** Tenant shall deposit with Landlord upon execution hereof the Security Deposit as security for Tenant's faithful performance of its obligations under this Lease. The Security Deposit shall be increased from time to time, as necessary so that the amount is always at least equal to the amount as set forth in PART A, Section 10, and Tenant shall pay any increased amount to Landlord within five (5) days of demand therefor. If Tenant fails to pay Rent, or otherwise Defaults under this Lease, Landlord may use, apply or retain all or any portion of such Security Deposit for the payment of any amount already due Landlord, for Rents which will be due in the future, and/ or to reimburse or compensate Landlord for any liability, expense, loss or damage which Landlord may suffer or incur by reason thereof. If Landlord uses or applies all or any portion of the Security Deposit, Tenant shall within ten (10) days after written request therefor deposit monies with Landlord sufficient to restore such Security Deposit to the full amount required by this Lease. Landlord shall not be required to keep the Security Deposit separate from its general accounts. Within ninety (90) days after the expiration or termination of this Lease, Landlord shall return that portion of the Security Deposit not used or applied by Landlord. No part of the Security Deposit shall be considered to be held in trust, to bear interest or to be prepayment for any monies to be paid by Tenant under this Lease.

#### **SECTION 5. USE.**

**5.1 Use.** Tenant shall use and occupy the Premises only for the Permitted Use, and for no other purpose. Tenant shall not use or permit the use of the Premises in a manner that is unlawful, creates damage, waste or a nuisance, or that disturbs occupants of or causes damage to neighboring premises or properties. Other than guide, signal and seeing eye dogs, Tenant shall not keep or allow in the Premises any pets, animals, birds, fish, or reptiles. Tenant shall not conduct, nor permit to be conducted, any auction upon the Premises, without Landlord's prior written consent. Landlord shall not be obligated to exercise any standard of reasonableness in determining whether to permit an auction.

#### **5.2 Hazardous Materials.**

(a) **Reportable Uses Require Consent.** The term "Hazardous Materials" as used in this Lease shall mean any product, substance, or waste whose presence, use, manufacture, disposal, transportation, or release, either by itself or in combination with other materials expected to be on the Premises, is either: (i) potentially injurious to the public health, safety or welfare, the environment or the Premises, (ii) regulated or monitored by any governmental authority, or (iii) a basis for potential liability of Landlord to any other governmental agency or third party under any applicable statute or common law theory. Hazardous Materials shall include, but not be limited to, hydrocarbons, petroleum, gasoline, and/or crude oil or any products, by-products or fractions thereof. Tenant shall not engage in any activity in or on the Premises which constitutes a Reportable Use of Hazardous Materials without the express prior written consent of Landlord and timely compliance (at Tenant's expense) with all Laws. "Reportable Use" shall mean (i) the installation or use of any above or below ground storage tank, (ii) the generation, possession, storage, use, transportation, or disposal of Hazardous Materials that requires a permit from, or with respect to which a report, notice, registration or business plan is required to be filed with, any governmental authority, and/or (iii) the presence at the Premises of Hazardous Materials with respect to which any Laws requires that a notice be given to persons entering or occupying the Premises or neighboring properties. Notwithstanding the foregoing, Tenant may use any ordinary and customary materials reasonably required to be used in the normal course of the Permitted Use, ordinary office supplies (copier toner, liquid paper, glue, etc.) and common household cleaning materials, so long as such use is in compliance with all Laws, is not a Reportable Use, and does not expose the Premises or neighboring property to any meaningful risk of contamination or damage or expose Landlord to any liability therefor. In addition, Landlord may condition its consent to any Reportable Use upon receiving such additional assurances as Landlord reasonably deems necessary to protect itself, the public, the Premises and/or the environment against damage, contamination, injury and/or liability, including, but not limited to, the installation (and removal on or before Lease expiration or termination) of protective modifications (such as concrete encasements) and/or increasing the Security Deposit.

(b) **Compliance with Laws.** Tenant, at its sole cost and expense, shall comply with all federal, state and local laws, ordinances and regulations and all rules, licenses, permits, orders, decrees and judgments relating to the environment and/or Hazardous Materials (collectively referred to as "Hazardous Materials Laws") conducted on the Premises. Tenant's default of any of its covenants or obligations under this Section shall constitute a material Event of Default under the Lease. The obligations of Tenant under this Section 5 shall survive the expiration or earlier termination of the Lease without any limitation, and shall constitute obligations that are independent and severable from Tenant's covenants and obligations to pay rent under the Lease.

(c) **Duty to Inform Landlord.** If Tenant knows, or has reasonable cause to believe, that Hazardous Materials has come to be located in, on, under or about the Premises, other than as previously consented to by Landlord, Tenant shall immediately give written notice of such fact to Landlord, and provide Landlord with a copy of any report, notice, claim or other documentation which it has concerning the presence of such Hazardous Materials.

(d) **Tenant Remediation.** Tenant shall not cause or permit any Hazardous Materials to be spilled or released in, on, under, or about the Premises (including through the plumbing or sanitary sewer system) and shall promptly, at Tenant's expense, comply with all Laws and take all investigatory and/or remedial action reasonably recommended, whether or not formally ordered or required, for the cleanup of any contamination of, and for the maintenance, security and/or monitoring of the Premises or neighboring properties, that was caused or materially contributed to by Tenant, or pertaining to or involving any Hazardous Materials brought onto the Premises during the term of this Lease, by or for Tenant, or any third party. Tenant shall pay for any investigations or remediation measures required by governmental entities having jurisdiction with respect to the existence of Hazardous Materials as a result of Tenant's use (including "Alterations", as defined in PART C, Section 7.3(a) below) of the Premises.

(e) **Tenant Indemnification.** Tenant shall indemnify, defend and hold Landlord, its agents, employees, lenders and ground lessor, if any, harmless from and against any and all loss of rents and/or damages, liabilities, judgments, claims, expenses, penalties, and attorneys' and consultants' fees arising out of or involving any Hazardous Materials brought onto the Premises by or for Tenant, or any third party (provided, however, that Tenant shall have no liability under this Lease with respect to underground migration of any Hazardous Materials under the Premises from areas outside of the Project not caused or contributed to by Tenant). Tenant's obligations shall include, but not be limited to, the effects of any contamination or injury to person, property, or the environment created or suffered by Tenant, and the cost of investigation, removal, remediation, restoration and/or abatement, and shall survive the expiration or termination of this Lease. No termination, cancellation or release agreement entered into by Landlord and Tenant shall release Tenant from its obligations under this Lease with respect to Hazardous Materials, unless specifically so agreed by Landlord in writing at the time of such agreement.

(f) **Landlord's Remediation.** Except as otherwise provided in PART C, Section 7.7, Landlord shall remediate all Hazardous Materials on the Premises prior to Tenant taking possession to the extent required by Laws and subject to Landlord's termination option in PART C, Section 5.2(g). Landlord's obligations, as and when required by the Laws, shall include, but not be limited to, the cost of investigation, removal, remediation, and restoration. Tenant shall cooperate fully in any such activities at the request of Landlord, including allowing Landlord and Landlord's agents to have reasonable access to the Premises at reasonable times in order to carry out Landlord's investigative and remedial responsibilities.

(g) **Termination Option.** If a Hazardous Materials Condition (see PART C, Section 8.1(e)) occurs during the term of this Lease, unless Tenant is legally responsible therefor (in which case Tenant shall make the investigation and remediation thereof required by the Laws and this Lease shall continue in full force and effect, but subject to Landlord's rights under PART C, Section 5.2(e) and PART C, Section 12), Landlord may, at Landlord's option, either (i) investigate and remediate such Hazardous Materials Condition, if required, as soon as reasonably possible at Landlord's expense, in which event this Lease shall continue in full force and effect, or (ii) if the estimated cost to remediate such condition exceeds twelve (12) times the then monthly Base Rent or \$50,000, whichever is greater, give written notice to Tenant, within thirty (30) days after receipt by Landlord of knowledge of the occurrence of such Hazardous Materials Condition, of Landlord's desire to terminate this Lease as of the date sixty (60) days following the date of such notice. If Landlord does not exercise option (i) within sixty (60) days of Landlord receiving notice from Tenant of the Hazardous Materials Condition, and Tenant did not cause the Hazardous Materials Condition, and is not legally responsible for such condition, the Tenant may terminate this Lease after giving Landlord thirty (30) days' notice. In the event Landlord elects to give a termination notice, Tenant may, within ten (10) days thereafter, give written notice to Landlord of Tenant's commitment to pay the amount by which the cost of the remediation of such Hazardous Materials Condition exceeds an amount equal to twelve (12) times the then monthly Base Rent or \$50,000, whichever is greater. Tenant shall provide Landlord with such funds or satisfactory assurance thereof within thirty (30) days following such commitment. In such event, this Lease shall continue in full force and effect, and Landlord shall proceed to make such remediation as soon as reasonably possible after the required funds are available. If Tenant does not give such notice and provide the required funds or assurance thereof within the time provided, this Lease shall terminate as of the date specified in Landlord's notice of termination.

**5.3 Tenant's Compliance with Laws.** Except as otherwise provided in this Lease, Tenant shall, at Tenant's sole expense, fully, diligently and in a timely manner, materially comply with all Laws, the requirements of any applicable insurance underwriter, and the recommendations of Landlord's engineers and/or consultants that relate in any manner to the such Requirements, without regard to whether such Requirements are now in effect or become effective after the Start Date. Tenant shall, within ten (10) days after receipt of Landlord's written request, provide Landlord with copies of all permits and other documents, and other information evidencing Tenant's compliance with any Laws specified by Landlord, and shall immediately upon receipt, notify Landlord in writing (with copies of any documents involved) of any threatened or actual claim, notice, citation, warning, complaint or report pertaining to or involving the failure of Tenant or the Premises to comply with any Laws. Likewise, Tenant shall immediately give written notice to Landlord of: (i) any water damage to the Premises and any suspected seepage, pooling, dampness or other condition conducive to the production of mold; or (ii) any mustiness or other odors that might indicate the presence of mold in the Premises.

**5.4 Inspection; Compliance.** Landlord and Landlord's "Lender" (as defined in PART C, Section 38) and consultants shall have the right to enter onto Premises at any time, in the case of an emergency, and otherwise at reasonable times after reasonable notice, for the purpose of inspecting the condition of the Premises and for verifying compliance by Tenant with this Lease. The cost of any such inspections shall be paid by Landlord, unless a violation of Laws, or a Hazardous Materials Condition (see PART C, Section 8.1) is found to exist or be imminent, or the inspection is requested or ordered by a governmental authority. In such case, Tenant shall upon request reimburse Landlord for the cost of such inspection, so long as such inspection is reasonably related to the violation or contamination. In addition, Tenant shall provide copies of all relevant material safety datasheets (MSDS) to Landlord within ten (10) days of the receipt of a written request therefor.

## **SECTION 6. MAINTENANCE; REPAIRS; UTILITY INSTALLATIONS; TRADE FIXTURES AND ALTERATIONS.**

### **6.1 Tenant's Obligations.**

(a) **In General.** Subject to the provisions of PART C, Section 1.2 (Condition), Section 5.3 (Tenant's Compliance with Laws), Section 6.2 (Landlord's Obligations), Section 8 (Damage or Destruction), and Section 13 (Eminent Domain), Tenant shall, at Tenant's sole expense, keep the Premises, Utility Installations (intended for Tenant's exclusive use, no matter where located), and Alterations in good order, condition and repair (whether or not the portion of the Premises requiring repairs, or the means of repairing the same, are reasonably or readily accessible to Tenant, and whether or not the need for such repairs occurs as a result of Tenant's use, any prior use, the elements or the age of such portion of the Premises), including, but not limited to, all equipment or facilities, such as plumbing, HVAC equipment, electrical, lighting facilities, boilers, pressure vessels, fixtures, interior walls, interior surfaces of exterior walls, ceilings, floors, windows, doors, plate glass and skylights, but excluding any items which are the responsibility of Landlord pursuant to PART C, Section 6.2. Tenant, in keeping the Premises in good order, condition and repair, shall exercise and perform good maintenance practices. Tenant's obligations shall include restorations, replacements or renewals when necessary to keep the Premises and all improvements thereon or a part thereof in good order, condition and state of repair. Tenant shall, at Tenant's sole expense, maintain the HVAC equipment, boiler and pressure vessels, and clarifiers, if any, within the Premises.

(b) **Failure to Perform.** If Tenant fails to perform Tenant's obligations under this PART C, Section 6.1, Landlord may enter upon the Premises after ten (10) days' prior written notice to Tenant (except in the case of an emergency, in which case no notice shall be required), perform such obligations on Tenant's behalf, and put the Premises in good order, condition and repair, and Tenant shall promptly pay to Landlord a sum equal to one hundred fifteen percent (115%) of the cost thereof.

(c) **Replacement.** Subject to Tenant's indemnification of Landlord as set forth in PART C, Section 7.7 below, and without relieving Tenant of liability resulting from Tenant's failure to exercise and perform good maintenance practices, if the HVAC equipment (used in common with other Tenants or serving common areas), if any, cannot be repaired other than at a cost which is in excess of fifty percent (50%) of the cost of replacing such item, then such item shall be replaced by Landlord, and the cost thereof shall be amortized over its useful life as Landlord shall determine in its sole discretion and such cost shall be included in the calculation of Common Area Operating Expense. Any air conditioning unit that is used exclusively by Tenant shall be maintained, repaired and replaced as needed at Tenant's sole cost and expense.

(d) **Americans with Disabilities Act.** Since compliance with the Americans with Disabilities Act (ADA) is dependent upon Tenant's specific use of the Premises, Landlord makes no warranty or representation as to whether or not the Premises comply with ADA or any similar legislation. In the event that Tenant's use of the Premises requires modifications or additions to the Premises in order to be in ADA compliance, Tenant agrees to make any and all such necessary modifications and/or additions at Tenant's expense.

**6.2 Landlord's Obligations.** Subject to the provisions of PART C, Section 1.2 (Condition), Section 8 (Damage or Destruction) and Section 13 (Eminent Domain), it is intended by the parties hereto that Landlord have no obligation, in any manner whatsoever, to repair and maintain the Premises. Landlord shall repair and maintain the structural portion of the Building and foundation, and shall replace the roof, at Landlord's sole cost and expense and such costs shall not be a Common Area Expense. Landlord shall repair and maintain the roof and such repair and maintenance costs shall be a Common Area Expense. It is the intention of the parties that the terms of this Lease govern the respective obligations of the parties as to

maintenance and repair of the Premises, and they expressly waive the benefit of any statute now or hereafter in effect to the extent it is inconsistent with the terms of this Lease.

### 6.3 Utility Installations; Trade Fixtures; Alterations.

(a) **Definitions.** The term "Utility Installations" refers to all floor and window coverings, air and/or vacuum lines, power panels, electrical distribution, security and fire protection systems, communication cabling, lighting fixtures, HVAC equipment, plumbing, and fencing in or on the Premises. The term "Trade Fixtures" shall mean Tenant's machinery and equipment that can be removed without doing material damage to the Premises. The term "Alterations" shall mean any modification of the improvements, other than Utility Installations or Trade Fixtures, whether by addition or deletion. "Tenant Owned Alterations and/or Utility Installations" are defined as Alterations and/or Utility Installations made by Tenant that are not yet owned by Landlord pursuant to PART C, Section 6.4(a).

(b) **Consent.** Tenant shall not make any Alterations or Utility Installations to the Premises without Landlord's prior written consent. Tenant may, however, make Alterations to the interior of the Premises (excluding the roof) without such consent but upon notice to Landlord, as long as such Alterations do not require a building permit and cost less than two (2) months' Base Rent. Landlord may, as a precondition to granting such approval, require Tenant to utilize a contractor chosen and/or approved by Landlord. Any Alterations or Utility Installations that Tenant shall desire to make and which require the consent of the Landlord shall be presented to Landlord in written form with detailed plans. Consent shall be deemed conditioned upon Tenant's: (i) acquiring all applicable governmental permits, (ii) furnishing Landlord with copies of both the permits and the plans and specifications prior to commencement of the work, and (iii) compliance with all conditions of such permits and other Laws in a prompt and expeditious manner. Any Alterations or Utility Installations shall be performed in a workmanlike manner with good and sufficient materials. Tenant shall promptly upon completion furnish Landlord with as-built plans and specifications. For work which costs an amount in excess of two (2) month's Base Rent, Landlord may condition its consent upon Tenant providing a lien and completion bond in an amount equal to one hundred fifty percent (150%) of the estimated cost of such Alteration or Utility Installation and/or upon Tenant's posting an additional Security Deposit with Landlord.

(c) **Liens; Bonds.** Tenant shall pay, when due, all claims for labor or materials furnished or alleged to have been furnished to or for Tenant at or for use on the Premises, which claims are or may be secured by any mechanic's or materialmen's lien against the Premises or any interest therein. Tenant shall give Landlord not less than ten (10) days' notice prior to the commencement of any work in, on or about the Premises, and Landlord shall have the right to post notices of non-responsibility. If Tenant shall contest the validity of any such lien, claim or demand, then Tenant shall, at its sole expense defend and protect itself, Landlord and the Premises against the same and shall pay and satisfy any such adverse judgment that may be rendered thereon before the enforcement thereof. If Landlord shall require, Tenant shall furnish a surety bond in an amount equal to one hundred fifty percent (150%) of the amount of such contested lien, claim or demand, indemnifying Landlord against liability for the same. If Landlord elects to participate in any such action, Tenant shall pay Landlord's attorneys' fees costs.

### 6.4 Ownership; Removal; Surrender; and Restoration.

(a) **Ownership.** Subject to Landlord's right to require removal or elect ownership as hereinafter provided, all Alterations and Utility Installations made by Tenant shall be the property of Tenant, but considered a part of the Premises. Landlord may, at any time, elect in writing to be the owner of all or any specified part of the Tenant Owned Alterations and Utility Installations. Unless otherwise instructed per PART C, Section 6.4(b) hereof, all Tenant Owned Alterations and Utility Installations shall, at the expiration or termination of this Lease, become the property of Landlord and be surrendered by Tenant with the Premises.

(b) **Removal.** By delivery to Tenant of written notice from Landlord not earlier than ninety (90) and not later than thirty (30) days prior to the end of the term of this Lease, Landlord may require that any or all Tenant Owned Alterations or Utility Installations be removed by the expiration or termination of this Lease. Landlord may require the removal at any time of all or any part of any Tenant Owned Alterations or Utility Installations made without the required consent.

(c) **Surrender; Restoration.** Tenant shall surrender the Premises by the Expiration Date or any earlier termination date, with all of the improvements, parts and surfaces thereof broom clean and free of debris, and in good operating order, condition and state of repair, ordinary wear and tear excepted. "Ordinary wear and tear" shall not include any damage or deterioration that would have been prevented by good maintenance practice. Tenant shall repair any damage occasioned by the installation, maintenance or removal of Trade Fixtures, Tenant owned Alterations and/or Utility Installations, furnishings, and equipment as well as the removal of any storage tank installed by or for Tenant. Tenant shall completely remove from the Premises any and all Hazardous Materials brought onto the Premises by or for Tenant, or any third party (except Hazardous Materials which were deposited via underground migration from areas outside of the Premises) even if such removal would require Tenant to perform or pay for work that exceeds statutory requirements. Trade Fixtures shall remain the property of Tenant and shall be removed by Tenant. Any personal property of Tenant not removed on or before the Expiration Date or any earlier termination date shall be deemed to have been abandoned by Tenant and may be disposed of or retained by Landlord as Landlord may desire. The failure by Tenant to timely vacate the Premises pursuant to this PART C, Section 6.4(c) without the express written consent of Landlord shall constitute a holdover under the provisions of Section 36 below.

6.5 **Restrictions on Signs.** Tenant shall not place on the exterior of the Premises, or any part of the interior that is visible from the exterior of the Premises, any sign or other advertising media, without the prior written consent of Landlord. Tenant shall provide its proposed sign plans to Landlord within five (5) days of the date of this Lease. All approved signs and advertising media must comply with all Laws. Landlord makes no representation that Tenant will be permitted to install its signage at the Premises. Landlord's approval shall not be deemed to be a representation that such signage complies with all Laws or that Tenant will be able to obtain all necessary permits for such signage. Tenant shall, at its sole cost and expense, install and maintain all signs, decorations, letterings, and advertising materials in good condition and repair at all times during the Term. Tenant shall not apply for any signage variance without the prior written consent of Landlord, which consent may be withheld in Landlord's sole discretion.

6.6 **Installation and Removal of Signs.** Tenant shall have all signs erected and/or installed and fully operative, subject to Landlord's prior approval thereof, all at Tenant's risk and expense. Upon Tenant's vacating the Premises, or the removal or alteration of its sign for any reason, Tenant shall be responsible for the repair, painting, and/or replacement of the building fascia surface where signs are attached. After the end of the Term or after Tenant's right to possess the Premises has been terminated, Landlord (a) may require that Tenant remove Tenant's signs by delivering to Tenant written notice thereof or (b) may use Tenant's signs, in which case such signs shall become the property of Landlord without compensation to Tenant. If Tenant fails to timely remove its signs after Landlord's written request therefor, Landlord may, at Tenant's expense, remove such signs, perform the related restoration and repair work as described herein and dispose of such signs in any manner Landlord deems appropriate. Tenant shall defend, indemnify and hold harmless Landlord and Landlord's partners, agents, employees, officers and/or directors from all losses, claims, costs and liabilities arising in connection with or related to the construction, installation, maintenance, use or removal of Tenant's signs. The rights granted to Tenant under this Section 6.6 may not be assigned to any party.

6.7 **Landlord's Signs.** Landlord may place on the Premises ordinary "For Sale" signs at any time and ordinary "For Lease" signs during the last six (6) months of the term hereof.

## **SECTION 7. INSURANCE; INDEMNITY.**

7.1 **Payment of Premium.** The cost of the premiums for the insurance policies carried by Landlord, pursuant to PART C, Sections 7.2(b), 7.3(a) and 7.3(b), shall be a Common Area Expense.

### **7.2 Liability Insurance.**

(a) **Carried by Tenant.** Tenant shall obtain and keep in force a Commercial General Liability policy of insurance protecting Tenant and Landlord as an additional insured against claims for bodily injury, personal injury and property damage based upon or arising out of the ownership, use, occupancy or maintenance of the Premises and all areas appurtenant thereto and for liabilities assumed under this Lease. Such insurance shall be on an occurrence basis providing single limit coverage in an amount not less than \$1,000,000 per occurrence with an annual aggregate of not less than \$2,000,000. The limits of Tenant's insurance shall not, however, limit the liability of Tenant nor relieve Tenant of any obligation hereunder. Tenant shall provide an endorsement on its liability policy(ies) which provides that its insurance shall be primary to and not contributory with any similar insurance carried by Landlord, whose insurance shall be considered excess insurance only. Tenant shall name Landlord and Landlord's managing agent and any mortgagee or other designee of Landlord (whose names shall have been furnished to Tenant) as additional insureds but only with respect to claims against them arising out of the acts or omissions of Tenant or Tenant's use or occupancy of the Premises, Project or Common Areas.

(b) **Carried by Landlord.** Landlord may maintain liability insurance as described in PART C, Section 7.2(a), in addition to, and not in lieu of, the insurance required to be maintained by Tenant. Tenant shall not be named as an additional insured therein. All insurance maintained by Landlord shall be a Common Area Expense.

### **7.3 Property Insurance - Building, Improvements and Rental Value.**

(a) **Building and Improvements.** Landlord may obtain and keep in force a policy or policies of insurance in the name of Landlord, with loss payable to Landlord, any ground-lessor, and to any Lender insuring loss or damage to the Premises. The amount of such insurance may be equal to the full insurable replacement cost of the Premises, as the same shall exist from time to time, or the amount required by any Lender, but in no event more than the commercially reasonable and available insurable value thereof. Tenant Owned Alterations and Utility Installations, Trade Fixtures, and Tenant's personal property shall be insured by Tenant not by Landlord. If the coverage is available and commercially appropriate, such policy or policies may insure against all risks of direct physical loss or damage (except the perils of flood and/or earthquake unless required by a Lender), including coverage for hurricane, debris removal and the enforcement of any Laws requiring the upgrading, demolition, reconstruction or replacement of any portion of the Premises as the result of a covered loss. Such policy or policies may also contain an agreed valuation provision in lieu of any coinsurance clause, waiver of subrogation, and inflation guard protection causing an increase in the annual property insurance coverage amount by a factor of not less than the adjusted U.S. Department of Labor Consumer Price Index for All Urban Consumers for the city nearest to whether the Premises are located. All insurance maintained by Landlord shall be a Common Area Operating Expense.

(b) **Rental Value.** Landlord may also obtain and keep in force a policy or policies in the name of Landlord with loss payable to Landlord and any Lender, insuring the loss of the full Rent for one year with an extended period of indemnity for an additional one hundred eighty (180) days ("**Rental Value Insurance**"). Such insurance shall contain an agreed valuation provision in lieu of any coinsurance clause, and the amount of coverage shall be adjusted annually to reflect the projected Rent otherwise payable by Tenant, for the next twelve (12) month period.

(c) **Increase in Premiums.** Tenant shall pay for any increase in the premiums for the property insurance of the Building and for the Common Areas or other buildings in the Project if such increase is caused by Tenant's acts, omissions, use or occupancy of the Premises.

(d) **Tenant's Improvements.** Landlord shall not be required to insure Tenant Owned Alterations and Utility Installations unless the item in question has become the property of Landlord under the terms of this Lease.

### **7.4 Tenant's Property; Plate Glass Insurance; Worker's Compensation Insurance.**

(a) **Property Damage.** Tenant shall obtain and maintain insurance coverage on all of Tenant's personal property, Trade Fixtures, and Tenant Owned Alterations and Utility Installations. Such insurance shall be full replacement cost coverage with a deductible of not to exceed \$1,000 per occurrence. The proceeds from any such insurance shall be used by Tenant for the replacement of personal property, Trade Fixtures and Tenant Owned Alterations.

(b) **Plate Glass Insurance.** Tenant shall obtain and maintain adequate plate glass insurance.

(c) **Worker's Compensation Insurance.** Tenant shall obtain and maintain Worker's Compensation Insurance in such amount as may be required by Laws. Such policy shall include a 'Waiver of Subrogation' endorsement. Tenant shall provide Landlord with a copy of such endorsement along with the certificate of insurance or copy of the policy required by PART C, Section 7.5.

(d) **No Representation of Adequate Coverage.** Landlord makes no representation that the limits or forms of coverage of insurance specified herein are adequate to cover Tenant's property, business operations or obligations under this Lease.

7.5 **Insurance Policies.** Insurance required herein shall be by companies maintaining during the policy term a "General Policyholders Rating" of at least A-, VII, as set forth in the most current issue of "Best's Insurance Guide", or such other rating as may be required by a Lender. Tenant shall not do or permit to be done anything which invalidates the required insurance policies. Tenant shall, prior to the Start Date, deliver to Landlord copies of policies of such insurance or certificates with copies of the required endorsements evidencing the existence and amounts of the required insurance. Tenant shall, at least ten (10) days prior to the expiration of such policies, furnish Landlord with evidence of renewals or "insurance binders" evidencing renewal thereof, or Landlord may order such insurance and charge the cost thereof to Tenant, which amount shall be payable by Tenant to Landlord upon demand. Such policies shall be for a term of at least one year, or the length of the remaining term of this Lease, whichever is less.

7.6 **Waiver of Subrogation.** Without affecting any other rights or remedies, Tenant and Landlord each hereby release and relieve the other, and waive their entire right to recover damages against the other, for loss of or damage to its property arising out of or incident to the perils required to be insured against or actually insured against herein. The effect of such releases and waivers is not limited by the amount of insurance carried or required, or by any deductibles applicable hereto. The parties agree to have their respective property damage insurance carriers waive any right to subrogation that such companies may have against Landlord or Tenant, as the case may be, so long as the insurance is not invalidated thereby.

7.7 **Indemnity.** Tenant shall indemnify, protect, defend and hold harmless, Landlord and its agents, Landlord's master or ground lessor, partners and Lenders, from and against any and all claims, loss of rents and/or damages, liens, judgments, penalties, attorneys' and consultants' fees, expenses and/or liabilities arising out of, involving, or in connection with, the use and/or occupancy of the Premises by Tenant. If any action or proceeding is brought against Landlord by reason of any of the foregoing matters, Tenant shall upon notice defend the same at Tenant's expense by counsel reasonably satisfactory to Landlord and Tenant shall cooperate with Tenant in such defense. Landlord need not have first paid any such claim in order to be defended or indemnified.

7.8 **Exemption of Landlord and its Agents from Liability.** Notwithstanding the negligence or default of this Lease by Landlord or its agents, neither Landlord nor its agents shall be liable under any circumstances for: (a) injury or damage to the person or goods, wares, merchandise or other property of Tenant, Tenant's employees, contractors, invitees, customers, or any other person in or about the Premises, whether such damage or injury is caused by or results from fire, steam, electricity, gas, water or rain, indoor air quality, the presence of mold or from the breakage, leakage, obstruction or other defects of pipes, fire sprinklers, wires, appliances, plumbing, HVAC or lighting fixtures, or from any other cause, whether the such injury or damage results from conditions arising upon the Premises or upon other portions of the Building, or from other sources or places, (b) any damages arising from any act or neglect of any other tenant of Landlord or from the failure of Landlord or its agents to enforce the provisions of any other lease in the Project, or (c) injury to Tenant's business or for any loss of income or profit therefrom. Instead, it is intended that Tenant's sole recourse in the event of such damages or injury be to file a claim on the insurance policy(ies) that Tenant is required to maintain pursuant to the provisions of PART C, Section 7.

## SECTION 8. DAMAGE OR DESTRUCTION.

### 8.1 Definitions.

(a) **"Premises Partial Damage"** shall mean damage or destruction to the Premises or improvements on the Premises, other than Tenant Owned Alterations and Utility Installations and Trade Fixtures, which can reasonably be repaired in twelve (12) months or less from the date of the damage or destruction as to whether or not the damage is partial or total. If Landlord is unable to repair and tender possession of the Premises to Tenant within twelve (12) months from the date of damage then Tenant shall have the right to terminate the Lease with thirty (30) days' written notice to Landlord. Notwithstanding the foregoing, Premises Partial Damage shall not include damage to windows, doors, and/or other similar items which Tenant has the responsibility to repair or replace pursuant to the provisions of PART C, Section 6.1.

(b) **"Premises Total Destruction"** shall mean damage or destruction to the Premises or improvements on the Premises, other than Tenant Owned Alterations and Utility Installations and Trade Fixtures, which cannot reasonably be repaired in twelve (12) months or less from the date of the damage or destruction and/or the cost thereof exceeds a sum equal to six (6) month's Base Rent. Landlord shall notify Tenant in writing within thirty (30) days from the date of the damage or destruction as to whether or not the damage is partial or total. If Landlord is unable to repair the Premises and to tender possession of the Premises to Tenant within twelve (12) months from the date of damage then Tenant shall have the right to terminate the Lease with thirty (30) days' written notice to Landlord.

(c) **"Insured Loss"** shall mean damage or destruction to improvements on the Premises, other than Tenant Owned Alterations and Utility Installations and Trade Fixtures, which was caused by an event required to be covered or actually covered by the insurance described in PART C, Section 7.3(a), irrespective of any deductible amounts or coverage limits involved.

(d) **"Replacement Cost"** shall mean the cost to repair or rebuild the improvements owned by Landlord at the time of the occurrence to their condition existing immediately prior thereto, including demolition, debris removal and upgrading required by the operation of Laws, and without deduction for depreciation.

(e) **"Hazardous Materials Condition"** shall mean the occurrence or discovery of a condition involving the presence of, or a contamination by, Hazardous Materials, in, on, or under the Premises which requires restoration.

8.2 **Partial Damage - Insured Loss.** If a Premises Partial Damage that is an Insured Loss occurs, then Landlord shall, at Landlord's expense, repair such damage (but not Tenant's Trade Fixtures or Tenant Owned Alterations and Utility Installations) as soon as reasonably possible and this Lease shall continue in full force and effect; provided, however, that Tenant shall, at Landlord's election, make the repair of any damage or destruction the total cost to repair of which is \$10,000 or less, and, in such event Landlord shall make any applicable insurance proceeds, if any, available to Tenant on a reasonable basis for that purpose. Notwithstanding the foregoing, if insurance was not in force or the insurance proceeds are not sufficient to effect such repair, Landlord may, but shall not be obligated to, contribute the shortage in proceeds as and when required to complete said repairs. Landlord shall have no obligation to pay for the shortage in insurance proceeds or to fully restore the unique aspects of the Premises unless Tenant provides Landlord with the funds to cover same, or adequate assurance thereof, within ten (10) days following receipt of written notice of such shortage and request therefor. If Landlord receives said funds or adequate assurance thereof within said ten (10) day period, the party responsible for making the repairs shall complete them as soon as reasonably possible and this Lease shall remain in full force and effect. If such funds or assurance are not received, Landlord may nevertheless elect by written notice to Tenant within ten (10) days thereafter to: (a) make such restoration and repair as is commercially reasonable with Landlord paying any shortage in proceeds, in which case this Lease shall remain in full force and effect, or (b) have this Lease terminate thirty (30) days thereafter, Tenant shall not be entitled to reimbursement of any funds contributed by Tenant to repair any such damage or destruction. Premises Partial Damage due to flood or earthquake shall be subject to Section 8.3, notwithstanding that there may be some insurance coverage, but the net proceeds of any such insurance shall be made available for the repairs if made by either party.

8.3 **Partial Damage - Uninsured Loss.** If a Premises Partial Damage that is not an Insured Loss occurs, unless caused by the gross negligence or willful misconduct of Tenant (in which event Tenant shall make the repairs at Tenant's expense), Landlord may either: (a) repair such damage as soon as reasonably possible at Landlord's expense, in which event this Lease shall continue in full force and effect, or (b) terminate this Lease by giving written notice to Tenant within thirty (30) days after receipt by Landlord of knowledge of the occurrence of such damage. Such termination shall be effective sixty (60) days following the date of such notice. In the event Landlord elects to terminate this Lease, Tenant shall have the right within ten (10) days after receipt of the termination notice to give written notice to Landlord of Tenant's commitment to pay for the repair of such damage without reimbursement from Landlord. Tenant shall provide Landlord with such funds or satisfactory assurance thereof within thirty (30) days after making such commitment. In such event this Lease shall continue in full force and effect, and Landlord shall proceed to make such repairs as soon as reasonably possible after the required funds are available. If Tenant does not make the required commitment, this Lease shall terminate as of the date specified in the termination notice.

8.4 **Total Destruction.** Notwithstanding any other provision hereof, if a Premises Total Destruction occurs, this Lease shall terminate sixty (60) days following such Destruction. If the damage or destruction was caused by the gross negligence or willful misconduct of Tenant, Landlord shall have the right to recover Landlord's damages from Tenant, except as provided in PART C, Section 7.6.



**8.5 Damage Near End of Term.** If at any time during the last six (6) months of this Lease there is damage for which the cost to repair exceeds one month's Base Rent, whether or not an Insured Loss, Landlord may terminate this Lease effective sixty (60) days following the date of occurrence of such damage by giving a written termination notice to Tenant within thirty (30) days after the date of occurrence of such damage. Notwithstanding the foregoing, if Tenant at that time has an exercisable option to extend this Lease or to purchase the Premises, then Tenant may preserve this Lease by, (a) exercising such option and (b) providing Landlord with any shortage in insurance proceeds (or adequate assurance thereof) needed to make the repairs on or before the earlier of (i) the date which is ten (10) days after Tenant's receipt of Landlord's written notice purporting to terminate this Lease, or (ii) the day prior to the date upon which such option expires. If Tenant duly exercises such option during such period and provides Landlord with funds (or adequate assurance thereof) to cover any shortage in insurance proceeds, Landlord shall, at Landlord's commercially reasonable expense, repair such damage as soon as reasonably possible and this Lease shall continue in full force and effect. If Tenant fails to exercise such option and provide such funds or assurance during such period, then this Lease shall terminate on the date specified in the termination notice and Tenant's option shall be extinguished.

**8.6 Abatement of Rent; Tenant's Remedies.**

(a) **Abatement.** In the event of Premises Partial Damage or Premises Total Destruction or a Hazardous Materials Condition for which Tenant is not responsible under this Lease, the Rent payable by Tenant for the period required for the repair, remediation or restoration of such damage shall be abated in proportion to the degree to which Tenant's use of the Premises is impaired. All other obligations of Tenant hereunder shall be performed by Tenant, and Landlord shall have no liability for any such damage, destruction, remediation, repair or restoration except as provided herein.

(b) **Remedies.** If Landlord is obligated to repair or restore the Premises and does not commence, in a substantial and meaningful way, such repair or restoration within ninety (90) days after such obligation shall accrue, Tenant may, at any time prior to the commencement of such repair or restoration, give written notice to Landlord and to any Lenders of which Tenant has actual notice, of Tenant's election to terminate this Lease on a date not less than sixty (60) days following the giving of such notice. If Tenant gives such notice and such repair or restoration is not commenced within thirty (30) days thereafter, this Lease shall terminate as of the date specified in such notice. If the repair or restoration is commenced within such thirty (30) days, this Lease shall continue in full force and effect. "**Commence**" shall mean either the unconditional authorization of the preparation of the required plans, or the beginning of the actual work on the Premises, whichever first occurs.

**8.7 Termination; Advance Payments.** Upon termination of this Lease pursuant to PART C, Section 5.2(g) or PART C, Section 8, an equitable adjustment shall be made concerning advance Base Rent and any other advance payments made by Tenant to Landlord. Landlord shall, in addition, return to Tenant so much of Tenant's Security Deposit as has not been, or is not then required to be, used by Landlord.

**SECTION 9. REAL PROPERTY TAXES.**

**9.1 Definition.** As used herein, the term "**Real Property Taxes**" shall include (a) all real property taxes and other assessments and governmental charges of any kind and nature whatsoever levied or assessed against the Project, (b) any other charges, taxes and/or impositions now in existence or hereafter imposed by any governmental authority based upon the privilege of renting the Premises in the Project including, but not limited to, assessments for special improvement districts and building improvement districts, (c) taxes and assessments levied in substitution or supplementation in whole or in part of any such taxes and assessments, (d) the Project's share of any real property taxes and assessments under any reciprocal easement agreement, common area agreement or similar agreement as to the Project and the amount of Rent collected therefor, (e) any tax, fee, levy, assessment or charge which is imposed as the result of a transfer, either partial or total, of Landlord's interest in the Project or which is added to a tax or charge hereinbefore included within the definition of real property tax by reason of such transfer, and (f) any special taxing district assessment which is imposed in order to fund public facilities for the area in which the Project is located.

**9.2 Payment of Taxes.** Except as otherwise provided in PART C, Section 9.3, Landlord shall pay the Real Property Taxes applicable to the Project, and such payments shall be included in the calculation of Common Area Expenses in accordance with the provisions of PART C, Section 3.2.

**9.3 Personal Property.** Tenant shall pay prior to delinquency all taxes assessed against and levied upon Tenant Owned Alterations and Utility Installations, Trade Fixtures, furnishings, equipment and all personal property of Tenant contained in the Premises. When possible, Tenant shall cause its Tenant Owned Alterations and Utility Installations, Trade Fixtures, furnishings, equipment and all other personal property to be assessed and billed separately from the real property of Landlord. If any of Tenant's such property shall be assessed with Landlord's real property, Tenant shall pay Landlord the taxes attributable to Tenant's property within ten (10) days after receipt of a written statement setting forth the taxes applicable to Tenant's property.

**SECTION 10. UTILITIES AND SERVICES.** Tenant shall pay for all water, gas, light, power, telephone, trash disposal and other utilities and services supplied to the Premises, together with any taxes thereon. Notwithstanding the provisions of PART C, Section 3.2, if at any time in Landlord's sole judgment, Landlord determines that Tenant is using a disproportionate amount of water, electricity or other commonly metered utilities, or that Tenant is generating such a large volume of trash as to require an increase in the size of the trash receptacle and/or an increase in the number of times per month that it is emptied, then Landlord may increase Tenant's Base Rent by an amount equal to such increased costs. There shall be no abatement of Rent and Landlord shall not be liable in any respect whatsoever for the inadequacy, stoppage, interruption or discontinuance of any utility or service due to riot, strike, labor dispute, breakdown, accident, repair or other cause beyond Landlord's reasonable control or in cooperation with governmental request or directions.

**SECTION 11. ASSIGNMENT AND SUBLETTING.**

**11.1 Landlord's Consent Required.**

(a) Tenant shall not voluntarily or by operation of law assign, transfer, mortgage or encumber (collectively, "**assign or assignment**") or sublet all or any part of Tenant's interest in this Lease or in the Premises without Landlord's prior written consent.

(b) Any assignment, sublease or other such transfer without Landlord's prior written consent shall be voidable, and, at Landlord's election, shall constitute an Event of Default by Tenant hereunder. Consent by Landlord to one or more assignments or sublettings shall not operate as a waiver of Landlord's rights with respect to any subsequent assignment or subletting. If Tenant is a partnership or limited liability company, a withdrawal or change (voluntary, involuntary, or by operation of Law) of any partner or member owning twenty percent (20%) or more of the partnership or the limited liability company, or the dilution or liquidation of the partnership or limited liability company, shall be deemed an assignment of this Lease. If Tenant consists of more than one person, a purported assignment (voluntary, involuntary, or by operation of Law) from any of such persons to any other person or entity shall be deemed an assignment of this Lease. If Tenant is a trust, one or more sales or transfers by operation of law or otherwise by which an aggregate of more than fifty percent (50%) of the total beneficial interests of a trust lessee shall become vested in one or more individuals, firms, or corporations who or which are not beneficiaries thereof, either legally or equitably, as of the date of this Lease or of Tenant's

subsequent acquisition of this Lease by assignment, shall be deemed an assignment of this Lease. If Tenant is a corporation, any dissolution, merger, consolidation, or other reorganization of Tenant, or the sale or other transfer of the controlling percentage of the capital stock of Tenant, or the sale of fifty-one percent (51%) of the value of the assets of Tenant, shall be deemed an assignment of this Lease. If Tenant is a corporation in which stock is publicly held and traded regularly on a recognized stock exchange, the condition that the present stockholders of the Tenant retain at least fifty percent (50%) of the voting stock of Tenant shall not apply, nor shall the provisions relating to the transfer, sale, pledge, or other disposition of corporation stock or voting securities of Tenant apply; provided, however, that a merger or acquisition of fifty-one percent (51%) or more of the outstanding stock of any such Tenant shall be construed to be an assignment and shall require Landlord's consent unless the successor or acquiring corporation has a net worth equal to or greater than Tenant had at the time this Lease was executed, or at the time of any such merger or acquisition (whichever shall be the greater). The phrase "**controlling percentage**" means the ownership of, and the right to vote, stock possessing at least fifty-one percent (51%) of the total combined voting power of all classes of Tenant's capital stock issued, outstanding, and entitled to vote for the election of directors. The term "**sublet**" shall be deemed to include the granting of licenses, concessions, and any other rights of occupancy of any portion of the Premises.

(c) If Tenant at any time desires to assign this Lease or to sublet the Premises or any part thereof, Tenant shall first notify Landlord in writing of its desire to do so, and offer Landlord the right to recapture, at the per square foot Base Rent for the Premises then applicable pursuant to this Lease or the rent that Tenant proposes to obtain, whichever is lower, of all (but not part) of the Premises that Tenant desires to assign or sublet. Landlord, upon receipt of such notice, shall have the option, to be exercised within forty-five (45) days from the date of the receipt of such notice, to require Tenant to execute an assignment of this Lease or sublease of the Premises or such portion thereof as Tenant desires to sublet, to Landlord in its own name, with the right to sublease to others, including Tenant's proposed assignee or sublessee. If Landlord exercises such option and such assignment or sublease is at the Rent specified in this Lease or higher, Tenant shall be released of all further liability hereunder, from and after the effective date of such assignment or sublease, with respect to the premises included therein. If Landlord should exercise such option and such assignment or sublease is at a rental less than that specified in this Lease, Tenant shall remain liable to Landlord only for the amount by which the Rent stated in Tenant's original lease exceeds the amount of rental as so determined for the assignment or sublease to Landlord. If Landlord does not exercise such option within such time period, Tenant may thereafter assign this Lease or sublet the Premises or a portion thereof, provided Landlord consents thereto, but at a rental not less than offered to Landlord in the notice and not later than ninety (90) days after delivery of the original notice to Landlord.

#### 11.2 Terms and Conditions Applicable to Assignment and Subletting.

(a) Regardless of Landlord's consent, no assignment or subletting shall: (i) be effective without the express written assumption by such assignee or sublessee of the obligations of Tenant under this Lease, (ii) release Tenant and Guarantor(s) of any obligations hereunder, or (iii) alter the primary liability of Tenant for the payment of Rent or for the performance of any other obligations to be performed by Tenant.

(b) Landlord may accept Rent or performance of Tenant's obligations from any person other than Tenant pending approval or disapproval of an assignment. Neither a delay in the approval or disapproval of such assignment nor the acceptance of Rent or performance shall constitute a waiver or estoppel of Landlord's right to exercise its remedies for an Event of Default.

(c) Landlord's consent to any assignment or subletting shall not constitute consent to any subsequent assignment or subletting.

(d) In the event of any Event of Default by Tenant, Landlord may proceed directly against Tenant, any Guarantors or anyone else responsible for the performance of Tenant's obligations under this Lease, including any assignee or sublessee, without first exhausting Landlord's remedies against any other person or entity responsible therefore to Landlord, or any security held by Landlord.

(e) Each request for consent to an assignment or subletting shall be in writing, accompanied by information relevant to Landlord's determination as to the financial and operational responsibility and appropriateness of the proposed assignee or sublessee, including but not limited to the Intended use and/or required modification of the Premises, if any, together with a fee of \$500, plus reasonable attorney's fees as consideration for Landlord's considering and processing such request. Tenant agrees to provide Landlord with such other or additional information and/or documentation as may be reasonably requested. (See also PART C, Section 42)

(f) Any assignee of, or sublessee under, this Lease shall, by reason of accepting such assignment, entering into such sublease, or entering into possession of the Premises or any portion thereof, be deemed to have assumed and agreed to conform and comply with each and every term, covenant, condition and obligation herein to be observed or performed by Tenant during the term of such assignment or sublease, other than such obligations as are contrary to or inconsistent with provisions of an assignment or sublease to which Landlord has specifically consented to in writing.

(g) Landlord's consent to any assignment or subletting shall not transfer to the assignee or sublessee any Option granted to the original Tenant by this Lease unless such transfer is specifically consented to by Landlord in writing. (See PART C, Section 44.2)

**11.3 Additional Terms and Conditions Applicable to Subletting.** The following terms and conditions shall apply to any subletting by Tenant of all or any part of the Premises and shall be deemed included in all subleases under this Lease whether or not expressly incorporated therein:

(a) Tenant hereby assigns and transfers to Landlord all of Tenant's interest in all Rent payable on any sublease, and Landlord may collect such Rent and apply same toward Tenant's obligations under this Lease; provided, however, that until an Event of Default shall occur in the performance of Tenant's obligations, Tenant may collect such Rent. In the event that the amount collected by Landlord exceeds Tenant's then outstanding obligations any such excess shall be refunded to Tenant. Landlord shall not, by reason of the foregoing or any assignment of such sublease, nor by reason of the collection of Rent, be deemed liable to the sublessee for any failure of Tenant to perform and comply with any of Tenant's obligations to such sublessee. Tenant hereby irrevocably authorizes and directs any such sublessee, upon receipt of a written notice from Landlord stating that an Event of Default exists in the performance of Tenant's obligations under this Lease, to pay to Landlord all Rent due and to become due under the sublease. Sublessee shall rely upon any such notice from Landlord and shall pay all Rents to Landlord without any obligation or right to inquire as to whether such Event of Default exists, notwithstanding any claim from Tenant to the contrary.

(b) In the Event of Default by Tenant, Landlord may, at its option, require sublessee to atorn to Landlord, in which event Landlord shall undertake the obligations of the sublessor under such sublease from the time of the exercise of such option to the expiration of such sublease; provided, however, Landlord shall not be liable for any prepaid rents or security deposit paid by such sublessee to such sublessor or for any prior Event of Default of such sublessor.

(c) Any matter requiring the consent of the sublessor under a sublease shall also require the consent of Landlord.

(d) No sublessee shall further assign or sublet all or any part of the Premises without Landlord's prior written consent.

(e) Landlord shall deliver a copy of any notice of Event of Default by Tenant to the sublessee, who shall have the right to cure the Event of Default of Tenant within the grace period, if any, specified in such notice. The sublessee shall have a right of reimbursement and offset from and against Tenant for any such Defaults cured by the sublessee.

## SECTION 12. DEFAULT; REMEDIES.

12.1 **Default.** Each of the following events shall be an "Event of Default" by Tenant under this Lease:

- (a) If Tenant shall fail to pay Rent when due and the continuance of such failure for a period of five days.
- (b) If Tenant shall fail to (1) obtain the insurance coverage required hereunder, or (2) comply with the provisions of PART C, Section 5.2 regarding Hazardous Materials.
- (c) The failure of Tenant to provide (i) reasonable written evidence of compliance with applicable Laws, (ii) the rescission of an unauthorized assignment or subletting, (iii) an estoppel certificate or financial statements, (iv) a requested subordination, (v) evidence concerning any guaranty and/or Guarantor, (vi) material data safety sheets (MSDS), or (v) any other documentation or information which Landlord may reasonably require of Tenant under the terms of this Lease, where any such failure continues for a period of ten (10) days following written notice to Tenant.
- (d) If any petition is filed by or against Tenant (the term "Tenant" shall include, for the purpose of this Section 12 any Guarantor(s)) (i) in any bankruptcy or other insolvency proceeding; (ii) seeking any relief under any state or federal debtor relief law; (iii) for the appointment of a liquidator or receiver for all or substantially all of Tenant's property or for Tenant's interest in this Lease; or (iv) for the reorganization or modification of Tenant's capital structure.
- (e) If Tenant admits in writing that it cannot meet its obligations as they become due or the making by Tenant of an assignment for the benefit of its creditors.
- (f) If Tenant shall vacate the Premises and permit the same to remain unoccupied and unattended, or shall remove or attempt to remove or manifest an intent to remove, not in the ordinary course of business, Tenant's goods or property from or out of the Premises.
- (g) If Tenant shall at any time be in default in the observance or performance of any of the other covenants and/or agreements required to be performed and/or observed by Tenant hereunder for a period of five (5) days; provided that if such default is curable but shall reasonably require more than five (5) days to cure, Tenant shall be afforded an additional time period to effect such cure, not to exceed thirty (30) days, provided Tenant commences to cure the default within the initial five-day period and diligently prosecutes the same to completion.
- (h) If any Guarantor of this Lease shall default under any guaranty or shall repudiate or revoke such guaranty or any obligation under such guaranty.

12.2 **Remedies.** Upon the occurrence of any such Event of Default, Landlord shall have the option to pursue any one or more of the following remedies without any notice or demand whatsoever:

- (a) Terminate this Lease, in which event Tenant shall immediately surrender the Premises to Landlord, and if Tenant fails to do so Landlord may, without prejudice to any other remedy which Landlord may have for omission or arrearages in rental, enter upon and take possession of the Premises and expel or remove Tenant and any other person who may be occupying the Premises or any part thereof, by force if necessary, without being liable for prosecution or any claim of damages therefor.
- (b) Enter upon and take possession of the Premises and expel or remove Tenant and any other person who may be occupying the Premises or any part thereof without being liable for prosecution or any claim for damages therefor, with or without having terminated this Lease.
- (c) Perform any act Tenant is obligated to perform under the terms of this Lease (and enter upon the Premises in connection therewith if necessary) in Tenant's name and on Tenant's behalf, without being liable for any claim for damages therefor, and Tenant shall reimburse Landlord on demand for any expenses which Landlord may incur in thus effecting compliance with Tenant's obligations under this Lease (including, but not limited to, collection costs and legal expenses), plus interest thereon at the lesser of twelve (12%) per annum or the maximum rate permitted by Law.
- (d) Alter all locks and other security devices at the Premises without terminating this Lease.
- (e) Bring an action for summary possession and, in such action, service of prior notice or demand is hereby expressly waived.

In addition to the other remedies provided in this Lease, and anything contained herein to the contrary notwithstanding, Landlord shall be entitled to restrain any default or violation, or attempted or threatened default or violation of any of the terms, covenants, conditions or other provisions of this Lease, by injunction, order of specific performance or other appropriate equitable relief.

12.3 **Exercise of Landlord's Remedies.** The remedies provided to Landlord hereunder are intended to be cumulative, and may be exercised by Landlord in any order, or simultaneously, without such exercise being a waiver by Landlord of its right to exercise any other remedy granted to Landlord hereunder (or under Laws) with respect to the same default. Exercise by Landlord of any one or more remedies hereunder granted or otherwise available shall not be deemed to be an acceptance or surrender of the Premises by Tenant, whether by agreement or by operation of Law, it being understood that such surrender can be effected only by the written agreement of Landlord and Tenant. No alteration of locks or other security devices and no removal or other exercise of dominion by Landlord over the property of Tenant or others at the Premises shall be deemed unauthorized or constitute a conversion or a tortious interference with the business, contracts or operations of Tenant, Tenant hereby consenting, after any Event of Default, to the aforesaid exercise of dominion over Tenant's property within the Premises. All claims for damages by reason of such re-entry and/or repossession and/or alteration of locks or other security devices are hereby waived, as are all claims for damages by reason of any distress warrant, forcible detainer proceedings, sequestration proceedings or other legal process. Tenant agrees that any re-entry by Landlord may be pursuant to judgment obtained in legal proceedings, or without the necessity for any legal proceedings, as Landlord may elect, and Landlord shall not be liable in trespass, for tortious interference with business or contract, or otherwise in connection therewith. To the fullest extent permitted by applicable Law, Landlord shall have the right to bring an action for unlawful detainer or possession separate from any action brought to recover damages due from Tenant by virtue of its default, and the bringing of such separate action for unlawful detainer or possession shall in no way prejudice or cut off Landlord's right to seek damages or to exercise any of its other rights and remedies under this Lease after recovering possession of the Premises.

12.4 **Termination of Lease.** If, after the occurrence of an Event of Default, Landlord elects to terminate this Lease, then notwithstanding such termination (and in addition to the additional costs and expenses recoverable from Tenant pursuant to PART C, Section 12.7), Tenant shall be liable for and shall pay to Landlord the sum of all Rent and other amounts payable to Landlord pursuant to the terms of this Lease which have accrued to

the date of such termination, plus, as damages, an amount equal to the total Rent for the remaining portion of the Term (had such Term not been terminated by Landlord prior to the date of its scheduled expiration), less the present value of the then fair Rental value of the Premises for such period based upon a discount rate of ten percent (10%) per annum.

**12.5 Separate Suits.** Tenant shall permit Landlord to split its cause of action for rent so as to permit institution of a separate suit or suits or proceedings for the Base Rent hereunder reserved to Landlord, and a separate suit or suits or proceedings for any other payment required hereunder, and neither the institution of such suit or proceeding, nor the entering of judgment therein, shall bar Landlord from bringing a subsequent suit or proceeding for the Base Rent, or for any other payments required hereunder.

**12.6 No Termination.** If Landlord elects to repossess the Premises without terminating this Lease, then (in addition to the additional costs and expenses recoverable from Tenant pursuant to PART C, Section 12.7), Tenant shall be liable for and shall pay to Landlord at the address specified for notice to Landlord herein all Rent and other amounts payable to Landlord pursuant to the terms of this Lease which have accrued to the date of such repossession, plus total Rent required to be paid by Tenant to Landlord during the remainder of the Term until the scheduled date of expiration of the Term, diminished by any net sums thereafter received by Landlord through reletting the Premises during such period (after deducting expenses incurred by Landlord as provided in PART C, Section 12.7). In reletting the Premises on Tenant's behalf, Landlord shall be entitled to grant any concessions it deems advisable, including rent abatement. In no event shall Tenant be entitled to any excess of any rental obtained by reletting over and above the rental herein reserved. Actions to collect amounts due by Tenant to Landlord as provided in this Section may be brought from time to time on one or more occasions, without the necessity of Landlord's waiting until expiration of the Term, or such action may be brought at or after the end of the Term, in which event Landlord's cause of action to collect such amounts shall be deemed (for purposes of applying any applicable statute of limitations) to have accrued on the last day of such Term, and Tenant hereby waives any defense based on application of a statute of limitations with respect to an action brought by Landlord to recover such amounts, as long as such action is brought within the applicable limitation period as measured from the last day of the Term.

**12.7 Additional Costs and Expenses of Default.** Following the occurrence of any Event of Default, Tenant shall also be liable for and shall pay to Landlord, in addition to any sum provided to be paid above: (a) costs and expenses incurred by Landlord to obtain possession of the Premises; (b) broker's fees incurred by Landlord in connection with reletting the whole or any part of the Premises; (c) the costs of removing, storing and/or disposing of Tenant's or other occupant's property; (d) the amount of all damages suffered by Landlord as a result of Tenant's default prior to termination or recovery of the Premises, as the case may be; (e) the cost of making repairs and replacements required to be made by Tenant hereunder, and of performing all covenants of Tenant relating to the condition of the Premises; (f) the cost of repairing, altering, remodeling or otherwise putting the Premises into condition acceptable to a new tenant or tenants; (g) all unamortized leasing commissions and tenant improvement allowance (based upon straight line amortization over the original term of the Lease); and (h) all reasonable expenses incurred by Landlord in enforcing or defending Landlord's rights and/or remedies at law, equity or hereunder, including reasonable attorneys' fees, litigation expenses and court costs.

**12.8 Reletting the Premises.** In the event of termination of this Lease or repossession of the Premises after an Event of Default, Landlord shall not have any obligation to relet or attempt to relet the Premises or any portion thereof, or to collect rental after reletting; Landlord may relet the whole or any portion of the Premises for any period, to any tenant, and for any use and purpose, upon such terms as it deems appropriate, and may grant any rental or other lease concessions as it deems advisable, including free rent.

**12.9 Repossession of the Premises.** If Landlord takes possession of the Premises pursuant to the authority herein granted, then Landlord shall have the right to keep in place and use all of the furniture, fixtures and equipment at the Premises, including that which is owned by or leased to Tenant at all times prior to any foreclosure thereon by Landlord or repossession thereof by any lessor thereof or third party having a lien thereon. Landlord shall also have the right to remove from the Premises (without the necessity of obtaining a distress warrant, writ of possession or other legal process and without being liable for prosecution or any claim for damages therefor) all or any portion of such furniture, fixtures, equipment and other property located thereon and place the same in storage at any place on the island in which the Premises is located or dispose of the same; and in such event, Tenant shall be liable to Landlord for costs incurred by Landlord in connection with such removal, storage and/or disposal and shall indemnify and hold harmless Landlord and Landlord's partners, agents, employees, officers and/or directors from all loss, damage, cost, expense and liability in connection with such removal, storage and/or disposal. Landlord shall also have the right to relinquish possession of all or any portion of such furniture, fixtures, equipment and other property to any person ("Claimant") claiming to be entitled to possession thereof who presents to Landlord a copy of any instrument purporting to have been executed by Tenant (or any predecessor of Tenant) or otherwise authorized by Law or a court, granting Claimant the right under various circumstances to take possession of such furniture, fixtures, equipment or other property, without the necessity on the part of Landlord to inquire into the authenticity of such instrument and without the necessity of Landlord's making any investigation or inquiry as to the validity of the factual or legal basis upon which Claimant purports to act; and Tenant agrees to indemnify, defend and hold harmless Landlord and Landlord's partners, agents, employees, officers and/or directors from all cost, expense, loss, damage and liability incident to Landlord's relinquishment of possession of all or any portion of such furniture, fixtures, equipment or other property to Claimant. Should Tenant abandon the Premises and leave property therein, Landlord may elect whether or not to accept the property, liquidate such property and apply the proceeds against any sums due and owing by Tenant, or to dispose of such property, and Tenant waives any claim to such property after any such abandonment. For purposes of the foregoing, Tenant shall be deemed to have abandoned its interest in such property if the same is not removed from the Premises by Tenant within ten (10) days after Landlord's demand that Tenant remove same, or within ten (10) days after expiration or earlier termination of this Lease, whichever first occurs.

**12.10 Waiver of Rights of Redemption.** Tenant hereby expressly waives any and all rights of redemption under any present or future laws in the event Tenant is evicted or dispossessed for any cause, or in the event Landlord obtains possession of the Premises by reason of Tenant's violation of any of the covenants and conditions of this Lease or otherwise.

**12.11 Additional Remedies.** The rights and remedies of Landlord herein stated shall be in addition to, and not in lieu of, any and all other rights and remedies which Landlord has or may hereafter have against Tenant or any other person or entity, at law or in equity, and Tenant stipulates and agrees that the rights granted to Landlord by this Lease are understood and have been expressly agreed to by Tenant.

**12.12 Late Charges.** Tenant hereby acknowledges that late payment by Tenant of Rent will cause Landlord to incur costs not contemplated by this Lease, the exact amount of which will be extremely difficult to ascertain. Such costs include, but are not limited to, processing and accounting charges, and late charges which may be imposed upon Landlord by any Lender. Accordingly, if any Rent shall not be received by Landlord within five (5) days after such amount shall be due, then, without any requirement for notice to Tenant, Tenant shall immediately pay to Landlord a one-time Late Charge equal to five percent (5%) of each such overdue amount or \$100, whichever is greater ("Late Charge"). The parties hereby agree that any Late Charge represents a fair and reasonable estimate of the costs Landlord will incur by reason of such late payment. Acceptance of such late charge by Landlord shall in no event constitute a waiver of Tenant's Event of Default with respect to such overdue amount, nor prevent the exercise of any of the other rights and remedies granted hereunder. In the event that a late charge is payable hereunder, whether or not collected, for three (3) consecutive installments of Rent, then notwithstanding any provision of this Lease to the contrary, Rent shall, at Landlord's option, become due and payable quarterly in advance and such payments shall be made by cashier's check.

**12.13 Interest on Past Due Amounts.** Any amounts owing by Tenant to Landlord under the terms of this Lease shall carry interest from the date the same become due until paid at a rate equal to the lesser of twelve percent (12%) per annum or the maximum rate permitted by Law. Such interest shall be considered as a part of the rental payable hereunder.

**12.14 Non-Sufficient Funds.** If Tenant pays any installment of Rent or any other sum by check and such check is returned for insufficient funds or other reason not the fault of Landlord, then Tenant shall pay to Landlord on demand a processing fee of \$50 per returned check.

**12.15 Default by Landlord.** Landlord shall not be deemed in default of this Lease unless Landlord fails within a reasonable time to perform an obligation required to be performed by Landlord. For purposes of this Section, a reasonable time shall in no event be less than thirty (30) days after receipt by Landlord, and any Lender whose name and address shall have been furnished Tenant in writing for such purpose, of written notice specifying wherein such obligation of Landlord has not been performed; provided, however, that if the nature of Landlord's obligation is such that more than thirty (30) days are reasonably required for its performance, then Landlord shall not be in default if performance is commenced within such thirty (30) day period and thereafter diligently pursued to completion. Tenant's exclusive remedy shall be an action for damages. Unless Landlord fails to so cure such default after such notice, Tenant shall not have any remedy or cause of action by reason thereof.

### **SECTION 13. EMINENT DOMAIN.**

**13.1 Substantial Taking.** If more than twenty percent (20%) of the floor area of the Premises should be taken for any public or quasi-public use under any governmental Law, ordinance or regulation or by right of eminent domain or by private purchase in lieu thereof, this Lease shall terminate and the Rent (excluding Rent accruing with respect to the period prior to the date of such termination) shall be abated during the unexpired portion of this Lease, effective on the date physical possession is taken by the condemning authority.

**13.2 Partial Taking.** If less than twenty percent (20%) of the floor area of the Premises should be taken as aforesaid, this Lease shall not terminate; however, the Rent payable hereunder during the unexpired portion of this Lease shall be reduced in proportion to the area taken, effective on the date physical possession is taken by the condemning authority. Rent shall be proportionately adjusted. Following such partial taking, Landlord shall make all necessary repairs or alterations within the scope of the improvements made by Landlord to the Premises for Tenant in connection with this Lease (if any) necessary to make the Premises an architectural whole. Notwithstanding this provision, Landlord shall also have the right to terminate this Lease if there is a taking of any portion of the Project that would leave the remainder of the Project unsuitable for Landlord's intended use of the Project in a manner comparable to the Project's use prior to the taking. Any such termination shall be effective as of the date that the physical taking of the portion of the Project occurs.

**13.3 Leasehold Taking.** In the event of a condemnation of a leasehold interest in all or a portion of the Premises without the condemnation of the fee simple title also, this Lease shall not terminate and such condemnation shall not excuse Tenant from full performance of all of its covenants hereunder, but Tenant in such event shall be entitled to present or pursue against the condemning authority its claim for and to receive all compensation or damages sustained by it by reason of such condemnation, and Landlord's right to recover compensation or damages shall be limited to compensation for and damages, if any, to its reversionary interest; it being understood, however, that during such time as Tenant shall be out of possession of the Premises by reason of such condemnation, the Lease shall not be subject to forfeiture for failure to observe and perform those covenants not calling for payment of money. In the event the condemning authority shall fail to keep the Premises in the state of repair required hereunder, or to perform any other covenant not calling for the payment of money, Tenant shall have ninety (90) days after the restoration of possession to it within which to carry out its obligation under such covenant or covenants. During such time as Tenant shall be out of possession of the Premises by reason of such leasehold condemnation, Tenant shall pay to Landlord, in lieu of the Base Rent and Percentage Rent provided for hereunder, and in addition to any other payments required of Tenant hereunder, an annual rental equal to the average aggregate annual rental paid by Tenant for the period from the commencement of the Lease Term until the condemning authority shall take possession, or during the preceding three (3) full calendar years, whichever period is shorter. At any time after such condemnation proceedings are commenced, Landlord shall have the right, at its option, to require Tenant to assign all compensation and damages payable by the condemnor to Tenant to Landlord, to be held without liability for interest thereon as security for the full performance of Tenant's covenants hereunder, such compensation and damages received pursuant to such assignment to be applied first to the payment of rents, taxes, assessments, insurance premiums and all other sums from time to time payable by Tenant pursuant to the terms of this Lease as such sums fall due and the remainder, if any to be payable to Tenant, it being understood and agreed that such assignment shall not relieve Tenant of any of its obligations under this Lease with respect to such rents, taxes, assessments, insurance premiums and other sums except as the same shall be actually received by Landlord.

**13.4 Common Areas Condemnation.** If any part of the Common Areas shall be taken as aforesaid, this Lease shall not terminate, nor shall the Rent payable hereunder be reduced; however, either Landlord or Tenant may terminate this Lease if the area of the Common Areas remaining following such taking plus any additional parking area provided by Landlord in reasonable proximity to the Project shall be less than seventy percent (70%) of the area of the Common Areas immediately prior to the taking. Any election to terminate this Lease in accordance with this provision shall be evidenced by written notice of termination delivered to the other party within thirty (30) days after the date physical possession is taken by the condemning authority.

**13.5 Condemnation Award.** All compensation awarded for any taking for public purposes, whether permanent or temporary (or the proceeds of private sale in lieu thereof), of the Premises or Common Areas, as between Landlord and Tenant, shall be the property of Landlord, and Tenant hereby assigns its interest in any such award to Landlord; however, Landlord shall have no interest in any award made to Tenant for loss of business or for the taking of Tenant's fixtures and other personal property of Tenant if a separate award for such items is made to Tenant. Tenant shall not be entitled to any award made for the value of the unexpired Term of this Lease and Tenant shall have no claim against Landlord. In the event that this Lease is not terminated by reason of such condemnation, Landlord shall repair, to the extent of severance damages received by Landlord in connection with such condemnation, any damage to the Premises caused by such condemnation except to the extent that Tenant has been reimbursed therefore by the condemning authority. Tenant shall pay any amount in excess of such severance damages required to complete such repair.

### **SECTION 14. ESTOPPEL CERTIFICATES.**

(a) Each party (as "**Responding Party**") shall within ten (10) days after written notice from the other party (the "**Requesting Party**") execute, acknowledge and deliver to the Requesting Party an estoppel certificate as may be reasonably requested by the Requesting Party.

(b) If the Responding Party shall fail to execute or deliver the estoppel certificate within such ten (10) day period, the Requesting Party may execute an estoppel certificate stating that (i) the Lease is in full force and effect without modification except as may be represented by the Requesting Party, (ii) there are no uncured defaults in the Requesting Party's performance, and (iii) if Landlord is the Requesting Party, not more than one (1) month's rent has been paid in advance. Prospective purchasers and encumbrancers may rely upon the Requesting Party's estoppel certificate, and the Responding Party shall be estopped from denying the truth of the facts contained in such certificate. In addition, Tenant acknowledges that any failure on its part to provide such an estoppel certificate will expose Landlord to risks and potentially cause Landlord to incur costs not contemplated by this Lease, the extent of which will be extremely difficult to ascertain.

(c) If Landlord desires to finance, refinance, or sell the Premises, or any part thereof, Tenant and all Guarantors shall within ten (10) days after written notice from Landlord deliver to any potential lender or purchaser designated by Landlord such financial statements as may be reasonably required by such lender or purchaser, including but not limited to Tenant's financial statements for the past three (3) years. All such financial statements shall be received by Landlord and such lender or purchaser in confidence and shall be used only for the purposes herein set forth.

#### **SECTION 15. DEFINITION OF LANDLORD.**

The term "Landlord" as used herein shall mean the owner or owners at the time in question of the fee title to the Premises, or, if this is a sublease, of the Tenant's interest in the prior lease. In the event of a transfer of Landlord's title or interest in the Premises or this Lease, Landlord shall deliver to the transferee or assignee (in cash or by credit) any unused Security Deposit held by Landlord. Upon such transfer or assignment and delivery of the Security Deposit, as aforesaid, the prior Landlord shall be relieved of all liability with respect to the obligations and/or covenants under this Lease thereafter to be performed by the Landlord. Subject to the foregoing, the obligations and/or covenants in this Lease to be performed by the Landlord shall be binding only upon the Landlord as hereinabove defined.

#### **SECTION 16. NO PARTNERSHIP.**

Nothing herein contained shall be deemed or construed by the parties hereto, nor by any third party, as creating the relationship of principal and agent or of partnership or of joint venture between Landlord and Tenant.

#### **SECTION 17. CAPTION: CONSTRUCTION OF TERMS.**

The captions used herein are for convenience only and do not limit or amplify the provisions hereof. The language in all parts of this Lease shall in all cases be construed as a whole and according to its fair meaning, and not strictly for or against either Landlord or Tenant, and the construction of this Lease and any of its various provisions shall be unaffected by any argument or claim, whether or not justified, that it has been prepared, wholly or in substantial part, by or on behalf of Landlord or Tenant. Whenever herein the singular number is used, the same shall include the plural, and words of any gender shall include each other gender. References to "day" or "days" shall mean calendar days.

#### **SECTION 18. NO WAIVER.**

One or more waivers of any covenant, term or condition of this Lease by either party shall not be construed as a waiver of a subsequent default of the same covenant, term or condition. The consent or approval by either party shall not be construed as a waiver of a subsequent default of the same covenant, term or condition. The consent or approval by either party to or of any act by the other party requiring such consent or approval shall not be deemed to waive or render unnecessary consent to or approval of any subsequent similar act. The subsequent acceptance of rent hereunder by Landlord shall not be deemed to be a waiver of any preceding default by Tenant of any term, covenant or condition of this Lease, other than the failure of Tenant to pay the particular rental so accepted, regardless of Landlord's knowledge of such preceding default at the time of acceptance of such rent. No payment by Tenant or receipt by Landlord of a lesser amount than the Rent due hereunder shall be deemed to be other than on account of the earliest due Rent, nor shall any endorsement or statement on any check or any letter accompanying any check or payment as Rent be deemed an accord and satisfaction, and Landlord may accept such check or payment without prejudice to Landlord's right to recover the balance of such Rent or pursue any other remedy provided in this Lease.

#### **SECTION 19. JOINT AND SEVERAL LIABILITY.**

If there is more than one Tenant, then the obligations hereunder imposed upon Tenant shall be joint and several. If Guarantor(s) are listed in PART A, Section 12, then the obligations hereunder imposed upon Tenant shall be the joint and several obligations of Tenant and Guarantor(s), and Landlord need not first proceed against Tenant before proceeding against such Guarantor(s) nor shall any such Guarantor(s) be released from its guaranty for any reason whatsoever.

#### **SECTION 20. TIME OF THE ESSENCE; FORCE MAJEURE.**

Time is of the essence with respect to all provisions of this Lease. The foregoing notwithstanding, whenever a period of time is herein prescribed for action to be taken by Landlord, Landlord shall not be liable or responsible for, and there shall be excluded from the computation of any such period of time, any delays due to strikes, riots, acts of God, shortages of labor or materials, war, acts of terrorists, computer crimes, governmental Laws or any other causes of any kind whatsoever which are beyond the reasonable control of Landlord. Unless otherwise explicitly provided herein, no such events shall excuse Tenant from payment of amounts due Landlord under this Lease or excuse Tenant from performance of its obligations under this Lease.

#### **SECTION 21. QUIET ENJOYMENT.**

Landlord agrees that if Tenant shall perform all of the covenants and agreements herein required to be performed by Tenant, Tenant shall, subject to the terms of this Lease, at all times during the continuance of this Lease have the peaceable and quiet enjoyment and possession of the Premises, without hindrance by Landlord or anybody claiming by, through or under Landlord, but not otherwise.

#### **SECTION 22. AMENDMENT.**

No agreement shall be effective to change or modify this Lease in whole or in part unless such agreement is in writing and duly signed by the party against whom enforcement of such change or modification is sought. Notwithstanding anything to the contrary in this Lease, Tenant agrees to make reasonable amendments or modifications to this Lease if such amendment or modification is requested by any lender of Landlord, provided that Tenant's obligations under the Lease are not materially increased.

#### **SECTION 23. BROKERS.**

Landlord shall have no obligation to pay any commission, finder's fee or other amount to any broker or other person in connection with this Lease except in accordance with a separate written agreement executed by Landlord. Tenant shall indemnify and hold harmless Landlord and Landlord's partners, agents, employees, officers and/or directors from all claims of any other brokers claiming to have represented Tenant in connection with this Lease. This indemnity shall also cover all costs and expenses, including reasonable attorney's fees, incurred by the indemnified party in the defense of any indemnified claims. By signing below, Landlord and Tenant confirm that oral and written disclosure of such representation was provided to them before the signing of this Lease.

#### **SECTION 24. GOVERNING LAW.**

This Lease and the rights and obligations of the parties shall be interpreted, construed and enforced in accordance with the Laws of the state of Hawaii, and Landlord and Tenant hereby irrevocably consent to the jurisdiction of Hawaii.

#### **SECTION 25. BINDING EFFECT.**

The terms, provisions and covenants contained in this Lease shall inure to the benefit of and be binding upon the parties hereto and their respective heirs, successors in interest and legal representatives except as otherwise herein expressly provided.

**SECTION 26. VALIDITY AND SEVERABILITY.**

Each provision of this Lease shall be construed in such manner as to give such provision the fullest legal force and effect possible. To the extent any provision herein (or part of such provision) is held to be unenforceable or invalid when applied to a particular set of facts, or otherwise, the unenforceability or invalidity of such provision (or part thereof) shall not affect the enforceability or validity of the remaining provisions hereof (or of the remaining parts of such provision), which shall remain in full force and effect, nor shall such unenforceability or invalidity render such provision (or part thereof) inapplicable to other facts in the context of which such provision (or part thereof) would be held legally enforceable and/or valid.

**SECTION 27. RIGHTS RESERVED BY LANDLORD.**

Landlord reserves a non-exclusive easement for the installation, relocation, restoration and maintenance of, such conduits, facilities and structures as may be located in the Premises (including the airspace above the finished ceiling in the Premises) for the common use and benefit of Landlord and other tenants. Tenant shall permit Landlord and its agents to enter into and upon the Premises at all reasonable times for inspecting the Premises, for showing the Premises to prospective purchasers, or for maintaining any portion of the Project. Landlord shall not be liable to Tenant for any inconvenience or disruption resulting from such construction or for any loss of occupation or quiet enjoyment of the Premises, and no such inconvenience or disruption shall be the basis for any abatement in Rent. Tenant understands and expressly acknowledges that Landlord has the right at any time to expand, reduce, remove, demolish, renovate, or construct any existing or new improvements at the Project (including but not limited to buildings, driveways, entrances and exits, automobile parking areas, mall, truck concourse and other circulation areas) or on adjacent or future acquired lands, including without limitation the right to change the shape, size, height, layout, location, number, design, or extent of such improvements, and the right to construct additional phases and/or buildings and/or additional stories and/or subterranean levels to existing buildings and structures in the Project, and the right to change the occupants of the Project. In accomplishing such activities, Landlord also reserves the right to enter into and upon the Premises for the purpose of constructing permanent supports, columns, beams and such other structural improvements as may be reasonably necessary with respect thereto; provided, however, that in the event of construction of permanent structures within the Premises, Base Rent shall be reduced in the same proportion that the square footage of such permanent structures bears to the total square footage of the Premises. Landlord reserves the right at any time to change the name by which the Project is designated.

**SECTION 28. INDEPENDENT COVENANTS.**

If Landlord shall commence any proceeding for nonpayment of Rent, or any other payment of any other kind to which Landlord may be entitled, or which it may claim hereunder, Tenant will not interpose any counterclaim or setoff of whatever nature or description, (other than compulsory counterclaim) in such proceedings nor seek to consolidate Landlord's action with any other action which would delay or prevent Landlord's action from proceeding. This restriction shall not, however, be construed to prohibit Tenant's assertion of compulsory counterclaims or Tenant's right to assert any claim against Landlord in a separate action or actions. The parties hereto specifically agree that Tenant's covenants to pay Rent or any other payments required of it hereunder are independent of all other covenants and agreements herein contained. The foregoing shall not be construed as a waiver of Tenant's right to assert any such claim in a separate action brought by Tenant against Landlord.

**SECTION 29. NO ELECTION OF REMEDIES.**

Mention in this Lease of any particular remedy shall not preclude Landlord from any other remedy at law or in equity to which it may be entitled, and all remedies herein provided are cumulative.

**SECTION 30. FULL EXECUTION.**

This Lease shall not be effective, and no leasehold or other agreement shall be deemed or construed to have been created between Landlord and Tenant, until such time as this Lease has been fully executed by both Landlord and Tenant, and a fully executed original has been delivered from Landlord to Tenant. Upon execution of this Lease, all understandings and agreements previously made between the parties with respect to the subject matter of this Lease are superseded by this Lease including, without limiting the generality of the foregoing, any prior offer to lease between Landlord and Tenant.

**SECTION 31. WAIVER OF JURY TRIAL.**

Landlord and Tenant hereby expressly waive trial by jury in any action, proceeding or counterclaim, brought by either of them against the other, on any claim or matter whatsoever arising out of or in any way connected with this Lease, their relationship as landlord and tenant, Tenant's use and occupancy of the Premises and/or any claim of injury or damage.

**SECTION 32. COUNTERPARTS.**

This Lease may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument, and in making proof of this Lease, it shall not be necessary to produce or account for more than one such counterpart.

**SECTION 33. CONFIDENTIALITY.**

Tenant acknowledges and agrees that the terms of this Lease are confidential and constitute proprietary information of Landlord. Disclosure of the terms could adversely affect the ability of Landlord to negotiate other leases and impair Landlord's relationship with other tenants. Accordingly, Tenant agrees that it, and its members, partners, officers, directors, employees, agents and attorneys, shall not intentionally and voluntarily disclose the terms and conditions of this Lease to any newspaper or other publication or any other tenant or apparent prospective tenant of the Project, or real estate agent, either directly or indirectly, without the prior written consent of Landlord, provided, however, that Tenant may disclose the terms to prospective subtenants or assignees under this Lease.

**SECTION 34. LIMITATION ON LIABILITY.**

The obligations of Landlord under this Lease shall not constitute personal obligations of Landlord or its partners, members, directors, officers, shareholders, Landlord's agents or property managers and Tenant shall look to the Premises, and to no other assets of Landlord, for the satisfaction of any liability of Landlord with respect to this Lease, and shall not seek recourse against Landlord's partners, members, directors, officers, shareholders, Landlord's agents or property managers, or any of their personal assets for such satisfaction.

**SECTION 35. NOTICES.**

If a demand, request, approval, consent or notice (collectively referred to as a "notice") which a party is required or may desire to give the other under this Lease shall be in writing and shall be sent by (a) personal delivery or (b) mail (either (i) by United States registered or certified mail, return receipt requested, postage prepaid, or (ii) by Federal Express or similar generally recognized overnight carrier regularly providing proof of delivery), addressed as set forth in the Notice Address for each party in PART A, Section 1 (subject to the right of a party to designate a different address for itself by notice similarly given), except that if Tenant has vacated the Premises (or if the Notice Address for Tenant is other than the Premises, and Tenant has vacated such address) without providing Landlord a new Notice Address, Landlord may serve notice in any manner described in this Section 35 or in another manner permitted by Law. Any such notice given shall be deemed given upon receipt (or refusal to accept receipt) of the same by the party. Any party may give notice by more than one method described in this Section.

## SECTION 36. NO RIGHT TO HOLDOVER.

Tenant has no right to retain possession of the Premises or any part thereof beyond the expiration or termination of this Lease. In the event that Tenant holds over, then the Base Rent shall be increased to two hundred percent (200%) of the Base Rent applicable immediately preceding the expiration or termination. Nothing contained herein shall be construed as consent by Landlord to any holding over by Tenant.

## SECTION 37. CUMULATIVE REMEDIES.

No remedy or election hereunder shall be deemed exclusive but shall, wherever possible, be cumulative with all other remedies at law or in equity.

## SECTION 38. SUBORDINATION; ATTORNMENT; NON-DISTURBANCE.

**38.1 Subordination.** This Lease and any Option granted hereby shall be subject and subordinate to any ground lease, mortgage, or other hypothecation or security device (collectively, "**Security Instrument**"), now or hereafter placed upon the Premises, to any and all advances made on the security thereof, and to all renewals, modifications, and extensions thereof. Tenant agrees that the holders of any such Security Instrument (in this Lease together referred to as "**Lender**") shall have no liability or obligation to perform any of the obligations of Landlord under this Lease. Any Lender may elect to have this Lease and/or any Option granted hereby superior to the lien of its Security Instrument by giving written notice thereof to Tenant, whereupon this Lease and such Options shall be deemed prior to such Security Instrument, notwithstanding the relative dates of the documentation or recordation thereof.

**38.2 Attornment.** Tenant shall unconditionally attorn to any party succeeding to Landlord's interest in the Premises, whether by purchase, foreclosure, deed in lieu of foreclosure, power of sale, or otherwise, upon such party's request, and shall execute such agreements confirming such attornment as such party may reasonably request.

**38.3 Non-Disturbance.** With respect to Security Instruments entered into by Landlord after the execution of this Lease, Tenant's subordination of this Lease shall be subject to receiving a commercially reasonable non-disturbance agreement (a "**Non-Disturbance Agreement**") from the Lender which Non-Disturbance Agreement provides that Tenant's possession of the Premises, and this Lease, including any options to extend the term hereof, will not be disturbed so long as Tenant is not in Default hereof and attorns to the record owner of the Premises.

**38.4 Self-Executing.** The agreements contained in this PART C, Section 38 shall be effective without the execution of any further documents; provided, however, that, upon written request from Landlord or a Lender in connection with a sale, financing or refinancing of the Premises, Tenant and Landlord shall execute such further writings as may be reasonably required to separately document any subordination, attornment and/or Non-Disturbance Agreement provided for herein.

## SECTION 39. ATTORNEYS' FEES.

If any party brings an action or proceeding involving the Premises whether founded in tort, contract or equity, or to declare rights hereunder, the Prevailing Party (as hereafter defined) in any such proceeding, action, or appeal thereon, shall be entitled to reasonable attorneys' fees. Such fees may be awarded in the same suit or recovered in a separate suit, whether or not such action or proceeding is pursued to decision or judgment. The term, "**Prevailing Party**" shall include, without limitation, a party who substantially obtains or defeats the relief sought, as the case may be, whether by compromise, settlement, judgment, or the abandonment by the other party of its claim or defense. The attorneys' fees award shall not be computed in accordance with any court fee schedule, but shall be such as to fully reimburse all attorneys' fees reasonably incurred. In addition, Landlord shall be entitled to attorneys' fees, costs and expenses incurred in the preparation and service of notices of an Event of Default and consultations in connection therewith, whether or not a legal action is subsequently commenced in connection with such Event of Default.

## SECTION 40. LANDLORD'S ACCESS; SHOWING PREMISES; REPAIRS.

Landlord and Landlord's agents shall have the right to enter the Premises at any time, in the case of an emergency, and otherwise at reasonable times after reasonable prior notice for the purpose of showing the same to prospective purchasers, lenders, or tenants, and making such alterations, repairs, improvements or additions to the Premises as Landlord may deem necessary or desirable and the erecting, using and maintaining of utilities, services, pipes and conduits through the Premises and/or other premises as long as there is no material adverse effect to Tenant's use of the Premises. All such activities shall be without abatement of rent or liability to Tenant.

## SECTION 41. TERMINATION; MERGER.

Unless specifically stated otherwise in writing by Landlord, the voluntary or other surrender of this Lease by Tenant, the mutual termination or cancellation hereof, or a termination hereof by Landlord for Default by Tenant, shall automatically terminate any sublease or lesser estate in the Premises; provided, however, that Landlord may elect to continue anyone or all existing subtenancies. Landlord's failure within ten (10) days following any such event to elect to the contrary by written notice to the holder of any such lesser interest, shall constitute Landlord's election to have such event constitute the termination of such interest.

## SECTION 42. CONSENTS.

Except as otherwise provided herein, wherever in this Lease the consent of a party is required to an act by or for the other party, such consent shall not be unreasonably withheld or delayed. Landlord's actual reasonable costs and expenses (including but not limited to architects', attorneys', engineers' and other consultants' fees) incurred in the consideration of, or response to, a request by Tenant for any Landlord consent, including but not limited to consents to an assignment, a subletting or the presence or use of Hazardous Materials, shall be paid by Tenant upon receipt of an invoice and supporting documentation therefor. Landlord's consent to any act, assignment or subletting shall not constitute an acknowledgment that no Event of Default by Tenant of this Lease exists, nor shall such consent be deemed a waiver of any then existing Event of Default, except as may be otherwise specifically stated in writing by Landlord at the time of such consent. The failure to specify herein any particular condition to Landlord's consent shall not preclude the imposition by Landlord at the time of consent of such further or conditions as are then reasonable with reference to the particular matter for which consent is being given. In the event that either party disagrees with any determination made by the other hereunder and reasonably requests the reasons for such determination, the determining party shall furnish its reasons in writing and in reasonable detail within ten (10) business days following such request.

## SECTION 43. GUARANTOR.

**43.1 Execution.** The Guarantors, if any, shall each execute a guaranty in the form acceptable to Landlord.

**43.2 Default.** It shall constitute a Default of the Tenant if any Guarantor fails or refuses, upon request to provide: (a) evidence of the execution of the guaranty, including the authority of the party signing on Guarantor's behalf to obligate Guarantor, and in the case of a corporate Guarantor, a certified copy of a resolution of its board of directors authorizing the making of such guaranty, (b) current financial statements, (c) an estoppel certificate, or (d) written confirmation that the guaranty is still in effect.



**SECTION 44. OPTIONS.**

If Tenant is granted any Option, as defined below, then the following provisions shall apply:

44.1 **Definition. "Option"** shall mean the right to extend the term of this Lease.

44.2 **Options Personal To Original Tenant.** Any Option granted to Tenant in this Lease is personal to the original Tenant, and cannot be assigned or exercised by anyone other than such original Tenant and only while the original Tenant is in full possession of the Premises and, if requested by Landlord, with Tenant certifying that Tenant has no intention of thereafter assigning or subletting.

44.3 **Multiple Options.** In the event that Tenant has any multiple Options to extend this Lease, a later Option cannot be exercised unless the prior Options have been validly exercised.

44.4 **Effect of Default on Options.**

(a) Tenant shall have no right to exercise an Option: (i) during the period of time any Rent is unpaid (without regard to whether notice thereof is given Tenant), (ii) during the time Tenant is in Default of this Lease, or (iii) in the event that Tenant has been in Default three (3) or more times, whether or not the Defaults are cured.

(b) The period of time within which an Option may be exercised shall not be extended or enlarged by reason of Tenant's inability to exercise an Option because of the provisions of PART C, Section 44.4.

(c) An Option shall terminate and be of no further force or effect, notwithstanding Tenant's due and timely exercise of the Option, if, after such exercise and prior to the commencement of the extended term or completion of the purchase, (i) Tenant fails to pay Rent for a period of thirty (30) days after such Rent becomes due (without any necessity of Landlord to give notice thereon), or (ii) if Tenant commits an Event of Default of this Lease.

**SECTION 45. CONFLICT.**

Any conflict between the printed provisions of this Lease and the typewritten or handwritten provisions shall be controlled by the typewritten or handwritten provisions.

**LANDLORD AND TENANT HAVE CAREFULLY READ AND REVIEWED THIS LEASE AND EACH TERM AND PROVISION CONTAINED HEREIN, AND BY THE EXECUTION OF THIS LEASE SHOWS THEIR INFORMED AND VOLUNTARY CONSENT THERETO. THE PARTIES HEREBY AGREE THAT, AT THE TIME THIS LEASE IS EXECUTED, THE TERMS OF THIS LEASE ARE COMMERCIALY REASONABLE AND EFFECTUATE THE INTENT AND PURPOSE OF LANDLORD AND TENANT WITH RESPECT TO THE PREMISES.**

**ATTENTION: NO REPRESENTATION OR RECOMMENDATION IS MADE BY THE HAWAII ASSOCIATION OF REALTORS® HAWAII CCIM OR BY ANY BROKER AS TO THE LEGAL SUFFICIENCY, LEGAL EFFECT, OR TAX CONSEQUENCES OF THIS LEASE OR THE TRANSACTION TO WHICH IT RELATES. THE PARTIES ARE URGED TO:**

1. **SEEK ADVICE OF COUNSEL AS TO THE LEGAL AND TAX CONSEQUENCES OF THIS LEASE.**
2. **RETAIN APPROPRIATE CONSULTANTS TO REVIEW AND INVESTIGATE THE CONDITION OF THE PREMISES. SUCH INVESTIGATION SHOULD INCLUDE BUT NOT BE LIMITED TO: THE POSSIBLE PRESENCE OF HAZARDOUS MATERIALS, THE ZONING OF THE PREMISES, THE CONDITION AND THE SUITABILITY OF THE PREMISES FOR TENANT'S INTENDED USE.**

*[The remainder of this page is intentionally left blank.]*

The parties hereto have executed this Lease on the dates specified above their respective signatures.

Executed at: \_\_\_\_\_

On: July 17, 2023

By LANDLORD:

\_\_\_\_\_

By: *Aryston Kukuini*

Name Printed: KAUAI INDEPENDENT FOOD BANK

Title: *Managing Agent*

By: \_\_\_\_\_

Name Printed: \_\_\_\_\_

Title: \_\_\_\_\_

Executed at: \_\_\_\_\_

On: \_\_\_\_\_

By TENANT:

\_\_\_\_\_

By: *Sutada Hesse*

Name Printed: SUTADA HESSE

Title: \_\_\_\_\_

By: \_\_\_\_\_

Name Printed: \_\_\_\_\_

Title: \_\_\_\_\_



**EXHIBIT C  
RULES AND REGULATIONS  
ADDENDUM TO COMMERCIAL LEASE  
(MULTI-TENANT LEASE)**



**Hawaii Association of REALTORS® Standard Form  
Revised 12/17 (NC) For Release 5/22**

**COPYRIGHT AND TRADEMARK NOTICE:** THIS COPYRIGHTED HAWAII ASSOCIATION OF REALTORS® STANDARD FORM IS LICENSED FOR USE UNDER TERMS OF THE HAWAII ASSOCIATION OF REALTORS® STANDARD FORM LICENSE AGREEMENT LOCATED AT <http://www.hawaii Realtors.com/standard-form-policy>. The use of this form is not intended to identify the real estate licensee as a REALTOR®. REALTOR® is a registered collective membership mark which may be used only by real estate licensees who are members of the National Association of REALTORS® and who subscribe to its Code of Ethics.

**NAR CODE OF ETHICS:** Landlord and Tenant are aware that the National Association of REALTORS® holds its members accountable for their actions through a strict professional Code of Ethics, which includes a grievance system to address complaints. Non-members are not held to the same standards as members, nor are they required to participate in the grievance system.

1. These Rules and Regulations are in addition to, and shall not be construed to in any way modify or amend, in whole or in part, the terms, covenants, agreements and conditions of any lease of premises in the Building.
2. Landlord reserves the right to make such other and reasonable Rules and Regulations as, in its judgment, may from time to time be needed for safety and security, for care and cleanliness of the Building and Project and for the preservation of good order therein. Tenant agrees to abide by all such Rules and Regulations hereinabove stated and any additional rules and regulations which are adopted.
3. Landlord may waive any one or more of these Rules and Regulations for the benefit of Tenant or any other tenant, but no such waiver by Landlord shall be construed as a waiver of such Rules and Regulations in favor of Tenant or any other tenant, nor prevent Landlord from thereafter enforcing any such Rules and Regulations against any or all of the tenants of the Building.
4. Landlord reserves the right to exclude or expel from the Building or Project any person who, in the judgment of Landlord, is intoxicated or under the influence of liquor or drugs, has no legitimate purpose to be in the Building or Project, or is violating the rules and regulations of the Building and Project.
5. Tenant shall be responsible for the observance of all of the foregoing rules of Tenant's employees, agents, clients, customers, invitees and guests.
6. The plumbing facilities shall not be used for any purpose other than that for which they are constructed, and no foreign substance of any kind shall be thrown therein. The expense of any breakage, stoppage, or damage resulting from a violation of this provision shall be borne by the tenant, who shall, or whose employees, agents or invitees shall have caused it.
7. No sign, placard, picture, advertisement, name or notice shall be inscribed, displayed, or printed or affixed on or to any part of the Building or Premises if visible from outside the Premises, without the prior written consent of Landlord.
8. Tenant shall not place or maintain any window covering, blinds or drapes on any window without Landlord's prior written approval.
9. The sidewalks, halls, passages, exits, entrances, elevators, escalators, and stairways shall not be obstructed by Tenant or used by it for any purpose other than for ingress to and egress from the Premises.
10. Tenant shall not overload any floor of the Premises or the Building. No furniture, freight or equipment of any kind shall be brought into the Building by Tenant or its contractors or agents without prior consent of Landlord and all moving of the same into or out of the Building shall be done at such time and in such manner as Landlord shall designate.
11. Tenant shall not use or keep in the Premises or the Building any kerosene, gasoline or flammable or combustible fluid or material, or use any method of heating or air conditioning other than that supplied or permitted by Landlord.
12. Tenant shall not canvass or solicit other tenants in the Building and Tenant shall cooperate to prevent any such canvassing and/or solicitation. Canvassing and peddling in the Building is prohibited.
13. Tenant agrees that it shall comply with all fire and security regulations that may be issued from time to time by Landlord, and Tenant shall also provide Landlord with the name of a designated responsible employee to represent Tenant in all matters pertaining to such fire or security regulations.
14. All loading and unloading of goods shall be done only at such times, in the areas, and through the entrances designated for such purposes by Landlord.
15. No loudspeakers, televisions, radios, or other devices shall be used in a manner so as to be heard or seen outside of the Premises without the prior written consent of Landlord. In addition, Tenant shall conduct its business in a quiet and orderly manner so as not to create unreasonable noise.
16. Tenant shall use at Tenant's cost such pest extermination contractor as Landlord may direct and at such intervals as Landlord may require.
17. Tenant shall not cause or permit any obnoxious or foul odors that disturb the public or other tenants.
18. No pets allowed in the Premises, without prior written consent by Landlord, or allowed by law.

Additional Rules and Regulations. Please number each additional rule and regulation.

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**LANDLORD AND TENANT HAVE CAREFULLY READ AND REVIEWED THIS EXHIBIT C AND EACH TERM AND PROVISION CONTAINED HEREIN, AND BY THE EXECUTION OF THIS EXHIBIT C SHOWS THEIR INFORMED AND VOLUNTARY CONSENT THERETO. THE PARTIES HEREBY AGREE THAT, AT THE TIME THIS EXHIBIT C IS EXECUTED, THE TERMS OF THIS EXHIBIT C ARE COMMERCIALY REASONABLE AND EFFECTUATE THE INTENT AND PURPOSE OF LANDLORD AND TENANT WITH RESPECT TO THE PREMISES.**

**ATTENTION: NO REPRESENTATION OR RECOMMENDATION IS MADE BY THE HAWAII ASSOCIATION OF REALTORS® HAWAII CCIM OR BY ANY BROKER AS TO THE LEGAL SUFFICIENCY, LEGAL EFFECT, OR TAX CONSEQUENCES OF THIS EXHIBIT C OR THE TRANSACTION TO WHICH IT RELATES. THE PARTIES ARE URGED TO:**

- 1. SEEK ADVICE OF COUNSEL AS TO THE LEGAL AND TAX CONSEQUENCES OF THIS EXHIBIT C.**
- 2. RETAIN APPROPRIATE CONSULTANTS TO REVIEW AND INVESTIGATE THE CONDITION OF THE PREMISES. SUCH INVESTIGATION SHOULD INCLUDE BUT NOT BE LIMITED TO: THE POSSIBLE PRESENCE OF HAZARDOUS MATERIALS, THE ZONING OF THE PREMISES, THE CONDITION AND THE SUITABILITY OF THE PREMISES FOR TENANT'S INTENDED USE.**



**EXHIBIT G  
GUARANTY OF LEASE  
ADDENDUM TO COMMERCIAL LEASE  
(MULTI-TENANT LEASE)**



**Hawaii Association of REALTORS® Standard Form  
Revised 12/17 (NC) For Release 5/22**

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**NAR CODE OF ETHICS:** Landlord and Tenant are aware that the National Association of REALTORS® holds its members accountable for their actions through a strict professional Code of Ethics, which includes a grievance system to address complaints. Non-members are not held to the same standards as members, nor are they required to participate in the grievance system.

THIS GUARANTY OF LEASE ("Guaranty") is made by Sutada Thongkul Hesse ("Guarantor") in favor of KAUAI INDEPENDENT FOOD BANK ("Landlord") in connection with that certain Commercial Lease (Multi-Tenant Lease) dated September 1, 2022 (the "Lease"), pursuant to which Landlord is to lease to SUTADA HESSE ("Tenant") the premises located at [REDACTED] (the "Premises").

A. Landlord requires this Guaranty as a condition to its execution of the Lease and the performance of the obligations to be performed under the Lease by Landlord.  
 B. Guarantor has agreed to provide this Guaranty to induce Landlord to enter into the Lease with Tenant and perform its obligations under the Lease.  
 In consideration of Landlord's agreement to execute the Lease and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Guarantor does hereby agree with Landlord as follows:

1. The Lease is hereby incorporated into and made a part of this Guaranty by this reference.
2. Guarantor hereby unconditionally guarantees, as a primary obligor and not as a surety, without deduction by reason of setoff, defense or counterclaim, the full and punctual payment of all sums of rent and other amounts payable under the Lease and the full and punctual performance of all terms, covenants and conditions in the Lease to be kept, performed and/or observed by Tenant. Guarantor's obligations under this Guaranty are continuing and unconditional. The foregoing obligations are sometimes referred to hereinafter as the "Guaranty Obligations."
3. Guarantor hereby agrees that, without the consent of or notice to Guarantor and without affecting any of the obligations of Guarantor hereunder: (a) the Lease may be extended and any other term, covenant or condition of the Lease may be amended, compromised, released or otherwise altered by Landlord and Tenant, and Guarantor does guarantee and promise to perform all the obligations of Tenant under the Lease as so extended, amended, compromised, released or altered; (b) any guarantor of or party to the Lease may be released, substituted or added; (c) any right or remedy under the Lease may be exercised, not exercised, impaired, modified, limited, destroyed, or suspended; (d) Landlord or any other person may deal in any manner with Tenant, any guarantor, any party to the Lease or any other person; (e) Landlord may permit Tenant to holdover the Premises beyond the Term of the Lease; and (f) all or any part of the Premises or of Tenant's rights or liabilities under the Lease may be sublet, assigned or assumed. Without in any way limiting the foregoing, Guarantor agrees not to unreasonably withhold its consent to any sublease, assignment of the Lease or other modification of the Lease which is agreed to by Landlord and Tenant.
4. Guarantor hereby waives and agrees not to assert or take advantage of: (a) any right to require Landlord to proceed against Tenant, or any other guarantor or person or to pursue any other security or remedy before proceeding against Guarantor; (b) any defense based on the genuineness, validity, regularity or enforceability of the Lease; (c) any right or defense that may arise by reason of the incapacity, lack of authority, death or disability of Tenant or any other person; and (d) any right or defense arising by reason of the absence, impairment, modification, limitation, destruction or cessation (in bankruptcy, by an election of remedies, or otherwise) of the liability of Tenant, of the subrogation rights of Guarantor or of the right of Guarantor to proceed against Tenant for reimbursement. Guarantor waives any right, statutory or otherwise, for itself to require or for Tenant to require Landlord to apply rents received toward the Guaranty Obligations, or to otherwise prioritize the receipt of rents as against the Guaranty Obligations.
5. Guarantor hereby waives and agrees not to assert or take advantage of (a) any right or defense based on the absence of any or all presentments, demands (including demands for performance), notices (including notices of any adverse change in the financial status of Tenant, notices of any other facts which increase the risk to Guarantor, notices of non-performance and notices of acceptance of this Guaranty) and protests of each and every kind; (b) the defense of any statute of limitations in any action under or related to this Guaranty or the Lease; (c) any right or defense based on a lack of diligence or failure or delay by Landlord in enforcing its rights under this Guaranty or the Lease.
6. Guarantor hereby waives and agrees not to assert or take advantage of any right to (a) exoneration if Landlord's actions shall impair any security or collateral of Guarantor; (b) any security or collateral held by Landlord; (c) require Landlord to proceed against or exhaust any security or collateral before proceeding against Guarantor; (d) require Landlord to pursue any right or remedy for the benefit of Guarantor.
7. Guarantor shall not, without the prior written consent of Landlord, commence, or join with any other person in commencing, any bankruptcy, reorganization or insolvency proceeding against Tenant. Guarantor's obligations under this Guaranty shall in no way be affected by any bankruptcy, reorganization or insolvency of Tenant or any successor or assignee of Tenant or by any disaffirmance or abandonment of the Lease or any payment under this Guaranty by a trustee of Tenant in any bankruptcy proceeding including, without limitation, any impairment, limitation, or modification of the liability of Tenant or the estate of Tenant in bankruptcy, or of any remedy for the enforcement of Tenant's liability under the Lease resulting from the operation of any present or future provision of any federal or state bankruptcy or insolvency law or other statute or from the decision of any court. Guarantor shall file in any bankruptcy or other proceeding in which the filing of claims is required or permitted by law all claims which Guarantor may have against Tenant relating to any indebtedness of Tenant to Guarantor and will assign to Landlord all rights of Guarantor thereunder. Landlord shall have the sole right to accept or reject any plan proposed in such proceeding and to take any other action which a party filing a claim is entitled to do. In all such cases, whether in administration, bankruptcy or otherwise, the person or persons authorized to pay such claim shall pay to Landlord the amount payable on such claim and, to the full extent necessary for that purpose, Guarantor hereby assigns to Landlord all of Guarantor's rights to any such



payments or distributions to which Guarantor would otherwise be entitled; provided, however, that Guarantor's obligations hereunder shall not be satisfied except to the extent that Landlord receives cash by reason of any such payment or distribution. If Landlord receives anything hereunder other than cash, the same shall be held as collateral for amounts due under this Guaranty.

8. Until all the Tenant's obligations under the Lease are fully performed, Guarantor: (a) shall have no right of subrogation or reimbursement against the Tenant by reason of any payments or acts of performance by Guarantor under this Guaranty; (b) subordinates any liability or indebtedness of the Tenant now or hereafter held by Guarantor to the obligations of the Tenant under, arising out of or related to the Lease or Tenant's use of the Premises; and (c) acknowledges that the actions of Landlord may affect or eliminate any rights of subrogation or reimbursement of Guarantor as against Tenant without any liability or recourse against Landlord.

9. Prior to the execution of this Guaranty and at any time during the Term of the Lease upon ten (10) days prior written notice from Landlord, Guarantor agrees to provide Landlord with a current financial statement for Guarantor and financial statements for Guarantor for the two (2) years prior to the current financial statement year to the extent not previously delivered to Landlord. Guarantor's financial statements are to be prepared in accordance with generally accepted accounting principles and, if such is the normal practice of Guarantor, audited by an independent certified public accountant. Guarantor represents and warrants that all such financial statements shall be true and correct statements of Guarantor's financial condition.

10. The liability of Guarantor and all rights, powers and remedies of Landlord hereunder and under any other agreement now or at any time hereafter in force between Landlord and Guarantor relating to the Lease shall be cumulative and not alternative and such rights, powers and remedies shall be in addition to all rights, powers and remedies given to Landlord by law.

11. This Guaranty applies to, inures to the benefit of and binds all parties hereto, their heirs, devisees, legatees, executors, administrators, representatives, successors and assigns. This Guaranty may be assigned by Landlord voluntarily or by operation of law.

12. This Guaranty shall constitute the entire agreement between Guarantor and the Landlord with respect to the subject matter hereof. No provision of this Guaranty or right of Landlord hereunder may be waived nor may any guarantor be released from any obligation hereunder except by a writing duly executed by an authorized officer, director or trustee of Landlord. The waiver or failure to enforce any provision of this Guaranty shall not operate as a waiver of any other breach of such provision or any other provisions hereof. No course of dealing between Landlord and Tenant shall alter or affect the enforceability of this Guaranty or Guarantor's obligations hereunder.

13. Guarantor hereby agrees to indemnify, protect, defend and hold Landlord harmless from and against, all losses, costs and expenses including, without limitation, all interest, default interest, post-petition bankruptcy interest and other post-petition obligations, late charges, court costs and attorneys' fees, which may be suffered or incurred by Landlord in enforcing or compromising any rights under this Guaranty or in enforcing or compromising the performance of Tenant's obligations under the Lease.

14. The term "Landlord" whenever hereinabove used refers to and means the Landlord in the foregoing Lease specifically named and also any assignee of said Landlord, whether by outright assignment or by assignment for security, and also any successor to the interest of said Landlord or of any assignee of such Lease or any part thereof, whether by assignment or otherwise. The term "Tenant" whenever hereinabove used refers to and means the Tenant in the foregoing Lease specifically named and also any assignee or subtenant of said Lease and also any successor to the interests of said Tenant, assignee or sublessee of such Lease or any part thereof, whether by assignment, sublease or otherwise including, without limitation, any trustee in bankruptcy and any bankruptcy estate of Tenant, Tenant's assignee or sublessee.

15. If any or all Guarantors shall become bankrupt or insolvent, or any application shall be made to have any or all Guarantors declared bankrupt or insolvent, or any or all Guarantors shall make an assignment for the benefit of creditors, or any or all Guarantors shall enter into a proceeding for the dissolution of marriage, or in the event of death of any or all Guarantors, notice of such occurrence or event shall be promptly furnished to Landlord by such Guarantor or such Guarantor's fiduciary. This Guaranty shall extend to and be binding upon each Guarantor's successors and assigns, including, but not limited to, trustees in bankruptcy and Guarantor's estate.

16. Any notice, request, demand, instruction or other communication to be given to any party hereunder shall be in writing and sent by registered or certified mail, return receipt requested in accordance with the notice provisions of the Lease. The Tenant shall be deemed Guarantor's agent for service of process and notice to Guarantor delivered to the Tenant at the address set forth in the Lease shall constitute proper notice to Guarantor for all purposes. Notices to Landlord shall be delivered to Landlord's address set forth in the Lease. Landlord, at its election, may provide an additional notice to Guarantor at the address provided under Guarantor's signature below.

17. If either party hereto participates in an action against the other party arising out of or in connection with this Guaranty, the prevailing party shall be entitled to have and recover from the other party reasonable attorneys' fees, collection costs and other costs incurred in and in preparation for the action. Guarantor hereby waives any right to trial by jury and further waives and agrees not to assert or take advantage of any defense based on any claim that any arbitration decision binding upon Landlord and Tenant is not binding upon Guarantor.

18. Guarantor agrees that all questions with respect to this Guaranty shall be governed by, and decided in accordance with, the laws of the State of Hawaii.

19. Should any one or more provisions of this Guaranty be determined to be illegal or unenforceable, all other provisions shall nevertheless be effective.

20. Time is strictly of the essence under this Guaranty and any amendment, modification or revision hereof.

21. If more than one person signs this Guaranty, each such person shall be deemed a guarantor and the obligation of all such guarantors shall be joint and several. When the context and construction so requires, all words used in the singular herein shall be deemed to have been used in the plural. The word "person" as used herein shall include an individual, company, firm, association, partnership, corporation, trust or other legal entity of any kind whatsoever.

22. If Guarantor is a corporation, each individual executing this Guaranty on behalf of said corporation represents and warrants that he is duly authorized to execute and deliver this Guaranty on behalf of said corporation, in accordance with a duly adopted resolution of the Board of Directors of said corporation or in accordance with the by-laws of said corporation, and that this Guaranty is binding upon said corporation in accordance with its terms. If Guarantor is a corporation, Landlord, at its option, may require Guarantor to concurrently, with the execution of this Guaranty, deliver to Landlord a certified copy of a resolution of the Board of Directors of said corporation authorizing or ratifying the execution of this Guaranty.

THE UNDERSIGNED HAS READ AND UNDERSTANDS THE TERMS AND CONDITIONS CONTAINED IN THIS GUARANTY INCLUDING, WITHOUT LIMITATION, ALL WAIVERS CONTAINED IN THIS GUARANTY.

Executed on this day 17 of July, 2023

Address of Guarantor:

[REDACTED]

Print Name:

Sutada Thongkul Hesse

Social Security No. / FEIN of Guarantor:

[REDACTED]

Signature:

Sutada Thongkul Hesse

LANDLORD AND TENANT HAVE CAREFULLY READ AND REVIEWED THIS EXHIBIT G AND EACH TERM AND PROVISION CONTAINED HEREIN, AND BY THE EXECUTION OF THIS EXHIBIT G SHOWS THEIR INFORMED AND VOLUNTARY CONSENT THERETO. THE PARTIES HEREBY AGREE THAT, AT THE TIME THIS EXHIBIT G IS EXECUTED, THE TERMS OF THIS EXHIBIT G ARE COMMERCIALY REASONABLE AND EFFECTUATE THE INTENT AND PURPOSE OF LANDLORD AND TENANT WITH RESPECT TO THE PREMISES.

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1. SEEK ADVICE OF COUNSEL AS TO THE LEGAL AND TAX CONSEQUENCES OF THIS EXHIBIT G.
2. RETAIN APPROPRIATE CONSULTANTS TO REVIEW AND INVESTIGATE THE CONDITION OF THE PREMISES. SUCH INVESTIGATION SHOULD INCLUDE BUT NOT BE LIMITED TO: THE POSSIBLE PRESENCE OF HAZARDOUS MATERIALS, THE ZONING OF THE PREMISES, THE CONDITION AND THE SUITABILITY OF THE PREMISES FOR TENANT'S INTENDED USE.



**COMMERCIAL LEASE  
(MULTI-TENANT LEASE)  
Hawaii Association of REALTORS® Standard Form  
Revised 12/17 (NC) For Release 5/23**



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**COMMERCIAL  
LEASE  
(Multi-Tenant Lease)**

**By and Between**

**Landlord: Kauai Independent Food Bank**

**and**

**Tenant: Eyes Wide Open Productions LLC**

**Dated: May 31, 2023**

**Premises: 3285-C Waapa Road, Lihue, HI 96766**





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COMMERCIAL LEASE (MULTI-TENANT LEASE)

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NAR CODE OF ETHICS: Landlord and Tenant are aware that the National Association of REALTORS® holds its members accountable for their actions through a strict professional Code of Ethics, which includes a grievance system to address complaints.

Reviewed by: Clifton Kukino Name of Principal Broker/Broker-in-Charge Signature Kauai Realty, Inc. Brokerage Firm

PART A. SPECIFIC CONDITIONS.

1. Parties. This Lease ("Lease"), dated for reference purposes only on May 31, 2023, is made by and between Landlord and Tenant.

Landlord: Kauai Independent Food Bank ("Landlord")

Landlord's Address for Notice: Landlord's Address for Rent Payments:

[Redacted address lines]

Telephone No. [Redacted] Telephone No. [Redacted]

Fax No. [Redacted] Fax No. [Redacted]

E-mail Address: [Redacted] E-mail Address: [Redacted]

Attention: Clifton Kukino Attention: Clifton Kukino

Tenant: Eyes Wide Open Productions LLC ("Tenant"), with Federal I.D./Social Security No. [Redacted]

Tenant's Trade Name: Eyes Wide Open Productions LLC

Tenant's Address for Notice: Notices shall be sent to Tenant at the following address:

[Redacted address lines] Telephone No. [Redacted] Fax No. ( ) - [Redacted]

3285C Waapa Rd, Lihue, HI 96766 Attention: Mel Bell-Grey E-mail Address: [Redacted]

2. Tenant's Address in Project. 3285C Waapa Rd, Lihue, Hawaii 96766

3. Premises. Space C, with approximately 1,920 square feet of floor space as depicted on the plan attached hereto as Exhibit A, being the square footage of the Premises, and being part of the (the "Project"), situated upon the property described in Exhibit B. Exhibit A sets forth the general layout of the Project, but shall not be deemed to be a warranty, representation or agreement on the part of Landlord that the Project or the Premises be exactly as indicated.

In addition to Tenant's rights to use and occupy the Premises as hereinafter specified, Tenant shall have non-exclusive rights to the Common Areas (as defined in Section 1.5 below), but shall not have any rights to the roof or exterior walls of the building containing the Premises (the "Building") or to any other buildings in the Project. (See also PART C, Section 1)

4. Parking. NA unreserved, currently \$ NA per month, as may be adjusted by Landlord from time to time, NA reserved, currently \$ NA per month, as may be adjusted by Landlord from time to time, vehicle parking spaces as shown on Exhibit B-1, if any. (See also PART C, Section 1.4)

5. Term. [X] 2 years and zero months, [ ] 5 years less 1 day ("Original Term") commencing June 1, 2023 ("Commencement Date") and ending May 31, 2025 ("Expiration Date"). (See also PART C, Section 2)

6. Rent Due Date. Base Rent shall be due and payable, in advance, on or before the 1st day of each calendar month during the Term. If the Rent Commencement Date is a date other than the first day of a calendar month, there shall be due on such date a sum equal to that proportion of the Base Rent specified for the first full calendar month in which a monthly payment of Base Rent is due, which the number of days from the Rent Commencement Date to the end of the calendar month during which the Rent Commencement Date shall fall bears to the total number of days in such month. Under such circumstances, the next occurring monthly installment of Base Rent shall be paid by application of the Advance Deposit.

7. Base Rent. Rent Commencement Date: [X] June 1, 2023 or [ ] The earliest to occur of (a) NA; (b) NA days after the Commencement Date, or (c) the date upon which actually opens the Premises to the public for business. If Tenant fails to commence operations from the Premises on the Rent Commencement Date, liquidated damages shall be assessed at the rate that is two (2) times the daily Base Rent per day from the Rent Commencement Date until the date upon which Tenant commences operations from the Premises. Rent shall accrue hereunder from the Rent Commencement Date. The Rent Commencement Date shall be adjusted in accordance with Part C, Section 2.2 if Landlord is unable to deliver possession of the Premises before the Rent Commencement Date.



The following amounts for the following periods of time:

Time Period [MM/DD/YYYY to MM/DD/YYYY]		Base Rent Per Month
06/01/2023	12/31/2024	1270.00 NO CAM/GET
01/01/2024	05/31/2024	1382.40+CAM+GET
06/01/2024	05/31/2025	1516.80+CAM+GET

8. **Tenant's Share of Common Area Expenses.** Nineteen percent (19.350 %) ("Tenant's Share") (currently \$ 0.18 per square foot). Tenant's Share is calculated by dividing the area of the Premises by the gross area of the Building as follows:

$$\frac{\text{Area of the Premises: } 1,920}{\text{Area of the Building: } 9,920} = \underline{19.355\%} \text{ (multiply by 100 to obtain percentage)}$$

9. **Base Rent and Other Monies Paid Upon Execution.**

- (a) **Base Rent:** \$ 1,270.00 for the period 6/1/2023 to 12/31/2023
- (b) **Common Area Expenses:** \$ \_\_\_\_\_ for the period \_\_\_\_\_
- (c) **Other:** \$ \_\_\_\_\_ for \_\_\_\_\_
- (d) **General Excise Tax:** \$ \_\_\_\_\_
- Total** \$ 1,270.00
- (e) **Security Deposit:** \$ 1,270.00 ("Security Deposit"). (See also PART C, Section 4)
- (f) **Parking: Reserved:** \$ \_\_\_\_\_
- Unreserved:** \$ \_\_\_\_\_
- (g) **Total Due Upon Execution of this Lease:** \$ 2,540.00

10. **Security Deposit:** ONE month(s) gross rent.

11. **Permitted Use (to the extent permitted by Law).** Media productions.

(See also PART C, Section 5)

12. **Guarantor.** The obligations of the Tenant under this Lease are to be guaranteed by Mel Bell-Grey ("Guarantor"). (See also PART C, Section 43)

13. **General.** Each of the foregoing definitions and basic provisions shall be construed in conjunction with and limited by references thereto in other provisions of this Lease. Additionally, the following terms shall have the following meaning: "Laws" means all federal state and local laws, rules and regulations, ordinances, all court orders, all governmental directives and governmental orders and requirements, and all restrictive covenants affecting the Project, including, but not limited to, disability laws, and "Law" means any of the foregoing; "Tenant Party" shall include Tenant, any assignees claiming by, through, or under Tenant, any subtenants claiming by, through or under Tenant, and any agents, contractors, employees, invitees, licensees, or concessionaires of the foregoing parties; and "including" means, including, without limitation.

14. **Attachments.** Attached hereto are the following, all of which constitute a part of this Lease:

- Exhibit A - a site plan depicting the Premises;
- Exhibit B - a site plan depicting the Project;
- Exhibit B-1 - Parking Plan;
- Exhibit C - a current set of the Rules and Regulations for the Project;
- Exhibit D - a Work Letter;
- Exhibit E - Ground Lease;
- Exhibit F - Option to Extend;
- Exhibit G - Guaranty;
- Exhibit H - Percentage Rent.
- Exhibit \_\_\_\_\_
- Exhibit \_\_\_\_\_

END OF PART A



**PART C. GENERAL CONDITIONS.****SECTION 1. PREMISES.**

1.1 **Granting Clause.** In consideration of the obligation of Tenant to pay Rent as herein provided, and the other terms, covenants and conditions of this Lease, the receipt and sufficiency of which are hereby acknowledged, Landlord hereby leases to Tenant, and Tenant hereby leases from Landlord, the Premises TO HAVE AND TO HOLD for the Term, all upon the terms and conditions set forth in this Lease. Landlord has not made, and does not hereby make, any representation or warranty, express or implied, as to the physical condition of the Premises, the uses to which the Premises may be put, the suitability of the Premises for Tenant's intended purposes, compliance of the improvements within Premises with existing building codes or other laws or the ability of Tenant to use the Premises for Tenant's intended uses.

1.2 **Condition.** Landlord shall deliver the Premises to Tenant broom clean and free of debris on the Commencement Date ("**Start Date**"). Tenant accepts the existing electrical, plumbing, fire sprinkler, lighting, ventilating and air conditioning systems ("**HVAC**"), loading doors, sump pumps, if any, and all other such elements in the Premises in their current AS-IS condition without warranty.

1.3 **Acknowledgements.** Tenant acknowledges that: (a) it has been given an opportunity to inspect and measure the Premises, (b) it has been advised by Landlord to satisfy itself with respect to the size and condition of the Premises (including but not limited to the electrical, HVAC and fire sprinkler systems, security, environmental aspects, and compliance with Laws and the Americans with Disabilities Act), and their suitability for Tenant's intended use, (c) it has made such investigation and assumes all responsibility therefor relating to the zoning of the Project and Premises and that Tenant's proposed use is permitted within such zoning, (d) it has made such investigation and assumes all responsibility therefor that all utilities within the Premises are of sufficient capacity for Tenant's use; (e) Tenant has made such investigation as it deems necessary with reference to such matters and assumes all responsibility therefor as the same relates or may relate to its occupancy of the Premises, (f) it is not relying on any representation as to the size of the Premises made by Landlord, (g) the square footage of the Premises was not material to Tenant's decision to lease the Premises and pay the Rent stated herein, and (h) neither Landlord or Landlord's agents have made any oral or written representations or warranties with respect to such matters other than as set forth in this Lease. In addition, Landlord acknowledges that: (i) Landlord's agents have made no representations, promises or warranties concerning Tenant's ability to honor the Lease or suitability to occupy the Premises, and (ii) it is Landlord's sole responsibility to investigate the financial capability and/or suitability of all proposed tenants. Tenant further acknowledges that the Rent payable to Landlord hereunder does not include the cost security of the Premises, and that Landlord shall have no obligation whatsoever to provide the same. Tenant assumes all responsibility for the protection of the Premises, Tenant, its agents and invitees and their property from the acts of third parties.

1.4 **Vehicle Parking.** Tenant shall be entitled to use the number of parking spaces specified in PART A, Section 4 on those portions of the Common Areas designated from time to time by Landlord for parking. Tenant shall not use more parking spaces than the stated number. The parking spaces shall be for parking by vehicles no larger than full-size passenger automobiles or pick-up trucks, herein called "**Permitted Size Vehicles.**" Landlord may regulate the loading and unloading of vehicles by adopting Rules and Regulations as provided in PART C, Section 1.7. No vehicles other than operational Permitted Size Vehicles may be parked in the Common Areas without the prior written permission of Landlord. In addition:

(a) Tenant shall not permit or allow any vehicles that belong to or are controlled by Tenant or Tenant's employees, suppliers, shippers, customers, contractors or invitees to be loaded, unloaded, or parked in areas other than those designated by Landlord for such activities.

(b) Tenant shall not service or store any vehicles in the Common Areas or in any parking spaces.

(c) If Tenant permits or allows any of the prohibited activities described in this PART C, Section 1.4, the Landlord shall have the right, without notice, in addition to such other rights and remedies that it may have, to remove or tow away the vehicle involved and charge the cost to Tenant, which cost shall be immediately payable upon demand by Landlord.

1.5 **Common Areas - Definition.** As used herein, the "**Common Areas**" shall mean that part of the Project designated by Landlord from time to time for the common use of all tenants, including equipment, signs, parking areas, sidewalks, landscaping, curbs, loading areas, private streets and alleys, lighting facilities, hallways, elevators, escalators, stairs, other access-ways, malls, restrooms, and all other areas and improvements provided by Landlord for the common use of all tenants, all of which shall be subject to Landlord's sole management and control and shall be operated and maintained in such manner as Landlord, in its discretion, shall determine.

1.6 **Common Areas - Tenant's Rights.** Landlord grants to Tenant, for the benefit of Tenant and its employees, suppliers, shippers, contractors, customers and invitees, during the term of this Lease, the non-exclusive right to use, in common with others entitled to such use, the Common Areas as they exist from time to time, subject to any rights, powers, and privileges reserved by Landlord under the terms hereof or under the terms of any rules and regulations or restrictions governing the use of the Project. Under no circumstances shall the right herein granted to use the Common Areas be deemed to include the right to store any property, temporarily or permanently, in the Common Areas. Any such storage shall be permitted only by the prior written consent of Landlord or Landlord's designated agent, which consent may be revoked at any time. In the event that any unauthorized storage shall occur then Landlord shall have the right, without notice, in addition to such other rights and remedies that it may have, to remove the property and charge the cost to Tenant, which cost shall be immediately payable upon demand by Landlord.

1.7 **Common Areas - Rules and Regulations.** Landlord or other person(s) as Landlord may appoint shall have the exclusive control and management of the Common Areas and shall have the right, from time to time, to establish, modify, amend and enforce reasonable rules and regulations ("**Rules and Regulations**") for the management, safety, care, and cleanliness of the grounds, the parking and unloading of vehicles and the preservation of good order, as well as for the convenience of other occupants or tenants of the Building and the Project and their invitees. Tenant agrees to abide by and conform to all such Rules and Regulations, and shall use its best efforts to cause its employees, suppliers, shippers, customers, contractors and invitees to so abide and conform. Landlord shall not be responsible to Tenant for the non-compliance with such Rules and Regulations by other tenants of the Project.

1.8 **Common Areas - Changes.** Landlord shall have the right, in Landlord's sole discretion, from time to time: (a) To make changes to the Common Areas, including, without limitation, changes in the location, size, shape and number of driveways, entrances, parking spaces, parking areas, loading and unloading areas, ingress, egress, direction of traffic, landscaped areas, walkways and lighting facilities; (b) To close temporarily any of the Common Areas for maintenance purposes so long as reasonable access to the Premises remains available; (c) To designate other land outside the boundaries of the Project to be a part of the Common Areas; (d) To add additional buildings and improvements to the Common Areas; (e) To use the Common Areas while engaged in making additional improvements, repairs or alterations to the Project, or any portion thereof; and (f) To do and perform such other acts and make such other changes in, to or with respect to the Common Areas and Project as Landlord may, in the exercise of sound business judgment, deem to be appropriate.

**SECTION 2. TERM.**

2.1 **Term.** The Commencement Date, Expiration Date and Original Term of this Lease are as specified in PART A, Section 5.

2.2 **Delay in Possession.** Landlord agrees to use commercially reasonable efforts to deliver possession of the Premises to Tenant by the Commencement Date. If Landlord is unable to tender possession of the Premises to Tenant before the Rent Commencement Date, then (a) Tenant's obligation to pay Rent hereunder shall be waived until Landlord tenders possession of the Premises to Tenant and any period of rent abatement that Tenant would have otherwise have enjoyed shall run from the date of delivery of possession and continue for a period equal to what Tenant would otherwise have enjoyed under the terms hereof, but minus any days of delay caused by the acts or omissions of Tenant, (b) the Term shall be extended by the time between the scheduled Rent Commencement Date and the date on which Landlord tenders possession of the Premises to Tenant, Landlord shall not be in default hereunder or be liable for damages therefor, and (c) Tenant shall accept possession of the Premises when Landlord tenders possession thereof to Tenant. If possession is not delivered within sixty (60) days after the Commencement Date, as the same may be extended under the terms of any Work Letter executed by Landlord and Tenant, Tenant may, at its option, by notice in writing within ten (10) days after the end of such sixty (60) day period, cancel this Lease, in which event the parties shall be discharged from all obligations hereunder. If such written notice is not received by Landlord within such ten (10) day period, Tenant's right to cancel shall terminate. If possession of the Premises is not delivered within one hundred twenty (120) days after the Commencement Date, this Lease shall terminate unless other agreements are reached between Landlord and Tenant, in writing.

2.3 **Tenant Compliance.** Landlord shall not be required to deliver possession of the Premises to Tenant until Tenant complies with its obligation to provide evidence of insurance (PART C, Section 7.5). Pending delivery of such evidence, Tenant shall be required to perform all of its obligations under this Lease from and after the Start Date, including the payment of Rent, notwithstanding Landlord's election to withhold possession pending receipt of such evidence of insurance. Further, if Tenant is required to perform any other conditions prior to or concurrent with the Start Date, the Start Date shall occur but Landlord may elect to withhold possession until such conditions are satisfied.

**SECTION 3. RENT.**

3.1 **Rent Defined.** All monetary obligations of Tenant to Landlord under the terms of this Lease (except for the Security Deposit) are deemed to be rent ("Rent").

3.2 **Common Area Expenses.** Tenant shall pay to Landlord during the term hereof, in addition to the Base Rent, Tenant's Share (as specified in PART A, Section 8) of all Common Area Expenses, as hereinafter defined, during each calendar year of the term of this Lease, in accordance with the following provisions:

(a) "**Common Area Expenses**" are defined, for purposes of this Lease, as all costs incurred by Landlord relating to the ownership and operation of the Project, including, but not limited to, the following: (i) The operation, repair and maintenance, in neat, clean, good order and condition, and if necessary the replacement, of the following: (aa) The Common Areas and Common Area improvements, including but not limited to parking areas, loading and unloading areas, trash areas, roadways, parkways, walkways, driveways, landscaped areas, bumpers, irrigation systems, Common Area lighting facilities, fences and gates, elevators; (bb) Exterior signs and any tenant directories; (cc) Any fire sprinkler systems; (dd) All other areas and improvements that are within the exterior boundaries of the Project but outside of the Premises and/or any other space occupied by a tenant; (ii) The cost of repair and maintenance (but not replacement) of the roofs and roof drainage systems; (iii) The cost of water, gas, electricity and telephone to service the Common Areas and any utilities not separately metered; (iv) The cost of trash disposal, pest control services, property management, security services, owners' association dues and fees; (v) Reserves set aside for maintenance, repair and/or replacement of Common Area improvements and equipment; (vi) Real Property Taxes (as defined in PART C, Section 9); (vii) The cost of the premiums for the insurance maintained by Landlord pursuant to PART C, Section 7; (viii) Any deductible portion of an insured loss concerning the Building or the Common Areas; (ix) Auditors', accountants' and attorneys' fees and costs related to the operation, maintenance, repair and replacement of the Project; (x) The cost of any capital improvement to the Building or the Project (excluding those that are Landlord's sole responsibility under PART C, Section 6.2), provided; however, that Landlord shall amortize the cost of any such capital improvement over the useful life of the improvement as reasonably determined by Landlord; and (xi) The cost of any other services to be provided by Landlord that are stated elsewhere in this Lease to be a Common Area Operating Expense.

(b) The inclusion of the improvements, facilities and services set forth in Subsection 3.2(a) shall not be deemed to impose an obligation upon Landlord to either have such improvements or facilities or to provide those services unless the Project already has the same, Landlord already provides the services, or Landlord has agreed elsewhere in this Lease to provide the same or some of them.

(c) Tenant's Share of Common Area Expenses is payable monthly on the same day as the Base Rent is due hereunder. The amount of such payments shall be based on Landlord's estimate of the annual Common Area Expenses. Within ninety (90) days after the end of each calendar year Landlord shall deliver to Tenant a reasonably detailed statement showing Tenant's Share of the actual Common Area Expenses for the preceding year. If Tenant's payments during such year exceed Tenant's Share, Landlord shall credit the amount of such over-payment against Tenant's future payments. If Tenant's payments during such year were less than Tenant's Share, Tenant shall pay to Landlord the amount of the deficiency within ten (10) days after delivery by Landlord to Tenant of the statement. While Landlord will endeavor to provide such annual statement to Tenant within ninety (90) days after the end of each calendar year, Tenant's liability for any deficiency and Landlord's obligation to provide a credit for any excess shall not be affected by the issuance of such statement after such ninety (90) day period.

(d) Common Area Expenses shall not include any expenses paid by any tenant directly to third parties, or as to which Landlord is otherwise reimbursed by any third party, other tenant, or insurance proceeds.

3.3 **Payment.** Tenant shall cause payment of Rent to be received by Landlord in lawful money of the United States, without offset or deduction (except as specifically permitted in this Lease), on or before the day on which it is due. In the event that any invoice prepared by Landlord is inaccurate such inaccuracy shall not constitute a waiver and Tenant shall be obligated to pay the amount set forth in this Lease. Rent for any period during the term hereof which is for less than one full calendar month shall be prorated based on a 30-day month. Payment of Rent shall be made to Landlord at its address stated herein or to such other persons or place as Landlord may from time to time designate in writing. Acceptance of a payment which is less than the amount then due shall not be a waiver of Landlord's rights to the balance of such Rent, regardless of Landlord's endorsement of any check so stating. In the event that any check, draft, or other instrument of payment given by Tenant to Landlord is dishonored for any reason, Tenant agrees to pay to Landlord the sum of \$50 in addition to any Late Charge, as defined in PART C, Section 12.12, and Landlord, at its option, may require all future Rent be paid by cashier's check. Payments will be applied first to accrued late charges and attorney's fees, second to accrued interest, then to Base Rent and Common Area Expenses, and any remaining amount to any other outstanding charges or costs.

3.4 **Tax on Rent and Other Payments.** In addition to Base Rent, Tenant shall also pay to Landlord, as additional rent, with each payment of Rent, an amount equal to any state or county general excise or gross income tax assessed against Landlord and attributable to such payment, including the amount paid by Tenant to Landlord under this Section. Tenant shall pay any and all increases in such taxes. Tenant shall also

pay, as additional rent, any and all other taxes or duties levied or assessed by the federal government, the state, and the county in which the Premises are located, or any other political entity now or hereafter having power to levy taxes or duties which are attributable to any payments made by Tenant under the terms of this Lease. It is the intent of this Section and of the other provisions of this Lease to insure that the Rent (including additional rent) paid to Landlord by Tenant will be received by Landlord without diminution by any tax, assessment, charge or levy of any nature whatever, except United States and state net income taxes, and the terms and conditions of this Lease shall be liberally construed to effect such purpose.

**3.5 Conveyance Tax.** Any conveyance tax imposed by law due to this Lease and any amendment to this Lease shall be paid by Tenant.

**SECTION 4. SECURITY DEPOSIT.** Tenant shall deposit with Landlord upon execution hereof of the Security Deposit as security for Tenant's faithful performance of its obligations under this Lease. The Security Deposit shall be increased from time to time, as necessary so that the amount is always at least equal to the amount as set forth in PART A, Section 10, and Tenant shall pay any increased amount to Landlord within five (5) days of demand therefor. If Tenant fails to pay Rent, or otherwise Defaults under this Lease, Landlord may use, apply or retain all or any portion of such Security Deposit for the payment of any amount already due Landlord, for Rents which will be due in the future, and/or to reimburse or compensate Landlord for any liability, expense, loss or damage which Landlord may suffer or incur by reason thereof. If Landlord uses or applies all or any portion of the Security Deposit, Tenant shall within ten (10) days after written request therefor deposit monies with Landlord sufficient to restore such Security Deposit to the full amount required by this Lease. Landlord shall not be required to keep the Security Deposit separate from its general accounts. Within ninety (90) days after the expiration or termination of this Lease, Landlord shall return that portion of the Security Deposit not used or applied by Landlord. No part of the Security Deposit shall be considered to be held in trust, to bear interest or to be prepayment for any monies to be paid by Tenant under this Lease.

**SECTION 5. USE.**

**5.1 Use.** Tenant shall use and occupy the Premises only for the Permitted Use, and for no other purpose. Tenant shall not use or permit the use of the Premises in a manner that is unlawful, creates damage, waste or a nuisance, or that disturbs occupants of or causes damage to neighboring premises or properties. Other than guide, signal and seeing eye dogs, Tenant shall not keep or allow in the Premises any pets, animals, birds, fish, or reptiles. Tenant shall not conduct, nor permit to be conducted, any auction upon the Premises, without Landlord's prior written consent. Landlord shall not be obligated to exercise any standard of reasonableness in determining whether to permit an auction.

**5.2 Hazardous Materials.**

(a) **Reportable Uses Require Consent.** The term "Hazardous Materials" as used in this Lease shall mean any product, substance, or waste whose presence, use, manufacture, disposal, transportation, or release, either by itself or in combination with other materials expected to be on the Premises, is either: (i) potentially injurious to the public health, safety or welfare, the environment or the Premises, (ii) regulated or monitored by any governmental authority, or (iii) a basis for potential liability of Landlord to any other governmental agency or third party under any applicable statute or common law theory. Hazardous Materials shall include, but not be limited to, hydrocarbons, petroleum, gasoline, and/or crude oil or any products, by-products or fractions thereof. Tenant shall not engage in any activity in or on the Premises which constitutes a Reportable Use of Hazardous Materials without the express prior written consent of Landlord and timely compliance (at Tenant's expense) with all Laws. "Reportable Use" shall mean (i) the installation or use of any above or below ground storage tank, (ii) the generation, possession, storage, use, transportation, or disposal of Hazardous Materials that requires a permit from, or with respect to which a report, notice, registration or business plan is required to be filed with, any governmental authority, and/or (iii) the presence at the Premises of Hazardous Materials with respect to which any Laws requires that a notice be given to persons entering or occupying the Premises or neighboring properties. Notwithstanding the foregoing, Tenant may use any ordinary and customary materials reasonably required to be used in the normal course of the Permitted Use, ordinary office supplies (copier toner, liquid paper, glue, etc.) and common household cleaning materials, so long as such use is in compliance with all Laws, is not a Reportable Use, and does not expose the Premises or neighboring property to any meaningful risk of contamination or damage or expose Landlord to any liability therefor. In addition, Landlord may condition its consent to any Reportable Use upon receiving such additional assurances as Landlord reasonably deems necessary to protect itself, the public, the Premises and/or the environment against damage, contamination, injury and/or liability, including, but not limited to, the installation (and removal on or before Lease expiration or termination) of protective modifications (such as concrete encasements) and/or increasing the Security Deposit.

(b) **Compliance with Laws.** Tenant, at its sole cost and expense, shall comply with all federal, state and local laws, ordinances and regulations and all rules, licenses, permits, orders, decrees and judgments relating to the environment and/or Hazardous Materials (collectively referred to as "Hazardous Materials Laws") conducted on the Premises. Tenant's default of any of its covenants or obligations under this Section shall constitute a material Event of Default under the Lease. The obligations of Tenant under this Section 5 shall survive the expiration or earlier termination of the Lease without any limitation, and shall constitute obligations that are independent and severable from Tenant's covenants and obligations to pay rent under the Lease.

(c) **Duty to Inform Landlord.** If Tenant knows, or has reasonable cause to believe, that Hazardous Materials has come to be located in, on, under or about the Premises, other than as previously consented to by Landlord, Tenant shall immediately give written notice of such fact to Landlord, and provide Landlord with a copy of any report, notice, claim or other documentation which it has concerning the presence of such Hazardous Materials.

(d) **Tenant Remediation.** Tenant shall not cause or permit any Hazardous Materials to be spilled or released in, on, under, or about the Premises (including through the plumbing or sanitary sewer system) and shall promptly, at Tenant's expense, comply with all Laws and take all investigatory and/or remedial action reasonably recommended, whether or not formally ordered or required, for the cleanup of any contamination of, and for the maintenance, security and/or monitoring of the Premises or neighboring properties, that was caused or materially contributed to by Tenant, or pertaining to or involving any Hazardous Materials brought onto the Premises during the term of this Lease, by or for Tenant, or any third party. Tenant shall pay for any investigations or remediation measures required by governmental entities having jurisdiction with respect to the existence of Hazardous Materials as a result of Tenant's use (including "Alterations", as defined in PART C, Section 7.3(a) below) of the Premises.

(e) **Tenant Indemnification.** Tenant shall indemnify, defend and hold Landlord, its agents, employees, lenders and ground lessor, if any, harmless from and against any and all loss of rents and/or damages, liabilities, judgments, claims, expenses, penalties, and attorneys' and consultants' fees arising out of or involving any Hazardous Materials brought onto the Premises by or for Tenant, or any third party (provided, however, that Tenant shall have no liability under this Lease with respect to underground migration of any Hazardous Materials under the Premises from areas outside of the Project not caused or contributed to by Tenant). Tenant's obligations shall include, but not be limited to, the effects of any contamination or injury to person, property, or the environment created or suffered by Tenant, and the cost of investigation, removal, remediation, restoration and/or abatement, and shall survive the expiration or termination of this Lease. No termination, cancellation or release agreement entered into by Landlord and Tenant shall release Tenant from its obligations under this Lease with respect to Hazardous Materials, unless specifically so agreed by Landlord in writing at the time of such agreement.



(f) **Landlord's Remediation.** Except as otherwise provided in PART C, Section 7.7, Landlord shall remediate all Hazardous Materials on the Premises prior to Tenant taking possession to the extent required by Laws and subject to Landlord's termination option in PART C, Section 5.2(g). Landlord's obligations, as and when required by the Laws, shall include, but not be limited to, the cost of investigation, removal, remediation, and restoration. Tenant shall cooperate fully in any such activities at the request of Landlord, including allowing Landlord and Landlord's agents to have reasonable access to the Premises at reasonable times in order to carry out Landlord's investigative and remedial responsibilities.

(g) **Termination Option.** If a Hazardous Materials Condition (see PART C, Section 8.1(e)) occurs during the term of this Lease, unless Tenant is legally responsible therefor (in which case Tenant shall make the investigation and remediation thereof required by the Laws and this Lease shall continue in full force and effect, but subject to Landlord's rights under PART C, Section 5.2(e) and PART C, Section 12), Landlord may, at Landlord's option, either (i) investigate and remediate such Hazardous Materials Condition, if required, as soon as reasonably possible at Landlord's expense, in which event this Lease shall continue in full force and effect, or (ii) if the estimated cost to remediate such condition exceeds twelve (12) times the then monthly Base Rent or \$50,000, whichever is greater, give written notice to Tenant, within thirty (30) days after receipt by Landlord of knowledge of the occurrence of such Hazardous Materials Condition, of Landlord's desire to terminate this Lease as of the date sixty (60) days following the date of such notice. If Landlord does not exercise option (i) within sixty (60) days of Landlord receiving notice from Tenant of the Hazardous Materials Condition, and Tenant did not cause the Hazardous Materials Condition, and is not legally responsible for such condition, the Tenant may terminate this Lease after giving Landlord thirty (30) days' notice. In the event Landlord elects to give a termination notice, Tenant may, within ten (10) days thereafter, give written notice to Landlord of Tenant's commitment to pay the amount by which the cost of the remediation of such Hazardous Materials Condition exceeds an amount equal to twelve (12) times the then monthly Base Rent or \$50,000, whichever is greater. Tenant shall provide Landlord with such funds or satisfactory assurance thereof within thirty (30) days following such commitment. In such event, this Lease shall continue in full force and effect, and Landlord shall proceed to make such remediation as soon as reasonably possible after the required funds are available. If Tenant does not give such notice and provide the required funds or assurance thereof within the time provided, this Lease shall terminate as of the date specified in Landlord's notice of termination.

5.3 **Tenant's Compliance with Laws.** Except as otherwise provided in this Lease, Tenant shall, at Tenant's sole expense, fully, diligently and in a timely manner, materially comply with all Laws, the requirements of any applicable insurance underwriter, and the recommendations of Landlord's engineers and/or consultants that relate in any manner to the such Requirements, without regard to whether such Requirements are now in effect or become effective after the Start Date. Tenant shall, within ten (10) days after receipt of Landlord's written request, provide Landlord with copies of all permits and other documents, and other information evidencing Tenant's compliance with any Laws specified by Landlord, and shall immediately upon receipt, notify Landlord in writing (with copies of any documents involved) of any threatened or actual claim, notice, citation, warning, complaint or report pertaining to or involving the failure of Tenant or the Premises to comply with any Laws. Likewise, Tenant shall immediately give written notice to Landlord of: (i) any water damage to the Premises and any suspected seepage, pooling, dampness or other condition conducive to the production of mold; or (ii) any mustiness or other odors that might indicate the presence of mold in the Premises.

5.4 **Inspection; Compliance.** Landlord and Landlord's "Lender" (as defined in PART C, Section 38) and consultants shall have the right to enter onto Premises at any time, in the case of an emergency, and otherwise at reasonable times after reasonable notice, for the purpose of inspecting the condition of the Premises and for verifying compliance by Tenant with this Lease. The cost of any such inspections shall be paid by Landlord, unless a violation of Laws, or a Hazardous Materials Condition (see PART C, Section 8.1) is found to exist or be imminent, or the inspection is requested or ordered by a governmental authority. In such case, Tenant shall upon request reimburse Landlord for the cost of such inspection, so long as such inspection is reasonably related to the violation or contamination. In addition, Tenant shall provide copies of all relevant material safety datasheets (**MSDS**) to Landlord within ten (10) days of the receipt of a written request therefor.

## **SECTION 6. MAINTENANCE; REPAIRS; UTILITY INSTALLATIONS; TRADE FIXTURES AND ALTERATIONS.**

### **6.1 Tenant's Obligations.**

(a) **In General.** Subject to the provisions of PART C, Section 1.2 (Condition), Section 5.3 (Tenant's Compliance with Laws), Section 6.2 (Landlord's Obligations), Section 8 (Damage or Destruction), and Section 13 (Eminent Domain), Tenant shall, at Tenant's sole expense, keep the Premises, Utility Installations (intended for Tenant's exclusive use, no matter where located), and Alterations in good order, condition and repair (whether or not the portion of the Premises requiring repairs, or the means of repairing the same, are reasonably or readily accessible to Tenant, and whether or not the need for such repairs occurs as a result of Tenant's use, any prior use, the elements or the age of such portion of the Premises), including, but not limited to, all equipment or facilities, such as plumbing, HVAC equipment, electrical, lighting facilities, boilers, pressure vessels, fixtures, interior walls, interior surfaces of exterior walls, ceilings, floors, windows, doors, plate glass and skylights, but excluding any items which are the responsibility of Landlord pursuant to PART C, Section 6.2. Tenant, in keeping the Premises in good order, condition and repair, shall exercise and perform good maintenance practices. Tenant's obligations shall include restorations, replacements or renewals when necessary to keep the Premises and all improvements thereon or a part thereof in good order, condition and state of repair. Tenant shall, at Tenant's sole expense, maintain the HVAC equipment, boiler and pressure vessels, and clarifiers, if any, within the Premises.

(b) **Failure to Perform.** If Tenant fails to perform Tenant's obligations under this PART C, Section 6.1, Landlord may enter upon the Premises after ten (10) days' prior written notice to Tenant (except in the case of an emergency, in which case no notice shall be required), perform such obligations on Tenant's behalf, and put the Premises in good order, condition and repair, and Tenant shall promptly pay to Landlord a sum equal to one hundred fifteen percent (115%) of the cost thereof.

(c) **Replacement.** Subject to Tenant's indemnification of Landlord as set forth in PART C, Section 7.7 below, and without relieving Tenant of liability resulting from Tenant's failure to exercise and perform good maintenance practices, if the HVAC equipment (used in common with other Tenants or serving common areas), if any, cannot be repaired other than at a cost which is in excess of fifty percent (50%) of the cost of replacing such item, then such item shall be replaced by Landlord, and the cost thereof shall be amortized over its useful life as Landlord shall determine in its sole discretion and such cost shall be included in the calculation of Common Area Operating Expense. Any air conditioning unit that is used exclusively by Tenant shall be maintained, repaired and replaced as needed at Tenant's sole cost and expense.

(d) **Americans with Disabilities Act.** Since compliance with the Americans with Disabilities Act (**ADA**) is dependent upon Tenant's specific use of the Premises, Landlord makes no warranty or representation as to whether or not the Premises comply with ADA or any similar legislation. In the event that Tenant's use of the Premises requires modifications or additions to the Premises in order to be in ADA compliance, Tenant agrees to make any and all such necessary modifications and/or additions at Tenant's expense.

6.2 **Landlord's Obligations.** Subject to the provisions of PART C, Section 1.2 (Condition), Section 8 (Damage or Destruction) and Section 13 (Eminent Domain), it is intended by the parties hereto that Landlord have no obligation, in any manner whatsoever, to repair and maintain the Premises. Landlord shall repair and maintain the structural portion of the Building and foundation, and shall replace the roof, at Landlord's sole cost and expense and such costs shall not be a Common Area Expense. Landlord shall repair and maintain the roof and such repair and maintenance costs shall be a Common Area Expense. It is the intention of the parties that the terms of this Lease govern the respective obligations of the parties as to

maintenance and repair of the Premises, and they expressly waive the benefit of any statute now or hereafter in effect to the extent it is inconsistent with the terms of this Lease.

### 6.3 Utility Installations; Trade Fixtures; Alterations.

(a) **Definitions.** The term "Utility Installations" refers to all floor and window coverings, air and/or vacuum lines, power panels, electrical distribution, security and fire protection systems, communication cabling, lighting fixtures, HVAC equipment, plumbing, and fencing in or on the Premises. The term "Trade Fixtures" shall mean Tenant's machinery and equipment that can be removed without doing material damage to the Premises. The term "Alterations" shall mean any modification of the improvements, other than Utility Installations or Trade Fixtures, whether by addition or deletion. "Tenant Owned Alterations and/or Utility Installations" are defined as Alterations and/or Utility Installations made by Tenant that are not yet owned by Landlord pursuant to PART C, Section 6.4(a).

(b) **Consent.** Tenant shall not make any Alterations or Utility Installations to the Premises without Landlord's prior written consent. Tenant may, however, make Alterations to the interior of the Premises (excluding the roof) without such consent but upon notice to Landlord, as long as such Alterations do not require a building permit and cost less than two (2) months' Base Rent. Landlord may, as a precondition to granting such approval, require Tenant to utilize a contractor chosen and/or approved by Landlord. Any Alterations or Utility Installations that Tenant shall desire to make and which require the consent of the Landlord shall be presented to Landlord in written form with detailed plans. Consent shall be deemed conditioned upon Tenant's: (i) acquiring all applicable governmental permits, (ii) furnishing Landlord with copies of both the permits and the plans and specifications prior to commencement of the work, and (iii) compliance with all conditions of such permits and other Laws in a prompt and expeditious manner. Any Alterations or Utility Installations shall be performed in a workmanlike manner with good and sufficient materials. Tenant shall promptly upon completion furnish Landlord with as-built plans and specifications. For work which costs an amount in excess of two (2) month's Base Rent, Landlord may condition its consent upon Tenant providing a lien and completion bond in an amount equal to one hundred fifty percent (150%) of the estimated cost of such Alteration or Utility Installation and/or upon Tenant's posting an additional Security Deposit with Landlord.

(c) **Liens; Bonds.** Tenant shall pay, when due, all claims for labor or materials furnished or alleged to have been furnished to or for Tenant at or for use on the Premises, which claims are or may be secured by any mechanic's or materialmen's lien against the Premises or any interest therein. Tenant shall give Landlord not less than ten (10) days' notice prior to the commencement of any work in, on or about the Premises, and Landlord shall have the right to post notices of non-responsibility. If Tenant shall contest the validity of any such lien, claim or demand, then Tenant shall, at its sole expense defend and protect itself, Landlord and the Premises against the same and shall pay and satisfy any such adverse judgment that may be rendered thereon before the enforcement thereof. If Landlord shall require, Tenant shall furnish a surety bond in an amount equal to one hundred fifty percent (150%) of the amount of such contested lien, claim or demand, indemnifying Landlord against liability for the same. If Landlord elects to participate in any such action, Tenant shall pay Landlord's attorneys' fees costs.

### 6.4 Ownership; Removal; Surrender; and Restoration.

(a) **Ownership.** Subject to Landlord's right to require removal or elect ownership as hereinafter provided, all Alterations and Utility Installations made by Tenant shall be the property of Tenant, but considered a part of the Premises. Landlord may, at any time, elect in writing to be the owner of all or any specified part of the Tenant Owned Alterations and Utility Installations. Unless otherwise instructed per PART C, Section 6.4(b) hereof, all Tenant Owned Alterations and Utility Installations shall, at the expiration or termination of this Lease, become the property of Landlord and be surrendered by Tenant with the Premises.

(b) **Removal.** By delivery to Tenant of written notice from Landlord not earlier than ninety (90) and not later than thirty (30) days prior to the end of the term of this Lease, Landlord may require that any or all Tenant Owned Alterations or Utility Installations be removed by the expiration or termination of this Lease. Landlord may require the removal at any time of all or any part of any Tenant Owned Alterations or Utility Installations made without the required consent.

(c) **Surrender; Restoration.** Tenant shall surrender the Premises by the Expiration Date or any earlier termination date, with all of the improvements, parts and surfaces thereof broom clean and free of debris, and in good operating order, condition and state of repair, ordinary wear and tear excepted. "Ordinary wear and tear" shall not include any damage or deterioration that would have been prevented by good maintenance practice. Tenant shall repair any damage occasioned by the installation, maintenance or removal of Trade Fixtures, Tenant owned Alterations and/or Utility Installations, furnishings, and equipment as well as the removal of any storage tank installed by or for Tenant. Tenant shall completely remove from the Premises any and all Hazardous Materials brought onto the Premises by or for Tenant, or any third party (except Hazardous Materials which were deposited via underground migration from areas outside of the Premises) even if such removal would require Tenant to perform or pay for work that exceeds statutory requirements. Trade Fixtures shall remain the property of Tenant and shall be removed by Tenant. Any personal property of Tenant not removed on or before the Expiration Date or any earlier termination date shall be deemed to have been abandoned by Tenant and may be disposed of or retained by Landlord as Landlord may desire. The failure by Tenant to timely vacate the Premises pursuant to this PART C, Section 6.4(c) without the express written consent of Landlord shall constitute a holdover under the provisions of Section 36 below.

6.5 **Restrictions on Signs.** Tenant shall not place on the exterior of the Premises, or any part of the interior that is visible from the exterior of the Premises, any sign or other advertising media, without the prior written consent of Landlord. Tenant shall provide its proposed sign plans to Landlord within five (5) days of the date of this Lease. All approved signs and advertising media must comply with all Laws. Landlord makes no representation that Tenant will be permitted to install its signage at the Premises. Landlord's approval shall not be deemed to be a representation that such signage complies with all Laws or that Tenant will be able to obtain all necessary permits for such signage. Tenant shall, at its sole cost and expense, install and maintain all signs, decorations, letterings, and advertising materials in good condition and repair at all times during the Term. Tenant shall not apply for any signage variance without the prior written consent of Landlord, which consent may be withheld in Landlord's sole discretion.

6.6 **Installation and Removal of Signs.** Tenant shall have all signs erected and/or installed and fully operative, subject to Landlord's prior approval thereof, all at Tenant's risk and expense. Upon Tenant's vacating the Premises, or the removal or alteration of its sign for any reason, Tenant shall be responsible for the repair, painting, and/or replacement of the building fascia surface where signs are attached. After the end of the Term or after Tenant's right to possess the Premises has been terminated, Landlord (a) may require that Tenant remove Tenant's signs by delivering to Tenant written notice thereof or (b) may use Tenant's signs, in which case such signs shall become the property of Landlord without compensation to Tenant. If Tenant fails to timely remove its signs after Landlord's written request therefor, Landlord may, at Tenant's expense, remove such signs, perform the related restoration and repair work as described herein and dispose of such signs in any manner Landlord deems appropriate. Tenant shall defend, indemnify and hold harmless Landlord and Landlord's partners, agents, employees, officers and/or directors from all losses, claims, costs and liabilities arising in connection with or related to the construction, installation, maintenance, use or removal of Tenant's signs. The rights granted to Tenant under this Section 6.6 may not be assigned to any party.

6.7 **Landlord's Signs.** Landlord may place on the Premises ordinary "For Sale" signs at any time and ordinary "For Lease" signs during the last six (6) months of the term hereof.

**SECTION 7. INSURANCE; INDEMNITY.**

7.1 **Payment of Premium.** The cost of the premiums for the insurance policies carried by Landlord, pursuant to PART C, Sections 7.2(b), 7.3(a) and 7.3(b), shall be a Common Area Expense.

**7.2 Liability Insurance.**

(a) **Carried by Tenant.** Tenant shall obtain and keep in force a Commercial General Liability policy of insurance protecting Tenant and Landlord as an additional insured against claims for bodily injury, personal injury and property damage based upon or arising out of the ownership, use, occupancy or maintenance of the Premises and all areas appurtenant thereto and for liabilities assumed under this Lease. Such insurance shall be on an occurrence basis providing single limit coverage in an amount not less than \$1,000,000 per occurrence with an annual aggregate of not less than \$2,000,000. The limits of Tenant's insurance shall not, however, limit the liability of Tenant nor relieve Tenant of any obligation hereunder. Tenant shall provide an endorsement on its liability policy(ies) which provides that its insurance shall be primary to and not contributory with any similar insurance carried by Landlord, whose insurance shall be considered excess insurance only. Tenant shall name Landlord and Landlord's managing agent and any mortgagee or other designee of Landlord (whose names shall have been furnished to Tenant) as additional insureds but only with respect to claims against them arising out of the acts or omissions of Tenant or Tenant's use or occupancy of the Premises, Project or Common Areas.

(b) **Carried by Landlord.** Landlord may maintain liability insurance as described in PART C, Section 7.2(a), in addition to, and not in lieu of, the insurance required to be maintained by Tenant. Tenant shall not be named as an additional insured therein. All insurance maintained by Landlord shall be a Common Area Expense.

**7.3 Property Insurance - Building, Improvements and Rental Value.**

(a) **Building and Improvements.** Landlord may obtain and keep in force a policy or policies of insurance in the name of Landlord, with loss payable to Landlord, any ground-lessor, and to any Lender insuring loss or damage to the Premises. The amount of such insurance may be equal to the full insurable replacement cost of the Premises, as the same shall exist from time to time, or the amount required by any Lender, but in no event more than the commercially reasonable and available insurable value thereof. Tenant Owned Alterations and Utility Installations, Trade Fixtures, and Tenant's personal property shall be insured by Tenant not by Landlord. If the coverage is available and commercially appropriate, such policy or policies may insure against all risks of direct physical loss or damage (except the perils of flood and/or earthquake unless required by a Lender), including coverage for hurricane, debris removal and the enforcement of any Laws requiring the upgrading, demolition, reconstruction or replacement of any portion of the Premises as the result of a covered loss. Such policy or policies may also contain an agreed valuation provision in lieu of any coinsurance clause, waiver of subrogation, and inflation guard protection causing an increase in the annual property insurance coverage amount by a factor of not less than the adjusted U.S. Department of Labor Consumer Price Index for All Urban Consumers for the city nearest to whether the Premises are located. All insurance maintained by Landlord shall be a Common Area Operating Expense.

(b) **Rental Value.** Landlord may also obtain and keep in force a policy or policies in the name of Landlord with loss payable to Landlord and any Lender, insuring the loss of the full Rent for one year with an extended period of indemnity for an additional one hundred eighty (180) days ("**Rental Value Insurance**"). Such insurance shall contain an agreed valuation provision in lieu of any coinsurance clause, and the amount of coverage shall be adjusted annually to reflect the projected Rent otherwise payable by Tenant, for the next twelve (12) month period.

(c) **Increase in Premiums.** Tenant shall pay for any increase in the premiums for the property insurance of the Building and for the Common Areas or other buildings in the Project if such increase is caused by Tenant's acts, omissions, use or occupancy of the Premises.

(d) **Tenant's Improvements.** Landlord shall not be required to insure Tenant Owned Alterations and Utility Installations unless the item in question has become the property of Landlord under the terms of this Lease.

**7.4 Tenant's Property; Plate Glass Insurance; Worker's Compensation Insurance.**

(a) **Property Damage.** Tenant shall obtain and maintain insurance coverage on all of Tenant's personal property, Trade Fixtures, and Tenant Owned Alterations and Utility Installations. Such insurance shall be full replacement cost coverage with a deductible of not to exceed \$1,000 per occurrence. The proceeds from any such insurance shall be used by Tenant for the replacement of personal property, Trade Fixtures and Tenant Owned Alterations.

(b) **Plate Glass Insurance.** Tenant shall obtain and maintain adequate plate glass insurance.

(c) **Worker's Compensation Insurance.** Tenant shall obtain and maintain Worker's Compensation Insurance in such amount as may be required by Laws. Such policy shall include a 'Waiver of Subrogation' endorsement. Tenant shall provide Landlord with a copy of such endorsement along with the certificate of insurance or copy of the policy required by PART C, Section 7.5.

(d) **No Representation of Adequate Coverage.** Landlord makes no representation that the limits or forms of coverage of insurance specified herein are adequate to cover Tenant's property, business operations or obligations under this Lease.

7.5 **Insurance Policies.** Insurance required herein shall be by companies maintaining during the policy term a "General Policyholders Rating" of at least A-, VII, as set forth in the most current issue of "Best's Insurance Guide", or such other rating as may be required by a Lender. Tenant shall not do or permit to be done anything which invalidates the required insurance policies. Tenant shall, prior to the Start Date, deliver to Landlord copies of policies of such insurance or certificates with copies of the required endorsements evidencing the existence and amounts of the required insurance. Tenant shall, at least ten (10) days prior to the expiration of such policies, furnish Landlord with evidence of renewals or "insurance binders" evidencing renewal thereof, or Landlord may order such insurance and charge the cost thereof to Tenant, which amount shall be payable by Tenant to Landlord upon demand. Such policies shall be for a term of at least one year, or the length of the remaining term of this Lease, whichever is less.

7.6 **Waiver of Subrogation.** Without affecting any other rights or remedies, Tenant and Landlord each hereby release and relieve the other, and waive their entire right to recover damages against the other, for loss of or damage to its property arising out of or incident to the perils required to be insured against or actually insured against herein. The effect of such releases and waivers is not limited by the amount of insurance carried or required, or by any deductibles applicable hereto. The parties agree to have their respective property damage insurance carriers waive any right to subrogation that such companies may have against Landlord or Tenant, as the case may be, so long as the insurance is not invalidated thereby.

7.7 **Indemnity.** Tenant shall indemnify, protect, defend and hold harmless, Landlord and its agents, Landlord's master or ground lessor, partners and Lenders, from and against any and all claims, loss of rents and/or damages, liens, judgments, penalties, attorneys' and consultants' fees, expenses and/or liabilities arising out of, involving, or in connection with, the use and/or occupancy of the Premises by Tenant. If any action or proceeding is brought against Landlord by reason of any of the foregoing matters, Tenant shall upon notice defend the same at Tenant's expense by counsel reasonably satisfactory to Landlord and Tenant shall cooperate with Tenant in such defense. Landlord need not have first paid any such claim in order to be defended or indemnified.

7.8 **Exemption of Landlord and its Agents from Liability.** Notwithstanding the negligence or default of this Lease by Landlord or its agents, neither Landlord nor its agents shall be liable under any circumstances for: (a) injury or damage to the person or goods, wares, merchandise or other property of Tenant, Tenant's employees, contractors, invitees, customers, or any other person in or about the Premises, whether such damage or injury is caused by or results from fire, steam, electricity, gas, water or rain, indoor air quality, the presence of mold or from the breakage, leakage, obstruction or other defects of pipes, fire sprinklers, wires, appliances, plumbing, HVAC or lighting fixtures, or from any other cause, whether the such injury or damage results from conditions arising upon the Premises or upon other portions of the Building, or from other sources or places, (b) any damages arising from any act or neglect of any other tenant of Landlord or from the failure of Landlord or its agents to enforce the provisions of any other lease in the Project, or (c) injury to Tenant's business or for any loss of income or profit therefrom. Instead, it is intended that Tenant's sole recourse in the event of such damages or injury be to file a claim on the insurance policy(ies) that Tenant is required to maintain pursuant to the provisions of PART C, Section 7.

## SECTION 8. DAMAGE OR DESTRUCTION.

### 8.1 Definitions.

(a) **"Premises Partial Damage"** shall mean damage or destruction to the Premises or improvements on the Premises, other than Tenant Owned Alterations and Utility Installations and Trade Fixtures, which can reasonably be repaired in twelve (12) months or less from the date of the damage or destruction as to whether or not the damage is partial or total. If Landlord is unable to repair and tender possession of the Premises to Tenant within twelve (12) months from the date of damage then Tenant shall have the right to terminate the Lease with thirty (30) days' written notice to Landlord. Notwithstanding the foregoing, Premises Partial Damage shall not include damage to windows, doors, and/or other similar items which Tenant has the responsibility to repair or replace pursuant to the provisions of PART C, Section 6.1.

(b) **"Premises Total Destruction"** shall mean damage or destruction to the Premises or improvements on the Premises, other than Tenant Owned Alterations and Utility Installations and Trade Fixtures, which cannot reasonably be repaired in twelve (12) months or less from the date of the damage or destruction and/or the cost thereof exceeds a sum equal to six (6) month's Base Rent. Landlord shall notify Tenant in writing within thirty (30) days from the date of the damage or destruction as to whether or not the damage is partial or total. If Landlord is unable to repair the Premises and to tender possession of the Premises to Tenant within twelve (12) months from the date of damage then Tenant shall have the right to terminate the Lease with thirty (30) days' written notice to Landlord.

(c) **"Insured Loss"** shall mean damage or destruction to improvements on the Premises, other than Tenant Owned Alterations and Utility Installations and Trade Fixtures, which was caused by an event required to be covered or actually covered by the insurance described in PART C, Section 7.3(a), irrespective of any deductible amounts or coverage limits involved.

(d) **"Replacement Cost"** shall mean the cost to repair or rebuild the improvements owned by Landlord at the time of the occurrence to their condition existing immediately prior thereto, including demolition, debris removal and upgrading required by the operation of Laws, and without deduction for depreciation.

(e) **"Hazardous Materials Condition"** shall mean the occurrence or discovery of a condition involving the presence of, or a contamination by, Hazardous Materials, in, on, or under the Premises which requires restoration.

8.2 **Partial Damage - Insured Loss.** If a Premises Partial Damage that is an Insured Loss occurs, then Landlord shall, at Landlord's expense, repair such damage (but not Tenant's Trade Fixtures or Tenant Owned Alterations and Utility Installations) as soon as reasonably possible and this Lease shall continue in full force and effect; provided, however, that Tenant shall, at Landlord's election, make the repair of any damage or destruction the total cost to repair of which is \$10,000 or less, and, in such event Landlord shall make any applicable insurance proceeds, if any, available to Tenant on a reasonable basis for that purpose. Notwithstanding the foregoing, if insurance was not in force or the insurance proceeds are not sufficient to effect such repair, Landlord may, but shall not be obligated to, contribute the shortage in proceeds as and when required to complete said repairs. Landlord shall have no obligation to pay for the shortage in insurance proceeds or to fully restore the unique aspects of the Premises unless Tenant provides Landlord with the funds to cover same, or adequate assurance thereof, within ten (10) days following receipt of written notice of such shortage and request therefor. If Landlord receives said funds or adequate assurance thereof within said ten (10) day period, the party responsible for making the repairs shall complete them as soon as reasonably possible and this Lease shall remain in full force and effect. If such funds or assurance are not received, Landlord may nevertheless elect by written notice to Tenant within ten (10) days thereafter to: (a) make such restoration and repair as is commercially reasonable with Landlord paying any shortage in proceeds, in which case this Lease shall remain in full force and effect, or (b) have this Lease terminate thirty (30) days thereafter, Tenant shall not be entitled to reimbursement of any funds contributed by Tenant to repair any such damage or destruction. Premises Partial Damage due to flood or earthquake shall be subject to Section 8.3, notwithstanding that there may be some insurance coverage, but the net proceeds of any such insurance shall be made available for the repairs if made by either party.

8.3 **Partial Damage - Uninsured Loss.** If a Premises Partial Damage that is not an Insured Loss occurs, unless caused by the gross negligence or willful misconduct of Tenant (in which event Tenant shall make the repairs at Tenant's expense), Landlord may either: (a) repair such damage as soon as reasonably possible at Landlord's expense, in which event this Lease shall continue in full force and effect, or (b) terminate this Lease by giving written notice to Tenant within thirty (30) days after receipt by Landlord of knowledge of the occurrence of such damage. Such termination shall be effective sixty (60) days following the date of such notice. In the event Landlord elects to terminate this Lease, Tenant shall have the right within ten (10) days after receipt of the termination notice to give written notice to Landlord of Tenant's commitment to pay for the repair of such damage without reimbursement from Landlord. Tenant shall provide Landlord with such funds or satisfactory assurance thereof within thirty (30) days after making such commitment. In such event this Lease shall continue in full force and effect, and Landlord shall proceed to make such repairs as soon as reasonably possible after the required funds are available. If Tenant does not make the required commitment, this Lease shall terminate as of the date specified in the termination notice.

8.4 **Total Destruction.** Notwithstanding any other provision hereof, if a Premises Total Destruction occurs, this Lease shall terminate sixty (60) days following such Destruction. If the damage or destruction was caused by the gross negligence or willful misconduct of Tenant, Landlord shall have the right to recover Landlord's damages from Tenant, except as provided in PART C, Section 7.6.

**8.5 Damage Near End of Term.** If at any time during the last six (6) months of this Lease there is damage for which the cost to repair exceeds one month's Base Rent, whether or not an Insured Loss, Landlord may terminate this Lease effective sixty (60) days following the date of occurrence of such damage by giving a written termination notice to Tenant within thirty (30) days after the date of occurrence of such damage. Notwithstanding the foregoing, if Tenant at that time has an exercisable option to extend this Lease or to purchase the Premises, then Tenant may preserve this Lease by, (a) exercising such option and (b) providing Landlord with any shortage in insurance proceeds (or adequate assurance thereof) needed to make the repairs on or before the earlier of (i) the date which is ten (10) days after Tenant's receipt of Landlord's written notice purporting to terminate this Lease, or (ii) the day prior to the date upon which such option expires. If Tenant duly exercises such option during such period and provides Landlord with funds (or adequate assurance thereof) to cover any shortage in insurance proceeds, Landlord shall, at Landlord's commercially reasonable expense, repair such damage as soon as reasonably possible and this Lease shall continue in full force and effect. If Tenant fails to exercise such option and provide such funds or assurance during such period, then this Lease shall terminate on the date specified in the termination notice and Tenant's option shall be extinguished.

**8.6 Abatement of Rent; Tenant's Remedies.**

(a) **Abatement.** In the event of Premises Partial Damage or Premises Total Destruction or a Hazardous Materials Condition for which Tenant is not responsible under this Lease, the Rent payable by Tenant for the period required for the repair, remediation or restoration of such damage shall be abated in proportion to the degree to which Tenant's use of the Premises is impaired. All other obligations of Tenant hereunder shall be performed by Tenant, and Landlord shall have no liability for any such damage, destruction, remediation, repair or restoration except as provided herein.

(b) **Remedies.** If Landlord is obligated to repair or restore the Premises and does not commence, in a substantial and meaningful way, such repair or restoration within ninety (90) days after such obligation shall accrue, Tenant may, at any time prior to the commencement of such repair or restoration, give written notice to Landlord and to any Lenders of which Tenant has actual notice, of Tenant's election to terminate this Lease on a date not less than sixty (60) days following the giving of such notice. If Tenant gives such notice and such repair or restoration is not commenced within thirty (30) days thereafter, this Lease shall terminate as of the date specified in such notice. If the repair or restoration is commenced within such thirty (30) days, this Lease shall continue in full force and effect. "**Commence**" shall mean either the unconditional authorization of the preparation of the required plans, or the beginning of the actual work on the Premises, whichever first occurs.

**8.7 Termination; Advance Payments.** Upon termination of this Lease pursuant to PART C, Section 5.2(g) or PART C, Section 8, an equitable adjustment shall be made concerning advance Base Rent and any other advance payments made by Tenant to Landlord. Landlord shall, in addition, return to Tenant so much of Tenant's Security Deposit as has not been, or is not then required to be, used by Landlord.

**SECTION 9. REAL PROPERTY TAXES.**

**9.1 Definition.** As used herein, the term "**Real Property Taxes**" shall include (a) all real property taxes and other assessments and governmental charges of any kind and nature whatsoever levied or assessed against the Project, (b) any other charges, taxes and/or impositions now in existence or hereafter imposed by any governmental authority based upon the privilege of renting the Premises in the Project including, but not limited to, assessments for special improvement districts and building improvement districts, (c) taxes and assessments levied in substitution or supplementation in whole or in part of any such taxes and assessments, (d) the Project's share of any real property taxes and assessments under any reciprocal easement agreement, common area agreement or similar agreement as to the Project and the amount of Rent collected therefor, (e) any tax, fee, levy, assessment or charge which is imposed as the result of a transfer, either partial or total, of Landlord's interest in the Project or which is added to a tax or charge hereinbefore included within the definition of real property tax by reason of such transfer, and (f) any special taxing district assessment which is imposed in order to fund public facilities for the area in which the Project is located.

**9.2 Payment of Taxes.** Except as otherwise provided in PART C, Section 9.3, Landlord shall pay the Real Property Taxes applicable to the Project, and such payments shall be included in the calculation of Common Area Expenses in accordance with the provisions of PART C, Section 3.2.

**9.3 Personal Property.** Tenant shall pay prior to delinquency all taxes assessed against and levied upon Tenant Owned Alterations and Utility Installations, Trade Fixtures, furnishings, equipment and all personal property of Tenant contained in the Premises. When possible, Tenant shall cause its Tenant Owned Alterations and Utility Installations, Trade Fixtures, furnishings, equipment and all other personal property to be assessed and billed separately from the real property of Landlord. If any of Tenant's such property shall be assessed with Landlord's real property, Tenant shall pay Landlord the taxes attributable to Tenant's property within ten (10) days after receipt of a written statement setting forth the taxes applicable to Tenant's property.

**SECTION 10. UTILITIES AND SERVICES.** Tenant shall pay for all water, gas, light, power, telephone, trash disposal and other utilities and services supplied to the Premises, together with any taxes thereon. Notwithstanding the provisions of PART C, Section 3.2, if at any time in Landlord's sole judgment, Landlord determines that Tenant is using a disproportionate amount of water, electricity or other commonly metered utilities, or that Tenant is generating such a large volume of trash as to require an increase in the size of the trash receptacle and/or an increase in the number of times per month that it is emptied, then Landlord may increase Tenant's Base Rent by an amount equal to such increased costs. There shall be no abatement of Rent and Landlord shall not be liable in any respect whatsoever for the inadequacy, stoppage, interruption or discontinuance of any utility or service due to riot, strike, labor dispute, breakdown, accident, repair or other cause beyond Landlord's reasonable control or in cooperation with governmental request or directions.

**SECTION 11. ASSIGNMENT AND SUBLETTING.**

**11.1 Landlord's Consent Required.**

(a) Tenant shall not voluntarily or by operation of law assign, transfer, mortgage or encumber (collectively, "**assign or assignment**") or sublet all or any part of Tenant's interest in this Lease or in the Premises without Landlord's prior written consent.

(b) Any assignment, sublease or other such transfer without Landlord's prior written consent shall be voidable, and, at Landlord's election, shall constitute an Event of Default by Tenant hereunder. Consent by Landlord to one or more assignments or sublettings shall not operate as a waiver of Landlord's rights with respect to any subsequent assignment or subletting. If Tenant is a partnership or limited liability company, a withdrawal or change (voluntary, involuntary, or by operation of Law) of any partner or member owning twenty percent (20%) or more of the partnership or the limited liability company, or the dilution or liquidation of the partnership or limited liability company, shall be deemed an assignment of this Lease. If Tenant consists of more than one person, a purported assignment (voluntary, involuntary, or by operation of Law) from any of such persons to any other person or entity shall be deemed an assignment of this Lease. If Tenant is a trust, one or more sales or transfers by operation of law or otherwise by which an aggregate of more than fifty percent (50%) of the total beneficial interests of a trust lessee shall become vested in one or more individuals, firms, or corporations who or which are not beneficiaries thereof, either legally or equitably, as of the date of this Lease or of Tenant's

subsequent acquisition of this Lease by assignment, shall be deemed an assignment of this Lease. If Tenant is a corporation, any dissolution, merger, consolidation, or other reorganization of Tenant, or the sale or other transfer of the controlling percentage of the capital stock of Tenant, or the sale of fifty-one percent (51%) of the value of the assets of Tenant, shall be deemed an assignment of this Lease. If Tenant is a corporation in which stock is publicly held and traded regularly on a recognized stock exchange, the condition that the present stockholders of the Tenant retain at least fifty percent (50%) of the voting stock of Tenant shall not apply, nor shall the provisions relating to the transfer, sale, pledge, or other disposition of corporation stock or voting securities of Tenant apply; provided, however, that a merger or acquisition of fifty-one percent (51%) or more of the outstanding stock of any such Tenant shall be construed to be an assignment and shall require Landlord's consent unless the successor or acquiring corporation has a net worth equal to or greater than Tenant had at the time this Lease was executed, or at the time of any such merger or acquisition (whichever shall be the greater). The phrase "**controlling percentage**" means the ownership of, and the right to vote, stock possessing at least fifty-one percent (51%) of the total combined voting power of all classes of Tenant's capital stock issued, outstanding, and entitled to vote for the election of directors. The term "**sublet**" shall be deemed to include the granting of licenses, concessions, and any other rights of occupancy of any portion of the Premises.

(c) If Tenant at any time desires to assign this Lease or to sublet the Premises or any part thereof, Tenant shall first notify Landlord in writing of its desire to do so, and offer Landlord the right to recapture, at the per square foot Base Rent for the Premises then applicable pursuant to this Lease or the rent that Tenant proposes to obtain, whichever is lower, of all (but not part) of the Premises that Tenant desires to assign or sublet. Landlord, upon receipt of such notice, shall have the option, to be exercised within forty-five (45) days from the date of the receipt of such notice, to require Tenant to execute an assignment of this Lease or sublease of the Premises or such portion thereof as Tenant desires to sublet, to Landlord in its own name, with the right to sublease to others, including Tenant's proposed assignee or sublessee. If Landlord exercises such option and such assignment or sublease is at the Rent specified in this Lease or higher, Tenant shall be released of all further liability hereunder, from and after the effective date of such assignment or sublease, with respect to the premises included therein. If Landlord should exercise such option and such assignment or sublease is at a rental less than that specified in this Lease, Tenant shall remain liable to Landlord only for the amount by which the Rent stated in Tenant's original lease exceeds the amount of rental as so determined for the assignment or sublease to Landlord. If Landlord does not exercise such option within such time period, Tenant may thereafter assign this Lease or sublet the Premises or a portion thereof, provided Landlord consents thereto, but at a rental not less than offered to Landlord in the notice and not later than ninety (90) days after delivery of the original notice to Landlord.

#### 11.2 Terms and Conditions Applicable to Assignment and Subletting.

(a) Regardless of Landlord's consent, no assignment or subletting shall: (i) be effective without the express written assumption by such assignee or sublessee of the obligations of Tenant under this Lease, (ii) release Tenant and Guarantor(s) of any obligations hereunder, or (iii) alter the primary liability of Tenant for the payment of Rent or for the performance of any other obligations to be performed by Tenant.

(b) Landlord may accept Rent or performance of Tenant's obligations from any person other than Tenant pending approval or disapproval of an assignment. Neither a delay in the approval or disapproval of such assignment nor the acceptance of Rent or performance shall constitute a waiver or estoppel of Landlord's right to exercise its remedies for an Event of Default.

(c) Landlord's consent to any assignment or subletting shall not constitute consent to any subsequent assignment or subletting.

(d) In the event of any Event of Default by Tenant, Landlord may proceed directly against Tenant, any Guarantors or anyone else responsible for the performance of Tenant's obligations under this Lease, including any assignee or sublessee, without first exhausting Landlord's remedies against any other person or entity responsible therefore to Landlord, or any security held by Landlord.

(e) Each request for consent to an assignment or subletting shall be in writing, accompanied by information relevant to Landlord's determination as to the financial and operational responsibility and appropriateness of the proposed assignee or sublessee, including but not limited to the Intended use and/or required modification of the Premises, if any, together with a fee of \$500, plus reasonable attorney's fees as consideration for Landlord's considering and processing such request. Tenant agrees to provide Landlord with such other or additional information and/or documentation as may be reasonably requested. (See also PART C, Section 42)

(f) Any assignee of, or sublessee under, this Lease shall, by reason of accepting such assignment, entering into such sublease, or entering into possession of the Premises or any portion thereof, be deemed to have assumed and agreed to conform and comply with each and every term, covenant, condition and obligation herein to be observed or performed by Tenant during the term of such assignment or sublease, other than such obligations as are contrary to or inconsistent with provisions of an assignment or sublease to which Landlord has specifically consented to in writing.

(g) Landlord's consent to any assignment or subletting shall not transfer to the assignee or sublessee any Option granted to the original Tenant by this Lease unless such transfer is specifically consented to by Landlord in writing. (See PART C, Section 44.2)

**11.3 Additional Terms and Conditions Applicable to Subletting.** The following terms and conditions shall apply to any subletting by Tenant of all or any part of the Premises and shall be deemed included in all subleases under this Lease whether or not expressly incorporated therein:

(a) Tenant hereby assigns and transfers to Landlord all of Tenant's interest in all Rent payable on any sublease, and Landlord may collect such Rent and apply same toward Tenant's obligations under this Lease; provided, however, that until an Event of Default shall occur in the performance of Tenant's obligations, Tenant may collect such Rent. In the event that the amount collected by Landlord exceeds Tenant's then outstanding obligations any such excess shall be refunded to Tenant. Landlord shall not, by reason of the foregoing or any assignment of such sublease, nor by reason of the collection of Rent, be deemed liable to the sublessee for any failure of Tenant to perform and comply with any of Tenant's obligations to such sublessee. Tenant hereby irrevocably authorizes and directs any such sublessee, upon receipt of a written notice from Landlord stating that an Event of Default exists in the performance of Tenant's obligations under this Lease, to pay to Landlord all Rent due and to become due under the sublease. Sublessee shall rely upon any such notice from Landlord and shall pay all Rents to Landlord without any obligation or right to inquire as to whether such Event of Default exists, notwithstanding any claim from Tenant to the contrary.

(b) In the Event of Default by Tenant, Landlord may, at its option, require sublessee to attorn to Landlord, in which event Landlord shall undertake the obligations of the sublessor under such sublease from the time of the exercise of such option to the expiration of such sublease; provided, however, Landlord shall not be liable for any prepaid rents or security deposit paid by such sublessee to such sublessor or for any prior Event of Default of such sublessor.

(c) Any matter requiring the consent of the sublessor under a sublease shall also require the consent of Landlord.

(d) No sublessee shall further assign or sublet all or any part of the Premises without Landlord's prior written consent.

(e) Landlord shall deliver a copy of any notice of Event of Default by Tenant to the sublessee, who shall have the right to cure the Event of Default of Tenant within the grace period, if any, specified in such notice. The sublessee shall have a right of reimbursement and offset from and against Tenant for any such Defaults cured by the sublessee.

## **SECTION 12. DEFAULT; REMEDIES.**

**12.1 Default.** Each of the following events shall be an "Event of Default" by Tenant under this Lease:

- (a) If Tenant shall fail to pay Rent when due and the continuance of such failure for a period of five days.
- (b) If Tenant shall fail to (1) obtain the insurance coverage required hereunder, or (2) comply with the provisions of PART C, Section 5.2 regarding Hazardous Materials.
- (c) The failure of Tenant to provide (i) reasonable written evidence of compliance with applicable Laws, (ii) the rescission of an unauthorized assignment or subletting, (iii) an estoppel certificate or financial statements, (iv) a requested subordination, (v) evidence concerning any guaranty and/or Guarantor, (vi) material data safety sheets (MSDS), or (v) any other documentation or information which Landlord may reasonably require of Tenant under the terms of this Lease, where any such failure continues for a period of ten (10) days following written notice to Tenant.
- (d) If any petition is filed by or against Tenant (the term "Tenant" shall include, for the purpose of this Section 12 any Guarantor(s)) (i) in any bankruptcy or other insolvency proceeding; (ii) seeking any relief under any state or federal debtor relief law; (iii) for the appointment of a liquidator or receiver for all or substantially all of Tenant's property or for Tenant's interest in this Lease; or (iv) for the reorganization or modification of Tenant's capital structure.
- (e) If Tenant admits in writing that it cannot meet its obligations as they become due or the making by Tenant of an assignment for the benefit of its creditors.
- (f) If Tenant shall vacate the Premises and permit the same to remain unoccupied and unattended, or shall remove or attempt to remove or manifest an intent to remove, not in the ordinary course of business, Tenant's goods or property from or out of the Premises.
- (g) If Tenant shall at any time be in default in the observance or performance of any of the other covenants and/or agreements required to be performed and/or observed by Tenant hereunder for a period of five (5) days; provided that if such default is curable but shall reasonably require more than five (5) days to cure, Tenant shall be afforded an additional time period to effect such cure, not to exceed thirty (30) days, provided Tenant commences to cure the default within the initial five-day period and diligently prosecutes the same to completion.
- (h) If any Guarantor of this Lease shall default under any guaranty or shall repudiate or revoke such guaranty or any obligation under such guaranty.

**12.2 Remedies.** Upon the occurrence of any such Event of Default, Landlord shall have the option to pursue any one or more of the following remedies without any notice or demand whatsoever:

- (a) Terminate this Lease, in which event Tenant shall immediately surrender the Premises to Landlord, and if Tenant fails to do so Landlord may, without prejudice to any other remedy which Landlord may have for omission or arrearages in rental, enter upon and take possession of the Premises and expel or remove Tenant and any other person who may be occupying the Premises or any part thereof, by force if necessary, without being liable for prosecution or any claim of damages therefor.
- (b) Enter upon and take possession of the Premises and expel or remove Tenant and any other person who may be occupying the Premises or any part thereof without being liable for prosecution or any claim for damages therefor, with or without having terminated this Lease.
- (c) Perform any act Tenant is obligated to perform under the terms of this Lease (and enter upon the Premises in connection therewith if necessary) in Tenant's name and on Tenant's behalf, without being liable for any claim for damages therefor, and Tenant shall reimburse Landlord on demand for any expenses which Landlord may incur in thus effecting compliance with Tenant's obligations under this Lease (including, but not limited to, collection costs and legal expenses), plus interest thereon at the lesser of twelve (12%) per annum or the maximum rate permitted by Law.
- (d) Alter all locks and other security devices at the Premises without terminating this Lease.
- (e) Bring an action for summary possession and, in such action, service of prior notice or demand is hereby expressly waived.

In addition to the other remedies provided in this Lease, and anything contained herein to the contrary notwithstanding, Landlord shall be entitled to restrain any default or violation, or attempted or threatened default or violation of any of the terms, covenants, conditions or other provisions of this Lease, by injunction, order of specific performance or other appropriate equitable relief.

**12.3 Exercise of Landlord's Remedies.** The remedies provided to Landlord hereunder are intended to be cumulative, and may be exercised by Landlord in any order, or simultaneously, without such exercise being a waiver by Landlord of its right to exercise any other remedy granted to Landlord hereunder (or under Laws) with respect to the same default. Exercise by Landlord of any one or more remedies hereunder granted or otherwise available shall not be deemed to be an acceptance or surrender of the Premises by Tenant, whether by agreement or by operation of Law, it being understood that such surrender can be effected only by the written agreement of Landlord and Tenant. No alteration of locks or other security devices and no removal or other exercise of dominion by Landlord over the property of Tenant or others at the Premises shall be deemed unauthorized or constitute a conversion or a tortious interference with the business, contracts or operations of Tenant, Tenant hereby consenting, after any Event of Default, to the aforesaid exercise of dominion over Tenant's property within the Premises. All claims for damages by reason of such re-entry and/or repossession and/or alteration of locks or other security devices are hereby waived, as are all claims for damages by reason of any distress warrant, forcible detainer proceedings, sequestration proceedings or other legal process. Tenant agrees that any re-entry by Landlord may be pursuant to judgment obtained in legal proceedings, or without the necessity for any legal proceedings, as Landlord may elect, and Landlord shall not be liable in trespass, for tortious interference with business or contract, or otherwise in connection therewith. To the fullest extent permitted by applicable Law, Landlord shall have the right to bring an action for unlawful detainer or possession separate from any action brought to recover damages due from Tenant by virtue of its default, and the bringing of such separate action for unlawful detainer or possession shall in no way prejudice or cut off Landlord's right to seek damages or to exercise any of its other rights and remedies under this Lease after recovering possession of the Premises.

**12.4 Termination of Lease.** If, after the occurrence of an Event of Default, Landlord elects to terminate this Lease, then notwithstanding such termination (and in addition to the additional costs and expenses recoverable from Tenant pursuant to PART C, Section 12.7), Tenant shall be liable for and shall pay to Landlord the sum of all Rent and other amounts payable to Landlord pursuant to the terms of this Lease which have accrued to

the date of such termination, plus, as damages, an amount equal to the total Rent for the remaining portion of the Term (had such Term not been terminated by Landlord prior to the date of its scheduled expiration), less the present value of the then fair Rental value of the Premises for such period based upon a discount rate of ten percent (10%) per annum.

**12.5 Separate Suits.** Tenant shall permit Landlord to split its cause of action for rent so as to permit institution of a separate suit or suits or proceedings for the Base Rent hereunder reserved to Landlord, and a separate suit or suits or proceedings for any other payment required hereunder, and neither the institution of such suit or proceeding, nor the entering of judgment therein, shall bar Landlord from bringing a subsequent suit or proceeding for the Base Rent, or for any other payments required hereunder.

**12.6 No Termination.** If Landlord elects to repossess the Premises without terminating this Lease, then (in addition to the additional costs and expenses recoverable from Tenant pursuant to PART C, Section 12.7), Tenant shall be liable for and shall pay to Landlord at the address specified for notice to Landlord herein all Rent and other amounts payable to Landlord pursuant to the terms of this Lease which have accrued to the date of such repossession, plus total Rent required to be paid by Tenant to Landlord during the remainder of the Term until the scheduled date of expiration of the Term, diminished by any net sums thereafter received by Landlord through reletting the Premises during such period (after deducting expenses incurred by Landlord as provided in PART C, Section 12.7). In reletting the Premises on Tenant's behalf, Landlord shall be entitled to grant any concessions it deems advisable, including rent abatement. In no event shall Tenant be entitled to any excess of any rental obtained by reletting over and above the rental herein reserved. Actions to collect amounts due by Tenant to Landlord as provided in this Section may be brought from time to time on one or more occasions, without the necessity of Landlord's waiting until expiration of the Term, or such action may be brought at or after the end of the Term, in which event Landlord's cause of action to collect such amounts shall be deemed (for purposes of applying any applicable statute of limitations) to have accrued on the last day of such Term, and Tenant hereby waives any defense based on application of a statute of limitations with respect to an action brought by Landlord to recover such amounts, as long as such action is brought within the applicable limitation period as measured from the last day of the Term.

**12.7 Additional Costs and Expenses of Default.** Following the occurrence of any Event of Default, Tenant shall also be liable for and shall pay to Landlord, in addition to any sum provided to be paid above: (a) costs and expenses incurred by Landlord to obtain possession of the Premises; (b) broker's fees incurred by Landlord in connection with reletting the whole or any part of the Premises; (c) the costs of removing, storing and/or disposing of Tenant's or other occupant's property; (d) the amount of all damages suffered by Landlord as a result of Tenant's default prior to termination or recovery of the Premises, as the case may be; (e) the cost of making repairs and replacements required to be made by Tenant hereunder, and of performing all covenants of Tenant relating to the condition of the Premises; (f) the cost of repairing, altering, remodeling or otherwise putting the Premises into condition acceptable to a new tenant or tenants; (g) all unamortized leasing commissions and tenant improvement allowance (based upon straight line amortization over the original term of the Lease); and (h) all reasonable expenses incurred by Landlord in enforcing or defending Landlord's rights and/or remedies at law, equity or hereunder, including reasonable attorneys' fees, litigation expenses and court costs.

**12.8 Reletting the Premises.** In the event of termination of this Lease or repossession of the Premises after an Event of Default, Landlord shall not have any obligation to relet or attempt to relet the Premises or any portion thereof, or to collect rental after reletting; Landlord may relet the whole or any portion of the Premises for any period, to any tenant, and for any use and purpose, upon such terms as it deems appropriate, and may grant any rental or other lease concessions as it deems advisable, including free rent.

**12.9 Repossession of the Premises.** If Landlord takes possession of the Premises pursuant to the authority herein granted, then Landlord shall have the right to keep in place and use all of the furniture, fixtures and equipment at the Premises, including that which is owned by or leased to Tenant at all times prior to any foreclosure thereon by Landlord or repossession thereof by any lessor thereof or third party having a lien thereon. Landlord shall also have the right to remove from the Premises (without the necessity of obtaining a distress warrant, writ of possession or other legal process and without being liable for prosecution or any claim for damages therefor) all or any portion of such furniture, fixtures, equipment and other property located thereon and place the same in storage at any place on the island in which the Premises is located or dispose of the same; and in such event, Tenant shall be liable to Landlord for costs incurred by Landlord in connection with such removal, storage and/or disposal and shall indemnify and hold harmless Landlord and Landlord's partners, agents, employees, officers and/or directors from all loss, damage, cost, expense and liability in connection with such removal, storage and/or disposal. Landlord shall also have the right to relinquish possession of all or any portion of such furniture, fixtures, equipment and other property to any person ("Claimant") claiming to be entitled to possession thereof who presents to Landlord a copy of any instrument purporting to have been executed by Tenant (or any predecessor of Tenant) or otherwise authorized by Law or a court, granting Claimant the right under various circumstances to take possession of such furniture, fixtures, equipment or other property, without the necessity on the part of Landlord to inquire into the authenticity of such instrument and without the necessity of Landlord's making any investigation or inquiry as to the validity of the factual or legal basis upon which Claimant purports to act; and Tenant agrees to indemnify, defend and hold harmless Landlord and Landlord's partners, agents, employees, officers and/or directors from all cost, expense, loss, damage and liability incident to Landlord's relinquishment of possession of all or any portion of such furniture, fixtures, equipment or other property to Claimant. Should Tenant abandon the Premises and leave property therein, Landlord may elect whether or not to accept the property, liquidate such property and apply the proceeds against any sums due and owing by Tenant, or to dispose of such property, and Tenant waives any claim to such property after any such abandonment. For purposes of the foregoing, Tenant shall be deemed to have abandoned its interest in such property if the same is not removed from the Premises by Tenant within ten (10) days after Landlord's demand that Tenant remove same, or within ten (10) days after expiration or earlier termination of this Lease, whichever first occurs.

**12.10 Waiver of Rights of Redemption.** Tenant hereby expressly waives any and all rights of redemption under any present or future laws in the event Tenant is evicted or dispossessed for any cause, or in the event Landlord obtains possession of the Premises by reason of Tenant's violation of any of the covenants and conditions of this Lease or otherwise.

**12.11 Additional Remedies.** The rights and remedies of Landlord herein stated shall be in addition to, and not in lieu of, any and all other rights and remedies which Landlord has or may hereafter have against Tenant or any other person or entity, at law or in equity, and Tenant stipulates and agrees that the rights granted to Landlord by this Lease are understood and have been expressly agreed to by Tenant.

**12.12 Late Charges.** Tenant hereby acknowledges that late payment by Tenant of Rent will cause Landlord to incur costs not contemplated by this Lease, the exact amount of which will be extremely difficult to ascertain. Such costs include, but are not limited to, processing and accounting charges, and late charges which may be imposed upon Landlord by any Lender. Accordingly, if any Rent shall not be received by Landlord within five (5) days after such amount shall be due, then, without any requirement for notice to Tenant, Tenant shall immediately pay to Landlord a one-time Late Charge equal to five percent (5%) of each such overdue amount or \$100, whichever is greater ("**Late Charge**"). The parties hereby agree that any Late Charge represents a fair and reasonable estimate of the costs Landlord will incur by reason of such late payment. Acceptance of such late charge by Landlord shall in no event constitute a waiver of Tenant's Event of Default with respect to such overdue amount, nor prevent the exercise of any of the other rights and remedies granted hereunder. In the event that a late charge is payable hereunder, whether or not collected, for three (3) consecutive installments of Rent, then notwithstanding any provision of this Lease to the contrary, Rent shall, at Landlord's option, become due and payable quarterly in advance and such payments shall be made by cashier's check.



**12.13 Interest on Past Due Amounts.** Any amounts owing by Tenant to Landlord under the terms of this Lease shall carry interest from the date the same become due until paid at a rate equal to the lesser of twelve percent (12%) per annum or the maximum rate permitted by Law. Such interest shall be considered as a part of the rental payable hereunder.

**12.14 Non-Sufficient Funds.** If Tenant pays any installment of Rent or any other sum by check and such check is returned for insufficient funds or other reason not the fault of Landlord, then Tenant shall pay to Landlord on demand a processing fee of \$50 per returned check.

**12.15 Default by Landlord.** Landlord shall not be deemed in default of this Lease unless Landlord fails within a reasonable time to perform an obligation required to be performed by Landlord. For purposes of this Section, a reasonable time shall in no event be less than thirty (30) days after receipt by Landlord, and any Lender whose name and address shall have been furnished Tenant in writing for such purpose, of written notice specifying wherein such obligation of Landlord has not been performed; provided, however, that if the nature of Landlord's obligation is such that more than thirty (30) days are reasonably required for its performance, then Landlord shall not be in default if performance is commenced within such thirty (30) day period and thereafter diligently pursued to completion. Tenant's exclusive remedy shall be an action for damages. Unless Landlord fails to so cure such default after such notice, Tenant shall not have any remedy or cause of action by reason thereof.

### **SECTION 13. EMINENT DOMAIN.**

**13.1 Substantial Taking.** If more than twenty percent (20%) of the floor area of the Premises should be taken for any public or quasi-public use under any governmental Law, ordinance or regulation or by right of eminent domain or by private purchase in lieu thereof, this Lease shall terminate and the Rent (excluding Rent accruing with respect to the period prior to the date of such termination) shall be abated during the unexpired portion of this Lease, effective on the date physical possession is taken by the condemning authority.

**13.2 Partial Taking.** If less than twenty percent (20%) of the floor area of the Premises should be taken as aforesaid, this Lease shall not terminate; however, the Rent payable hereunder during the unexpired portion of this Lease shall be reduced in proportion to the area taken, effective on the date physical possession is taken by the condemning authority. Rent shall be proportionately adjusted. Following such partial taking, Landlord shall make all necessary repairs or alterations within the scope of the improvements made by Landlord to the Premises for Tenant in connection with this Lease (if any) necessary to make the Premises an architectural whole. Notwithstanding this provision, Landlord shall also have the right to terminate this Lease if there is a taking of any portion of the Project that would leave the remainder of the Project unsuitable for Landlord's intended use of the Project in a manner comparable to the Project's use prior to the taking. Any such termination shall be effective as of the date that the physical taking of the portion of the Project occurs.

**13.3 Leasehold Taking.** In the event of a condemnation of a leasehold interest in all or a portion of the Premises without the condemnation of the fee simple title also, this Lease shall not terminate and such condemnation shall not excuse Tenant from full performance of all of its covenants hereunder, but Tenant in such event shall be entitled to present or pursue against the condemning authority its claim for and to receive all compensation or damages sustained by it by reason of such condemnation, and Landlord's right to recover compensation or damages shall be limited to compensation for and damages, if any, to its reversionary interest; it being understood, however, that during such time as Tenant shall be out of possession of the Premises by reason of such condemnation, the Lease shall not be subject to forfeiture for failure to observe and perform those covenants not calling for payment of money. In the event the condemning authority shall fail to keep the Premises in the state of repair required hereunder, or to perform any other covenant not calling for the payment of money, Tenant shall have ninety (90) days after the restoration of possession to it within which to carry out its obligation under such covenant or covenants. During such time as Tenant shall be out of possession of the Premises by reason of such leasehold condemnation, Tenant shall pay to Landlord, in lieu of the Base Rent and Percentage Rent provided for hereunder, and in addition to any other payments required of Tenant hereunder, an annual rental equal to the average aggregate annual rental paid by Tenant for the period from the commencement of the Lease Term until the condemning authority shall take possession, or during the preceding three (3) full calendar years, whichever period is shorter. At any time after such condemnation proceedings are commenced, Landlord shall have the right, at its option, to require Tenant to assign all compensation and damages payable by the condemnor to Tenant to Landlord, to be held without liability for interest thereon as security for the full performance of Tenant's covenants hereunder, such compensation and damages received pursuant to such assignment to be applied first to the payment of rents, taxes, assessments, insurance premiums and all other sums from time to time payable by Tenant pursuant to the terms of this Lease as such sums fall due and the remainder, if any to be payable to Tenant, it being understood and agreed that such assignment shall not relieve Tenant of any of its obligations under this Lease with respect to such rents, taxes, assessments, insurance premiums and other sums except as the same shall be actually received by Landlord.

**13.4 Common Areas Condemnation.** If any part of the Common Areas shall be taken as aforesaid, this Lease shall not terminate, nor shall the Rent payable hereunder be reduced; however, either Landlord or Tenant may terminate this Lease if the area of the Common Areas remaining following such taking plus any additional parking area provided by Landlord in reasonable proximity to the Project shall be less than seventy percent (70%) of the area of the Common Areas immediately prior to the taking. Any election to terminate this Lease in accordance with this provision shall be evidenced by written notice of termination delivered to the other party within thirty (30) days after the date physical possession is taken by the condemning authority.

**13.5 Condemnation Award.** All compensation awarded for any taking for public purposes, whether permanent or temporary (or the proceeds of private sale in lieu thereof), of the Premises or Common Areas, as between Landlord and Tenant, shall be the property of Landlord, and Tenant hereby assigns its interest in any such award to Landlord; however, Landlord shall have no interest in any award made to Tenant for loss of business or for the taking of Tenant's fixtures and other personal property of Tenant if a separate award for such items is made to Tenant. Tenant shall not be entitled to any award made for the value of the unexpired Term of this Lease and Tenant shall have no claim against Landlord. In the event that this Lease is not terminated by reason of such condemnation, Landlord shall repair, to the extent of severance damages received by Landlord in connection with such condemnation, any damage to the Premises caused by such condemnation except to the extent that Tenant has been reimbursed therefore by the condemning authority. Tenant shall pay any amount in excess of such severance damages required to complete such repair.

### **SECTION 14. ESTOPPEL CERTIFICATES.**

(a) Each party (as "**Responding Party**") shall within ten (10) days after written notice from the other party (the "**Requesting Party**") execute, acknowledge and deliver to the Requesting Party an estoppel certificate as may be reasonably requested by the Requesting Party.

(b) If the Responding Party shall fail to execute or deliver the estoppel certificate within such ten (10) day period, the Requesting Party may execute an estoppel certificate stating that (i) the Lease is in full force and effect without modification except as may be represented by the Requesting Party, (ii) there are no uncured defaults in the Requesting Party's performance, and (iii) if Landlord is the Requesting Party, not more than one (1) month's rent has been paid in advance. Prospective purchasers and encumbrancers may rely upon the Requesting Party's estoppel certificate, and the Responding Party shall be estopped from denying the truth of the facts contained in such certificate. In addition, Tenant acknowledges that any failure on its part to provide such an estoppel certificate will expose Landlord to risks and potentially cause Landlord to incur costs not contemplated by this Lease, the extent of which will be extremely difficult to ascertain.

(c) If Landlord desires to finance, refinance, or sell the Premises, or any part thereof, Tenant and all Guarantors shall within ten (10) days after written notice from Landlord deliver to any potential lender or purchaser designated by Landlord such financial statements as may be reasonably required by such lender or purchaser, including but not limited to Tenant's financial statements for the past three (3) years. All such financial statements shall be received by Landlord and such lender or purchaser in confidence and shall be used only for the purposes herein set forth.

#### **SECTION 15. DEFINITION OF LANDLORD.**

The term "Landlord" as used herein shall mean the owner or owners at the time in question of the fee title to the Premises, or, if this is a sublease, of the Tenant's interest in the prior lease. In the event of a transfer of Landlord's title or interest in the Premises or this Lease, Landlord shall deliver to the transferee or assignee (in cash or by credit) any unused Security Deposit held by Landlord. Upon such transfer or assignment and delivery of the Security Deposit, as aforesaid, the prior Landlord shall be relieved of all liability with respect to the obligations and/or covenants under this Lease thereafter to be performed by the Landlord. Subject to the foregoing, the obligations and/or covenants in this Lease to be performed by the Landlord shall be binding only upon the Landlord as hereinabove defined.

#### **SECTION 16. NO PARTNERSHIP.**

Nothing herein contained shall be deemed or construed by the parties hereto, nor by any third party, as creating the relationship of principal and agent or of partnership or of joint venture between Landlord and Tenant.

#### **SECTION 17. CAPTION: CONSTRUCTION OF TERMS.**

The captions used herein are for convenience only and do not limit or amplify the provisions hereof. The language in all parts of this Lease shall in all cases be construed as a whole and according to its fair meaning, and not strictly for or against either Landlord or Tenant, and the construction of this Lease and any of its various provisions shall be unaffected by any argument or claim, whether or not justified, that it has been prepared, wholly or in substantial part, by or on behalf of Landlord or Tenant. Whenever herein the singular number is used, the same shall include the plural, and words of any gender shall include each other gender. References to "day" or "days" shall mean calendar days.

#### **SECTION 18. NO WAIVER.**

One or more waivers of any covenant, term or condition of this Lease by either party shall not be construed as a waiver of a subsequent default of the same covenant, term or condition. The consent or approval by either party shall not be construed as a waiver of a subsequent default of the same covenant, term or condition. The consent or approval by either party to or of any act by the other party requiring such consent or approval shall not be deemed to waive or render unnecessary consent to or approval of any subsequent similar act. The subsequent acceptance of rent hereunder by Landlord shall not be deemed to be a waiver of any preceding default by Tenant of any term, covenant or condition of this Lease, other than the failure of Tenant to pay the particular rental so accepted, regardless of Landlord's knowledge of such preceding default at the time of acceptance of such rent. No payment by Tenant or receipt by Landlord of a lesser amount than the Rent due hereunder shall be deemed to be other than on account of the earliest due Rent, nor shall any endorsement or statement on any check or any letter accompanying any check or payment as Rent be deemed an accord and satisfaction, and Landlord may accept such check or payment without prejudice to Landlord's right to recover the balance of such Rent or pursue any other remedy provided in this Lease.

#### **SECTION 19. JOINT AND SEVERAL LIABILITY.**

If there is more than one Tenant, then the obligations hereunder imposed upon Tenant shall be joint and several. If Guarantor(s) are listed in PART A, Section 12, then the obligations hereunder imposed upon Tenant shall be the joint and several obligations of Tenant and Guarantor(s), and Landlord need not first proceed against Tenant before proceeding against such Guarantor(s) nor shall any such Guarantor(s) be released from its guaranty for any reason whatsoever.

#### **SECTION 20. TIME OF THE ESSENCE; FORCE MAJEURE.**

Time is of the essence with respect to all provisions of this Lease. The foregoing notwithstanding, whenever a period of time is herein prescribed for action to be taken by Landlord, Landlord shall not be liable or responsible for, and there shall be excluded from the computation of any such period of time, any delays due to strikes, riots, acts of God, shortages of labor or materials, war, acts of terrorists, computer crimes, governmental Laws or any other causes of any kind whatsoever which are beyond the reasonable control of Landlord. Unless otherwise explicitly provided herein, no such events shall excuse Tenant from payment of amounts due Landlord under this Lease or excuse Tenant from performance of its obligations under this Lease.

#### **SECTION 21. QUIET ENJOYMENT.**

Landlord agrees that if Tenant shall perform all of the covenants and agreements herein required to be performed by Tenant, Tenant shall, subject to the terms of this Lease, at all times during the continuance of this Lease have the peaceable and quiet enjoyment and possession of the Premises, without hindrance by Landlord or anybody claiming by, through or under Landlord, but not otherwise.

#### **SECTION 22. AMENDMENT.**

No agreement shall be effective to change or modify this Lease in whole or in part unless such agreement is in writing and duly signed by the party against whom enforcement of such change or modification is sought. Notwithstanding anything to the contrary in this Lease, Tenant agrees to make reasonable amendments or modifications to this Lease if such amendment or modification is requested by any lender of Landlord, provided that Tenant's obligations under the Lease are not materially increased.

#### **SECTION 23. BROKERS.**

Landlord shall have no obligation to pay any commission, finder's fee or other amount to any broker or other person in connection with this Lease except in accordance with a separate written agreement executed by Landlord. Tenant shall indemnify and hold harmless Landlord and Landlord's partners, agents, employees, officers and/or directors from all claims of any other brokers claiming to have represented Tenant in connection with this Lease. This indemnity shall also cover all costs and expenses, including reasonable attorney's fees, incurred by the indemnified party in the defense of any indemnified claims. By signing below, Landlord and Tenant confirm that oral and written disclosure of such representation was provided to them before the signing of this Lease.

#### **SECTION 24. GOVERNING LAW.**

This Lease and the rights and obligations of the parties shall be interpreted, construed and enforced in accordance with the Laws of the state of Hawaii, and Landlord and Tenant hereby irrevocably consent to the jurisdiction of Hawaii.

#### **SECTION 25. BINDING EFFECT.**

The terms, provisions and covenants contained in this Lease shall inure to the benefit of and be binding upon the parties hereto and their respective heirs, successors in interest and legal representatives except as otherwise herein expressly provided.

**SECTION 26. VALIDITY AND SEVERABILITY.**

Each provision of this Lease shall be construed in such manner as to give such provision the fullest legal force and effect possible. To the extent any provision herein (or part of such provision) is held to be unenforceable or invalid when applied to a particular set of facts, or otherwise, the unenforceability or invalidity of such provision (or part thereof) shall not affect the enforceability or validity of the remaining provisions hereof (or of the remaining parts of such provision), which shall remain in full force and effect, nor shall such unenforceability or invalidity render such provision (or part thereof) inapplicable to other facts in the context of which such provision (or part thereof) would be held legally enforceable and/or valid.

**SECTION 27. RIGHTS RESERVED BY LANDLORD.**

Landlord reserves a non-exclusive easement for the installation, relocation, restoration and maintenance of, such conduits, facilities and structures as may be located in the Premises (including the airspace above the finished ceiling in the Premises) for the common use and benefit of Landlord and other tenants. Tenant shall permit Landlord and its agents to enter into and upon the Premises at all reasonable times for inspecting the Premises, for showing the Premises to prospective purchasers, or for maintaining any portion of the Project. Landlord shall not be liable to Tenant for any inconvenience or disruption resulting from such construction or for any loss of occupation or quiet enjoyment of the Premises, and no such inconvenience or disruption shall be the basis for any abatement in Rent. Tenant understands and expressly acknowledges that Landlord has the right at any time to expand, reduce, remove, demolish, renovate, or construct any existing or new improvements at the Project (including but not limited to buildings, driveways, entrances and exits, automobile parking areas, mall, truck concourse and other circulation areas) or on adjacent or future acquired lands, including without limitation the right to change the shape, size, height, layout, location, number, design, or extent of such improvements, and the right to construct additional phases and/or buildings and/or additional stories and/or subterranean levels to existing buildings and structures in the Project, and the right to change the occupants of the Project. In accomplishing such activities, Landlord also reserves the right to enter into and upon the Premises for the purpose of constructing permanent supports, columns, beams and such other structural improvements as may be reasonably necessary with respect thereto; provided, however, that in the event of construction of permanent structures within the Premises, Base Rent shall be reduced in the same proportion that the square footage of such permanent structures bears to the total square footage of the Premises. Landlord reserves the right at any time to change the name by which the Project is designated.

**SECTION 28. INDEPENDENT COVENANTS.**

If Landlord shall commence any proceeding for nonpayment of Rent, or any other payment of any other kind to which Landlord may be entitled, or which it may claim hereunder, Tenant will not interpose any counterclaim or setoff of whatever nature or description, (other than compulsory counterclaim) in such proceedings nor seek to consolidate Landlord's action with any other action which would delay or prevent Landlord's action from proceeding. This restriction shall not, however, be construed to prohibit Tenant's assertion of compulsory counterclaims or Tenant's right to assert any claim against Landlord in a separate action or actions. The parties hereto specifically agree that Tenant's covenants to pay Rent or any other payments required of it hereunder are independent of all other covenants and agreements herein contained. The foregoing shall not be construed as a waiver of Tenant's right to assert any such claim in a separate action brought by Tenant against Landlord.

**SECTION 29. NO ELECTION OF REMEDIES.**

Mention in this Lease of any particular remedy shall not preclude Landlord from any other remedy at law or in equity to which it may be entitled, and all remedies herein provided are cumulative.

**SECTION 30. FULL EXECUTION.**

This Lease shall not be effective, and no leasehold or other agreement shall be deemed or construed to have been created between Landlord and Tenant, until such time as this Lease has been fully executed by both Landlord and Tenant, and a fully executed original has been delivered from Landlord to Tenant. Upon execution of this Lease, all understandings and agreements previously made between the parties with respect to the subject matter of this Lease are superseded by this Lease including, without limiting the generality of the foregoing, any prior offer to lease between Landlord and Tenant.

**SECTION 31. WAIVER OF JURY TRIAL.**

Landlord and Tenant hereby expressly waive trial by jury in any action, proceeding or counterclaim, brought by either of them against the other, on any claim or matter whatsoever arising out of or in any way connected with this Lease, their relationship as landlord and tenant, Tenant's use and occupancy of the Premises and/or any claim of injury or damage.

**SECTION 32. COUNTERPARTS.**

This Lease may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument, and in making proof of this Lease, it shall not be necessary to produce or account for more than one such counterpart.

**SECTION 33. CONFIDENTIALITY.**

Tenant acknowledges and agrees that the terms of this Lease are confidential and constitute proprietary information of Landlord. Disclosure of the terms could adversely affect the ability of Landlord to negotiate other leases and impair Landlord's relationship with other tenants. Accordingly, Tenant agrees that it, and its members, partners, officers, directors, employees, agents and attorneys, shall not intentionally and voluntarily disclose the terms and conditions of this Lease to any newspaper or other publication or any other tenant or apparent prospective tenant of the Project, or real estate agent, either directly or indirectly, without the prior written consent of Landlord, provided, however, that Tenant may disclose the terms to prospective subtenants or assignees under this Lease.

**SECTION 34. LIMITATION ON LIABILITY.**

The obligations of Landlord under this Lease shall not constitute personal obligations of Landlord or its partners, members, directors, officers, shareholders, Landlord's agents or property managers and Tenant shall look to the Premises, and to no other assets of Landlord, for the satisfaction of any liability of Landlord with respect to this Lease, and shall not seek recourse against Landlord's partners, members, directors, officers, shareholders, Landlord's agents or property managers, or any of their personal assets for such satisfaction.

**SECTION 35. NOTICES.**

If a demand, request, approval, consent or notice (collectively referred to as a "notice") which a party is required or may desire to give the other under this Lease shall be in writing and shall be sent by (a) personal delivery or (b) mail (either (i) by United States registered or certified mail, return receipt requested, postage prepaid, or (ii) by Federal Express or similar generally recognized overnight carrier regularly providing proof of delivery), addressed as set forth in the Notice Address for each party in PART A, Section 1 (subject to the right of a party to designate a different address for itself by notice similarly given), except that if Tenant has vacated the Premises (or if the Notice Address for Tenant is other than the Premises, and Tenant has vacated such address) without providing Landlord a new Notice Address, Landlord may serve notice in any manner described in this Section 35 or in another manner permitted by Law. Any such notice given shall be deemed given upon receipt (or refusal to accept receipt) of the same by the party. Any party may give notice by more than one method described in this Section.

**SECTION 36. NO RIGHT TO HOLDOVER.**

Tenant has no right to retain possession of the Premises or any part thereof beyond the expiration or termination of this Lease. In the event that Tenant holds over, then the Base Rent shall be increased to two hundred percent (200%) of the Base Rent applicable immediately preceding the expiration or termination. Nothing contained herein shall be construed as consent by Landlord to any holding over by Tenant.

**SECTION 37. CUMULATIVE REMEDIES.**

No remedy or election hereunder shall be deemed exclusive but shall, wherever possible, be cumulative with all other remedies at law or in equity.

**SECTION 38. SUBORDINATION; ATTORNMENT; NON-DISTURBANCE.**

**38.1 Subordination.** This Lease and any Option granted hereby shall be subject and subordinate to any ground lease, mortgage, or other hypothecation or security device (collectively, "**Security Instrument**"), now or hereafter placed upon the Premises, to any and all advances made on the security thereof, and to all renewals, modifications, and extensions thereof. Tenant agrees that the holders of any such Security Instrument (in this Lease together referred to as "**Lender**") shall have no liability or obligation to perform any of the obligations of Landlord under this Lease. Any Lender may elect to have this Lease and/or any Option granted hereby superior to the lien of its Security Instrument by giving written notice thereof to Tenant, whereupon this Lease and such Options shall be deemed prior to such Security Instrument, notwithstanding the relative dates of the documentation or recordation thereof.

**38.2 Attornment.** Tenant shall unconditionally attorn to any party succeeding to Landlord's interest in the Premises, whether by purchase, foreclosure, deed in lieu of foreclosure, power of sale, or otherwise, upon such party's request, and shall execute such agreements confirming such attornment as such party may reasonably request.

**38.3 Non-Disturbance.** With respect to Security Instruments entered into by Landlord after the execution of this Lease, Tenant's subordination of this Lease shall be subject to receiving a commercially reasonable non-disturbance agreement (a "**Non-Disturbance Agreement**") from the Lender which Non-Disturbance Agreement provides that Tenant's possession of the Premises, and this Lease, including any options to extend the term hereof, will not be disturbed so long as Tenant is not in Default hereof and attorns to the record owner of the Premises.

**38.4 Self-Executing.** The agreements contained in this PART C, Section 38 shall be effective without the execution of any further documents; provided, however, that, upon written request from Landlord or a Lender in connection with a sale, financing or refinancing of the Premises, Tenant and Landlord shall execute such further writings as may be reasonably required to separately document any subordination, attornment and/or Non-Disturbance Agreement provided for herein.

**SECTION 39. ATTORNEYS' FEES.**

If any party brings an action or proceeding involving the Premises whether founded in tort, contract or equity, or to declare rights hereunder, the Prevailing Party (as hereafter defined) in any such proceeding, action, or appeal thereon, shall be entitled to reasonable attorneys' fees. Such fees may be awarded in the same suit or recovered in a separate suit, whether or not such action or proceeding is pursued to decision or judgment. The term, "**Prevailing Party**" shall include, without limitation, a party who substantially obtains or defeats the relief sought, as the case may be, whether by compromise, settlement, judgment, or the abandonment by the other party of its claim or defense. The attorneys' fees award shall not be computed in accordance with any court fee schedule, but shall be such as to fully reimburse all attorneys' fees reasonably incurred. In addition, Landlord shall be entitled to attorneys' fees, costs and expenses incurred in the preparation and service of notices of an Event of Default and consultations in connection therewith, whether or not a legal action is subsequently commenced in connection with such Event of Default.

**SECTION 40. LANDLORD'S ACCESS; SHOWING PREMISES; REPAIRS.**

Landlord and Landlord's agents shall have the right to enter the Premises at any time, in the case of an emergency, and otherwise at reasonable times after reasonable prior notice for the purpose of showing the same to prospective purchasers, lenders, or tenants, and making such alterations, repairs, improvements or additions to the Premises as Landlord may deem necessary or desirable and the erecting, using and maintaining of utilities, services, pipes and conduits through the Premises and/or other premises as long as there is no material adverse effect to Tenant's use of the Premises. All such activities shall be without abatement of rent or liability to Tenant.

**SECTION 41. TERMINATION; MERGER.**

Unless specifically stated otherwise in writing by Landlord, the voluntary or other surrender of this Lease by Tenant, the mutual termination or cancellation hereof, or a termination hereof by Landlord for Default by Tenant, shall automatically terminate any sublease or lesser estate in the Premises; provided, however, that Landlord may elect to continue anyone or all existing subtenancies. Landlord's failure within ten (10) days following any such event to elect to the contrary by written notice to the holder of any such lesser interest, shall constitute Landlord's election to have such event constitute the termination of such interest.

**SECTION 42. CONSENTS.**

Except as otherwise provided herein, wherever in this Lease the consent of a party is required to an act by or for the other party, such consent shall not be unreasonably withheld or delayed. Landlord's actual reasonable costs and expenses (including but not limited to architects', attorneys', engineers' and other consultants' fees) incurred in the consideration of, or response to, a request by Tenant for any Landlord consent, including but not limited to consents to an assignment, a subletting or the presence or use of Hazardous Materials, shall be paid by Tenant upon receipt of an invoice and supporting documentation therefor. Landlord's consent to any act, assignment or subletting shall not constitute an acknowledgment that no Event of Default by Tenant of this Lease exists, nor shall such consent be deemed a waiver of any then existing Event of Default, except as may be otherwise specifically stated in writing by Landlord at the time of such consent. The failure to specify herein any particular condition to Landlord's consent shall not preclude the imposition by Landlord at the time of consent of such further or conditions as are then reasonable with reference to the particular matter for which consent is being given. In the event that either party disagrees with any determination made by the other hereunder and reasonably requests the reasons for such determination, the determining party shall furnish its reasons in writing and in reasonable detail within ten (10) business days following such request.

**SECTION 43. GUARANTOR.**

**43.1 Execution.** The Guarantors, if any, shall each execute a guaranty in the form acceptable to Landlord.

**43.2 Default.** It shall constitute a Default of the Tenant if any Guarantor fails or refuses, upon request to provide: (a) evidence of the execution of the guaranty, including the authority of the party signing on Guarantor's behalf to obligate Guarantor, and in the case of a corporate Guarantor, a certified copy of a resolution of its board of directors authorizing the making of such guaranty, (b) current financial statements, (c) an estoppel certificate, or (d) written confirmation that the guaranty is still in effect.

**SECTION 44. OPTIONS.**

If Tenant is granted any Option, as defined below, then the following provisions shall apply:

**44.1 Definition.** "Option" shall mean the right to extend the term of this Lease.

**44.2 Options Personal To Original Tenant.** Any Option granted to Tenant in this Lease is personal to the original Tenant, and cannot be assigned or exercised by anyone other than such original Tenant and only while the original Tenant is in full possession of the Premises and, if requested by Landlord, with Tenant certifying that Tenant has no intention of thereafter assigning or subletting.

**44.3 Multiple Options.** In the event that Tenant has any multiple Options to extend this Lease, a later Option cannot be exercised unless the prior Options have been validly exercised.

**44.4 Effect of Default on Options.**

(a) Tenant shall have no right to exercise an Option: (i) during the period of time any Rent is unpaid (without regard to whether notice thereof is given Tenant), (ii) during the time Tenant is in Default of this Lease, or (iii) in the event that Tenant has been in Default three (3) or more times, whether or not the Defaults are cured.

(b) The period of time within which an Option may be exercised shall not be extended or enlarged by reason of Tenant's inability to exercise an Option because of the provisions of PART C, Section 44.4.

(c) An Option shall terminate and be of no further force or effect, notwithstanding Tenant's due and timely exercise of the Option, if, after such exercise and prior to the commencement of the extended term or completion of the purchase, (i) Tenant fails to pay Rent for a period of thirty (30) days after such Rent becomes due (without any necessity of Landlord to give notice thereon), or (ii) if Tenant commits an Event of Default of this Lease.

**SECTION 45. CONFLICT.**

Any conflict between the printed provisions of this Lease and the typewritten or handwritten provisions shall be controlled by the typewritten or handwritten provisions.

**LANDLORD AND TENANT HAVE CAREFULLY READ AND REVIEWED THIS LEASE AND EACH TERM AND PROVISION CONTAINED HEREIN, AND BY THE EXECUTION OF THIS LEASE SHOWS THEIR INFORMED AND VOLUNTARY CONSENT THERETO. THE PARTIES HEREBY AGREE THAT, AT THE TIME THIS LEASE IS EXECUTED, THE TERMS OF THIS LEASE ARE COMMERCIALY REASONABLE AND EFFECTUATE THE INTENT AND PURPOSE OF LANDLORD AND TENANT WITH RESPECT TO THE PREMISES.**

**ATTENTION: NO REPRESENTATION OR RECOMMENDATION IS MADE BY THE HAWAII ASSOCIATION OF REALTORS® HAWAII CCIM OR BY ANY BROKER AS TO THE LEGAL SUFFICIENCY, LEGAL EFFECT, OR TAX CONSEQUENCES OF THIS LEASE OR THE TRANSACTION TO WHICH IT RELATES. THE PARTIES ARE URGED TO:**

- 1. SEEK ADVICE OF COUNSEL AS TO THE LEGAL AND TAX CONSEQUENCES OF THIS LEASE.**
- 2. RETAIN APPROPRIATE CONSULTANTS TO REVIEW AND INVESTIGATE THE CONDITION OF THE PREMISES. SUCH INVESTIGATION SHOULD INCLUDE BUT NOT BE LIMITED TO: THE POSSIBLE PRESENCE OF HAZARDOUS MATERIALS, THE ZONING OF THE PREMISES, THE CONDITION AND THE SUITABILITY OF THE PREMISES FOR TENANT'S INTENDED USE.**

*[The remainder of this page is intentionally left blank.]*

The parties hereto have executed this Lease on the dates specified above their respective signatures.

Executed at: \_\_\_\_\_  
On: 6/8/2023 \_\_\_\_\_

By LANDLORD:

DocuSigned by:  
By: Clifton Kukino  
Name Printed: Kauai Independent Food Bank  
Title: Managing Agent

By: \_\_\_\_\_  
Name Printed: \_\_\_\_\_  
Title: \_\_\_\_\_

Executed at: \_\_\_\_\_  
On: 6/9/2023 \_\_\_\_\_

By TENANT:

DocuSigned by:  
By: Mel Bell-Gray  
Name Printed: Eyes Wide Open Productions LLC  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Name Printed: \_\_\_\_\_  
Title: \_\_\_\_\_



**EXHIBIT C  
RULES AND REGULATIONS  
ADDENDUM TO COMMERCIAL LEASE  
(MULTI-TENANT LEASE)**



**Hawaii Association of REALTORS® Standard Form  
Revised 12/17 (NC) For Release 5/23**

**COPYRIGHT AND TRADEMARK NOTICE:** THIS COPYRIGHTED HAWAII ASSOCIATION OF REALTORS® STANDARD FORM IS LICENSED FOR USE UNDER TERMS OF THE HAWAII ASSOCIATION OF REALTORS® STANDARD FORM LICENSE AGREEMENT LOCATED AT <http://www.hawaii Realtors.com/standard-form-policy>. The use of this form is not intended to identify the real estate licensee as a REALTOR®. REALTOR® is a registered collective membership mark which may be used only by real estate licensees who are members of the National Association of REALTORS® and who subscribe to its Code of Ethics.

**NAR CODE OF ETHICS:** Landlord and Tenant are aware that the National Association of REALTORS® holds its members accountable for their actions through a strict professional Code of Ethics, which includes a grievance system to address complaints. Non-members are not held to the same standards as members, nor are they required to participate in the grievance system.

1. These Rules and Regulations are in addition to, and shall not be construed to in any way modify or amend, in whole or in part, the terms, covenants, agreements and conditions of any lease of premises in the Building.
2. Landlord reserves the right to make such other and reasonable Rules and Regulations as, in its judgment, may from time to time be needed for safety and security, for care and cleanliness of the Building and Project and for the preservation of good order therein. Tenant agrees to abide by all such Rules and Regulations hereinabove stated and any additional rules and regulations which are adopted.
3. Landlord may waive any one or more of these Rules and Regulations for the benefit of Tenant or any other tenant, but no such waiver by Landlord shall be construed as a waiver of such Rules and Regulations in favor of Tenant or any other tenant, nor prevent Landlord from thereafter enforcing any such Rules and Regulations against any or all of the tenants of the Building.
4. Landlord reserves the right to exclude or expel from the Building or Project any person who, in the judgment of Landlord, is intoxicated or under the influence of liquor or drugs, has no legitimate purpose to be in the Building or Project, or is violating the rules and regulations of the Building and Project.
5. Tenant shall be responsible for the observance of all of the foregoing rules of Tenant's employees, agents, clients, customers, invitees and guests.
6. The plumbing facilities shall not be used for any purpose other than that for which they are constructed, and no foreign substance of any kind shall be thrown therein. The expense of any breakage, stoppage, or damage resulting from a violation of this provision shall be borne by the tenant, who shall, or whose employees, agents or invitees shall have caused it.
7. No sign, placard, picture, advertisement, name or notice shall be inscribed, displayed, or printed or affixed on or to any part of the Building or Premises if visible from outside the Premises, without the prior written consent of Landlord.
8. Tenant shall not place or maintain any window covering, blinds or drapes on any window without Landlord's prior written approval.
9. The sidewalks, halls, passages, exits, entrances, elevators, escalators, and stairways shall not be obstructed by Tenant or used by it for any purpose other than for ingress to and egress from the Premises.
10. Tenant shall not overload any floor of the Premises or the Building. No furniture, freight or equipment of any kind shall be brought into the Building by Tenant or its contractors or agents without prior consent of Landlord and all moving of the same into or out of the Building shall be done at such time and in such manner as Landlord shall designate.
11. Tenant shall not use or keep in the Premises or the Building any kerosene, gasoline or flammable or combustible fluid or material, or use any method of heating or air conditioning other than that supplied or permitted by Landlord.
12. Tenant shall not canvass or solicit other tenants in the Building and Tenant shall cooperate to prevent any such canvassing and/or solicitation. Canvassing and peddling in the Building is prohibited.
13. Tenant agrees that it shall comply with all fire and security regulations that may be issued from time to time by Landlord, and Tenant shall also provide Landlord with the name of a designated responsible employee to represent Tenant in all matters pertaining to such fire or security regulations.
14. All loading and unloading of goods shall be done only at such times, in the areas, and through the entrances designated for such purposes by Landlord.
15. No loudspeakers, televisions, radios, or other devices shall be used in a manner so as to be heard or seen outside of the Premises without the prior written consent of Landlord. In addition, Tenant shall conduct its business in a quiet and orderly manner so as not to create unreasonable noise.
16. Tenant shall use at Tenant's cost such pest extermination contractor as Landlord may direct and at such intervals as Landlord may require.
17. Tenant shall not cause or permit any obnoxious or foul odors that disturb the public or other tenants.
18. No pets allowed in the Premises, without prior written consent by Landlord, or allowed by law.

Additional Rules and Regulations. Please number each additional rule and regulation.

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**EXHIBIT G  
GUARANTY OF LEASE  
ADDENDUM TO COMMERCIAL LEASE  
(MULTI-TENANT LEASE)**



**Hawaii Association of REALTORS® Standard Form  
Revised 12/17 (NC) For Release 5/23**

**COPYRIGHT AND TRADEMARK NOTICE:** THIS COPYRIGHTED HAWAII ASSOCIATION OF REALTORS® STANDARD FORM IS LICENSED FOR USE UNDER TERMS OF THE HAWAII ASSOCIATION OF REALTORS® STANDARD FORM LICENSE AGREEMENT LOCATED AT <http://www.hawaii Realtors.com/standard-form-policy>. The use of this form is not intended to identify the real estate licensee as a REALTOR®. REALTOR® is a registered collective membership mark which may be used only by real estate licensees who are members of the National Association of REALTORS® and who subscribe to its Code of Ethics.

**NAR CODE OF ETHICS:** Landlord and Tenant are aware that the National Association of REALTORS® holds its members accountable for their actions through a strict professional Code of Ethics, which includes a grievance system to address complaints. Non-members are not held to the same standards as members, nor are they required to participate in the grievance system.

THIS GUARANTY OF LEASE ("Guaranty") is made by Mel Bell Grey ("Guarantor") in favor of Kauai Independent Food Bank ("Landlord") in connection with that certain Commercial Lease (Multi-Tenant Lease) dated \_\_\_\_\_ (the "Lease"), pursuant to which Landlord is to lease to Eyes Wide Open Productions LLC ("Tenant") the premises located at 3285-C Waapa Road, Lihue, HI 96766 (the "Premises").

A. Landlord requires this Guaranty as a condition to its execution of the Lease and the performance of the obligations to be performed under the Lease by Landlord.  
B. Guarantor has agreed to provide this Guaranty to induce Landlord to enter into the Lease with Tenant and perform its obligations under the Lease.  
In consideration of Landlord's agreement to execute the Lease and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Guarantor does hereby agree with Landlord as follows:

1. The Lease is hereby incorporated into and made a part of this Guaranty by this reference.
2. Guarantor hereby unconditionally guarantees, as a primary obligor and not as a surety, without deduction by reason of setoff, defense or counterclaim, the full and punctual payment of all sums of rent and other amounts payable under the Lease and the full and punctual performance of all terms, covenants and conditions in the Lease to be kept, performed and/or observed by Tenant. Guarantor's obligations under this Guaranty are continuing and unconditional. The foregoing obligations are sometimes referred to hereinafter as the "Guaranty Obligations."
3. Guarantor hereby agrees that, without the consent of or notice to Guarantor and without affecting any of the obligations of Guarantor hereunder: (a) the Lease may be extended and any other term, covenant or condition of the Lease may be amended, compromised, released or otherwise altered by Landlord and Tenant, and Guarantor does guarantee and promise to perform all the obligations of Tenant under the Lease as so extended, amended, compromised, released or altered; (b) any guarantor of or party to the Lease may be released, substituted or added; (c) any right or remedy under the Lease may be exercised, not exercised, impaired, modified, limited, destroyed, or suspended; (d) Landlord or any other person may deal in any manner with Tenant, any guarantor, any party to the Lease or any other person; (e) Landlord may permit Tenant to holdover the Premises beyond the Term of the Lease; and (f) all or any part of the Premises or of Tenant's rights or liabilities under the Lease may be sublet, assigned or assumed. Without in any way limiting the foregoing, Guarantor agrees not to unreasonably withhold its consent to any sublease, assignment of the Lease or other modification of the Lease which is agreed to by Landlord and Tenant.
4. Guarantor hereby waives and agrees not to assert or take advantage of: (a) any right to require Landlord to proceed against Tenant, or any other guarantor or person or to pursue any other security or remedy before proceeding against Guarantor; (b) any defense based on the genuineness, validity, regularity or enforceability of the Lease; (c) any right or defense that may arise by reason of the incapacity, lack of authority, death or disability of Tenant or any other person; and (d) any right or defense arising by reason of the absence, impairment, modification, limitation, destruction or cessation (in bankruptcy, by an election of remedies, or otherwise) of the liability of Tenant, of the subrogation rights of Guarantor or of the right of Guarantor to proceed against Tenant for reimbursement. Guarantor waives any right, statutory or otherwise, for itself to require or for Tenant to require Landlord to apply rents received toward the Guaranty Obligations, or to otherwise prioritize the receipt of rents as against the Guaranty Obligations.
5. Guarantor hereby waives and agrees not to assert or take advantage of (a) any right or defense based on the absence of any or all presentments, demands (including demands for performance), notices (including notices of any adverse change in the financial status of Tenant, notices of any other facts which increase the risk to Guarantor, notices of non-performance and notices of acceptance of this Guaranty) and protests of each and every kind; (b) the defense of any statute of limitations in any action under or related to this Guaranty or the Lease; (c) any right or defense based on a lack of diligence or failure or delay by Landlord in enforcing its rights under this Guaranty or the Lease.
6. Guarantor hereby waives and agrees not to assert or take advantage of any right to (a) exoneration if Landlord's actions shall impair any security or collateral of Guarantor; (b) any security or collateral held by Landlord; (c) require Landlord to proceed against or exhaust any security or collateral before proceeding against Guarantor; (d) require Landlord to pursue any right or remedy for the benefit of Guarantor.
7. Guarantor shall not, without the prior written consent of Landlord, commence, or join with any other person in commencing, any bankruptcy, reorganization or insolvency proceeding against Tenant. Guarantor's obligations under this Guaranty shall in no way be affected by any bankruptcy, reorganization or insolvency of Tenant or any successor or assignee of Tenant or by any disaffirmance or abandonment of the Lease or any payment under this Guaranty by a trustee of Tenant in any bankruptcy proceeding including, without limitation, any impairment, limitation, or modification of the liability of Tenant or the estate of Tenant in bankruptcy, or of any remedy for the enforcement of Tenant's liability under the Lease resulting from the operation of any present or future provision of any federal or state bankruptcy or insolvency law or other statute or from the decision of any court. Guarantor shall file in any bankruptcy or other proceeding in which the filing of claims is required or permitted by law all claims which Guarantor may have against Tenant relating to any indebtedness of Tenant to Guarantor and will assign to Landlord all rights of Guarantor thereunder. Landlord shall have the sole right to accept or reject any plan proposed in such proceeding and to take any other action which a party filing a claim is entitled to do. In all such cases, whether in administration, bankruptcy or otherwise, the person or persons authorized to pay such claim shall pay to Landlord the amount payable on such claim and, to the full extent necessary for that purpose, Guarantor hereby assigns to Landlord all of Guarantor's rights to any such



payments or distributions to which Guarantor would otherwise be entitled; provided, however, that Guarantor's obligations hereunder shall not be satisfied except to the extent that Landlord receives cash by reason of any such payment or distribution. If Landlord receives anything hereunder other than cash, the same shall be held as collateral for amounts due under this Guaranty.

8. Until all the Tenant's obligations under the Lease are fully performed, Guarantor: (a) shall have no right of subrogation or reimbursement against the Tenant by reason of any payments or acts of performance by Guarantor under this Guaranty; (b) subordinates any liability or indebtedness of the Tenant now or hereafter held by Guarantor to the obligations of the Tenant under, arising out of or related to the Lease or Tenant's use of the Premises; and (c) acknowledges that the actions of Landlord may affect or eliminate any rights of subrogation or reimbursement of Guarantor as against Tenant without any liability or recourse against Landlord.

9. Prior to the execution of this Guaranty and at any time during the Term of the Lease upon ten (10) days prior written notice from Landlord, Guarantor agrees to provide Landlord with a current financial statement for Guarantor and financial statements for Guarantor for the two (2) years prior to the current financial statement year to the extent not previously delivered to Landlord. Guarantor's financial statements are to be prepared in accordance with generally accepted accounting principles and, if such is the normal practice of Guarantor, audited by an independent certified public accountant. Guarantor represents and warrants that all such financial statements shall be true and correct statements of Guarantor's financial condition.

10. The liability of Guarantor and all rights, powers and remedies of Landlord hereunder and under any other agreement now or at any time hereafter in force between Landlord and Guarantor relating to the Lease shall be cumulative and not alternative and such rights, powers and remedies shall be in addition to all rights, powers and remedies given to Landlord by law.

11. This Guaranty applies to, inures to the benefit of and binds all parties hereto, their heirs, devisees, legatees, executors, administrators, representatives, successors and assigns. This Guaranty may be assigned by Landlord voluntarily or by operation of law.

12. This Guaranty shall constitute the entire agreement between Guarantor and the Landlord with respect to the subject matter hereof. No provision of this Guaranty or right of Landlord hereunder may be waived nor may any guarantor be released from any obligation hereunder except by a writing duly executed by an authorized officer, director or trustee of Landlord. The waiver or failure to enforce any provision of this Guaranty shall not operate as a waiver of any other breach of such provision or any other provisions hereof. No course of dealing between Landlord and Tenant shall alter or affect the enforceability of this Guaranty or Guarantor's obligations hereunder.

13. Guarantor hereby agrees to indemnify, protect, defend and hold Landlord harmless from and against, all losses, costs and expenses including, without limitation, all interest, default interest, post-petition bankruptcy interest and other post-petition obligations, late charges, court costs and attorneys' fees, which may be suffered or incurred by Landlord in enforcing or compromising any rights under this Guaranty or in enforcing or compromising the performance of Tenant's obligations under the Lease.

14. The term "Landlord" whenever hereinabove used refers to and means the Landlord in the foregoing Lease specifically named and also any assignee of said Landlord, whether by outright assignment or by assignment for security, and also any successor to the interest of said Landlord or of any assignee of such Lease or any part thereof, whether by assignment or otherwise. The term "Tenant" whenever hereinabove used refers to and means the Tenant in the foregoing Lease specifically named and also any assignee or subtenant of said Lease and also any successor to the interests of said Tenant, assignee or sublessee of such Lease or any part thereof, whether by assignment, sublease or otherwise including, without limitation, any trustee in bankruptcy and any bankruptcy estate of Tenant, Tenant's assignee or sublessee.

15. If any or all Guarantors shall become bankrupt or insolvent, or any application shall be made to have any or all Guarantors declared bankrupt or insolvent, or any or all Guarantors shall make an assignment for the benefit of creditors, or any or all Guarantors shall enter into a proceeding for the dissolution of marriage, or in the event of death of any or all Guarantors, notice of such occurrence or event shall be promptly furnished to Landlord by such Guarantor or such Guarantor's fiduciary. This Guarantee shall extend to and be binding upon each Guarantor's successors and assigns, including, but not limited to, trustees in bankruptcy and Guarantor's estate.

16. Any notice, request, demand, instruction or other communication to be given to any party hereunder shall be in writing and sent by registered or certified mail, return receipt requested in accordance with the notice provisions of the Lease. The Tenant shall be deemed Guarantor's agent for service of process and notice to Guarantor delivered to the Tenant at the address set forth in the Lease shall constitute proper notice to Guarantor for all purposes. Notices to Landlord shall be delivered to Landlord's address set forth in the Lease. Landlord, at its election, may provide an additional notice to Guarantor at the address provided under Guarantor's signature below.

17. If either party hereto participates in an action against the other party arising out of or in connection with this Guaranty, the prevailing party shall be entitled to have and recover from the other party reasonable attorneys' fees, collection costs and other costs incurred in and in preparation for the action. Guarantor hereby waives any right to trial by jury and further waives and agrees not to assert or take advantage of any defense based on any claim that any arbitration decision binding upon Landlord and Tenant is not binding upon Guarantor.

18. Guarantor agrees that all questions with respect to this Guaranty shall be governed by, and decided in accordance with, the laws of the State of Hawaii.

19. Should any one or more provisions of this Guaranty be determined to be illegal or unenforceable, all other provisions shall nevertheless be effective.

20. Time is strictly of the essence under this Guaranty and any amendment, modification or revision hereof.

21. If more than one person signs this Guaranty, each such person shall be deemed a guarantor and the obligation of all such guarantors shall be joint and several. When the context and construction so requires, all words used in the singular herein shall be deemed to have been used in the plural. The word "person" as used herein shall include an individual, company, firm, association, partnership, corporation, trust or other legal entity of any kind whatsoever.

22. If Guarantor is a corporation, each individual executing this Guaranty on behalf of said corporation represents and warrants that he is duly authorized to execute and deliver this Guaranty on behalf of said corporation, in accordance with a duly adopted resolution of the Board of Directors of said corporation or in accordance with the by-laws of said corporation, and that this Guaranty is binding upon said corporation in accordance with its terms. If Guarantor is a corporation, Landlord, at its option, may require Guarantor to concurrently, with the execution of this Guaranty, deliver to Landlord a certified copy of a resolution of the Board of Directors of said corporation authorizing or ratifying the execution of this Guaranty.

THE UNDERSIGNED HAS READ AND UNDERSTANDS THE TERMS AND CONDITIONS CONTAINED IN THIS GUARANTY INCLUDING, WITHOUT LIMITATION, ALL WAIVERS CONTAINED IN THIS GUARANTY.

Executed on this day 6/9/2023 of \_\_\_\_\_, 20\_\_.

Address of Guarantor:  
\_\_\_\_\_  
\_\_\_\_\_

Print Name:  
Mel Bell-Grey

Social Security No. / FEIN of Guarantor:  
\_\_\_\_\_

Signature:  
DocuSigned by:  
Mel Bell-Grey  
B683C11B5BC54F4...

LANDLORD AND TENANT HAVE CAREFULLY READ AND REVIEWED THIS EXHIBIT G AND EACH TERM AND PROVISION CONTAINED HEREIN, AND BY THE EXECUTION OF THIS EXHIBIT G SHOWS THEIR INFORMED AND VOLUNTARY CONSENT THERETO. THE PARTIES HEREBY AGREE THAT, AT THE TIME THIS EXHIBIT G IS EXECUTED, THE TERMS OF THIS EXHIBIT G ARE COMMERCIALY REASONABLE AND EFFECTUATE THE INTENT AND PURPOSE OF LANDLORD AND TENANT WITH RESPECT TO THE PREMISES.

ATTENTION: NO REPRESENTATION OR RECOMMENDATION IS MADE BY THE HAWAII ASSOCIATION OF REALTORS® HAWAII CCIM OR BY ANY BROKER AS TO THE LEGAL SUFFICIENCY, LEGAL EFFECT, OR TAX CONSEQUENCES OF THIS EXHIBIT G OR THE TRANSACTION TO WHICH IT RELATES. THE PARTIES ARE URGED TO:

1. SEEK ADVICE OF COUNSEL AS TO THE LEGAL AND TAX CONSEQUENCES OF THIS EXHIBIT G.
2. RETAIN APPROPRIATE CONSULTANTS TO REVIEW AND INVESTIGATE THE CONDITION OF THE PREMISES. SUCH INVESTIGATION SHOULD INCLUDE BUT NOT BE LIMITED TO: THE POSSIBLE PRESENCE OF HAZARDOUS MATERIALS, THE ZONING OF THE PREMISES, THE CONDITION AND THE SUITABILITY OF THE PREMISES FOR TENANT'S INTENDED USE.

JOSH GREEN, M.D.  
GOVERNOR | KE KIA'ĀINA

SYLVIA LUKE  
LIEUTENANT GOVERNOR | KA HOPE KIA'ĀINA



DAWN N. S. CHANG  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE  
MANAGEMENT

STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
LAND DIVISION

3060 Eiwa Street, Room 208  
Lihue, Hawaii 96766  
PHONE: (808) 274-3491  
FAX: (808) 241-3535

September 8, 2023

## EXEMPTION NOTIFICATION

Regarding the preparation of an environmental assessment pursuant to Chapter 343, HRS and Chapter 11-200.1, HAR

**Project Title:** Cancellation of General Lease No. S-4023 to The Kauai Food Bank, Inc., dba Kauai Independent Food Bank, and Issuance of Direct Lease to The Kauai Food Bank, Inc., dba Kauai Independent Food Bank for Business Purposes; Request to Consent to Sublease to (i) Sutada Hesse, dba Hesse Flooring and (ii) Eyes Wide Open Productions LLC, Lihue, Kauai, Tax Map Key: (4) 3-2-004:011.

**Project / Reference No.:** 23KD-044

**Project Location:** Lihue, Kauai, Tax Map Key: (4) 3-2-004:011.

**Project Description:** Cancellation of GL-4023 and Issuance of Direct Lease for Business Purposes; Consent to Subleases.

**Chap. 343 Trigger(s):** Use of State Land

**Exemption Class No. and Description:** In accordance with Hawaii Administrative Rules (HAR) § 11-200.1-16 and the Exemption List for the Department of Land and Natural Resources reviewed and concurred on by the Environmental Council on November 10, 2020, the improvements proposed by KFB for an Individual Waste System, are exempt from the preparation of an environmental assessment pursuant to General Exemption Type 1 that states:

“Operations, repairs or maintenance of existing structures, facilities, equipment, or topographical features, involving minor

**EXHIBIT D**

expansion or minor change of use beyond that previously existing.”

Part 1, Item 40 that states:

“Leases of state land involving negligible or no expansion or change of use beyond that previously existing.”

And further pursuant to General Exemption Type 2 that states:

“Replacement or reconstruction of existing structures and facilities where the new structure will be located generally on the same site and will have substantially the same purpose, capacity, density, height, and dimensions as the structure replaced.”

Part 1, Item 7 that states, “Replacement of cesspools with individual wastewater systems located generally on the same site with substantially the same purpose and capacity.”

**Cumulative Impact of Planned Successive Actions in Same Place Significant?:**

No. Staff believes there are no cumulative impacts involved with the proposed use under a direct lease.

**Action May Have Significant Impact on Particularly Sensitive Environment?:**

No. There are no sensitive environmental issues involved with the proposed business use of the land under a direct lease.

**Analysis:**

The proposed action is an issuance of a direct lease for business purposes with the lessee committing to closing existing cesspools and replacing them with an individual wastewater system. Such dispositions have not resulted in known significant impacts to the natural and environmental resources in the area. As such, staff believes that the proposed disposition would involve negligible or no expansion or change in use of the subject area beyond that previously existing.

**Consulted Parties:**

County of Kauai Planning Department, County of Kauai Public Works, State Historic Preservation Division, Department of Health, Office of Hawaiian Affairs

**Recommendation:**

That the Board find this project will probably have minimal or no significant effect on the environment and is presumed to be exempt from the preparation of an environmental assessment as a de minimis action.

INTERNAL REVENUE SERVICE  
DISTRICT DIRECTOR  
P. O. BOX 2508  
CINCINNATI, OH 45201

DEPARTMENT OF THE TREASURY

Date: ~~MAY 20 1999~~

KAUAI FOOD BANK INC  
3285 WAAPA ST  
LIHUE, HI 96766

Employer Identification Number:

DLN:

17053100757029

Contact Person:

FRANCIS E BERNHARDT

ID# 31258

Contact Telephone Number:

Our Letter Dated:

April 1995

Addendum Applies:

No

Dear Applicant:

This modifies our letter of the above date in which we stated that you would be treated as an organization that is not a private foundation until the expiration of your advance ruling period.

Your exempt status under section 501(a) of the Internal Revenue Code as an organization described in section 501(c)(3) is still in effect. Based on the information you submitted, we have determined that you are not a private foundation within the meaning of section 509(a) of the Code because you are an organization of the type described in section 509(a)(1) and 170(b)(1)(A)(vi).

Grantors and contributors may rely on this determination unless the Internal Revenue Service publishes notice to the contrary. However, if you lose your section 509(a)(1) status, a grantor or contributor may not rely on this determination if he or she was in part responsible for, or was aware of, the act or failure to act, or the substantial or material change on the part of the organization that resulted in your loss of such status, or if he or she acquired knowledge that the Internal Revenue Service had given notice that you would no longer be classified as a section 509(a)(1) organization.

If we have indicated in the heading of this letter that an addendum applies, the addendum enclosed is an integral part of this letter.

Because this letter could help resolve any questions about your private foundation status, please keep it in your permanent records.

If you have any questions, please contact the person whose name and telephone number are shown above.

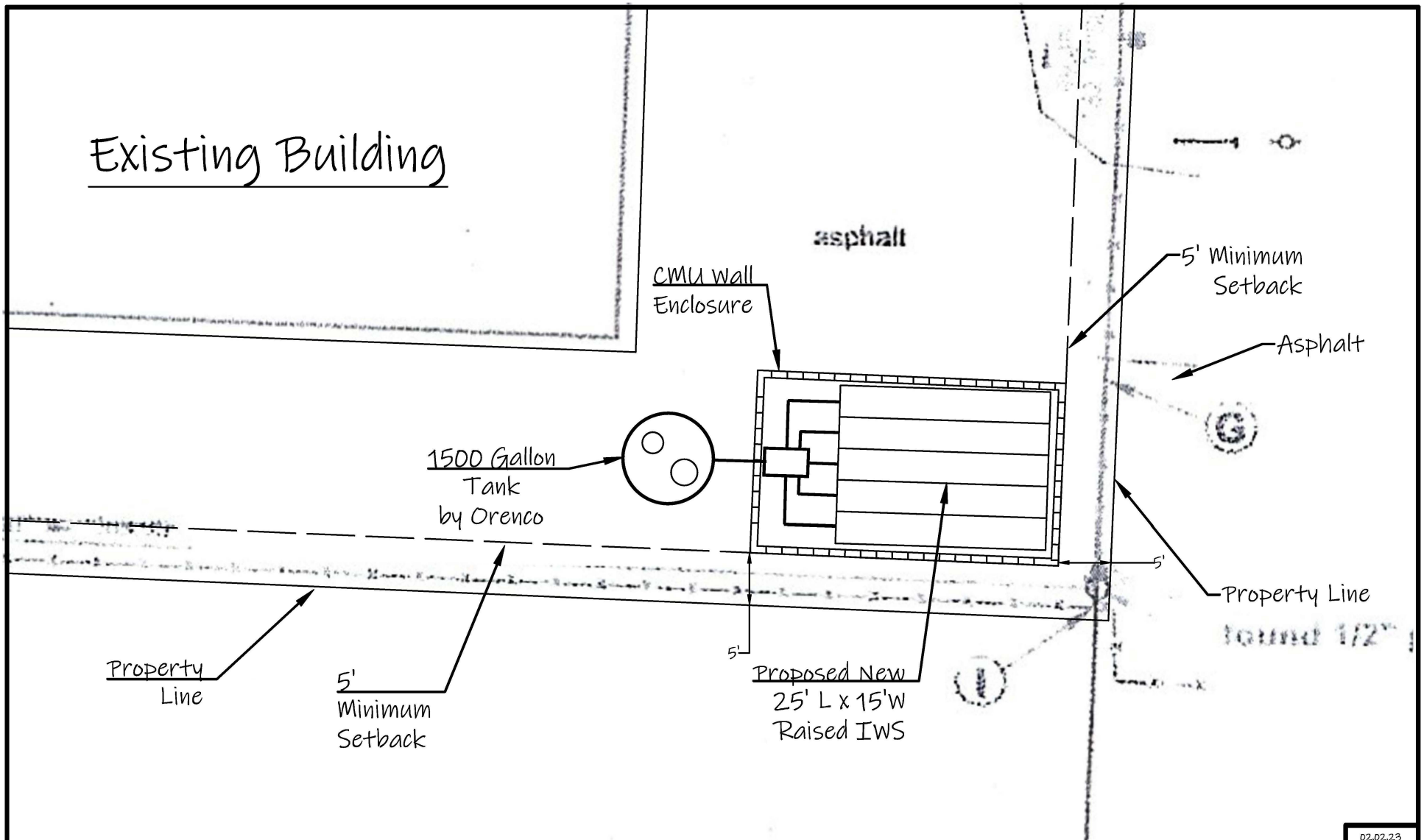
Sincerely yours,



District Director

Letter 1050 (DO/CG)

EXHIBIT E



Scale: 1" = 25'



SIGNATURE  
 THIS WORK WAS PREPARED  
 BY ME OR UNDER MY  
 SUPERVISION AND  
 CONSTRUCTION OF THIS  
 PROJECT WILL BE UNDER  
 MY OBSERVATION  
 MY LICENSE EXPIRES:  
 APRIL 30, 2024

PLOT PLAN

02.02.23

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IWS for The Kauai Food Bank  
 Nawiliwili, Lihue, Kauai, HI  
 TMK (4) 3-2-004:011

Volk LLC, Hawaii  
 Kauaisepticsystems.com  
 808-720-0905



808-651-9203  
PO BOX 1961 Kapā`a, HI 96746

March 17, 2023

Estimate for the installation of a 1,500 gallon septic system at Kauai Food Bank.

We can install a system behind the building. The ground water table is believed to be about 3 feet in this area which presents unique challenges. This installation will require the removal of asphalt and dirt which will require a great deal of space to accommodate the removed material. We can design an aerobic system that can be installed below existing grade and would potentially have the ability to be driven on or have the space above the leach field be useful. The aerobic system will require a maintenance and inspection schedule (required by state health department). The aerobic system will require electricity. A second option would be a standard septic system with a raised bed leach field. This would require building a three foot high absorption bed that does not allow use of the space. The waist water will need to be pumped up to the raised bed so electric will be required for this system as well. Both systems will be similar in cost. There are some variable and choices that may impact the final price. Many of these variables can be addressed at the design phase, others are exploratory or unforeseen (large rocks, utilities, buried debris, ground water, tidal issues, logistical problems, existing plumbing).

Septic system	\$120,000	\$150,000
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Thank you,

Alan Sweat

**EXHIBIT G**



The Lessee plans to make improvements to the lease in the amount of \$150,000 as a condition of the 40-year lease and therefore will need to amortize its cost over the remaining term of the lease. The following calculation allows for full amortization of the Lessee's financial improvements along with allowances for property insurance, maintenance costs, General Excise Tax, and Real Property Tax.

CALCULATION:

Annual Ground Rent	\$480.00
Annual Sublease Rent	\$49,800.00
Less G. E. Tax	\$ -2,346.58
Less Real Property Tax	\$ -7,187.13
Misc. Allowances (Amortized improvements (\$3,750.00), insurance (\$7,193.58), property management (\$3,613.32) and maintenance costs (\$2166.16))	\$ -16,723.06
Total Allowances	<u>\$ -23,910.19</u>
Total Sublease Rent	\$23,063.23
Income to Land (less GET)	\$47,453.42
Annual Ground rent	\$ -480.00
Total Allowances	<u>\$ -23,910.19</u>
Total Amount	\$23,063.23