

**Fill in this information to identify the case:**

Debtor 1 Gold's Texas Holdings Group, Inc.

Debtor 2 \_\_\_\_\_  
(Spouse, if filing)

United States Bankruptcy Court for the: Northern District of Texas, Dallas Division

Case number 20-31337-hdh11

E-Filed on 09/09/2020  
Claim # 343

## Official Form 410

## Proof of Claim

**04/19**

**Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.**

**Filers must leave out or redact** information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

**Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.**

**Part 1: Identify the Claim**

<b>1. Who is the current creditor?</b>		<u>ER South by South Congress, LLC</u> Name of the current creditor (the person or entity to be paid for this claim)	
		Other names the creditor used with the debtor _____	
<b>2. Has this claim been acquired from someone else?</b>		<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
<b>3. Where should notices and payments to the creditor be sent?</b>  Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)	<b>Where should notices to the creditor be sent?</b>		<b>Where should payments to the creditor be sent? (if different)</b>
	<u>Jason Wright</u> Name  <u>1301 E. 9th Street Suite 3500</u> Number Street <u>Cleveland</u> <u>OH</u> <u>44138</u> City State ZIP Code  Contact phone <u>(216) 658-6219</u> Contact email <u>jwright@walterhav.com</u>  Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____		<u>ER South by South Congress, LLC</u> Name  <u>6900 Dallas Parkway, 3rd Floor</u> Number Street <u>Plano</u> <u>TX</u> <u>75024</u> City State ZIP Code  Contact phone <u>(214) 259-7009</u> Contact email <u>cprice@encore.biz</u>
<b>4. Does this claim amend one already filed?</b>		<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
<b>5. Do you know if anyone else has filed a proof of claim for this claim?</b>		<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	

**Part 2:** Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor? ☐ No ☒ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: 0 2 8 4

7. How much is the claim? \$ 223,613.72. Does this amount include interest or other charges? ☒ No ☐ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. What is the basis of the claim? Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information.
- Shopping Center Lease

9. Is all or part of the claim secured? ☒ No ☐ Yes. The claim is secured by a lien on property.
- Nature of property:**
- ☐ Real estate. If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.
- ☐ Motor vehicle
- ☐ Other. Describe: \_\_\_\_\_
- Basis for perfection:** \_\_\_\_\_
- Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)
- Value of property:** \$ \_\_\_\_\_
- Amount of the claim that is secured:** \$ \_\_\_\_\_
- Amount of the claim that is unsecured:** \$ \_\_\_\_\_ (The sum of the secured and unsecured amounts should match the amount in line 7.)
- Amount necessary to cure any default as of the date of the petition:** \$ \_\_\_\_\_
- Annual Interest Rate** (when case was filed) \_\_\_\_\_ %
- ☐ Fixed
- ☐ Variable

10. Is this claim based on a lease? ☐ No ☒ Yes. Amount necessary to cure any default as of the date of the petition. \$ 75,667.02

11. Is this claim subject to a right of setoff? ☒ No ☐ Yes. Identify the property: \_\_\_\_\_

12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☒ No

☐ Yes. Check one:

☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).

Amount entitled to priority

\$ 0.00

☐ Up to \$3,025\* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).

\$ 0.00

☐ Wages, salaries, or commissions (up to \$13,650\*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).

\$ 0.00

☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).

\$ 0.00

☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).

\$ 0.00

☐ Other. Specify subsection of 11 U.S.C. § 507(a)( ) that applies.

\$ 0.00

\* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

☒ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 09/09/2020  
MM / DD / YYYY

/s/ Jason Wright

Signature

Print the name of the person who is completing and signing this claim:

Name Jason Wright  
First name Middle name Last name

Title Attorney for Creditor

Company Walter Haverfield, LLP  
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address  
Number Street

City State ZIP Code

Contact phone Email

Attachment 1 - Gold's Gym - POC Exhibit A\_Statement\_Redacted.pdf

Description - Statement

# Lease Ledger

Tenant: 0284 Date: 08/28/2020

Date	Description	Unit	Charge	Payment	Balance	Chg/Rec	Hold
01/01/2020	Base Rent Retail (01/2020)	C	25,231.18	0.00	25,231.18	C-48352	No
01/01/2020	Real Estate Tax (01/2020)	C	8,171.02	0.00	33,402.20	C-48353	No
01/01/2020	CAM (01/2020)	C	1,397.42	0.00	34,799.62	C-48354	No
01/01/2020	Insurance (01/2020)	C	485.22	0.00	35,284.84	C-48355	No
01/01/2020	Rental Concessions - Retail (01/2020)	C	(25,231.18)	0.00	10,053.66	C-48356	No
02/01/2020	CAM (02/2020)	C	2,280.00	0.00	12,333.66	C-47629	No
02/01/2020	Insurance (02/2020)	C	791.67	0.00	13,125.33	C-47630	No
02/01/2020	Real Estate Tax (02/2020)	C	13,331.67	0.00	26,457.00	C-47631	No
02/01/2020	Base Rent Retail (02/2020)	C	41,166.67	0.00	67,623.67	C-47632	No
02/01/2020	Rental Concessions - Retail (02/2020)	C	(41,166.67)	0.00	26,457.00	C-47633	No
03/01/2020	CAM (03/2020)	C	2,280.00	0.00	28,737.00	C-47883	No
03/01/2020	Insurance (03/2020)	C	791.67	0.00	29,528.67	C-47884	No
03/01/2020	Real Estate Tax (03/2020)	C	13,331.67	0.00	42,860.34	C-47885	No
03/01/2020	Base Rent Retail (03/2020)	C	41,166.67	0.00	84,027.01	C-47886	No
03/01/2020	Rental Concessions - Retail (03/2020)	C	(41,166.67)	0.00	42,860.34	C-47887	No
04/01/2020	CAM (04/2020)	C	2,280.00	0.00	45,140.34	C-48198	No
04/01/2020	Insurance (04/2020)	C	791.67	0.00	45,932.01	C-48199	No
04/01/2020	Real Estate Tax (04/2020)	C	13,331.67	0.00	59,263.68	C-48200	No
04/01/2020	Base Rent Retail (04/2020)	C	41,166.67	0.00	100,430.35	C-48201	No
04/01/2020	Rental Concessions - Retail (04/2020)	C	(41,166.67)	0.00	59,263.68	C-48202	No
05/01/2020	CAM (05/2020)	C	2,280.00	0.00	61,543.68	C-48646	No
05/01/2020	Insurance (05/2020)	C	791.67	0.00	62,335.35	C-48647	No
05/01/2020	Real Estate Tax (05/2020)	C	13,331.67	0.00	75,667.02	C-48648	No
05/01/2020	Base Rent Retail (05/2020)	C	41,166.67	0.00	116,833.69	C-48649	No
05/01/2020	Rental Concessions - Retail (05/2020)	C	(41,166.67)	0.00	75,667.02	C-48650	No
06/01/2020	CAM (06/2020)	C	2,280.00	0.00	77,947.02	C-48942	No
06/01/2020	Insurance (06/2020)	C	791.67	0.00	78,738.69	C-48943	No
06/01/2020	Real Estate Tax (06/2020)	C	13,331.67	0.00	92,070.36	C-48944	No
06/01/2020	Base Rent Retail (06/2020)	C	41,166.67	0.00	133,237.03	C-48945	No
06/01/2020	Rental Concessions - Retail (06/2020)	C	(41,166.67)	0.00	92,070.36	C-48946	No
07/01/2020	CAM (07/2020)	C	2,280.00	0.00	94,350.36	C-49236	No
07/01/2020	Insurance (07/2020)	C	791.67	0.00	95,142.03	C-49237	No
07/01/2020	Real Estate Tax (07/2020)	C	13,331.67	0.00	108,473.70	C-49238	No
07/01/2020	Base Rent Retail (07/2020)	C	41,166.67	0.00	149,640.37	C-49239	No
07/01/2020	Rental Concessions - Retail (07/2020)	C	(41,166.67)	0.00	108,473.70	C-49240	No
08/01/2020	CAM (08/2020)	C	2,280.00	0.00	110,753.70	C-49470	No
08/01/2020	Insurance (08/2020)	C	791.67	0.00	111,545.37	C-49471	No
08/01/2020	Real Estate Tax (08/2020)	C	13,331.67	0.00	124,877.04	C-49472	No
08/01/2020	Base Rent Retail (08/2020)	C	41,166.67	0.00	166,043.71	C-49473	No
09/01/2020	CAM (09/2020)	C	2,280.00	0.00	168,323.71	C-49780	No
09/01/2020	Insurance (09/2020)	C	791.67	0.00	169,115.38	C-49781	No
09/01/2020	Real Estate Tax (09/2020)	C	13,331.67	0.00	182,447.05	C-49782	No

Lease Ledger

Tenant: 0284 Date: 08/28/2020

Date	Description	Unit	Charge	Payment	Balance	Chg/Rec	Hold
09/01/2020	Base Rent Retail (09/2020)	C	41,166.67	0.00	223,613.72	C-49783	No

Attachment 2 - Gold's Gym - POC Exhibit B\_Shopping\_Center\_Lease.pdf

Description - Shopping Center Lease Dated April 30, 2017

# **SHOPPING CENTER LEASE**

Dated as of April 30<sup>th</sup>, 2017

by and between

**ER South by South Congress, LLC**

as Landlord

and

**Gold's Texas Holdings Group, Inc.**

as Tenant

Location: W. Slaughter Lane & Cullen Lane, Austin, Texas



## Table of Contents

	Page
ARTICLE I -- DEFINITIONS.....	1
ARTICLE II -- GRANT AND TERM.....	2
Section 2.01    Grant.....	2
(a)    Initial Term .....	3
(b)    Options to Extend.....	3
Section 2.02    Supplemental Agreement.....	3
ARTICLE III -- CONSTRUCTION OF IMPROVEMENTS.....	3
Section 3.01    Delivery .....	3
Section 3.02    Delivery Date.....	3
Section 3.03    Acceptance of Building Site .....	4
Section 3.04    Landlord and Tenant's Plans and Specifications .....	4
Section 3.05    Construction of Landlord's Work, Landlord's Finish Work and Tenant's Work .....	4
Section 3.06    Alterations.....	4
Section 3.07    Landlord Representations .....	4
ARTICLE IV -- RENT .....	5
Section 4.01    Base Rent.....	5
Section 4.02    Stipulation of Size .....	5
Section 4.03    Late Payments.....	5
ARTICLE V -- CONDUCT OF BUSINESS BY TENANT .....	5
Section 5.01    Use of Premises .....	5
Section 5.02    No Duty to Continuously Operate .....	5
Section 5.03    Compliance with Laws and Regulations.....	6
Section 5.04    Exclusive Rights .....	6
ARTICLE VI -- UTILITIES.....	7
Section 6.01    Cost of Utilities.....	7
Section 6.02    Landlord's Obligations .....	7
Section 6.03    Landlord's Right to Provide Utilities.....	7
Section 6.04    Limitation on Liability.....	7
ARTICLE VII -- TAXES AND REAL ESTATE CHARGES .....	7
Section 7.01    Personal Property Taxes .....	7
Section 7.02    Real Estate Taxes.....	7
Section 7.03    Adjustment .....	8
ARTICLE VIII -- THE COMMON AREA .....	8
Section 8.01    Common Area.....	8
Section 8.02    Use of Common Area .....	9
Section 8.03    Common Area Maintenance .....	9
Section 8.04    Common Area Maintenance Charges .....	9
Section 8.05    Reconciliation .....	10
Section 8.06    Parking.....	10
Section 8.07    Roof Rights.....	11
Section 8.08    Center Expenses Statement.....	11
ARTICLE IX -- MAINTENANCE AND REPAIR OF THE PREMISES.....	12
Section 9.01    Maintenance by Landlord .....	12
Section 9.02    Maintenance by Tenant.....	13
Section 9.03    Warranties.....	14
ARTICLE X -- INSURANCE AND INDEMNITY .....	14
Section 10.01    Landlord's Insurance .....	14
Section 10.02    Tenant's Insurance.....	14
Section 10.03    Indemnification.....	15
ARTICLE XI -- DAMAGE BY CASUALTY .....	15
Section 11.01    Restoration.....	16
Section 11.02    Landlord's Obligations to Rebuild .....	16

Section 11.03	Continued Operations .....	16
ARTICLE XII -- CONDEMNATION.....		16
Section 12.01	Partial Taking .....	16
Section 12.02	Total Taking .....	16
Section 12.03	Taking of Common Area .....	16
Section 12.04	Application of Award .....	16
ARTICLE XIII -- ASSIGNMENT AND SUBLETTING .....		17
Section 13.01	Consent Required .....	17
Section 13.02	Permitted Transfer .....	17
Section 13.03	Tenant to Remain Liable .....	17
Section 13.04	Void Transfer.....	17
Section 13.05	Transfer by Landlord .....	17
Section 13.06	No Mortgage.....	17
ARTICLE XIV -- DEFAULT .....		17
Section 14.01	Events of Default .....	17
Section 14.02	Remedies .....	18
(a)	Termination of Right of Possession .....	18
(b)	Termination of Term of Lease .....	18
(c)	Entry.....	19
(d)	Self-Help.....	19
(e)	Other Remedies.....	19
(f)	Jury Trial .....	19
Section 14.03	Landlord's Default.....	19
ARTICLE XV -- HOLDING OVER .....		20
ARTICLE XVI -- ACCESS BY LANDLORD .....		20
ARTICLE XVII -- QUIET POSSESSION .....		20
ARTICLE XVIII -- BANKRUPTCY-INSOLVENCY .....		20
ARTICLE XIX -- TITLE TO IMPROVEMENTS; SURRENDER .....		21
ARTICLE XX -- MECHANICS' LIENS .....		21
ARTICLE XXI -- PRESENT CONDITION OF BUILDING SITE .....		22
ARTICLE XXII -- HAZARDOUS MATERIALS .....		22
Section 22.01	Prohibition of Hazardous Materials.....	22
Section 22.02	Tenant Indemnity.....	22
Section 22.03	Landlord Indemnity .....	22
Section 22.04	Remediation .....	23
ARTICLE XXIII -- SPECIAL PROVISIONS .....		23
Section 23.01	Landlord's Entry .....	23
Section 23.02	Independent Obligations .....	23
ARTICLE XXIV -- SUBROGATION .....		23
ARTICLE XXV -- PRESALES CENTER .....		23
ARTICLE XXVI -- SIGNAGE .....		24
ARTICLE XXVII -- MISCELLANEOUS PROVISIONS .....		24
Section 27.01	Relationship of Parties.....	24
Section 27.02	Construction.....	24
Section 27.03	Parties Bound.....	24
Section 27.04	Entire Agreement.....	25
Section 27.05	Brokers .....	25
Section 27.06	Savings and Governing Law .....	25
Section 27.07	Force Majeure.....	25
Section 27.08	Recording of Lease.....	25
Section 27.09	No Option .....	25
Section 27.10	Notices.....	25
Section 27.11	Estoppel Certificates.....	26
Section 27.12	Intentionally Omitted.....	26
Section 27.13	Right of First Refusal to Purchase. ....	26
Section 27.14	Subordination.....	26

Section 27.15	Liability of Landlord.....	27
---------------	----------------------------	----

Exhibits

"A"	Property
"B"	Site Plan
"C"	Commencement Date Memorandum
"D-1"	Landlord's Work
"D-2"	Tenant's Work
"E"	Intentionally Omitted
"F"	Intentionally Omitted
"G"	Delivery Date Memorandum
"H"	Approved Signage
"I"	Subordination, Attornment and Non-Disturbance Agreement

## SHOPPING CENTER LEASE

**THIS SHOPPING CENTER LEASE** (this “**Lease**”) is made and entered into as of the date first written above (the “**Effective Date**”) by and between **ER SOUTH BY SOUTH CONGRESS, LLC**, a Delaware limited liability company (“**Landlord**”), and **GOLD’S TEXAS HOLDINGS GROUP, INC.**, a Delaware corporation (“**Tenant**”).

### ARTICLE I --DEFINITIONS

“**Additional Rent**” means any and all payments that Tenant is obligated to make to Landlord under the terms of this Lease other than Base Rent.

“**Building**” means that certain building to be constructed by Tenant on the Building Site and to contain approximately 38,000 square feet.

“**Building Site**” means a site able to accommodate a 38,000 square foot building at the location depicted on the Site Plan.

“**Delivery Date**”: The date that Landlord provides the Building Site to Tenant, in the condition described in **Section 3.01** of this Lease and ready for Tenant’s Work.

“**Event of Default**” is defined in **Section 14.01** of this Lease.

“**Expiration Date**” is defined in **Section 2.01(a)** of this Lease.

“**Floor Area**” means the aggregate floor area of each level of any space within the Shopping Center measured to the outside faces of exterior walls and to the center of any interior walls.

“**Hazardous Material**” means any hazardous, radioactive or toxic substance, material or waste, including, but not limited to, those substances, materials and wastes (whether or not mixed, commingled or otherwise combined with other substances, materials or wastes) listed in the United States Department of Transportation Hazardous Materials Table (49 C.F.R. Section 172.101) or by the Environmental Protection Agency as hazardous substances (40 C.F.R. Part 302 and amendments thereto), or substances, materials and wastes which are or become regulated under any applicable local, state or federal law including, without limitation, any material, waste or substance which is (i) a petroleum product, crude oil or any fraction thereof, (ii) asbestos, (iii) polychlorinated biphenyls, (iv) designated as a “hazardous substance” pursuant to Section 311 of the Clean Water Act, or listed pursuant to Section 307 of the Clean Water Act, (v) defined as a “hazardous waste” pursuant to Section 1004 of the Resource Conservation and Recovery Act, or (vi) defined as a “hazardous substance” pursuant to Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act.

“**Landlord’s Work**” means collectively Landlord’s Initial Work and Landlord’s Finish Work, as described on Exhibit “D-1” attached hereto.

“**Lease Year**” means, as to the first Lease Year, the twelve (12) calendar month period beginning on the Rent Commencement Date except that if the Rent Commencement Date is not the first day of a calendar month, the first Lease Year shall be the initial partial month plus the following twelve (12) calendar month period, and as to each subsequent Lease Year, each twelve (12) calendar month period beginning on the anniversary of the previous lease year.

“**Opening Date**” is the date which Tenant opens for business to the general public.

“**Parcel**” means a separately divided and assessed parcel of land located on the Property and depicted on Exhibit “B-1” attached hereto and incorporated herein.

“Permitted Use” means a health and fitness center offering such fitness programs and recreational facilities as Tenant may determine from time to time, which may include, but shall not be limited to, a jogging track, running track, gymnasiums, whirlpools, swimming pool, saunas, aerobics and/or floor exercise, group exercise classes, spin, yoga, pilates and similar meditative or holistic exercise, martial arts or similar pursuits, basketball and racquetball courts, free weights, exercise machinery and equipment, personal fitness training, and the sale of vitamins, nutritional supplements and smoothies (collectively “Primary Uses”). As part of the Permitted Use, Tenant may use portions of the Building for the following uses as the same may be ancillary to a health and fitness center: child nursery facilities, the sale of equipment and apparel, the sale of snacks and juices, nutritional counseling, physical therapy, therapeutic massage, sports medicine therapy, weight loss advice, and tanning salon (collectively “Ancillary Uses”) provided that no more than twenty five percent (25%) of the Premises may be used for Ancillary Uses.

“Premises” means that certain 38,000 square foot (approximately) retail space of the Building located in the Shopping Center as shown on the Site Plan.

“Prime Rate” means, at any time, the rate of interest most recently published as the “Prime Rate” in the Money Rates section of The Wall Street Journal.

“Property” means the certain real property described on Exhibit “A” attached hereto and depicted on Exhibit “B-1” attached hereto which is owned by Landlord.

“Rent” as used herein, shall mean collectively Base Rent and Additional Rent

“Rent Commencement Date” shall mean the earlier of (i) 300 days after the Delivery Date; or (ii) the Opening Date.

“Shopping Center” means the Property and all improvements constructed thereon as shown on Exhibit “B-1” attached hereto.

“Site Plan” means that certain Site Plan of the Shopping Center attached hereto as Exhibit “B”.

“Tenant Parties” shall mean Tenant’s agents, employees, contractors or invitees.

“Tenant Protected Parking” means that portion of the Common Area identified on the Site Plan.

“Tenant’s Proportionate Share”: A percentage, computed on the ratio that the total Floor Area of the Premises bears to the total Floor Area of building(s) within the Shopping Center (which currently is approximated at fifty three thousand (53,000) square feet), subject to change from time to time.

“Term” and “Term of this Lease” are defined in **Section 2.01(a)** of this Lease.

## ARTICLE II --GRANT AND TERM

**Section 2.01** Grant. Landlord does hereby demise and lease the Premises, as the same may be constructed, to Tenant, and Tenant does lease and take the Premises, as the same may be constructed, from Landlord. Landlord further grants to Tenant during the Term the non-exclusive right, privilege and easement in common with all other tenants of the Shopping Center, for Tenant and its licensees, employees, agents, customers and invitees, to use the Common Areas, and all access roads and parking spaces within the Shopping Center as shown on the Site Plan for pedestrian and vehicular ingress and egress to and from the Premises without payment of any fee or other charge being made therefor except as may be specifically set forth in this Lease. The foregoing grants and the leasehold estate created thereby include any rights contained in, and are subject to, any covenants, restrictions and easements, the terms and provisions of certain reciprocal easement and/or operating conditions, agreements and other matters of record now or hereinafter entered into by Landlord for itself or with the owners or lessees of the Property and/or adjacent properties, if any, (each such matter of record is hereinafter individually referred to as an “Encumbrance”, and all such matters are hereinafter collectively referred to as the

“Encumbrances”) and any restrictions otherwise set forth in this Lease. Landlord represents that it has authority to enter into this Lease. Landlord further represents that it shall not enter into any Encumbrances that would materially or adversely interfere with Tenant’s use of the Premises for the Primary Uses or materially or adversely increase Tenant’s obligations or decrease Tenant’s rights, as stated in this Lease, without the prior written consent of Tenant, which shall not be unreasonably withheld.

(a) Initial Term. The term of this Lease (the “Term” or the “Term of this Lease”) shall commence on the Delivery Date and shall expire on the last day of the last full calendar month of the fifteenth (15<sup>th</sup>) Lease Year (“Expiration Date”), except as it may be extended as provided in **Section 2.01(b)** hereof or sooner terminated in accordance with the terms hereof. As used herein, “Term” and “Term of this Lease” refer to such initial term and to any extension thereof. If the Rent Commencement Date is on a date other than the first day of a calendar month (i) Base Rent for the month containing the Rent Commencement Date shall be prorated based upon the ratio that the number of days in the Term within such month bears to the total number of days in such month, and (ii) the initial monthly rental period shall cover the month containing the Rent Commencement Date and the following month (unless the Rent Commencement Date is the first day of the month, in which event the initial monthly rental period shall cover only the month containing the Rent Commencement Date). Notwithstanding the foregoing, from and after the Effective Date, this Lease shall be in full force and effect, and Tenant shall perform and observe all of the terms, covenants, conditions, agreements and indemnities to be kept, performed or observed by Tenant (other than the payment of Rent) prior to the Rent Commencement Date.

(b) Options to Extend. Landlord grants to Tenant four (4) options to extend the Term for periods of five (5) years each. Each option can be exercised by Tenant giving Landlord notice of such exercise not less than 270 days before the expiration of the then-existing Term; provided, however, that no such exercise shall be effective if Tenant is in default under this Lease beyond applicable notice and cure periods at the time such notice is given or at the time such extended term would commence.

Section 2.02 Supplemental Agreement. In order to place in writing the exact dates of commencement and termination of the Term of this Lease, the parties shall, within ten (10) days after the Rent Commencement Date, execute a commencement date memorandum in the form attached hereto as Exhibit “C” to become a part hereof, setting forth the Delivery Date, the Rent Commencement Date, the Term, Base Rent, Tenant’s Proportionate Share of Additional Rent, the Floor Area of the Premises and such other items as Landlord may reasonably request.

### ARTICLE III --CONSTRUCTION OF IMPROVEMENTS

Section 3.01 Delivery. Landlord shall have been deemed to have delivered the Building Site to Tenant when the following conditions have been satisfied: (i) Tenant has full physical and exclusive possession of the Building Site, subject to all matters of record; (ii) Tenant shall have received a non-disturbance agreement from all current lenders; (iii) Tenant has obtained any and all permits and/or necessary third party approvals (including, without limitation, from Landlord, any governmental authority, and any lenders) for the Primary Uses, the Plans (as hereinafter defined), and Tenant’s signage, provided Tenant applies timely as required hereunder and diligently pursues the same; (iv) Landlord has provided evidence reasonably acceptable to Tenant that (a) the Building Site is free of any and all Hazardous Materials and Landlord’s Initial Work is in compliance with the ADA, all building, fire safety, health, land use, and other laws, ordinance, codes, rules, and regulations; (b) the Premises may be used for the Primary Uses under applicable zoning laws; and (c) the Primary Uses are not prohibited by any restrictions applicable to the Premises; and (v) Landlord’s Initial Work is completed. Notwithstanding the foregoing, in the event that Tenant does not submit the Plans for approval as required by **Section 3.04** or timely submit for signage and/or any other necessary third party approvals (including, without limitation, from Landlord, any governmental authority, and any lenders) as required hereunder and/or does not use reasonable efforts to pursue the same, then subsection (iii) above as it relates to the untimely Plans, signage or third party approval shall not be deemed a condition of Landlord’s delivery of the Building Site to Tenant.

Section 3.02 Delivery Date. Landlord shall submit for permits for Landlord’s Work within ninety (90) days of the Effective Date. Landlord shall use reasonable efforts to ensure (i) that the completion of Landlord’s Initial Work occurs on or about ninety (90) days following Landlord’s receipt of all required permits for

Landlord's Initial Work from applicable government authorities, and (ii) that the completion of Landlord's Finish Work occurs on or about two hundred seventy (270) days following the Delivery Date. Landlord, and Tenant with respect to Section 3.01 subsection (iii) above, shall use reasonable efforts to ensure that the Delivery Date occurs within ninety (90) days of Landlord's receipt of permits for Landlord's Initial Work (the "Estimated Delivery Date"). In order to place in writing the exact Delivery Date, the parties shall, within ten (10) days after the Delivery Date, execute a delivery date memorandum in the form attached hereto as Exhibit "G" to become a part hereof, setting forth the Delivery Date. Subject to day for day extensions for Tenant delays, including Tenant's obligations with respect to Section 3.01 subsection (iii), or due to events of force majeure, if the Delivery Date has not occurred by the Estimated Delivery Date or if the Landlord's Finish Work has not been completed by the Rent Commencement Date, then Landlord shall give Tenant a credit against Rent equal to two days of Base Rent for each day after the Estimated Delivery Date until the Delivery Date and for each day after the Rent Commencement Date until the completion of Landlord's Finish Work, which credits shall be cumulative. Subject to day for day extensions for Tenant delays, including Tenant's obligations with respect to Section 3.01 subsection (iii), or due to events of force majeure, if the Delivery Date has not occurred within two hundred ten (210) days following Landlord's receipt of all required permits for Landlord's Work from applicable government authorities, Tenant may terminate this Lease and have no further obligation or liability to Landlord.

Section 3.03      Acceptance of Building Site. Subject to (i) Landlord's completion of Landlord's Work in compliance with the terms of this Lease, (ii) the representations and warranties set forth in this Lease, and (iii) latent defects which were not discoverable by a reasonably diligent investigation conducted on or about the Delivery Date and for which Tenant provides written notice to Landlord within one (1) year of the Delivery Date, Tenant accepts the Building Site in its "As-Is" condition.

Section 3.04      Landlord and Tenant's Plans and Specifications. Landlord shall deliver construction drawings for Landlord's Work to Tenant within ninety (90) days of the Effective Date. Within ninety (90) days of Tenant's receipt of construction drawings for Landlord's Work, Tenant shall submit to Landlord for approval, which approval shall not be unreasonably withheld, conditioned or delayed, plans for the construction and improvements Tenant plans to make to construct the Premises ("Premises Work"), Tenant's Building Signage (as hereinafter defined) and the interior construction and improvements Tenant plans to construct within the Premises ("Tenant's Improvements") (collectively, "Tenant's Work") in "permit ready" form (the "Plans"). If Landlord does not approve or object to the Plans within ten (10) business days of receipt thereof, the Plans shall be deemed to be approved by Landlord. If Landlord provides its objections to the Plans within the foregoing 10-business day time period, then the parties shall work in good faith to agree on the Plans within 30 days thereafter. Within ten (10) business days of Tenant's receipt of Landlord's approval of the Plans, Tenant shall submit the Plans to the applicable government authority for approval and thereafter diligently pursue the same.

Section 3.05      Construction of Landlord's Work, Landlord's Finish Work and Tenant's Work. Landlord shall complete Landlord's Initial Work and Landlord's Finish Work in accordance with Exhibit "D-1" attached hereto and Tenant shall construct all Tenant's Work in accordance with the attached as Exhibit "D-2" attached hereto.

Section 3.06      Alterations. Except as expressly permitted herein, Tenant shall not construct any improvements after the initial improvements or make any structural alterations to the Premises without first obtaining the written consent of Landlord; provided that, subject to the approval of all applicable government authorities, Tenant may make interior, non-structural alterations or improvements which cost less than \$50,000.00, without obtaining Landlord's consent, so long as the same do not trigger structural changes to the Premises or changes to the Common Areas of the Shopping Center thereby. Landlord shall not unreasonably withhold, condition or delay its consent to any interior, non-structural alterations. Landlord may withhold its consent to any structural and/or exterior alterations in its sole and absolute discretion.

Section 3.07      Landlord Representations. Landlord represents and warrants to Tenant that, as of the Effective Date: (i) Landlord owns the Property, (ii) the Primary Uses are permissible by applicable zoning laws, (iii) the Primary Uses are not prohibited by any restrictions applicable to the Building Site, (iv) to Landlord's actual knowledge, the Property is free of any Hazardous Materials, (v) to Landlord's actual knowledge, the Parcel is not subject to any reciprocal easements and/or operating agreements, and (vi) no party has any rights with respect to construction on the Property or the use of the Building Site, except as disclosed to Tenant in writing. Landlord

further represents and warrants that, as of the Delivery Date, and with respect to Landlord's Finish Work, the completion date thereof, the Landlord's Work will comply, in all material respects, with the ADA, all building, fire safety, health, land use, and other laws, ordinance, codes, rules, and regulations. Tenant shall be responsible for obtaining permits and/or necessary third party approvals for the Ancillary Uses.

#### ARTICLE IV --RENT

Section 4.01 Base Rent. Except as otherwise specifically set forth in this Lease, Tenant shall pay to Landlord without any prior demand therefor and without any deduction or setoff whatsoever beginning as of the Rent Commencement Date, Base Rent ("Base Rent") as follows:

<u>Period</u>	<u>Annual Base Rent</u>	<u>Monthly Base Rent</u>
(i) From the Rent Commencement Date through the last day of the calendar month that is 6 months after the Rent Commencement Date	<b>\$0.00</b>	<b>\$0.00</b>
(ii) From the first day of the calendar month that is 7 months after the Rent Commencement Date through Lease Year 5, inclusive	<b>\$494,000</b>	<b>\$41,166.67</b>
(iii) Lease Year 6 through Lease Year 10, inclusive	<b>\$543,400</b>	<b>\$45,283.33</b>
(iv) Lease Year 11 through Lease Year 15, inclusive	<b>\$597,740</b>	<b>\$49,811.67</b>
(v) During the first 5 year renewal period	<b>\$657,514</b>	<b>\$54,792.83</b>
(vi) During the second 5 year renewal period	<b>\$726,265</b>	<b>\$60,522.08</b>
(vii) During the third 5 year renewal period	<b>\$795,592</b>	<b>\$66,299.33</b>
(viii) During the fourth 5 year renewal period	<b>\$875,151</b>	<b>\$72,929.25</b>

Base Rent for each month during the Term shall be due and payable monthly in advance on or before the first (1<sup>st</sup>) day of such month.

Section 4.02 Stipulation of Size. Intentionally Omitted.

Section 4.03 Late Payments. In the event any payment of Base Rent, Additional Rent, and other sums due Landlord under this Lease is not received within five (5) days after it is due for any reason whatsoever, then in addition to the sums due Tenant shall pay interest thereon from the due date until paid by Tenant, at the rate of two percent (2%) above the Prime Rate, not to exceed the maximum rate of interest allowed by law in the state where the Shopping Center is located and a \$500 late fee to compensate Landlord for its administrative expenses in connection with such late payment. The interest and late fee shall be deemed to be Additional Rent.

#### ARTICLE V --CONDUCT OF BUSINESS BY TENANT

Section 5.01 Use of Premises. The Premises shall be used and occupied solely for the Permitted Use, and for no other use or purpose whatsoever without Landlord's prior written consent, such consent shall not be unreasonably withheld, conditioned or delayed provided that the proposed change of use does violate any then-existing restricted or exclusive uses affecting the Shopping Center. Notwithstanding the foregoing, no more than 25% of the square footage of the Premises may be used for Ancillary Uses.

Section 5.02 No Duty to Continuously Operate. Tenant shall open for business to the general public no later than 365 days after the Delivery Date, subject to day for day extensions for Landlord delays and events of force majeure. Thereafter, provided that Tenant continues to pay Rent and perform its other obligations



hereunder, Tenant may cease its operations at the Premises at any time. Notwithstanding the foregoing, in the event that Tenant shall cease its operations at the Premises for a period in excess of ninety (90) days and the same is not attributable to a remodeling (not to exceed one hundred twenty (120) days), casualty, or condemnation (each an "Exempted Discontinuance"), then Landlord shall have the right, upon thirty (30) days' notice to Tenant, to terminate this Lease and recapture the Premises, provided that Tenant has not re-opened the Premises, fully-equipped and staffed, within the thirty (30) days' notice period. If Tenant reopens the Premises, fully-equipped and staffed, within the thirty (30) day notice period and thereafter ceases operations at the Premises for any reason other than an Exempted Discontinuance for a period of time in excess of thirty (30) days, then Landlord shall have the right to immediately terminate this Lease and recapture the Premises upon notice to Tenant without any prior notice to Tenant and without any right to Tenant to reopen. In the event of a termination hereunder, the parties hereto shall automatically be released from any and all liability of whatever kind for the terminated portion of the unexpired Term, excepting only those obligations which expressly survive the expiration or termination of this Lease. Nothing herein shall be deemed to affect the obligation to pay Rent until the effective date of said termination by the Landlord.

Section 5.03      Compliance with Laws and Regulations. Tenant shall comply with all laws, ordinances, codes, orders and regulations applicable to the Premises or to Tenant's activities or business relating to the Premises. Tenant shall not, without Landlord's prior written consent, keep anything within the Premises or use the Premises for any purpose which increases the insurance premium cost or invalidates any insurance policy carried on the Premises or other parts of the Shopping Center. All property kept, stored or maintained within the Premises by Tenant shall be at Tenant's sole risk. Also, Tenant shall be responsible for compliance with the Americans with Disabilities Act as amended from time to time (the "ADA"), and related state and municipal laws and regulations, in all matters regarding both the interior configuration of the Premises and Tenant's business operations at the Premises. Landlord shall comply with all laws, ordinances, codes, orders and regulations, including the ADA, applicable to the Common Areas (as hereinafter defined) of the Shopping Center.

Section 5.04      Exclusive Rights. Provided that Tenant is not in default under this Lease beyond applicable notice and cure periods and, except for an Exempted Discontinuance, is open and operating in the Premises, neither Landlord nor an affiliate shall (i) enter into any lease or other occupancy agreement covering the Shopping Center with any person or entity whose use of the property could compete with (a) a health or fitness center offering a jogging track, running track, gymnasiums, whirlpools, swimming pool, saunas, aerobics and/or floor exercise, group exercise classes, spin, yoga, pilates and similar meditative or holistic exercise, martial arts or similar pursuits, basketball and racquetball courts, free weights, exercise machinery and equipment, or personal fitness training, or (b) the sale of vitamins, nutritional supplements and smoothies or (ii) itself use the Shopping Center in a way that could compete with (a) a health or fitness center offering a jogging track, running track, gymnasiums, whirlpools, swimming pool, saunas, aerobics and/or floor exercise, group exercise classes, spin, yoga, pilates and similar meditative or holistic exercise, martial arts or similar pursuits, basketball and racquetball courts, free weights, exercise machinery and equipment, or personal fitness training, or (b) the sale of vitamins, nutritional supplements and smoothies, or (iii) enter into any lease or other occupancy agreement covering the Landlord Property with any person or entity for use as a health or fitness center or itself use the Landlord Property or any portion thereof (other than the Premises) as a health or fitness center. As used herein, "Landlord Property" means any real property owned or leased by Landlord, or an affiliate, located within two (2) miles of the Premises boundaries (the "Restricted Territory"), including the remaining leasable space within the Shopping Center. In the event the Shopping Center is acquired by a person or entity, who at the time of the transaction owns or leases property within the Restricted Territory that is being used as a health or fitness center or has the right to be used as a health or fitness center, such property shall not be subject to the exclusive use prohibition in this Section. The exclusive use prohibition in this Section shall also not apply to the following: (1) tenants within the Shopping Center with sales of smoothies that do not exceed 15% of its gross revenues, (2) tenants within the Restricted Territory engaged in the retail sale of health and fitness equipment for off-premise use only, (3) tenants operating a weight loss center within the Restricted Territory and whose use does not conflict with a Primary Use, (4) tenants within the Restricted Territory engaged in any of the Ancillary Uses, (5) tenants within the Restricted Territory operating as a children's entertainment facility (such as Monkey Joes, Leaping Lizzards or BounceU), (6) tenants within the Restricted Territory operating as a martial arts studio, and/or (7) drug stores, grocery stores, warehouse clubs, and/or discount department stores selling vitamins or nutritional supplements as incidental items. In the event of a breach of this covenant by Landlord, if Landlord fails to cure such breach within thirty (30) days after written notice from Tenant, then as Tenant's sole remedy therefor, fifty percent (50%) of all Base Rent shall abate until

Landlord's cure of such breach. Notwithstanding the foregoing, in the event of a breach of this covenant by a tenant within the Restricted Territory operating outside of its permitted use clause (a "Rogue Tenant"), if Landlord fails to cure such breach within one hundred eighty (180) days after written notice from Tenant, then as Tenant's sole remedy therefor, fifty percent (50%) of all Base Rent shall abate until the earlier of (aa) Landlord's cure of such breach, (bb) the determination by a jurisdiction having authority hereof that there is no breach of this covenant, or (cc) eighteen (18) months following Tenant's written notice to Landlord of such breach, subject to Landlord's obligation to diligently pursue cure as set forth in this paragraph. In the event that the breach of this covenant caused by a Rogue Tenant continues after Tenant has been paying such abated rent for a period of eighteen (18) months, then Tenant shall have the right to terminate this Lease within thirty (30) days of the end of such 18-month period by giving Landlord thirty (30) days' written notice. In the event that Tenant does not timely exercise such termination right with such 30-day period, Tenant shall have waived such termination right and provided that Landlord has diligently pursued and continues to diligently pursue the cure of the breach of this covenant by such Rogue Tenant, Tenant shall resume paying full Base Rent as specified hereunder. As used in this Section, "affiliate" shall mean any person or entity which, directly or indirectly, through one or more of its intermediaries, controls, is controlled by, or is under common control with the Landlord. In the event of any claim or action by any governmental authority alleging that Landlord's agreement pursuant to the foregoing exclusive constitutes a restraint of trade or gives rise to alleged violations of federal or state anti-trust laws, then Landlord may notify Tenant in writing and Tenant shall within thirty (30) days: (yy) agree to indemnify, defend, and hold Landlord harmless from and against all losses, costs, liabilities, damages or expenses, including reasonable attorneys' fees and costs; in which event this Lease, and this **Section 5.04** shall remain in full force and effect; or (zz) waive this **Section 5.04**, in which case this Lease shall continue without change except as to this **Section 5.04**.

#### ARTICLE VI --UTILITIES

Section 6.01 Cost of Utilities. Tenant shall be solely responsible for and promptly pay all charges for heat, water (including sewage charges and/or taxes or other charges based on water consumption), gas, electricity or any other utility used or consumed in the Premises. Tenant shall pay the cost for all heating, air conditioning and ventilation ("HVAC") service provided to the Premises, including the cost of maintenance, repair and replacement of same as may be further described in Article IX of this Lease.

Section 6.02 Landlord's Obligations. Landlord shall provide to the Building Site the conduits for utilities as required in Exhibit "D-1" attached hereto. Prior to the Rent Commencement Date, Landlord shall provide a trash enclosure in a mutually agreed upon location which shall include a garbage bin and recycling bin that meet all applicable federal, state and local code requirements.

Section 6.03 Landlord's Right to Provide Utilities. Landlord may, if it so elects, furnish one or more utility services to Tenant, and in such event Tenant shall purchase the use of such services as are tendered by Landlord, and shall pay within 30 days of demand as Additional Rent the rates established therefore by Landlord which shall not exceed the rates which would be charged for the same services furnished directly by the local public utility companies. Landlord may at any time discontinue furnishing any such service without obligation to Tenant other than to connect the Building Site to the public utility, if any, furnishing such service.

Section 6.04 Limitation on Liability. LANDLORD SHALL NOT BE LIABLE TO TENANT FOR DAMAGES IF THE FURNISHING OF ANY UTILITY SERVICE, TELEPHONE SERVICE OR OTHER SERVICE TO THE PREMISES SHALL BE INTERRUPTED, REDUCED, CURTAILED OR IMPAIRED UNLESS TENANT IS UNABLE TO OPERATE IN THE PREMISES OR ANY MATERIAL PART THEREOF AND THE SAME IS CAUSED BY LANDLORD, ITS AGENTS, EMPLOYEES OR CONTRACTORS AND OCCURRING FOR A PERIOD IN EXCESS OF FIVE (5) CONSECUTIVE DAYS.

#### ARTICLE VII --TAXES AND REAL ESTATE CHARGES

Section 7.01 Personal Property Taxes. Tenant shall be liable for all taxes levied against personal property and trade fixtures and improvements placed by Tenant in the Premises.

Section 7.02 Real Estate Taxes. Tenant shall also be liable for all "Real Estate Charges" (as hereinafter defined) related to the Parcel on which the Premises is located or Landlord's ownership of such Parcel.

Tenant's obligations under this **Section 7.02** shall be prorated during any partial year (i.e., the first year and the last year of the Term). Real Estate Charges shall include ad valorem taxes, general and special assessments, parking surcharges, any tax or excise on rents, any tax or charge for governmental services (such as street maintenance or police or fire protection) assessed against the Property or any improvements thereon and/or on the income of Landlord derived from the Shopping Center and any state or federal tax or charge which replaces or is substituted for or is in addition to or is levied, in whole or in part, in lieu of, in substitution for, or in addition to any of such above-described Real Estate Charges: provided, however, that Real Estate Charges shall not be deemed to include any franchise, estate, inheritance or other general income tax, except for any state or federal tax or charge which replaces or is substituted for or is levied, in whole or in part, in lieu of, in substitution for, or in addition to any of such above-described Real Estate Charges. Landlord shall provide copies of any notices or correspondence related to the Real Estate Charges related to the Parcel upon thirty (30) days' written request from Tenant. For any calendar year in which Landlord retains a tax consultant to protest Real Estate Charges related to the Parcel (an "Applicable Tax Consultant Year"), Tenant shall have the right to provide input to any tax consultant retained by Landlord to protest any Real Estate Charges related to the Parcel. For any calendar year that is not an Applicable Tax Consultant Year, Tenant shall have the right to request that Landlord protest any Real Estate Charges related to the Parcel and Landlord shall cooperate with Tenant in such protest at no expense to Landlord and shall execute any documents reasonably required in furtherance of such purpose.

**Section 7.03**      Adjustment. During each month of the Term of this Lease, at the same time and in the same manner as with the payment of monthly installments of Base Rent and Additional Rent, Tenant shall make a monthly payment to Landlord equal to one-twelfth (1/12) of Tenant's Proportionate Share of the Real Estate Charges related to the Parcel, which Landlord reasonably estimates will be due and payable for that particular year. Tenant's Proportionate Share of the initial Real Estate Charges is estimated to be \$4.21 per square foot of Floor Area of the Premises for the first calendar year. In the event Landlord does not otherwise notify Tenant of the monthly amounts to be paid under this Article VII, then Tenant shall continue to pay such monthly deposits in an amount equal to one-twelfth (1/12) of Tenant's Proportionate Share of the Real Estate Charges for the immediately preceding twelve (12) month period. The initial monthly Real Estate Charges are based upon Tenant's Proportionate Share of the estimated Real Estate Charges on the Parcel for the year in question, and the monthly Real Estate Charges are subject to increase at any time during the Term of this Lease as determined by Landlord to reflect an accurate amount of Tenant's Proportionate Share of the Real Estate Charges. The Real Estate Charges due from Tenant shall be reconciled annually. If Tenant's total Real Estate Charges are less than Tenant's actual proportionate share of the Real Estate Charges related to the Parcel, Tenant shall pay to Landlord within 30 days of demand the difference; if the total real estate payments of Tenant are more than Tenant's actual proportionate share of the Real Estate Charges related to the Parcel, Landlord shall retain such excess and such excess sum shall either (i) be credited against the next maturing installments due from Tenant to Landlord for Tenant's Proportionate Share of actual Real Estate Charges or (unless otherwise provided herein), or (ii) if no further installments are due from Tenant, be refunded by Landlord to Tenant.

## ARTICLE VIII --THE COMMON AREA

**Section 8.01**      Common Area. The term "Common Area" is defined for all purposes of this Lease as that part of the Shopping Center intended for the common use of all tenants, including among other facilities (as such may be applicable to the Shopping Center), parking areas, private streets and alleys, landscaping and landscaped areas, irrigation systems, storm water drainage facilities, utilities to the extent not maintained by a utility provider, curbs, common loading areas, sidewalks, malls and promenades (enclosed or otherwise), lighting facilities, drinking fountains, meeting rooms, trash enclosures, public toilets, service halls and the like but excluding (i) space in buildings (now or hereafter existing) designated for rental for commercial purposes, as the same may exist from time to time, (ii) easements, streets and alleys maintained or controlled by a public authority, (iii) areas within the Shopping Center which may from time to time not be owned by Landlord (unless subject to a cross-access agreement benefiting the area which includes the Premises), and (iv) areas leased to a single-purpose user (such as a bank or a fast-food restaurant) where access is restricted. Finally, storm water drainage and outlet facilities and retention and detention areas and related facilities that may not be part of the Common Area but nevertheless serve the Shopping Center shall be deemed Common Area and shall be included for purposes of determining the Common Area Maintenance Charges (as hereinafter defined), as will Real Estate Charges and insurance expenses related thereto. Landlord reserves the right to change from time to time the dimensions and location of the Common Area, as well as the dimensions, identities, locations and types of any buildings, signs or

other improvements in the Shopping Center, provided that such change does not materially or adversely affect Tenant, the visibility of Tenant's storefront, or access to the Premises; and further provided that no changes may be made to parking spaces located within the area labeled "Tenant's Protected Parking" on the Site Plan without Tenant's prior written consent, such consent not to be unreasonably withheld.

Section 8.02            Use of Common Area. Tenant and its employees and customers, and when duly authorized pursuant to the provisions of this Lease, its subtenants, licensees and concessionaires, shall have the nonexclusive right to use the Common Area as constituted from time to time, such use to be in common with Landlord, other tenants in the Shopping Center and other persons permitted by the Landlord to use the same, and subject to such reasonable and non-discriminatory rules and regulations governing use as Landlord may from time to time prescribe.

Section 8.03            Common Area Maintenance. Landlord shall be responsible for the operation, management and maintenance of the Common Area, the manner of maintenance and the expenditures will be generally consistent with similar shopping centers within the same geographical area as the Shopping Center.

Section 8.04            Common Area Maintenance Charges. (a) In addition to the Rent and other charges prescribed in this Lease, Tenant shall pay to Landlord Tenant's Proportionate Share of all reasonable costs of operation and maintenance of the Common Area (including insurance thereon) (collectively, "Common Area Maintenance Charges") which may be incurred by Landlord in its discretion. Common Area Maintenance Charges shall include, without limitation, all sums reasonably expended in connection with: service and maintenance contracts, including, without limitation, windows and general cleaning, removing of snow, ice, debris and surface water, electronic intrusion and fire control and telephone alert systems; maintenance and repair of machinery and equipment used in the operation of the Shopping Center; maintenance and repair of storm, sanitary and other drainage or detention systems, sprinklers and other fire protection systems, irrigation systems, and electrical, gas, water, telephone and other utility systems; maintenance and repair of paving, curbs, sidewalks, walkways, roadways, parking surfaces (including repaving, sealing, striping and patching); maintenance and repair of lighting facilities (including replacement of light bulbs and ballasts); maintenance and repair of signage; all costs and expenses allocable to any applicable operating agreement benefiting the Property; appeal or contest of Real Estate Charges; all costs and expenses of water or other common utilities; uniforms, supplies and materials used in connection with the operation and maintenance of the Shopping Center; seasonal decorations (but not sculptures or other art), an administrative fee not to exceed 5% of the total of all other Common Area Maintenance Charges, and the cost of Landlord's insurance maintained pursuant to **Section 10.01** and any deductible if and when paid, but limited to the extent not in excess of deductible amounts maintained by owners of comparable buildings in the Austin, Texas market. In addition, although the foundations, exterior walls, and roofs of the buildings in the Shopping Center and the utility lines serving the same are not literally part of the Common Area, Landlord and Tenant agree that maintenance and repair (but not replacement) of the foregoing, as described in **Section 9.01**, shall be included as a common area maintenance item to the extent not covered by a third party warranty or not specifically allocated to Tenant under this Lease nor to another tenant pursuant to its lease, and shall, for all purposes, be deemed to be Controllable CAM Charges (as defined below) and subject to the cap on Controllable CAM Charges set forth in Section 8.04(d), below.

(b) Notwithstanding anything to the contrary contained in this Lease, the following shall be excluded from the Common Area Maintenance Charges: (a) interest, amortization or other costs associated with any mortgage, loan or refinancing of all or any part of the Shopping Center or the sale of all or any portion of the Shopping Center; (b) ground rents paid by Landlord for the property on which the Shopping Center is located; (c) legal or other fees associated with the enforcement of leases against other tenants; (d) leasing commissions, attorney's fees and other expenses incurred in connection with the development or leasing of the Shopping Center; (e) improvements, repairs or alterations to interior of spaces leased to other tenants; (f) the cost of providing any service directly to any other tenant; (g) the cost of any items to the extent Landlord is to receive reimbursement from a third party; (h) any reserves for future expenditures or liabilities which would be incurred subsequent to the then current accounting year; (i) costs in connection with the cleanup or removal of Hazardous Substances not caused by Tenant; (j) any bad debt loss, rent loss or reserve for bad debt or rent loss; (k) any administrative fee or similar fees or charges which exceed 5% of the total of all other Common Area Maintenance Charges; (l) any salaries or payroll expenses of Landlord's employees; (m) Intentionally Omitted; (n) advertising or promotional fees; (o) costs incurred by Landlord (or any tenant) due to the violation of any applicable law, code, regulation,

ordinance or the like, which costs would not have been incurred but for such violation; (p) costs incurred by Landlord pursuant to **Section 9.01** of this Lease and not expressly included as a common area maintenance item in Section 8.04(a); (q) depreciation; (r) costs incurred to obtain or upgrade a LEED certification or similar rating for the Premises and/or Shopping Center; (s) political or charitable contributions; (t) costs incurred to comply with any applicable law, code, regulation, ordinance or the like which was in effect on the Commencement Date of this Lease; (u) costs of correcting any defects in the construction of the Shopping Center; and (v) any expenditure that is properly categorized as capital under generally accepted accounting principles, including, without limitation: the original investment in capital improvements, any replacements of capital items or other equipment, and structural additions to the Shopping Center. There shall be no duplication of charges and at no time shall Tenant pay a proportionate share of an amount that exceeds Landlord's cost for any particular expense.

(c) Tenant's Proportionate Share of the initial Common Area Maintenance Charges (including Landlord's insurance pursuant to **Section 10.01** below) is estimated to be \$0.72 per square foot of Floor Area of the Premises for the first calendar year. Each month during the Term of this Lease, at the same time and in the same manner as with the monthly installments of Base Rent, Tenant shall pay to Landlord one-twelfth (1/12) of the estimated Common Area Maintenance Charges for the current year which Landlord may have given Tenant for the current year or, if the Common Area Maintenance Charges has not been estimated by Landlord, then Tenant shall pay one-twelfth (1/12) of the actual Common Area Maintenance Charges for the immediately preceding calendar year. Each Common Area Maintenance Charges payment shall be due and payable at the same time and in the same manner as the payment of Base Rent. Landlord may at its option make monthly or other periodic changes based upon the estimated annual Common Area Maintenance Charges, payable in advance, but subject to adjustment after the end of the year on the basis of the actual cost for such year, as provided herein. Notwithstanding anything to the contrary contained in this Lease, Tenant's Proportionate Share of the initial Common Area Maintenance Charges for the first calendar year shall not exceed \$1.25 per square foot of Floor Area of the Premises.

(d) Notwithstanding anything to the contrary contained in this Lease, for purposes of calculating Common Area Maintenance Charges, the maximum increase in the amount of Controllable CAM Charges (as hereinafter defined) that may be included in calculating such Common Area Maintenance Charges for each calendar year after initial calendar year, annualized, shall be limited to five percent (5%) per calendar year on a non-cumulative, non-compounding basis. "Controllable CAM Charges" means all Common Area Maintenance Charges other than Real Estate Taxes, insurance, utilities, security and snow, ice and trash removal. For purposes of calculating the maximum increase in the amount of Controllable CAM Charges, the Controllable CAM Charges for the initial calendar year shall equal the lesser of the actual cost for the initial calendar year or \$1.25 per square foot of Floor Area of the Premises.

Section 8.05 Reconciliation. In the event Landlord does not otherwise notify Tenant of the monthly amounts to be paid under this Article VIII, then Tenant shall continue to pay such monthly deposits in an amount equal to one-twelfth (1/12) of Tenant's Proportionate Share of the Common Area Maintenance Charges for the immediately preceding twelve (12) month period. The Common Area Maintenance Charges due from Tenant shall be reconciled annually as provided in **Section 8.08**.

Section 8.06 Parking. In no event will the Tenant Protected Parking Area (as depicted on Exhibit "B") be modified in a way that materially adversely affects the Premises or Tenant's Permitted Use therein without Tenant's prior written consent, which will not be unreasonably withheld or delayed except for those matters listed in this paragraph below that are specifically subject to Tenant's approval in Tenant's sole discretion. Landlord shall not construct any buildings for occupancy within the Tenant Protected Parking Area, nor otherwise make any improvements to the Tenant Protected Parking Area which materially or adversely affects visibility to the Premises, without Tenant's consent which may be withheld in its sole discretion. Except as may be required by applicable law, Landlord shall not reconfigure, restripe, or restrict the parking spaces contained in the Tenant Protected Parking Area in any manner that reduces the number or size of parking spaces available for parking by Tenant's invitees in the Tenant Protected Parking Area, without Tenant's consent, which may be withheld in its sole discretion. Notwithstanding anything herein to the contrary, Landlord shall have the right to install additional light poles in Tenant's Protected Parking Area at Landlord's cost and expense, which such costs and expenses may not be passed through to Tenant as Common Area Maintenance Charges unless such additional light poles are requested by Tenant.

**Section 8.07      Roof Rights.** During the Term of this Lease, upon and subject to the terms and conditions set forth below, Landlord grants to Tenant the license (exclusive as to the location on the roof on which the same is placed, but otherwise a non-exclusive license) at Tenant's sole cost to install, maintain, operate and, from time to time, replace one (1) satellite dish on the roof of the Building with necessary cabling and wiring connecting it to the Premises (such satellite dish, cabling and wiring being collectively referred to as the "Satellite Dish Equipment") for purposes of facilitating wireless communications of Tenant to and from the Premises, provided that (A) Tenant shall obtain Landlord's reasonable prior written approval of the proposed size, weight, location and aesthetic impact of the Satellite Dish Equipment and the method for fastening the Satellite Dish Equipment to the Building; (B) Tenant will at its sole cost comply with (i) all insurance requirements and all applicable laws relating to the Satellite Dish Equipment, (ii) Landlord's reasonable rules, regulations and requirements as promulgated from time to time, and (iii) the conditions of any warranty on the roof of the Building; (C) the Satellite Dish Equipment shall not materially interfere, electronically or otherwise, with the equipment, facilities, use or operations of Landlord or other tenant of the Shopping Center. The Satellite Dish Equipment shall be installed in a good and workmanlike manner in accordance with the plans and specifications reasonably approved in advance by Landlord, and the installation shall be performed by contractors reasonably approved by Landlord. Tenant shall, following reasonable notice from other licensees or tenants of Landlord, use reasonable efforts to avoid material interference by the Satellite Dish Equipment with any later-installed Satellite Dish Equipment and wireless communications of such other parties, provided that (a) no such coordination efforts shall materially interfere with the normal operations of the Satellite Dish Equipment, and (b) Tenant shall not be required to incur any costs in connection therewith. Landlord may supervise any roof penetration. In no event shall Landlord's approval of plans for the Satellite Dish Equipment or supervision of roof penetration be deemed a representation that the Satellite Dish Equipment will not cause, or be subject to, interference or that such plans will comply with applicable law or the conditions of any warranty maintained by Landlord on the roof. Tenant, at its sole cost, shall repair any damage to the Building caused by the installation, maintenance, replacement, use or removal of the Satellite Dish Equipment. The Satellite Dish Equipment shall remain the property of Tenant. Tenant may remove the Satellite Dish Equipment at its sole cost during the Term of this Lease, and Tenant shall remove the Satellite Dish Equipment at its sole cost upon expiration or termination of this Lease and surrender the area in which the Satellite Dish Equipment had been installed in the same condition existing prior to such installation damage by fire or other casualty excepted. Landlord shall have the right to require Tenant, at Landlord's cost, to relocate all or any part of the Satellite Dish Equipment from time to time, provided that such relocation does not render Tenant's use of the Satellite Dish Equipment impracticable, or materially interfere with such use. If the Satellite Dish Equipment is not relocated as requested by Landlord, Landlord shall have the right to relocate the Satellite Dish Equipment at Tenant's sole cost. The rights under this Section are personal to the Tenant named herein and are not assignable, except with respect to permitted transfers in **Section 13.02**. Without limiting any other rights or remedies available to Landlord, Tenant's license under this Section shall automatically terminate upon the earlier to occur of the end of the Term of this Lease or the date on which Tenant's right to occupy the Premises has been terminated. Tenant shall protect, defend, indemnify and hold harmless Landlord from and against claims, damages, liabilities, costs and expenses, including attorney's fees, incurred by or asserted against Landlord arising out of the installation, maintenance, replacement, use or removal of the Satellite Dish Equipment (including the costs and expenses of Landlord's review of plans for the Satellite Dish Equipment), except to the extent any such claims, damages, liabilities, costs and expenses are caused by or attributable to the negligence or willful misconduct of Landlord, its agents or employees. Prior to the installation of the Satellite Dish Equipment, Tenant shall provide Landlord with a revised certificate of insurance showing that Tenant's liability coverage includes the Satellite Dish Equipment installation.

**Section 8.08      Center Expenses Statement** Within one hundred twenty (120) days after the end of each calendar year during the Term, Landlord will deliver to Tenant a written statement that shows, in reasonable detail and in accordance with generally accepted accounting principles, the computation of the actual Real Estate Charges, insurance expenses, and Common Area Maintenance Charges payable by Tenant (the "Center Expenses") with respect to such whole or partial calendar year ("Center Expenses Statement"); provided, however, that there shall be no penalty to Landlord for any delay in providing the same. If the total of the Center Expenses paid by Tenant for such whole or partial calendar year is more than the actual amount of the Center Expenses payable by Tenant with respect to such whole or partial calendar year, then Landlord shall credit the excess against any outstanding Rent due from Tenant and any future expenses to be paid by Tenant; provided that, if there are no future expenses to be paid by Tenant, then Landlord shall refund the excess to Tenant within thirty (30) days. If the total of the Center Expenses

paid by Tenant for such whole or partial calendar year is less than the actual amount of the Center Expenses payable by Tenant with respect to such whole or partial calendar year, then Tenant shall pay the amount of such deficiency within thirty (30) days, unless Tenant has timely invoked its audit rights as provided below, in which case the deficiency shall be due and payable within fifteen (15) days after the completion of Tenant's audit.

(b) Tenant shall have the right, at Tenant's expense, to audit Center Expenses for the previous two (2) calendar years of the Term (or partial calendar years) for a period of one hundred twenty (120) days following the receipt of the Center Expenses Statement for the previous calendar year period or partial calendar year period. Landlord shall provide reasonable access to all books and records relating to Center Expenses upon notice to Landlord at least thirty (30) days in advance, during ordinary business hours and at Landlord's corporate office. Landlord shall retain copies of all records related to Center Expenses for at least the two (2) most recent calendar years at Landlord's corporate office. The audit shall be conducted only by reputable independent certified public accountants employed by Tenant on an hourly or fixed fee basis, and not on a contingency fee basis. The nature and content of any audit are confidential, and Tenant, for itself and on behalf of its representatives, shall not disclose the information obtained from the audit to any other tenant in the Center or any other parties, except for its attorneys, accountants, and other persons assisting Tenant with evaluation of the Center Expenses; provided however, Tenant shall provide a copy of the results of Tenant's audit to Landlord regardless of whether or not any discrepancies are discovered. If as a result of its audit, Tenant determines that the actual Center Expenses for the period covered by any statement are different than the amount shown on the Center Expenses Statement, Tenant shall promptly notify Landlord of such determination, which notice shall be accompanied by a copy of the results of Tenant's audit.

(c) Upon receipt of such notice and accompanying information, Landlord may object to Tenant's determination by providing Tenant with written notice of such objection within 30 days following receipt by Landlord of Tenant's notice and accompanying information. Unless Landlord so objects, Landlord shall credit (or refund, if no further amounts are due under this Lease) to Tenant the excess as determined by the results of Tenant's audit within 30 days following receipt of Tenant's notice and accompanying information. If, however, Landlord timely objects, Landlord and Tenant shall negotiate for a 30-day period to attempt to reach agreement concerning the dispute, following which they shall appoint, by mutual agreement, a neutral independent certified public accountant who shall promptly make a written determination of the Center Expenses for the period in question and shall provide such determination to Landlord and Tenant. The neutral independent certified public accountant's determination shall be binding upon Landlord and Tenant for all purposes.

(d) If the neutral independent certified public accountant determines (or if Landlord does not timely object to the results of Tenant's audit) that Landlord has overstated Tenant's pro rata share of Center Expenses by 5% or more cumulatively for the period covered by the audit, then Landlord shall pay the fees and costs owed to the neutral independent certified public accountant for its services. If the neutral independent certified public accountant determines that Landlord did not overstate Center Expenses by 5% or more cumulatively for the period covered by the audit, Tenant shall pay the fees and costs owed to the neutral independent certified public accountant for its services. Any amount owed by one party to the other following the neutral auditor's determination shall be paid within 10 days of the date of such determination.

#### ARTICLE IX --MAINTENANCE AND REPAIR OF THE PREMISES

Section 9.01 Maintenance by Landlord. Landlord shall keep the foundation, the exterior walls (except plate glass; windows; doors and other exterior opening), the utility lines serving the Premises up to the Premises (but not within the Premises), the roof of the Premises and the parking lot within the Parcel in good repair. Landlord, at its sole cost and expense, which may not be passed through to Tenant as Common Area Maintenance Charges, shall be responsible for the costs and expenses incurred by Landlord in connection with this Section 9.01, except for the maintenance and repair (but not replacement) of the foundation, exterior wall, the roof of the Premises, the utility lines serving the Premises, and the parking lot within the Parcel, which are expressly included as a common area maintenance item in Section 8.04(a). In the event that the Premises or the parking lot within the

Parcel should become in need of repairs required to be made by Landlord hereunder, Tenant shall give written notice thereof to Landlord and Landlord shall have a reasonable time of not less than thirty (30) days after receipt by Landlord of such written notice in which to make such repairs. Notwithstanding the foregoing sentence, for emergency repairs of the Premises that are necessary to avoid possible injury or damage to persons or property, Landlord shall commence such repairs promptly after receipt of written notice from Tenant or as otherwise may be outlined in the roof warranty.

If Landlord fails to perform any repair to the Premises that is Landlord's obligation under this Lease within the time periods set forth in the warranties described in **Section 9.03** or this **Section 9.01**, then Tenant shall have the right to perform such repair in accordance with the following procedure:

As a condition to exercising any right of self-help expressly provided to Tenant by this **Section 9.01**:

(i) Tenant must first give Landlord (and any mortgagee whose address has been provided to Tenant) written notice ("Notice of Self-Help") of (a) Landlord's failure to provide such repair to the Premises or the parking lot within the Parcel, as required under this Lease; and (b) Tenant's intent to take self-help action pursuant to this **Section 9.01**. If Landlord fails or refuses to commence non-emergency repairs within ten (10) days, non-roof emergency repairs within five (5) days or emergency roof repairs within the minimum time frame provided in the roof warranty after Landlord's receipt of the Notice of Self-Help, subject to extension for reasons beyond Landlord's reasonable control including, without limitation any delays caused by Tenant and force majeure ("Landlord's Repair Period"), then Tenant shall have the option to exercise its self-help right as set forth in this **Section 9.01**;

(ii) if Tenant's action, in accordance with this **Section 9.01**, affects the Premises' roof or the structural integrity of the Premises, Tenant shall use only those contractors used by Landlord in the Shopping Center that work on the Shopping Center systems or structure, unless such contractors are unwilling or unable to perform such work, in which event Tenant may utilize the services of another qualified, licensed, and insured contractor, provided however that any contractor performing work upon any component of the Premises still under warranty, including without limitation the roof of the Premises, must be approved by the applicable manufacturer as an authorized servicer of such component;

(iii) Tenant shall take only such action as is reasonably necessary to correct the condition in need of repair;

(iv) Tenant shall use commercially reasonable efforts to minimize interference with the rights of other tenants to use their respective premises to the Shopping Center; and

(v) any work done by Tenant under this **Section 9.01** is otherwise subject to all applicable laws, ordinances, rules, regulations and orders and the terms and conditions of this Lease.

In the event Tenant exercises its self-help right as hereinabove provided, Landlord shall reimburse Tenant the reasonable cost of such repair ("Repair Costs") within thirty (30) days of Landlord's receipt from Tenant of (i) copies of invoices and paid checks evidencing the cost of the repair, (ii) original lien waivers from all applicable contractors and/or subcontractors providing labor and/or materials, and (iii) evidence of the bids received by Tenant for the repair as required hereunder. If Landlord fails to pay such charge within such thirty (30) day period, then Tenant may offset up to fifty percent (50%) of Base Rent due during each month until Tenant has been credited with the full amount due to Tenant.

**Section 9.02      Maintenance by Tenant.** Except for those repairs to the Premises which Landlord has expressly agreed to make pursuant to **Section 9.01**, Tenant shall make all other necessary repairs and maintenance to the Premises or the improvements thereon. Without limiting the coverage of the previous sentence, it is understood that Tenant's responsibilities therein include the repair and maintenance of all lighting, heating, air conditioning, plumbing, and other electrical, mechanical and electromotive installation, equipment and fixtures. If Tenant fails to make such repairs within 30 days after written notice of the same from Landlord, then Landlord may perform such repairs and charge the reasonable, actual cost thereof to Tenant as Additional Rent. Tenant shall keep the Premises and Tenant's Improvements in first class condition order and repair, clean, sanitary and safe. In



addition to the foregoing, Tenant shall maintain a preventative maintenance contract on the HVAC serving the Premises, which contract shall provide for periodic maintenance in accordance with the manufacturer's specifications. In the event Tenant fails to maintain such preventative maintenance contract, Landlord, at its option, may arrange for such a preventative maintenance contract for the HVAC units; provided, however, Landlord has notified Tenant, in writing of this failure of Tenant to comply with the maintenance requirements set forth herein and Tenant has failed to cure such noncompliance within thirty (30) days from receipt by Tenant of Landlord's notice, in which event the cost of such preventative HVAC maintenance shall be billed directly to Tenant and shall be paid within ten (10) days of receipt of invoice therefor.

Section 9.03            Warranties

Tenant shall require any person performing work included in Tenant's Work to guarantee that such work is free from any and all defects in workmanship and materials for one (1) year from the date that Tenant's architect issues a certificate of substantial completion. Tenant shall also require any such person to be responsible for correcting any defect covered by the foregoing guaranty, without additional charge. The correction of work shall include, without additional charge, correcting any part of work damaged or disturbed by the defective work. Tenant shall assign to Landlord all construction warranties for any items required to be maintained by Landlord pursuant to this Lease, including the applicable roof warranty of not less than twenty (20) years, to Landlord, and such roof warranty shall allow Landlord to select the roofing service provider so long as Landlord's roofing service provider is approved by the roofing manufacturer.

ARTICLE X --INSURANCE AND INDEMNITY

Section 10.01           Landlord's Insurance

Landlord shall procure and maintain throughout the Term of this Lease a policy or policies of insurance causing the Shopping Center and all improvements thereon to be insured under standard fire and extended coverage insurance for their actual replacement cost and causing the Common Areas to be insured under commercial general liability insurance for limits of not less than One Million and No/Dollars (\$1,000,000.00) per occurrence and Five Million and No/Dollars (\$5,000,000.00) annual aggregate for personal injury including bodily injury and death or property damage liability and shall contain a contractual liability endorsement (and any other endorsements which are customary carried by owners of similar properties).

Section 10.02           Tenant's Insurance

(a)        At all times during construction of Tenant's Work or any approved alterations to the Premises, Tenant shall maintain and keep in effect Builder's Risk Insurance with completed operations coverage, in insurance companies reasonably satisfactory to Landlord.

(b)        At all times during the Term of this Lease, Tenant shall:

(i)        carry, or cause to be carried in the name of Landlord and Tenant as their interest may appear, in insurance companies reasonably satisfactory to Landlord, standard fire and extended coverage insurance, including, by endorsement if necessary, coverage of the following additional perils: flood, including sprinkler leakage coverage, and ordinance or law, insuring the Tenant's Improvements located on Premises and its appurtenances for the actual replacement cost (such insurance shall include an endorsement for business income and extra expense coverage, shall name Landlord as loss payee, include an "agreed amount" endorsement, and eliminate any coinsurance requirement);

(ii)       effect and maintain commercial general liability insurance, on an occurrence basis, for the benefit of Landlord and Tenant for limits of not less than One Million and No/Dollars (\$1,000,000.00) per occurrence and Five Million and No/Dollars (\$5,000,000.00) annual aggregate for personal injury including bodily injury and death or property damage liability and shall contain a contractual liability endorsement (such amounts may be met through a

combination of primary and excess/umbrella insurance policies). Tenant shall name Landlord as an additional insured on Tenant's commercial general liability insurance; and

(iii) effect and maintain workers' compensation insurance in statutory amounts.

(c) Evidence of insurance must be on file with Landlord before Tenant receives the Building Site and must be kept current at all times.

(d) All policies of insurance required to be procured herein shall be issued by insurance companies with general policyholder's rating of not less than A and a financial rating of Class VII as rated in the most current available "Best's Insurance Reports", and licensed to do business in the state where the Building Site is located and authorized to issue such policy or policies. All such policies shall contain a provision that the coverage shall be primary and non-contributing with respect to any policy carried by the other party, and that any policy carried by the other party shall be excess insurance.

(e) All policies procured by either party shall contain an endorsement containing an express waiver of any right of subrogation (as more specifically addressed in Article XXIV of this Lease) by the insurance company against the other party (whether named as an insured or not).

Tenant's Proportionate Share of Landlord's "insurance expenses" related to the Shopping Center shall be paid monthly, in advance, in equal installments, in an amount estimated by Landlord from time to time subject to adjustment after the end of each calendar year on the basis of the actual "insurance expenses" for such calendar year as part of Common Area Maintenance Charges. A copy of an insurance bill submitted by Landlord to Tenant shall at all times be sufficient evidence of the amount of "insurance expenses" to which such bill relates.

#### Section 10.03      Indemnification

(a) Indemnification by Tenant. **SUBJECT TO THE PROVISIONS OF ARTICLE XXIV OF THIS LEASE, TENANT SHALL INDEMNIFY, DEFEND AND HOLD LANDLORD HARMLESS FROM ANY AND ALL LOSSES, DAMAGES, CLAIMS, SUITS OR ACTIONS, JUDGMENTS AND COSTS, WHICH MAY ARISE OR GROW OUT OF THE FAILURE OF TENANT TO PERFORM ITS OBLIGATIONS PURSUANT TO THIS LEASE, OR ANY CLAIMS FOR LIABILITY OF ANY NATURE WHATEVER ARISING FROM CIRCUMSTANCES WITHIN THE PREMISES AND/OR BUILDING SITE, AS APPLICABLE, EXCEPT TO THE EXTENT CAUSED BY THE NEGLIGENCE OR WILLFUL MISCONDUCT OF LANDLORD OR ITS EMPLOYEES, PARTNERS, AGENTS, CONTRACTORS OR REPRESENTATIVES. NOTWITHSTANDING THE FOREGOING, IN NO EVENT SHALL TENANT BE LIABLE FOR CONSEQUENTIAL DAMAGES EXCEPT AS RELATED TO HOLDOVER AND HAZARDOUS SUBSTANCES.**

(b) Indemnification by Landlord. **SUBJECT TO THE PROVISIONS OF ARTICLE XXIV OF THIS LEASE, LANDLORD SHALL INDEMNIFY, DEFEND AND HOLD TENANT HARMLESS FROM ANY AND ALL LOSSES, DAMAGES, CLAIMS, SUITS OR ACTIONS, JUDGMENTS AND COSTS, WHICH MAY ARISE OR GROW OUT OF THE FAILURE OF LANDLORD TO PERFORM ITS OBLIGATIONS PURSUANT TO THIS LEASE, OR ANY CLAIMS FOR LIABILITY OF ANY NATURE WHATEVER ARISING FROM CIRCUMSTANCES OCCURRING WITHIN THE COMMON AREAS OF THE SHOPPING CENTER, BUT OUTSIDE THE PREMISES, EXCEPT TO THE EXTENT CAUSED BY THE NEGLIGENCE OR WILLFUL MISCONDUCT OF TENANT OR ITS EMPLOYEES, PARTNERS, AGENTS, CONTRACTORS OR REPRESENTATIVES. NOTWITHSTANDING ANYTHING IN THIS LEASE TO THE CONTRARY, IN NO EVENT SHALL LANDLORD BE LIABLE FOR CONSEQUENTIAL DAMAGES.**

#### ARTICLE XI --DAMAGE BY CASUALTY

Section 11.01 Restoration. Except as otherwise provided in **Section 11.02** hereof, if the Premises (except moveable trade fixtures, furniture and furnishings on the Premises) should at any time during the Term be damaged or destroyed by fire or otherwise, and Landlord does not elect to terminate this Lease as hereinafter provided, Landlord shall, to the extent insurance proceeds are available to Landlord (or would have been available to Landlord had Landlord maintained the insurance required by this Lease), rebuild a dark shell in accordance with Tenant's Plans, and such rebuilding, prosecuted with due diligence, shall be completed as soon as reasonably possible. Landlord shall give written notice to Tenant of such election (to the extent such election is available to Landlord) within thirty (30) days after the occurrence of such casualty and, if it elects to rebuild and repair, shall proceed to do so with reasonable diligence and at its sole cost and expense. In the event of a termination of this Lease pursuant to this Article, Base Rent shall be apportioned on a per diem basis and paid to the date of such casualty. Notwithstanding the foregoing, if the Premises is totally or partially destroyed or damaged during the last thirty six (36) months of the Term or any renewal thereof, either Landlord or Tenant may terminate this Lease as of the date of the occurrence of such damage or destruction by giving written notice thereof to the other party within thirty (30) days after the date of the casualty; provided, however, that if Landlord elects to terminate this Lease in accordance with the foregoing provision, then Tenant may nullify such termination by exercising its renewal option (if any) within thirty (30) days of Landlord's election to terminate.

Section 11.02 Landlord's Obligations to Rebuild. Landlord's obligation to rebuild and repair under this **Article XI** shall in any event be limited to restoring the Premises to a dark shell in accordance with Tenant's Plans. Tenant agrees that promptly after completion of such work by Landlord, Tenant will proceed with reasonable diligence and at Tenant's sole cost and expense to restore, repair and replace all alterations, additions, Tenant's Improvements, fixtures, signs and equipment installed by Tenant, as the case may be.

Section 11.03 Continued Operations. Tenant agrees that during any period of reconstruction or repair of the Premises, it will continue the operation of its business within the Premises to the extent practicable and Tenant's Base Rent shall be abated in proportion to the area damaged until the earlier of Tenant's opening for business in the Premise or one hundred twenty (120) days following Landlord's delivery of the Premises with Landlord's reconstruction work complete pursuant to this **Article XI**.

## ARTICLE XII --CONDEMNATION

Section 12.01 Partial Taking. If less than ten percent (10%) of the Floor Area of the Premises and less than twenty percent (20%) of Tenant's Protected Parking 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 (a "Partial Condemnation"), and Landlord's lender consents to the restoration of the Premises, this Lease shall not terminate; however, the Base Rent payable hereunder during the unexpired portion of this Lease shall be reduced in proportion to the area of the Premises so taken, effective on the date physical possession is taken by the condemning authority. Following such Condemnation, and Landlord's receipt of any condemnation award, Landlord shall make all necessary repairs or alterations to the remaining premises required to make the remaining portions of this Premises an architectural whole and the parties will agree to a mutually acceptable revised Tenant's Protected Parking area.

Section 12.02 Total Taking. If more than 10% of the Floor Area of the Premises or more than twenty percent (20%) of Tenant's Protected Parking shall 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 (a "Total Condemnation") then Tenant shall have the right to terminate this Lease as of the date possession shall be taken by such authority and the Base Rent shall be abated during the unexpired portion of this Lease.

Section 12.03 Taking of Common Area. If any immaterial part of the Common Area should be taken as aforesaid, this Lease shall not terminate, nor shall the Base Rent payable hereunder be reduced.

Section 12.04 Application of Award. In the event of a Total Condemnation, or a Partial Condemnation, the awards and other payments which Landlord and Tenant shall be entitled to have and receive, shall be paid to Landlord. Notwithstanding the foregoing, Tenant shall have the right to prove in any condemnation proceedings and to receive any separate award which may be made for damages to or condemnation of Tenant's movable trade fixtures and equipment and for moving expenses; provided, however, Tenant shall in no event have

any right to receive any award for its interest in this Lease or for loss of leasehold, and any such award shall not reduce amounts that would otherwise be available to Landlord.

#### ARTICLE XIII --ASSIGNMENT AND SUBLETTING

Section 13.01      Consent Required. Tenant shall not, directly or indirectly, transfer, assign, sublet, enter into license or concession agreements, change ownership, hypothecate, or pledge this Lease or Tenant's interest in and to the Premises in whole or in part, or otherwise permit occupancy of all or any part of the Premises by anyone with, through or under it, without first procuring the written consent of Landlord, which consent will not be unreasonably withheld, conditioned or delayed. The transfer of a direct or indirect controlling interest in Tenant shall be deemed to be a transfer requiring Landlord's consent if Tenant is not a publicly traded corporation. The general prohibition contained herein against assigning or subletting shall be construed to include a prohibition against any assignment or subletting by operation of law. No assignment or sublease shall be effective until the assignee executes a written agreement, in form reasonably satisfactory to Landlord, assuming the obligations of Tenant contained in this Lease.

Section 13.02      Permitted Transfer. Notwithstanding the foregoing, Tenant may, without Landlord's consent but with written notice to Landlord, sublet all or any portion of the Premises or assign this Lease to the following only if the transferee expressly agrees in writing to be bound by each and every duty and obligation set forth in this Lease, and Tenant is not in default under this Lease beyond applicable notice and cure periods at the time of the assignment or sublease: (a) a parent, subsidiary, affiliate, division, or other entity, controlling, controlled by, or under common control with Tenant or (b) any entity which acquires at least five of Tenant's health and fitness clubs in Travis County, Texas, whether through an acquisition, merger, consolidation or otherwise.

Section 13.03      Tenant to Remain Liable. Notwithstanding any transfer, Tenant shall at all times remain fully liable for the performance of all of Tenant's obligations under this Lease (notwithstanding future transfers and regardless of whether or not Tenant's approval has been obtained for such future transfers). The transferee shall agree in a form reasonably satisfactory to Landlord to comply with and be bound by all of the terms, covenants, conditions, provisions and agreements of this Lease to the extent of the space transfer, and Tenant shall deliver to Landlord promptly after execution an executed copy of each such transfer and an agreement of compliance by each such transferee.

Section 13.04      Void Transfer. Any sale, mortgage or transfer of this Lease by Tenant which is not in compliance with the provisions of this Article XIII shall be of no effect and void.

Section 13.05      Transfer by Landlord. In the event of the transfer and assignment by Landlord of its interest in this Lease, Landlord shall thereby be released from any further obligations hereunder accruing after the date of such transfer or assignment, and Tenant agrees to look solely to such successor in interest of Landlord for performance of such future obligations. Any security given by Tenant to secure performance of Tenant's obligations hereunder may be assigned and transferred by Landlord to such successor in interest, and Landlord shall thereafter be discharged of any further obligation relating thereto upon the written acknowledgement of receipt thereof from such successor in interest.

Section 13.06      No Mortgage. Tenant shall not mortgage, pledge or otherwise encumber its interest in this Lease or in the Premises without Landlord's prior written consent, such consent not to be unreasonably withheld, conditioned or delayed. Notwithstanding the foregoing, Tenant may grant a security interest against Tenant's removable trade fixtures and equipment in connection with the purchase money financing thereof without Landlord's consent.

#### ARTICLE XIV --DEFAULT

Section 14.01      Events of Default. The following events shall be deemed to be "Events of Default" by Tenant under this Lease:

(a) Tenant shall have failed to pay any installment of Base Rent, Additional Rent or any other charge provided herein, or any portion thereof when the same shall be due and payable, and the same shall remain unpaid for a period of five (5) business days after written notice from Landlord; or

(b) Tenant shall have failed to comply with any other provision of this Lease, if the failure continues for thirty (30) days after written notice to Tenant; provided, however, that in the case of a default which cannot, with due diligence, be cured within a period of thirty (30) days, Tenant shall have such additional time to cure such default as may reasonably be necessary, provided Tenant proceeds promptly and with due diligence to cure such default within thirty (30) days after receipt of said notice; or

(c) The making by Tenant of a general assignment for the benefit of creditors; the filing by or against Tenant of a petition to have Tenant adjudged a bankrupt, or of a petition for reorganization or arrangement under any law relating to bankruptcy (unless a petition filed against Tenant is dismissed within ninety (90) days); the appointment of a trustee or receiver to take possession of substantially all of Tenant's assets located at the Premises or of Tenant's interest in this Lease if possession is not restored to Tenant within thirty (30) days; or the attachment, execution or other judicial seizure of substantially all of Tenant's assets located at the Premises, or of Tenant's interest in this Lease, if the seizure is not discharged within thirty (30) days.

Section 14.02 Remedies. Upon the occurrence of any Event of Default, Landlord may pursue any one or more of the following remedies without any notice or demand whatsoever:

(a) Termination of Right of Possession. Landlord may terminate Tenant's right of possession of the Premises without terminating the Term of this Lease. Upon such termination, Landlord may, at Landlord's option, enter into the Premises and take and hold possession thereof, without such entry into possession terminating the Term of this Lease or releasing Tenant in whole or in part from Tenant's obligation to pay Base Rent and Additional Rent for the full Term. Upon such re-entry, Landlord may remove all persons and property from the Premises, and store such property in a public warehouse or elsewhere at the cost of and for the account of Tenant, all without service of notice or resort to legal process and without being deemed guilty of trespass, or becoming liable for any loss or damage which may be occasioned thereby. Landlord may make repairs to the Premises to the extent necessary to put the Premises in substantially the same condition as of the Opening Date, ordinary wear and tear excepted, and Tenant shall, upon demand, pay the actual and verifiable costs thereof, together with Landlord's reasonable expense of reletting. The amount, if any, by which cash consideration actually received by Landlord upon any such reletting, exceeds Landlord's expenses incident thereto, including reasonable brokerage fees and legal expenses, shall be credited to Tenant's rental obligations hereunder. Landlord may cancel and terminate the Term of this Lease by serving five (5) days' written notice on Tenant of such further election and to pursue any remedy at law or in equity that may be available to Landlord. Landlord shall use commercially reasonable efforts to mitigate its damages.

(b) Termination of Term of Lease. Landlord may terminate the Term of this Lease. Upon such termination, Landlord shall have the right to recover from Tenant:

(i) the worth at the time of the award of any unpaid Rent which has been earned at the time of such termination; and

(ii) the worth at the time of the award of the amount by which Base Rent and Additional Rent that would have been earned after such termination until the time of award exceeds the fair market rental value of the Premises over the same period of time; and

(iii) the worth at the time of award of the amount by which Base Rent and Additional Rent for the balance of the Term after the time of award exceeds the fair market rental value of the Premises over the same period of time; and

(iv) any other amount necessary to compensate Landlord for the detriment proximately caused by Tenant's failure to perform its obligations (including the costs and expenses of recovering the Premises and reasonable attorneys' fees); and

(v) all other amounts permitted by applicable law; provided, however, that, except as otherwise specifically set forth in this Lease, in no event shall Landlord be entitled to seek and Landlord hereby waives any right to any consequential, special or punitive damages against Tenant for Tenant's default or breach of this Lease.

(c) Entry.

. Landlord may enter upon the Premises and/or Building Site, as applicable, without being liable for prosecution or any claim of damages therefor unless due to the gross negligence or willful misconduct of Landlord, its contractors, agents or employees, and do whatever Tenant is obligated to do under the terms of this Lease, and Tenant agrees to reimburse Landlord on demand for any reasonable, actual expenses including, without limitation, reasonable attorneys' fees in thus effecting compliance with Tenant's obligations under this Lease. Tenant further agrees that Landlord shall not be liable for any damages resulting to Tenant from such action.

(d) Self-Help.

. Landlord may, at its option, without waiving or releasing Tenant from obligations of Tenant, make any such payment or perform any such other act on behalf of Tenant. All reasonable, actual, out-of-pocket sums so paid by Landlord, or incurred by Landlord in effecting such performance or other act, and all necessary incidental costs, together with interest thereon at the legal rate of interest, from the date of such payment by Landlord, shall be payable to Landlord on demand. Tenant covenants to pay any such sums, and Landlord shall have (in addition to any other right or remedy of Landlord) the same rights and remedies in the event of the non-payment thereof by Tenant as in the case of default by Tenant in the payment of Rent.

(e) Other Remedies. Pursuit of any of the foregoing remedies by Landlord shall not preclude pursuit of any of the other remedies herein provided or any other remedies provided by law (all such remedies being cumulative), nor shall pursuit of any remedy herein provided constitute a forfeiture or waiver of any Rent or other payments due to Landlord hereunder or of any damages accruing to Landlord by reason of the violation of any of the terms, provisions and covenants herein contained. No act or thing done by Landlord or its agents during the Term of this Lease shall be deemed a termination of the Term of this Lease or an acceptance of the surrender of the Premises, and no agreement to terminate the Term of this Lease or accept a surrender of the Premises shall be valid unless in writing signed by Landlord. No waiver by Landlord of any violation or breach of any of the terms, provisions and covenants herein contained shall be deemed or construed to constitute a waiver of any other violation or breach of any of the terms, provisions and covenants herein contained. Landlord's acceptance of the payment of Rent or other payments hereunder after the occurrence of a default shall not be construed as a waiver of such default, unless Landlord so notifies Tenant in writing. Forbearance by Landlord in enforcing one or more of the remedies herein provided upon a default shall not be deemed or construed to constitute a waiver of such default or of Landlord's right to enforce any such remedies with respect to such default or any subsequent default.

(f) Jury Trial. The parties waive trial by jury in any action, proceeding or counterclaim brought by either of the parties against the other with respect to matters arising under this Lease.

Section 14.03 Landlord's Default. Landlord shall, in no event, be charged with default in the performance of any of its obligations hereunder unless and until Landlord shall have failed to perform such obligations within thirty (30) days after written notice by Tenant to Landlord properly specifying wherein Landlord has failed to perform any such obligation; provided, however, that in the case of a default which cannot, with due diligence, be cured within a period of thirty (30) days, Landlord shall have such additional time to cure such default as may reasonably be necessary, provided Landlord proceeds promptly and with due diligence to cure such default

within thirty (30) days after receipt of said notice. In no event shall Tenant be entitled to seek and Tenant hereby waives any right to any special, punitive or consequential damages against Landlord for Landlord's default or breach of this Lease.

Section 14.04 Waiver of Landlord's Lien. Landlord hereby waives and relinquishes any and all contractual, statutory or constitutional liens or rights to claim a lien against Tenant's furniture, fixtures, equipment or other personal property, and agrees to execute such other and further documentation evidencing such waiver as may be reasonably requested by any lender and on a form reasonably acceptable to Landlord providing financing for such property, as well as granting such lender reasonable rights to access the Premises for purposes of removing their collateral.

#### ARTICLE XV --HOLDING OVER

If Tenant, without Landlord's written consent, remains in possession of the Premises after the expiration of the Term and without the execution of a new lease, it shall be deemed to be occupying the Premises on a month-to-month basis at a rental equal to one hundred twenty-five percent (125%) of the Base Rent plus one hundred percent (100%) of Additional Rent herein provided for the period immediately before the expiration of the Term and otherwise subject to all the conditions, provisions and obligations of this Lease. The exercise of Landlord's rights shall not be interpreted to allow Tenant to continue in possession, nor shall it be deemed an election to extend the Term.

#### ARTICLE XVI --ACCESS BY LANDLORD

Landlord or Landlord's agents shall have the right to enter the Premises upon at least 24 hours prior notice (except in the event of an emergency) to examine the same, and to show them to prospective purchasers or lessees of the building. During the six (6) months before the expiration of the Term of this Lease or any renewal term, and provided Tenant has not previously exercised an option to extend the Term, Landlord may place upon the Premises the usual notice "For Lease" or "For Sale", which notices Tenant shall permit to remain thereon. If Tenant shall not be personally present to open and permit an entry into the Premises at any time when for any reason an entry therein shall be necessary to protect the Premises from damage, Landlord or Landlord's agents may enter the same, without rendering Landlord or such agents liable therefor and without, in any manner, affecting the obligations and covenants of this Lease. Landlord shall repair any damage caused by its entry. Nothing herein contained, however, shall be deemed or construed to impose upon Landlord any additional obligation, responsibility or liability whatsoever, for the care, maintenance or repair of the building or any part thereof, except as otherwise herein specifically provided.

#### ARTICLE XVII --QUIET POSSESSION

Landlord covenants that Tenant, on paying the Rents reserved herein and performing the covenants and agreements hereof, shall peaceably and quietly have, hold and enjoy the Premises and all rights, easements, appurtenances and privileges thereunto belonging or in any ways appertaining, during the Term hereof, free from any claims of Landlord, its agents, employees or contractors.

#### ARTICLE XVIII --BANKRUPTCY-INSOLVENCY

The parties acknowledge that in order to protect the mix of tenants within the Shopping Center, the purpose for which Tenant may use the Premises have been specifically limited by the provisions of Article V hereof, and that the economics of this Lease, particularly with respect to the agreed upon Base Rent and Additional Rent, were established on the basis of Tenant's expected business operations for the Permitted Use. Anything in this Lease to the contrary notwithstanding, if Tenant becomes subject to voluntary or involuntary proceedings under the United States Bankruptcy Code (the "Bankruptcy Code") and Tenant or any trustee, receiver or other custodian of Tenant or of its assets or properties shall assign this Lease, any and all amounts paid or to be paid by or for the account of the assignee in consideration of such assignment shall be and remain the property of Landlord, and any and all such amounts received by Tenant or such trustee, receiver or custodian shall be held in trust for Landlord and remitted to Landlord promptly after receipt thereof.

## ARTICLE XIX --TITLE TO IMPROVEMENTS; SURRENDER

Tenant covenants and agrees that its interest in the Tenant's Improvements (other than Tenant's moveable trade fixtures, machinery, equipment and personal property) to be constructed on the Premises shall become subject to the terms and conditions of this Lease and that any grantees or assignees of its interest in the Tenant's Improvements or this Lease shall take subject to and be bound by the terms and conditions of this Lease, expressly including the following provisions:

(a) Upon expiration or termination of the Term of this Lease, except to the extent Tenant is required to backfill the swimming pool, whirlpool or other similar water facility as provided below, Landlord shall be the sole and absolute owner of the Tenant's Improvements, free of any right, title, interest or estate of Tenant therein without the execution of any further instrument and without payment of any money or other consideration thereof. Tenant shall execute such further assurances of title as may be requisite. Tenant hereby grants, releases, transfers, sets over, assigns and conveys to Landlord all of its right, title and interest in and to Tenant's Improvements upon the termination of the Term of this Lease.

(b) Tenant shall, upon such termination, surrender and deliver the Premises and deliver Tenant's Improvements, other than Tenant's moveable trade fixtures, machinery, equipment and personal property (without any payment or allowance whatever to Tenant on account of, or for, the improvements or any part thereof) to the possession and use of Landlord, without delay and in good order, condition and repair, ordinary wear and tear and casualty and condemnation excepted. Notwithstanding anything to the contrary contained herein, in the event any portion of the Construction Allowance is applied to the cost (including, without limitation, construction and/or installation) of any swimming pool, whirlpool or other similar water facility located in or around the Premises, then Tenant, at Tenant's cost, shall at Landlord's request given to Tenant prior to expiration or earlier termination of this Lease, backfill the swimming pool, whirlpool or other similar water facility in accordance with all applicable laws, including, without limitation, proper soil compression and replacement of the concrete slab. The restoration work contemplated by the immediately preceding sentence shall be completed within thirty (30) days following expiration or earlier termination of this Lease. During the performance of such work, Tenant shall be obligated to comply with all of the terms and conditions of this Lease other than payment of Rent, including, without limitation the insurance and indemnity requirements set forth herein.

(c) Landlord, upon termination of the Term of this Lease for any reason, may, without notice (any notice to quit or intention to re-enter required by law being expressly waived by Tenant), re-enter upon the Premises and/or Building Site, as applicable, and possess itself thereof by summary proceedings, ejectment, or otherwise, and may dispossess Tenant and remove Tenant and all other persons and property from the Premises. Any personal property of Tenant remaining on the Premises and/or Building Site, as applicable, after termination or expiration of this Lease shall be deemed abandoned by it and be retained by Landlord as its sole property or be disposed of, without liability or accountability, as Landlord sees fit and at Tenant's sole cost and expense.

## ARTICLE XX --MECHANICS' LIENS

Notice is hereby given that Landlord shall not be liable for any work performed or to be performed on the Building Site or Premises, or any improvement thereon or in connection with any appurtenance thereto, for Tenant or any subtenant, or for any materials furnished or to be furnished at the Building Site or Premises for Tenant or any subtenant, and that no mechanic's or other lien for such work or materials shall attach to the reversionary or other interest of Landlord. If, in connection with any work being performed by Tenant or any subtenant or in connection with any materials being furnished to Tenant or any subtenant, any mechanic's lien or other lien or charge shall be filed or made against the Building Site or Premises or any part thereof or any buildings or improvements now or hereafter erected and maintained thereon or on any appurtenances thereto, or if any such lien or charge shall be filed or made against Landlord as owner, then Tenant, at Tenant's cost and expense, within 30 days after Tenant receives notice of such lien or charge, shall cause the same to be canceled and discharged of record by payment thereof, filing of a bond or providing an indemnity or otherwise, and shall also defend, at Tenant's cost and expense, any action, suit or proceeding which may be brought for the enforcement of such lien or charge, and shall pay any actual damages suffered or incurred therein by Landlord and shall satisfy and discharge any judgment entered therein. In



the event of the failure of Tenant to cure within the above-mentioned 30-day period any mechanic's lien or other lien or charge herein required to be cured by Tenant, Landlord may pay such items or discharge such liability by payment or bond, or both, and Tenant will repay to Landlord within 30 days of demand any and all amounts paid by Landlord therefor, or by reason of any liability on any cash bond, and also any and all incidental expenses, including counsel fees in reasonable amount, incurred by Landlord in connection therewith; provided, however, Tenant shall have the right to contest any such mechanic's lien or other lien, provided, that Tenant (i) diligently continues such contest in good faith, and (ii) deposits or delivers to Landlord satisfactory indemnification or other security reasonably satisfactory to Landlord.

#### ARTICLE XXI --PRESENT CONDITION OF BUILDING SITE

Except as specifically provided otherwise in this Lease, Tenant accepts the Building Site, without recourse to Landlord, in the condition or state in which they or any of them now are or are as of the Delivery Date, without representation or warranty, express or implied, in fact or by law, as to the nature, condition or usability thereof or as to the use or uses to which the Building Site or any part thereof may be put or as to the prospective income from, and expense of operation of, the Building Site. Tenant agrees that Landlord, its employees and agents have made no representations, inducements or promises about the Building Site, the Shopping Center or this Lease, or about the characteristics or conditions regarding or pertaining to the Building Site or the Shopping Center, unless the representations, inducements and promises are in this Lease. Therefore, no claim or liability, or cause for termination, shall be asserted by Tenant against Landlord, its employees and agents, for, and they shall not be liable because of, the breach of any representations, inducements or promises not expressly in this Lease.

#### ARTICLE XXII --HAZARDOUS MATERIALS

Section 22.01      Prohibition of Hazardous Materials. Tenant shall not cause or permit any Hazardous Material to be brought upon, transported through, stored, kept, used, discharged or disposed in or about the Shopping Center by Tenant or any Tenant Parties, except that Tenant may store and use de minimis amounts of Hazardous Materials in the Premises, if: (i) they are used in the ordinary course of business, and (ii) their storage or use does not violate any applicable laws.

Section 22.02      Tenant Indemnity. Tenant shall indemnify, defend, protect and hold harmless (collectively, the "Indemnity") Landlord (and Landlord's parents, subsidiaries, affiliates, employees, partners, agents, mortgagees or successors to Landlord's interest in the Shopping Center) from any and all claims, sums paid in settlement of claims, judgments, damages, clean-up costs, penalties, fines, costs, liabilities, losses or expenses (including, without limitation, reasonable attorneys', consultants' and experts' fees and any other reasonable and customary fees by Landlord to enforce the Indemnity) which arise during or after the Term as a result of Tenant's breach of the obligations of this Article XXII or the release of Hazardous Materials or the contamination of the Shopping Center by Tenant or Tenant Parties, including, without limitation: diminution in value of the Shopping Center; damages for the loss of, or the restriction on the use of, rentable or usable space or any amenity of the Shopping Center; damages arising from any adverse impact on the sale or lease of the Shopping Center. This Indemnity includes, without limitation, costs incurred in connection with any investigation of site conditions or any clean-up, remedial, removal or restoration work required by any federal, state or local governmental agency or political subdivision because of Hazardous Material present in the soil or groundwater on, under or originating from the Shopping Center. This Indemnity shall survive the expiration or earlier termination of the Term of this Lease and shall survive any transfer of Landlord's interest in the Shopping Center.

Section 22.03      Landlord Indemnity. Landlord shall indemnify, defend, and hold Tenant harmless from and against from any and all claims, sums paid in settlement of claims, judgments, damages, clean-up costs, penalties, fines, costs, liabilities, losses or expenses (including, without limitation, reasonable attorneys', consultants' and experts' fees and any other reasonable and customary fees by Tenant to enforce the Indemnity) which arise during or after the Term as a result of any of the following: (i) any Hazardous Materials that existed on or about the Building Site or the Shopping Center prior to the Delivery Date; or (ii) any Hazardous Materials existing on or about the Premises or the Shopping Center that are caused or created by Landlord or any of Landlord's parents, subsidiaries, affiliates, employees, partners, agents, mortgagees or successors or assigns. This Indemnity shall survive the expiration or earlier termination of the Term of this Lease and shall survive any transfer of Tenant's interest in the Premises.

Section 22.04      Remediation. Without limiting the foregoing, if the presence of Hazardous Material anywhere on the Shopping Center caused or permitted by Tenant or any Tenant Parties results in the contamination, release or threatened release of Hazardous Material on, from or under the Shopping Center or other properties, Tenant shall promptly take all actions at its sole cost and expense which are necessary to return the Shopping Center and other properties to the condition existing before the introduction of the Hazardous Material; provided that Landlord's written approval of the actions shall be obtained first (which approval shall not be unreasonably withheld) and so long as such actions do not have or would not potentially have any material, adverse long-term or short-term effect on Landlord or on the Shopping Center or other properties.

#### ARTICLE XXIII --SPECIAL PROVISIONS

Section 23.01      Landlord's Entry. In any circumstance where Landlord is permitted to enter upon the Premises and/or Building Site, as applicable, during the Term, whether for the purpose of curing any default of Tenant, repairing damage resulting from fire or other casualty or an eminent domain taking or is otherwise permitted under this Lease or by law to go upon the Premises, and/or Building Site, as applicable, no such entry shall: (a) constitute an eviction or disturbance of Tenant's use and possession of the Premises and/or Building Site, as applicable, or a breach by Landlord or any Landlord's obligations under this Lease; (b) except in the case of the breach of this Lease, gross negligence, or willful misconduct of Landlord, its agents, representatives, employees or any of them, render Landlord liable for damages for loss of business or otherwise, or entitle Tenant to be relieved from any of Tenant's obligations under this Lease; or (c) grant Tenant any right of setoff or recoupment or other remedy that is not provided for by this Lease. In connection with any entry incident to performance of repairs, replacements, maintenance or construction, all of the aforesaid provisions shall be applicable notwithstanding that Landlord may elect to take building materials in, to or upon the Premises and/or Building Site, as applicable, that may be required or utilized in connection with entry by Landlord.

Section 23.02      Independent Obligations. The obligation of Tenant to pay Rent and other sums under this Lease, and the obligation of Tenant to perform Tenant's other covenants and duties under this Lease and the obligation of Landlord to perform Landlord's other covenants and duties under this Lease constitute independent and unconditional obligations, unless an abatement, offset, or reduction is expressly provided for in this Lease. Tenant waives and relinquishes all rights which it might have to claim any nature of lien against or withhold, or deduct from or offset against any Rent and other sums to be paid Landlord by Tenant, except as expressly set forth in this Lease.

#### ARTICLE XXIV --SUBROGATION

Landlord and Tenant each waive any rights each may have against the other on account of any loss or damage occasioned to Landlord or Tenant, as the case may be, their respective property, the Premises or its contents, or to other portions of the Shopping Center or the Premises arising from any liability, loss, damage or injury for which insurance is carried or required to be carried pursuant to this Lease. LANDLORD AND TENANT INTEND FOR THE WAIVER OF CLAIMS SET FORTH IN THIS ARTICLE XXIV TO APPLY EVEN IF THE LOSS OR DAMAGE DESCRIBED IN SUCH SECTION IS CAUSED BY THE NEGLIGENCE OF THE RELEASED PARTY AND EVEN IF THE RELEASED PARTY WOULD OTHERWISE BE STRICTLY LIABLE FOR SUCH LOSS OR DAMAGE UNDER APPLICABLE LAWS.

#### ARTICLE XXV --PRESALES CENTER

Notwithstanding anything to the contrary in this Lease, Tenant may, at its sole cost and expense, operate a pre-sales trailer in Tenant's Protected Parking Area, for the sale of memberships to the gym to be operated on the Premises, provided that the same (i) does not interfere with Landlord's Work or the rights of any other tenants of the Shopping Center, (ii) is limited to a period of time beginning 150 days following the Delivery Date and ending on the Rent Commencement Date ("Pre-Sales Period"), and (iii) meets the Pre-Sales Trailer Conditions (as hereinafter defined). The operation of the pre-sales trailer shall not constitute Tenant being "open for business" and shall not affect the Rent Commencement Date. The pre-sales trailer will be in a location previously approved by Landlord, such approval not to be unreasonably withheld or delayed.

As a condition to Tenant's operation of the pre-sales trailer provided herein:

- a. Tenant shall be responsible for providing any necessary utilities to the pre-sales trailer during the Pre-Sales Period;
- b. At all times during the Pre-Sales Period, Tenant shall carry (i) standard fire and extended coverage insurance for limits of not less than \$300,000.00 which shall insure the pre-sales trailer, and (ii) commercial general liability insurance, on an occurrence basis, for the benefit of Landlord and Tenant for limits of not less than \$1,000,000.00 per occurrence for personal injury including bodily injury and death or property damage liability. Upon request, Tenant will furnish to Landlord a certificate evidencing such insurance coverage; and
- c. Tenant shall indemnify, defend and hold harmless Landlord from and against any claims, actions, damages, liability or expense which may arise or grow out of the failure of Tenant to perform its obligations pursuant to this Agreement, or any claims for liability of any nature arising from circumstances within the pre-sales trailer, except to the extent caused by the negligence or willful misconduct of Landlord or its employees, partners, agents, contractors or representatives.

#### ARTICLE XXVI --SIGNAGE

Tenant will be entitled to construct on the exterior of the Premises the maximum amount of signs permitted under applicable law (collectively, "Tenant's Building Signage"). Tenant's Building Signage shall be subject to the approval of Landlord, which will not be unreasonably withheld or delayed, and of all applicable governmental authorities. Subject to applicable law, Tenant shall also have the right to affix to the exterior of the Premises "Pre-Opening" and "Grand Opening" banners during the pre-sale and grand opening periods, as well as reasonable promotional banners periodically during the Lease Term.

#### ARTICLE XXVII --MISCELLANEOUS PROVISIONS

Section 27.01      Relationship of Parties. 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 the parties hereto, it being understood and agreed that neither the method of computation of rent, nor any other provision contained herein, nor any acts of the parties hereto, shall be deemed to create any relationship between the parties hereto other than the relationship of landlord and tenant. This Lease shall not confer rights or benefits, including third-party beneficiary rights or benefits to anyone that is not a named party to this Lease, including any individual, corporation, partnership, trust, unincorporated organization, governmental organization or agency or political subdivision.

Section 27.02      Construction. Each party has read and understands this Lease. The rule of construction that a document should be construed most strictly against the party which prepared the document shall not be applied, because both parties have participated in the preparation of this Lease. The necessary grammatical changes required to make the provisions of this Lease apply in the plural sense where there is more than one tenant and to either corporations, associations, partnerships or individuals, males or females, shall, in all instances, be assumed as though fully expressed. The captions used in this Lease are for convenience only and do not in any way limit or amplify the terms and provisions hereof. The parties acknowledge that certain charges, fees and other payments are deemed Additional Rent in order to enforce Landlord's remedies, and shall not be construed to be Base Rent if rent controls are imposed. The printed provisions of this Lease and written or typed additions shall be given equal weight for the interpretation of this Lease. The deletion of any portion of this Lease shall not create an implication regarding the intent of the parties, and this Lease shall be read and interpreted as if the deleted portion had never been in this Lease.

Section 27.03      Parties Bound. It is agreed that this Lease, and each and all the covenants and obligations hereof, shall be binding upon and inure to the benefit of, as the case may be, the parties hereto, their respective heirs, executors, administrators, successors and assigns, subject to all agreements and restrictions herein contained with respect to assignment or other transfer of Tenant's interest herein.

Section 27.04 Entire Agreement. This Lease contains the entire agreement between the parties, and no agreement shall be effective to change, modify or terminate 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, modification or termination is sought.

Section 27.05 Brokers. Landlord and Tenant warrant that neither has had any dealings with any broker or agent in connection with the negotiation or execution of this Lease other than: (a) Rich Flaten and Daniel Taylor with CBRE, Inc. (collectively "Tenant's Broker"); and (b) David Simmons with Retail Solutions ("Landlord's Broker"), and each party agrees to indemnify the other party and hold him harmless from and against any and all cost, expense or liability for commissions or other compensation and charges claimed by any other broker (other than Landlord's Broker or Tenant's Broker) or agent by, through, or under Landlord or Tenant with respect to this Lease. Landlord agrees to pay a commission due to Landlord's Broker and Tenant's Broker pursuant to separate agreements between Landlord and Landlord's Broker and Landlord and Tenant's Broker, if any.

Section 27.06 Savings and Governing Law. If any provision of this Lease or any paragraph, sentence, clause, phrase or word is judicially or administratively held invalid or unenforceable, that shall not affect, modify or impair any other paragraph, sentence, clause, phrase or word. The laws of the state of Texas shall govern the interpretation, validity, performance and enforcement of this Lease.

Section 27.07 Force Majeure. If either party hereto shall be delayed or hindered in or prevented from the performance of any act required hereunder by reason of strikes, lockouts, labor troubles, inability to procure materials, failure of power, restrictive governmental laws or regulations, riots, insurrection, war or other reason of a like nature not the fault of the party delayed in performing work or doing acts required under the terms of this Lease, then performance of such act shall be excused for the period of the delay, and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay. The provisions of this **Section 27.07** shall not operate to excuse either party from prompt payment of (as applicable) Base Rent, construction allowances or any other payments required by the terms of this Lease.

Section 27.08 Recording of Lease. This Lease shall not be recorded, but a short form lease of even date herewith, describing the property herein demised, giving the term of this Lease and referring to this Lease may be recorded by either party upon execution by both parties. The party so requesting such short form lease shall be responsible for preparation and recording thereof, and release thereof after termination of this Lease.

Section 27.09 No Option. The submission of this Lease for examination or execution does not constitute a reservation of or option for the Building Site, and this Lease becomes effective as a lease only upon execution and delivery thereof by Landlord and Tenant.

Section 27.10 Notices. Wherever any notice is required or permitted hereunder, such notice shall be in writing. Any notice or document required or permitted to be delivered hereunder shall be deemed to be delivered whether actually received or not when deposited in the United States Mail, postage prepaid, Registered or Certified Mail, Return Receipt Requested, or the day after deposit with a national recognized overnight delivery service (e.g. Federal Express) addressed to the parties hereto at the addresses hereinafter set forth, or at such other addresses as they have theretofore specified by written notice delivered in accordance herewith, or the day of transmittal by facsimile to the number specified herein if accompanied by confirmation thereof.

If to Landlord:

ER South by South Congress, LLC  
5005 LBJ Freeway, Suite 1200  
Austin, TX 75244  
Attn: Mike Nelson

With a copy to:

Encore Enterprises, Inc.  
5005 LBJ Freeway, Suite 1200

Dallas, TX 75244  
Attn: Legal

If to Tenant: Gold's Texas Holdings Group, Inc.  
4001 Maple Avenue, Suite 200  
Dallas, Texas 75219  
Attn: Real Estate/Accounting Department

With a copy to:

E Smith Realty Partners  
16000 North Dallas Parkway, Suite 550 N  
Dallas, Texas 75248  
Attention: Lease Administration

Section 27.11      Estoppel Certificates. Both Landlord and Tenant agree, upon request of the other party, at any time and from time to time upon ten (10) business days' notice, to execute and deliver to the requesting party, without charge, a written declaration, in recordable form: (i) ratifying this Lease, (ii) confirming the commencement and expiration dates of the Term; (iii) certifying that Tenant is in occupancy of the Premises, and that this Lease is in full force and effect and has not been assigned, modified, supplemented or amended, except by such writings as shall be stated; (iv) that there are no defenses or offsets against the enforcement of this Lease, or stating those claimed; and (v) reciting the amount of advance Rent, if any, paid by Tenant and the date to which Rent has been paid.

Section 27.12      Intentionally Omitted.

Section 27.13      Right of First Refusal to Purchase.

. Provided that Tenant is not in default under this Lease beyond applicable notice and cure periods, Tenant shall have the right of first refusal as to any bona fide, third party offer to purchase the Parcel upon which the Premises is located. Upon the occurrence of any such offer, Landlord shall give to Tenant in writing the right of first refusal to purchase the Parcel upon which the Premises is located on the same terms and conditions as are contained in a bona fide, third party offer to sell or to purchase the Parcel upon which the Premises is located. Landlord shall attach to the notice of the right of first refusal a copy of any written letter of intent or other written document containing the terms and conditions of such bona fide, third party offer, and Tenant shall exercise its right of first refusal by giving written notice to Landlord of its election within ten (10) days after its receipt of the notice of the right of first refusal. In the event that Tenant fails to respond within such 10-day period, Tenant will be deemed to have declined to exercise its right of first refusal. If Tenant exercises its right of first refusal, then the settlement on the sale of the Parcel on which the Premises is located to Tenant shall occur within the same prescribed time periods as described in the subject offer. If Tenant exercises its right of first refusal but fails to close on the sale of the Parcel upon which the Premises is located as required herein, then Landlord shall be free to sell the Parcel on which the Premises is located on no more favorable terms than those offered to Tenant. If Tenant elects not to exercise its right of first refusal, then Landlord shall be free to sell the Parcel on which the Premises is located on no more favorable terms than those offered to Tenant. This right of first refusal shall not apply to a conveyance by Landlord to an affiliate of Landlord or required conveyances related to financing by Landlord. As used herein, "affiliate" shall mean any person or entity which, directly or indirectly, through one or more of its intermediaries, controls, is controlled by, or is under common control with the Landlord.

Section 27.14      Subordination. This Lease and the estate of Tenant hereunder shall be subject and subordinate to any ground lease, deed of trust, mortgage lien or charge, or any reciprocal easement agreement or other operating agreement which now encumbers or which at any time hereafter may encumber the Premises (such ground lease, deed of trust, mortgage lien or charge or any reciprocal easement agreement or other operating agreement and any replacement, renewal, modification, consolidation or extension thereof being hereinafter referred to as an "Encumbrance"); provided always that this Lease shall never be subject or subordinate to any Encumbrance unless the holder of such Encumbrance and Landlord execute an agreement in a form reasonably satisfactory to

Tenant, which provides that Tenant's rights under this Lease will not be disturbed so long as Tenant is not in default hereunder, and which does not materially or adversely affect Tenant's rights in this Lease.

Section 27.15      Liability of Landlord

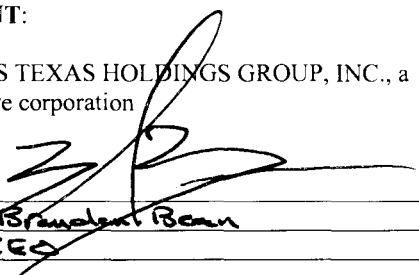
. Notwithstanding anything to the contrary provided in this Lease, it is specifically understood and agreed, such agreement being a primary consideration for the execution of this Lease by Landlord, that if Landlord shall fail to perform any covenant, term or condition of this Lease upon Landlord's part to be performed and, as a consequence of such default, Tenant shall recover a money judgment against Landlord, such judgment shall be satisfied only out of the proceeds of sale received upon execution of such judgment and levy thereon against the right, title, and interest of Landlord in the Shopping Center, as the same may then be encumbered, and neither Landlord nor any of its officers or shareholders shall be liable for any deficiency. It is understood that in no event shall Tenant have any right to levy execution against any property of Landlord other than its interest in the Shopping Center as hereinbefore expressly provided. To the extent that Landlord's interest in the Shopping Center is insufficient to cover the money judgment against Landlord, then following levy and execution thereon, Tenant may offset such amounts against Rent until Tenant has been paid in full. In the event of the sale or other transfer of Landlord's right, title and interest in the Premises or the Shopping Center, Landlord shall be released from all liability and obligations under this Lease from and after the date of transfer to the extent that the transferee assumes such liability and obligations under this Lease.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the parties hereto have duly executed and delivered this Lease as of the day and year first above written.

**TENANT:**

GOLD'S TEXAS HOLDINGS GROUP, INC., a  
Delaware corporation

By:   
Name: Brandon Bean  
Title: CEO


**LANDLORD:**

ER SOUTH BY SOUTH CONGRESS, LLC, a  
Delaware limited liability company

By: ER South Congress, LP,  
a Delaware limited partnership,  
its sole member

By: ER South Congress GP, LLC,  
a Delaware limited liability company  
its general partner

By: Encore Commercial, LLC,  
a Delaware limited liability  
company, its sole member

By:   
Nicholas K. Barber  
Title: President

## EXHIBIT "A"

### PROPERTY

BEING 7.558 ACRES OF LAND, MORE OR LESS, OUT OF AND A PORTION OF THE F. M. HODGES SURVEY NO. 22 AND THE STEPHEN H. SLAUGHTER LEAGUE BOTH IN THE CITY OF AUSTIN, TRAVIS COUNTY, TEXAS, AND BEING ALL OF THAT CERTAIN CALLEO 1.682 ACRE TRACT OF LAND CONVEYED BY DEED TO CAPITAL CITY WAREHOUSING, INC. AS RECORDED IN TRACT TWO OF VOLUME 12962, PAGE 125 OF THE REAL PROPERTY RECORDS OF TRAVIS COUNTY, TEXAS AND BEING OUT OF AND A PORTION OF LOT 3 OF THE TOM F. DUNNAHOO SUBDIVISION AS RECORDED IN VOLUME 683, PAGE 1 OF THE PLAT RECORDS OF TRAVIS COUNTY, TEXAS, SAID LOT 3 BEING CONVEYED BY DEED TO CAPITAL CITY WAREHOUSING INC. IN TRACT 1 OF SAID VOLUME 12962, PAGE 125 OF THE DEED RECORDS OF TRAVIS COUNTY, TEXAS, SAID 7.558 ACRES OF LAND BEING MORE PARTICULARLY DESCRIBED BY METES AND BOUNDS AS FOLLOWS:

BEGINNING at a found 112" iron rod on the westerly right-of-way line of South Congress Avenue (120 foot wide ROW) for the northeast corner of said 1.682 acre tract of land, same being the southeast corner of Lot 1, Block "A" of Penske South Subdivision as recorded in Document Number 200600272 of the Official Public Records of Travis County, Texas, and being the most easterly northeast corner of this tract of land;

THENCE S 45° 18' 46" W, along said right-of-way line, a distance of 21.73 feet to a mag nail set in the remains of a TXDOT Highway Concrete Monument at the point of curvature of a curve to the left (concave to the east);

THENCE along said curve, having the following elements: a central angle of 45° 38' 57", a radius of 859.83 feet and an arc length of 685.05 feet, the chord of which bears S 22° 39' 09" W a distance of 667.08 feet to a 112" iron rod found for the south corner of said 1.682 acre tract of land and this tract of land said point also being on the east line of Lot 5 of said Dunnahoo Subdivision;

THENCE N 02° 36' 35" W, along the common dividing line between said 1.682 acre tract of land and said Lot 5, a distance of 273.33 feet to a 112" iron rod found for the northeast corner of said Lot 5, same being the southeast corner of said Lot 3;

THENCE S 87° 36' 22" W, along the common dividing line between said Lot 5 and said Lot 3, a distance of 82.66 feet to a 112" iron rod found for the most easterly southwest corner of this tract of land;

THENCE through said Lot 3 the following three (3) courses and distances to a 112" iron rod found at the terminus of each course:

- 1) N 02° 05' 54" W 249.49 feet
- 2) N 76° 07' 09" W 72.96 feet, and
- 3) S 87° 36' 47" W 366.23 feet to a 112" iron rod found at the point of intersection with the east right-of-way line of Cullen Lane (ROW varies) same being the east line of a Street Deed to the city of Austin as recorded in Volume 12925, Page 93 of the Real Property Records of Travis County, Texas, and being the farthest west southwest corner of this tract of land;

THENCE N 07° 40' 16" E, along said right-of-way line, same being the east line of said street deed and the west line of this tract of land, a distance of 500.76 feet to a 1/2" iron rod found for the northeast corner of said street deed at the point of intersection with the north line of said Lot 3, same being the south line of tract 1 of the E. K. Stegall Subdivision conveyed by deed to Gary D. Rhodes as recorded in Document No. 2014061989 of the Official Public Records of Travis County, Texas;

THENCE N 87° 21' 54" E, along the common dividing line between Lot 3 and said Tract 1, a distance of 427.25 feet to a 1/2" iron rod found for the northeast corner of said Lot 3, same being on the west line of that certain tract of land conveyed by deed to the Pennington Limited Partnership as recorded in Document number 2007095447;

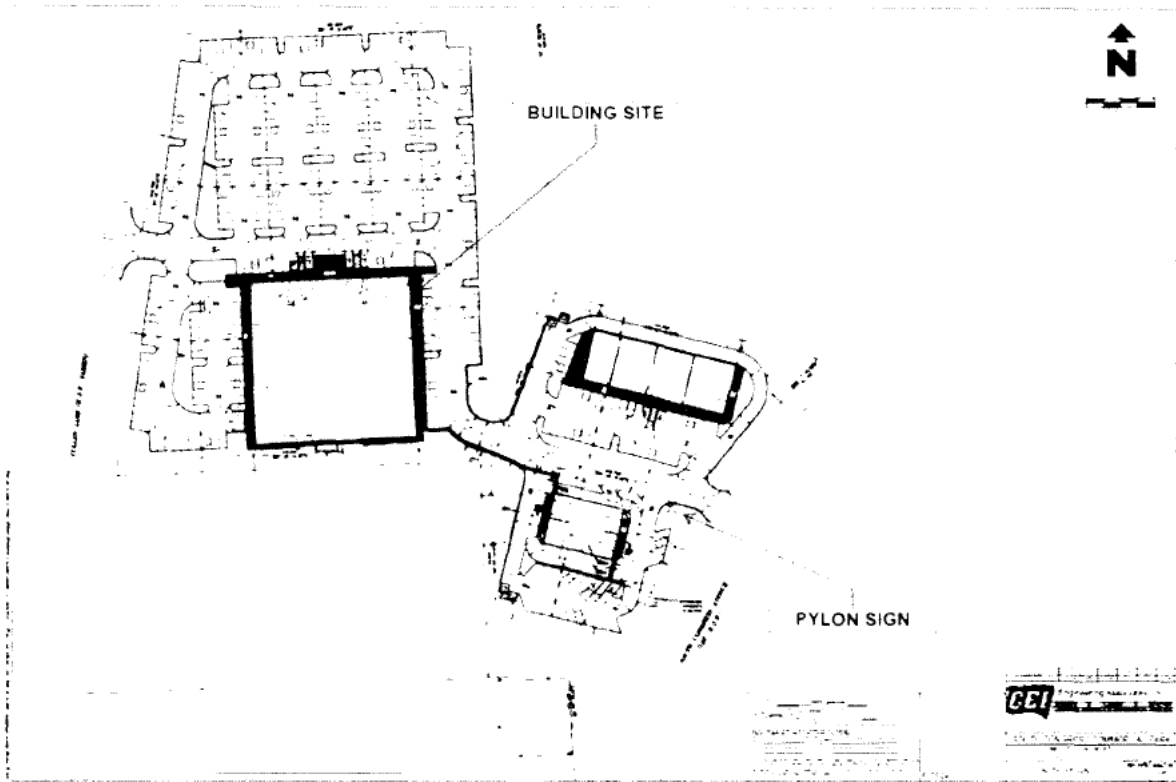


THENCE S 02°36'35" E, along the common dividing line between Lot 3 said Pennington Limited Partnership Tract of land and the west line of Lot 1, Block "A" of the Penske South Subdivision as recorded in Document No.200600272 of the Official Public Records of Travis County, Texas, a distance of 330.63 feet to a 1/2" iron rod found for the southwest corner of said Lot 1, same being the northwest corner of said called 1.682 acre tract of land;

THENCE S 76°00'23" E (Basis of Bearings) along the common dividing line between said Lot 1 and said called 1.682 acre tract of land, a distance of 313.89 feet to THE POINT OF BEGINNING and containing 7.558 acres of land, more or less.

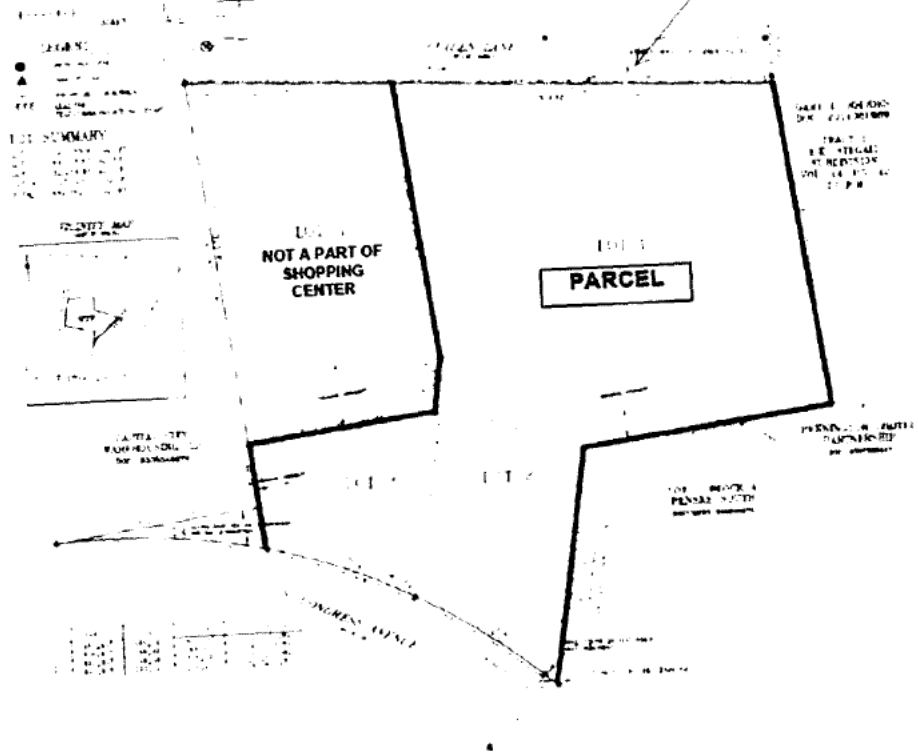
**EXHIBIT "B"**

**SITE PLAN**



The Site Plan is not intended as a representation to Tenant that all matters appearing on the Site Plan are exactly as shown thereon.

SHOPPING  
CENTER/  
PROPERTY



**EXHIBIT "C"**

**COMMENCEMENT DATE MEMORANDUM**

THIS COMMENCEMENT DATE MEMORANDUM ("Memorandum") dated as of \_\_\_\_\_, \_\_\_\_\_, by and between \_\_\_\_\_, a \_\_\_\_\_ ("Landlord"), and \_\_\_\_\_, a \_\_\_\_\_ ("Tenant").

**RECITALS:**

A. By that certain Commercial Lease dated as of \_\_\_\_\_, 20\_\_ (the "Lease") between Landlord and Tenant, Landlord leased to Tenant and Tenant leased from Landlord the Premises, subject to the conditions and limitations therein contained.

B. All capitalized terms used herein but not defined herein shall have the meaning prescribed to them in the Lease.

C. Pursuant to **Section 2.02** of the Lease, upon determination of the Rent Commencement Date, Landlord and Tenant shall execute a memorandum which shall set forth, among other things, the actual Rent Commencement Date and the Base Rent and shall evidence Tenant's acceptance of the Building Site.

D. The Rent Commencement Date has been determined and, accordingly, the parties desire to enter into this Memorandum pursuant to **Section 2.02** of the Lease.

E. Unless otherwise provided herein, all capitalized words and terms in this Memorandum shall have the same meanings ascribed to such words and terms as in the Lease.

NOW THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. The Rent Commencement Date is \_\_\_\_\_.
2. The Delivery Date occurred on \_\_\_\_\_.
3. The Floor Area of the Premises is \_\_\_\_\_ square feet and the Floor Area within the Shopping Center is \_\_\_\_\_ square feet.
4. The Initial Term expires \_\_\_\_\_, unless the Lease is sooner terminated in accordance with the terms thereof.
5. Tenant has \_\_\_ options to extend the Term of the Lease for additional \_\_\_ year periods each. Tenant shall exercise its right to the first Extension Term, if at all, before \_\_\_\_\_, subject to the conditions and limitations set forth in **Section 2.01 (b)** of the Lease.
6. Base Rent shall be as follows:

<u>Period</u>	<u>Dates</u>	<u>Per SF Rent Rate</u>	<u>Annual Minimum Rent</u>	<u>Monthly Minimum Rent</u>

7. Tenant's Proportionate Share is \_\_\_\_\_%.

8. This Memorandum may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, Landlord and Tenant have executed this Memorandum as of the day and year first above written.

**TENANT:**

GOLD'S TEXAS HOLDINGS GROUP, INC., a  
Delaware corporation

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

**LANDLORD:**

ER SOUTH BY SOUTH CONGRESS, LLC, a  
Delaware limited liability company

By: ER South Congress, LP,  
a Delaware limited partnership,  
its sole member

By: ER South Congress GP, LLC,  
a Delaware limited liability company  
its general partner

By: Encore Commercial, LLC,  
a Delaware limited liability  
company, its sole member

By: \_\_\_\_\_  
Nicholas K. Barber  
Title: \_\_\_\_\_

## **EXHIBIT “D-1”**

### **LANDLORD’S WORK**

- Landlord’s Initial Work includes:
  - The Building Site able to accommodate the Building and exterior amenities, geographically dependent, such as swimming facilities, outdoor bootcamp/exercise fields, or other similar activities
  - Landlord shall deliver the Building Site to Tenant pad ready (excluding any piers), a pad that meets geotechnical requirements to support the Building as described in the geotechnical reports and civil plans previously provided to Tenant by Landlord.
  - A 5’ minimum buffer around the Building Site for future landscaping
  - A parking field on the Parcel to accommodate 275 parking spaces with 80% of the parking spaces to be located in front of the Building, including all parking field grading, paving, and lighting (to meet 1.5 fc minimum across the parking field), retainage as necessary
  - Access points to the Building Site from South Congress Avenue and Cullen Lane, with one being direct
  - Utilities to the Building Site:
    - Water, Sewer and Gas
      - Minimum 6” sanitary sewer line with sufficient inverts to serve all locations depicted on permit plans
      - Minimum 2-1/2” dedicated domestic water line
      - Natural gas sufficient for 6,000 MBH demand
      - Connection points clearly identified on permit plans
      - Video verification of clear sanitary sewer lines
    - Electric
      - Minimum 1200 amp 480 volt 3 phase 4 wire electrical service or 2000 amp 208 volt 3 phase 4 wire electrical service, preferably underground to transformer pad
    - Telephone
      - 4” conduit from the telco service pedestal
    - Sprinkler System
      - Adequate water line with adequate water pressure to accommodate Building; typically a 6” line but must confirm with Tenant
    - Storm Sewer/Retention-Detention
      - Storm water distribution and/or retention/detention facilities, as required by code
  - As required by code, traffic control devices on the Parcel, including but not limited to acceleration/deceleration lanes, turn lanes, and signal lights
  - A pylon sign for the Shopping Center in the location shown on Exhibit “B”
  - Removal of all debris and trash from the Building Site.
  - Payment of all impact, initiation, or other fees associated with Landlord’s Initial Work
- Landlord’s Finish Work includes:
  - Striping of the parking field located on the Parcel
  - Landscaping of parking field located on the Parcel and in 5’ buffer around the Building, as required by code
  - Sidewalks around the perimeter of the Building
  - Accessible path from South Congress Avenue to Building
  - Sidewalk lighting illuminated to 1.5 fc
  - Payment of all impact, initiation, or other fees associated with Landlord’s Finish Work

## **EXHIBIT "D-2"**

### **TENANT'S WORK**

#### **ARTICLE 1.00 GENERAL DESIGN AND CONSTRUCTION CRITERIA**

- 1.01 Tenant is responsible for selecting contracts relating to the construction and installation of Tenant's Work, supervision and completion of the work, to make such improvements and payment therefor, procurement of all permits and permissions related to Tenant's Work, compliance with the requirements of all authorities having jurisdiction and with conditions contained herein, and payment of all fees and charges incurred in connection therewith. Tenant shall furnish to Landlord for Landlord's prior approval (not to be unreasonably withheld, conditioned or delayed) names and addresses of all contractors and subcontractors who shall perform Tenant's Work, copies of all contracts and subcontracts, and copies of all necessary permits, licenses and approvals.
- 1.02 Tenant shall impose and enforce all terms hereof on any architect, engineer, designer, contractor and workmen engaged by Tenant, its contractors and subcontractors.

#### **ARTICLE 2.00 INTENTIONALLY OMITTED**

#### **ARTICLE 3.00 CONSTRUCTION ALLOWANCE**

- 3.01 **CONSTRUCTION ALLOWANCE:** Landlord shall pay Tenant a construction allowance equal to the lesser of (i) actual costs incurred by Tenant in construction of Tenant's Work, or (ii) \$2,100,000.00. Provided Tenant is not then in default beyond any applicable notice and cure period, the construction allowance shall be paid in progress payments in accordance with a schedule of values, minus a 10% retainage. The 10% retainage will be paid to Tenant upon the Rent Commencement Date and Landlord's receipt of copies of paid invoices, an affidavit of completion and final lien waivers, provided that Tenant is open and operating and is not then in default beyond any applicable notice and cure period. If Landlord does not pay the Construction Allowance or any portion thereof to Tenant within 30 days after the date when such payment is due, then Tenant may offset such amounts against Rent until it has been paid in full.

#### **ARTICLE 4.00 TENANT'S WORK**

- 4.01 At its own expense, Tenant shall provide all design, engineering, plans, specifications, drawings, permits, fees, work, labor, skill and equipment required to complete the Premises for occupancy, and shall construct the Tenant's Work in accordance with the Plans, approved in the manner set forth herein.
- 4.02 No construction work shall be undertaken or commenced by Tenant until:
- (a) The Plans have been submitted to and approved by Landlord in accordance with the terms and conditions of this Lease, and
  - (b) all necessary building permits and required insurance coverages have been secured and certificates of insurance delivered to Landlord.
- 4.03 Tenant shall proceed with its work expeditiously, continuously, and efficiently, and shall use reasonable efforts to complete the same as soon as practicable following the Delivery Date.
- 4.04 Tenant shall ensure that all materials, skill and workmanship in Tenant's Work shall be of uniformly high quality, not less than building standard, and in accordance with the best standards of practice and any governing codes or regulations. Tenant shall have the obligation to timely deliver any materials and equipment and labor to be supplied by Tenant so as not to delay substantial completion of Tenant's Work. Tenant represents and warrants that the Plans and Tenant's Work contemplated thereby shall be in compliance with applicable building and zoning laws, ordinances, regulations and any covenants, conditions or restrictions affecting the Shopping Center, and that the same are in accordance with good engineering and architectural practice, and that the Plans are sufficient for issuance of a building permit for

Tenant's Work. Further, Tenant shall be responsible for obtaining the certificate of occupancy for the Premises, and shall furnish the same to Landlord prior to the Rent Commencement Date.

- 4.07 Tenant shall appoint a representative as Tenant's representative with full authority to make decisions and commitments on behalf of Tenant in respect to Tenant's Work and changes therein.
- 4.08 Except as otherwise set forth in this Lease or in the Plans, all of Tenant's Work shall be confined to the Building Site, with the exception of sign mountings, which shall be performed in compliance with the approved sign drawings.

#### ARTICLE 5.00 TENANT'S ACCESS FOR COMPLETION OF WORK

- 5.01 Tenant and its architects, designers, engineers, contractors and workmen shall have access to and non-exclusive use of the Building Site to perform Tenant's Work and such other work approved by Landlord as Tenant may desire. Any such work shall be done by contractors selected by Tenant.
- 5.02 Tenant shall at all times keep the Building Site and adjacent areas free from accumulations of unreasonable amounts of waste material or rubbish caused by its suppliers, contractors or workmen, considering the scope of Tenant's Work. At the completion of Tenant's Work, Tenant's contractor shall forthwith remove all rubbish and all tools, equipment and surplus materials from and about the Building Site and shall leave the Building Site clean.

#### ARTICLE 6.00 INSURANCE; PAYMENT DOCUMENTATION

- 6.01 Prior to commencement of Tenant's Work, Tenant shall obtain, at its sole expense, and maintain during the performance of Tenant's Work, the insurance coverages required by **Section 10.02** of the Lease.
- 6.02 Tenant shall furnish Landlord with sworn owner's and contractor's statements, contractor's affidavits and partial and final waivers of lien, in such form and content as Landlord may reasonably require, in order to establish that the cost of all labor, services and materials furnished in connection with Tenant's Work has been paid in full.



**EXHIBIT “E”**

**INTENTIONALLY OMITTED**

**EXHIBIT “F”**

**INTENTIONALLY OMITTED**

**EXHIBIT "G"**

**DELIVERY DATE MEMORANDUM**

THIS DELIVERY DATE MEMORANDUM ("Memorandum") dated as of \_\_\_\_\_, \_\_\_\_\_,  
by and between \_\_\_\_\_, a \_\_\_\_\_ ("Landlord"), and \_\_\_\_\_, a  
\_\_\_\_\_ ("Tenant").

**RECITALS:**

A. By that certain Commercial Lease dated as of \_\_\_\_\_, 20\_\_ (the "Lease") between Landlord and Tenant, Landlord leased to Tenant and Tenant leased from Landlord the Premises, subject to the conditions and limitations therein contained.

B. All capitalized terms used herein but not defined herein shall have the meaning prescribed to them in the Lease.

C. Pursuant to **Section 3.01** of the Lease, upon determination of the Delivery Date, Landlord and Tenant shall execute a memorandum which shall set forth the actual Delivery Date.

D. The Delivery Date has been determined and, accordingly, the parties desire to enter into this Memorandum pursuant to **Section 3.01** of the Lease.

E. Unless otherwise provided herein, all capitalized words and terms in this Memorandum shall have the same meanings ascribed to such words and terms as in the Lease.

NOW THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. The Estimated Delivery Date is \_\_\_\_\_.
2. The Delivery Date occurred on \_\_\_\_\_.
3. [Pursuant to **Section 3.01** of the Lease, Tenant is entitled to a credit against Rent equal to \$\_\_\_\_\_, such amount representing two days of Base Rent for each day after the Estimated Delivery Date that the Delivery Date occurred.]
4. This Memorandum may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, Landlord and Tenant have executed this Memorandum as of the day and year first above written.

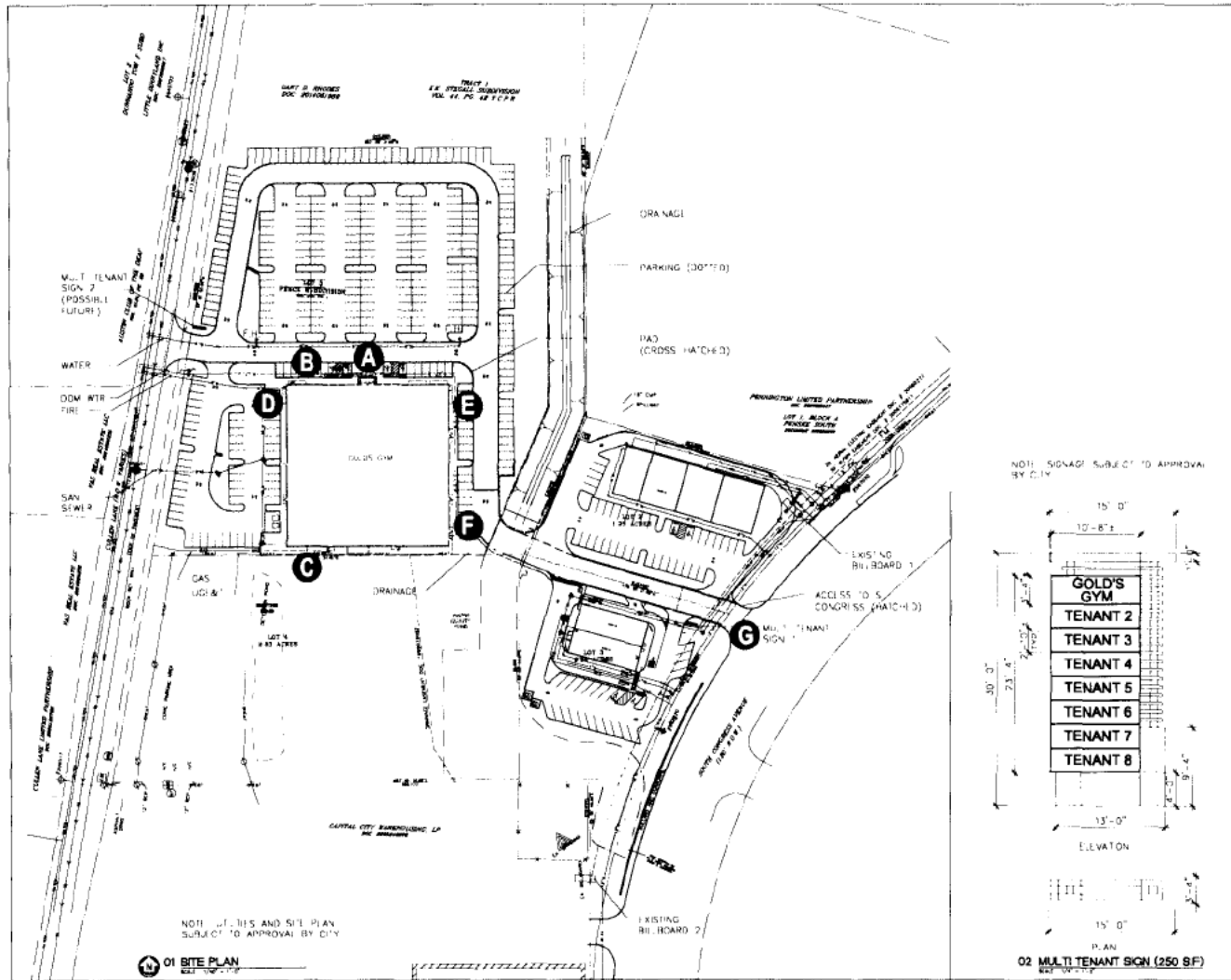
**LANDLORD:**

**TENANT:**

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

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

**EXHIBIT "H"**  
**APPROVED SIGNAGE**



# CODE

Building Signage: Wall signage square footage can be 20% of the first 10,000 sq. ft. of the building facade. The calculation is calculated by taking the entire side of the building facade and dividing it by 5. The result is the square footage of the building facade. The result is the square footage of the building facade. The result is the square footage of the building facade.

AREA OF A 1 BUILDING SIGNAGE: 49,430 sq. ft.

\* TENANT PANELS WILL NOT COUNT TOWARDS BUILDING SIGNAGE SQUARE FOOTAGE  
\* GOLD'S GYM WILL BE ALLOWED 562 SQ. FT. OF SIGNAGE FOR THIS LOCATION

1962' x 15' = 29,430 sq. ft. (15' sign elevation)  
1962' x 15' = 29,430 sq. ft. (15' sign elevation)  
1962' x 15' = 29,430 sq. ft. (15' sign elevation)  
1962' x 15' = 29,430 sq. ft. (15' sign elevation)

TOTAL = 118,320 SQ. FT. PROPOSED

TOTAL SQ. FT. ALLOWED FOR THE ENTIRE BUILDING IS 212,860 FT.

EXIST. SQ. FT. ALLOWED = 94,530 FT. PROPOSED = 118,320 FT. IS CURRENTLY NOT USED



GOLD'S GYM - CONGRESS  
SOUTH CONGRESS & SLAUGHTER  
AUSTIN, TEXAS  
CC  
03.09.17  
RH  
AM

This is an original drawing created by Walton. It is submitted for your review and approval. It is not to be used for any other purpose without the written consent of Walton. It is not to be used for any other purpose without the written consent of Walton. It is not to be used for any other purpose without the written consent of Walton.

H: Gold's Gym Location TX Austin, TX (South Congress) Design: 156291 RQ can

This is an original drawing created by Walton. It is submitted for your review and approval. It is not to be used for any other purpose without the written consent of Walton. It is not to be used for any other purpose without the written consent of Walton. It is not to be used for any other purpose without the written consent of Walton.

This is an original drawing created by Walton. It is submitted for your review and approval. It is not to be used for any other purpose without the written consent of Walton. It is not to be used for any other purpose without the written consent of Walton. It is not to be used for any other purpose without the written consent of Walton.

PAGE SIZE 11" X 17"

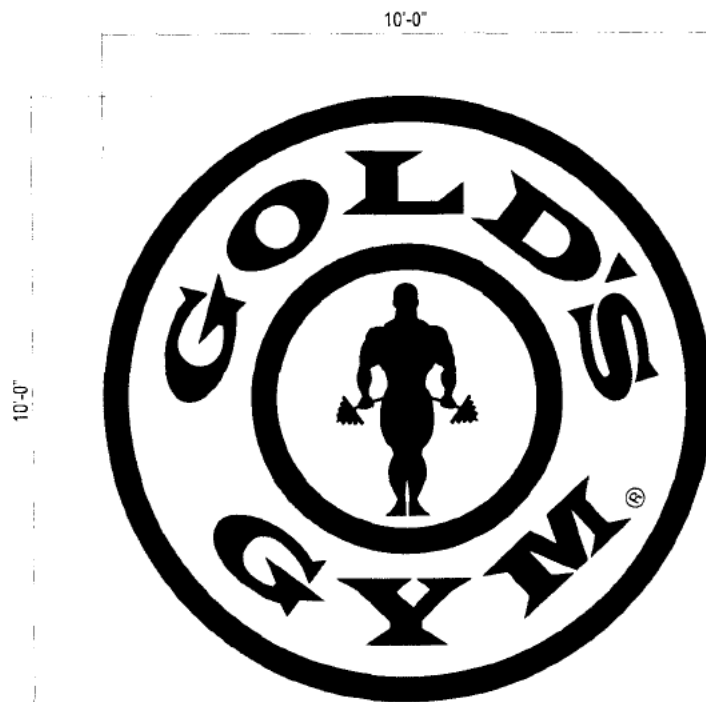
Sales: Date:  
P.M.: Date:  
Design: Date:  
Client: Date:

00156291

Sheet: 1 of 6









**A** S/F ILLUMINATED CABINET SIGN (FLEX FACE) - 100 SQ. FT.  
Scale: 3/4" = 1'-0"

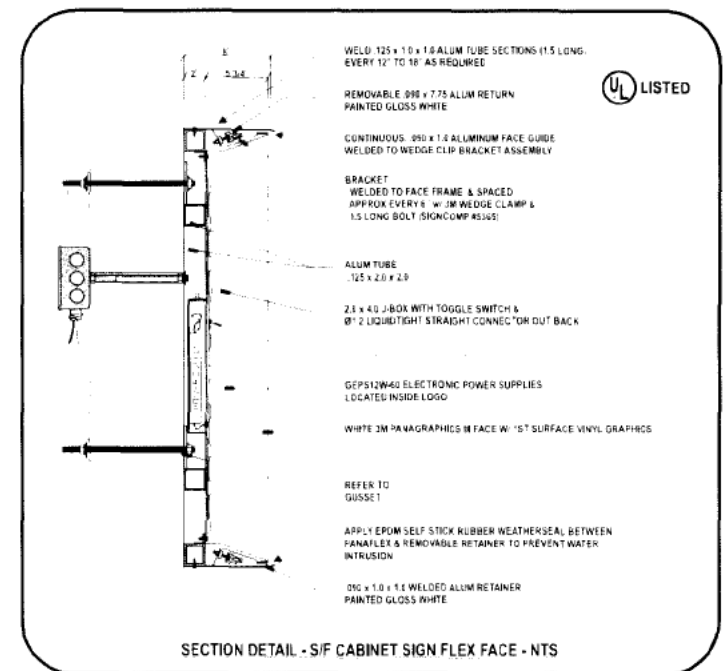
**SCOPE OF WORK:**

• MANUFACTURE AND INSTALL ONE (1) NEW FLEX FACE CABINET

## COLOR PALETTE

 YELLOW - PMS #19 ACRYLIC #2117  
3M VINYL 660-915

 BLACK - PMS BLACK C  
3M VINYL 660-27



## CODE

Bleeding Springs will accept separate drainage can be done at the West End of the building facade. The sign is a combination of the existing sign and the new Bleeding Springs. The main will be allowed a total of 100 sq ft. The sign will be allowed any additional free standing signage.

DATA OF A 1 BUILDING SIGNS: 494 80 17

- TENANT PANELS WILL NOT COUNT TOWARDS BUILDING SIGNAGE SQUARE FOOTAGE
- GOLD'S GYM WILL BE ALLOWED 500 SQ. FT. JIF SIGNAGE FOR THIS LOCATION

193-2<sup>1</sup> × 15' = 2858 sq. ft. = 22.6 × 5.79 sqft. front elevation,  
192-2<sup>1</sup> × 15' = 2859 sq. ft. = 22.6 × 5.79 sqft. side elevation,  
191-2<sup>1</sup> × 15' = 2858 sq. ft. = 22.6 × 5.79 sqft. rear elevation,  
194-2<sup>1</sup> × 15' = 2858 sq. ft. = 22.6 × 5.79 sqft. side elevation,

$$\text{Ti}(\text{S}^{\text{IV}})_2 \cdot 0.48\text{H}_2\text{O} \cdot 1.5 \text{ H}_2\text{O} \cdot 1.5 \text{ H}_2\text{O} \cdot 1.5 \text{ H}_2\text{O}$$

TO: ALL SQUADS ACCOUNTED FOR THE ENTIRE HOUR (0000-2359 SQUAD)

2012 50 FT ALLOWED = 948.5 50 FT PROPOSED = 158.5 IS CURRENTLY NOT USED



GOLD'S GYM - CONGRESS  
SOUTH CONGRESS & SLAUGHTER  
AUSTIN, TEXAS  
CC RH  
03.09.17 AM

RH  
AM

[illegible]

1. *Conduct a literature search* to identify relevant studies. This involves searching databases like PubMed, Scopus, and Web of Science for articles related to the topic.

This system is intended to be installed in accordance with the requirements of Article 602 of the National Electrical Code, and a future update may be needed. This includes proper grounding and bonding of the system.

PAGE SIZE 11" X 17"

Sales:	Date:
P.M.:	Date:
Design:	Date:
Client:	Date:

Q156291

Sheet: 4 of 6



PAGE SIZE 11" X 17"



**EXHIBIT "I"**

**SUBORDINATION, ATTORNMENMENT AND NON-DISTURBANCE AGREEMENT**



**SUBORDINATION, ATTORNMENT  
AND NON-DISTURBANCE AGREEMENT**

THIS SUBORDINATION, ATTORNMENT AND NON-DISTURBANCE AGREEMENT (the "Agreement"), is made this [\*] day of [\*], 2017, by and among Gold's Texas Holdings Group, Inc., a Delaware corporation, whose address is 4001 Maple Avenue, Suite 600, Dallas, Texas 75219 ("Tenant")—with a copy of all notices to Tenant to also be sent to E Smith Realty Partners, 16000 North Dallas Parkway, Suite 550 N, Dallas, Texas 75248, Attention: Lease Administration—and Frost Bank, P.O. Box 1600 San Antonio, Texas 78296 ("Lender"), and ER South by South Congress, LLC, a Delaware limited liability company, whose address is 5005 LBJ Freeway, Suite 1200, Dallas, TX 75244 ("Landlord").

R E C I T A L S:

A. By Lease dated [\*], as amended on [\*] (hereinafter referred to as the "Lease"), Landlord leased and rented to Tenant certain premises located in Travis County, Texas (the "Property") a more particular description of which Property appears in Exhibit "A", attached hereto and by this reference made a part hereof; and

B. Landlord has applied for a loan from Lender, to be secured by a Deed of Trust, Security Agreement – Financing Statement covering the Property and collaterally assigning the Lease and the rents thereunder (the "Mortgage") and Lender is unwilling to make such a loan (the "Loan") unless Tenant subordinates Tenant's interest under the Lease to the Mortgage; and

C. Tenant wishes to induce Lender to make the Loan and has agreed to such subordination upon certain terms and conditions, and has agreed to make certain warranties and representations to Lender; and

D. Tenant, Landlord and Lender desire hereby to establish certain rights, safeguards, obligations, and priorities with respect to their respective interests by means of the following Subordination, Attornment and Non-Disturbance Agreement;

NOW THEREFORE, FOR AND IN CONSIDERATION OF TEN AND NO/100 DOLLARS AND OTHER VALUABLE CONSIDERATION, the receipt and sufficiency of which are hereby acknowledged and agreed, and to induce Lender to make the Loan, Tenant, Landlord and Lender agree as follows:

1. The Lease and the rights of Tenant thereunder and with respect to the Property are and shall be subject and subordinate to the lien of the Mortgage and to all of the terms, conditions and provisions thereof and under any of the documents evidencing the Loan (the "Loan Documents") to all advances made or to be made thereunder, to the full extent of all sums from time to time secured thereby, and to any renewal, substitution, extension, modification, refinance or replacement thereof, including any increase in the indebtedness secured thereby or any supplements thereto.

2. In the event that Lender or any other person (the Lender, any other such person and their successors and assigns being referred to herein as the "Purchaser") acquires title to the Property pursuant to the exercise of any remedy provided for in the Mortgage and under any Loan Document (including without limitation foreclosure) or by reason of the acceptance of a deed in lieu of foreclosure or otherwise (a "Foreclosure Event"), Tenant covenants and agrees to attorn to and recognize and be bound to Purchaser as its new Landlord, and subject to the provisions in Paragraph 4 of this Agreement, the Lease shall continue in full force and effect as a direct Lease between Tenant and Purchaser without the execution of any further documents. Tenant agrees to execute and deliver at any time and from time to time, upon the request of Landlord or of any holder(s) of any of the indebtedness or other obligations secured by the Mortgage or any Purchaser, any instrument or certificate which, in the sole reasonable judgment of the requesting party, is necessary or appropriate, in connection with any Foreclosure Event, to evidence such attornment, which instrument or certificate shall be in form and content reasonably acceptable to Tenant. Tenant hereby waives the provisions of any statute or rule of law, now or hereafter in effect, which may give or purport to give Tenant any right or election to terminate or otherwise adversely affect the Lease and the obligations of Tenant thereunder as a result of any Foreclosure Event.

3. So long as the Lease is in full force and effect and Tenant shall not be in default under any provision of the Lease or this Agreement beyond the applicable cure and/or notice period, and no event has occurred which has continued to exist for a period of time (after cure and/or notice period, if any, required by the Lease) as would entitle Landlord to terminate the Lease or Tenant's right to possession thereunder or would cause, without further action by Landlord, the termination of the Lease, or would entitle Landlord to dispossess the Tenant thereunder:

(a) the right of possession of Tenant to the leased premises shall not be terminated or disturbed by any steps or proceedings taken by Lender in the exercise of any of its rights under the Mortgage or the indebtedness secured thereby or under the Loan Documents, including without limitation a Foreclosure Event;

(b) the Lease shall not be terminated (except upon expiration of the term thereof or as otherwise expressly permitted under the terms of the Lease) or affected by said exercise of any remedy provided for in the Mortgage and the Loan Documents, and Lender hereby covenants that any sale by it of the Property pursuant to the exercise of any rights and remedies under the Mortgage, the Loan Documents or otherwise, shall be made subject to the Lease and the rights of Tenant thereunder.

4. In no event shall Purchaser be:

(a) liable for any act or omission of any prior landlord, including the Landlord, or the breach of any warranties or obligations relating to the Property, except with respect to Continuing Defaults (defined below);

(b) liable for the return of any security deposit, except to the extent actually received by Purchaser;

(c) subject to any offsets, defenses or claims which the Tenant might have against any prior landlord (including Landlord), except with respect to Continuing Defaults or customary operating cost reconciliation provisions that are contained in the Lease;

(d) bound by any payment of rent or additional rent which the Tenant might have paid to any prior landlord for more than the current month, except to the extent actually received by Purchaser;

(e) bound by any amendment, modification, termination or cancellation of the Lease made without Purchaser's prior written consent, except for Approved Modifications (defined below);

(f) Except for obligations arising after a Foreclosure Event, obligated to complete any construction work required to be done by Landlord pursuant to the provisions of the Lease or to reimburse Tenant for any construction work done by Tenant;

(g) required to make any general repairs to the Property as a result of fire or other casualty, or by reason of condemnation, unless Purchaser shall be obligated under the Lease to make such repairs and Purchaser shall have received sufficient casualty insurance proceeds or condemnation awards to finance the completion of such repairs;

(h) Except for obligations arising after a Foreclosure Event, required to make any capital improvements to the Property in general or to the Property which are not expressly required by the Lease;

(i) liable or responsible for payment of any brokerage or other commission or compensation due with respect to the Lease or any renewal, extension, expansion or other amendment thereof; or

(j) liable to Tenant for any actions of its successors-in-interest upon a subsequent transfer by Purchaser of its interest in the Property.

A "Continuing Default" is defined as a default by Landlord under the Lease that began prior to a Foreclosure Event, is ongoing and continuing following the Foreclosure Event, is susceptible to being cured, and for which Tenant provided Lender with notice as required hereunder prior to the Foreclosure Event. Lender shall only be responsible for actual damages (not consequential or special damages) that arise after Foreclosure Event as a result of its failure to cure a Continuing Default.

5. Tenant agrees to provide Lender with copies of all written notices sent to Landlord pursuant to the Lease simultaneously with the transmission of such notices to Landlord, including notices of any default by Landlord under the Lease which would entitle Tenant to cancel the Lease or abate the rent payable thereunder (if allowed under the Lease), and agrees that notwithstanding any provision of the Lease, no notice of cancellation thereof shall be effective unless (i) Lender has received the notice aforesaid and has failed within thirty (30) days after the date of receipt thereof to cure, or (ii) if the default cannot be cured within thirty (30) days and Lender has commenced and diligently pursued the cure of Landlord's default which gave rise to such right of cancellation or abatement, Lender has failed within sixty (60) days after the date of receipt of notice of cancellation to cure. Tenant further agrees to give such notices to any successor-in-interest of Lender, provided that such successor-in-interest shall have given written notice to Tenant of its acquisition of Lender's interest in the Mortgage and designated the address to which such notices are to be sent.

6. Tenant agrees that it will not, without the prior written consent of Lender, do any of the following, and any such purported action without such consent shall be void as against Lender:

- (a) modify the Lease in any way except that Landlord and Tenant may enter into modifications, amendments and/or extensions of the Lease without Lender's consent so long as such agreement does not reduce any economic obligations of Tenant under the Lease or impair Landlord's or Lender's rights under the Lease (collectively "Approved Modifications"); or
- (b) terminate the Lease or surrender possession of the leased premises except on the presently scheduled expiration date in the Lease or in accordance with Section 5 above; or
- (c) make a prepayment in excess of one month of rent thereunder; or
- (d) subordinate or permit subordination of the Lease to any lien subordinate to the Mortgage; or
- (e) exercise any termination right by paying a cancellation, surrender or termination fee or other such payment except in accordance with Section 5 above; or
- (f) mortgage, pledge or grant a lien on any of its rights under the Lease or its leasehold interest.

7. Upon Tenant's receipt of written notice from Lender as provided in Paragraph 14 that substantially complies with the requirements of the terms of the Texas Assignment of Rents Act (Sections 64.001 et. seq. of the Texas Property Code) ("TARA"), Tenant shall pay to Lender the amount of all prepaid rents made in excess of one month's rent, all payments of accrued but unpaid rent, rents as they accrue after the notice is received and other sums that become due under the Lease without deduction or offset (except as provided in the Lease but subject to the provisions hereof regarding Continuing Defaults) directly to Lender or to the person and at the address specified by Lender, notwithstanding any conflicting instructions or demands by Landlord or any third party. Landlord hereby authorizes and directs Tenant to deliver such payment to Lender upon receipt of such written notice and shall indemnify and hold Tenant harmless from any loss, cost, expense or claim incurred by Tenant in connection with its compliance with this provision. Landlord waives any right, claim or demand it may now or hereafter have against Tenant by reason of such direct payment to Lender and agrees that such direct payment to Lender shall discharge all obligations of Tenant to make such payment to Landlord.

8. In order to induce Lender to extend credit to the Landlord, Landlord and Tenant hereby certify to Lender that the following statements are true and correct:

- (a) The Lease is in full force and effect, evidences the valid, binding, enforceable obligations of the Tenant and has not been modified, amended or terminated. A true and complete copy of the Lease is attached as Exhibit "B".

(b) The term of the Lease will commence on the date specified therein as the Commencement Date and will terminate [\*] ([\*]) years thereafter.

(c) Landlord has not waived any past, present or future compliance by Tenant with any provision of the Lease. Tenant has performed through the date hereof all of its obligations existing under the Lease or otherwise with respect to the leased premises and is not in breach or default of the Lease.

(d) To Tenant's actual knowledge, Landlord has performed through the date hereof all of its obligations existing under the Lease or otherwise with respect to the leased premises and is not in breach or default of the Lease. To Tenant's actual knowledge, no event has occurred and no condition exists which with either or both the passage of time or the giving of notice, or otherwise, would constitute a default or breach of the Lease or would relieve the Tenant of its obligations under the Lease.

(e) The Tenant has not paid any rental or other charges in advance or paid any security deposits or other deposits to Landlord.

(f) Tenant has no options to purchase the Property or to lease additional space in the Property, except as provided in the Lease. Tenant has no options to renew the term of the Lease, except as provided in the Lease.

(g) Tenant has not subleased, assigned, mortgaged or granted a lien on any of its rights under the Lease or its leasehold interest.

(h) Tenant has no present claim, counterclaim, defense or offset against the Landlord or against rent or other sums payable from and after the date hereof under the Lease.

Tenant and Landlord each understands and agrees that Lender will rely on this Agreement in financing the Property, and such financing shall be deemed good and valuable consideration for the representations made herein.

9. Tenant agrees to certify in writing to Lender, upon request, whether or not any default on the part of Landlord exists under the Lease and the nature of any such default, and such other information as Lender may reasonably request.

10. The agreements herein contained shall be binding upon and inure to the benefit of the parties hereto, their respective successors, successors-in-interest and assigns, and, without limiting such, the agreements of Lender shall specifically be binding upon any Purchaser of the Property at a Foreclosure Event.

11. This Agreement may not be modified other than by an agreement in writing signed by the parties hereto or their respective successors-in-interest.

12. This Agreement may be separately executed in any number of counterparts, each of which will be an original, but all of which, taken together, will be deemed to constitute one and the same instrument. For purposes of negotiating and finalizing this Agreement, if this document or any document executed in connection with it is transmitted by facsimile machine, electronic mail or other electronic transmission, it will be treated for all purposes as an original document. Additionally, the signature of any party on this document transmitted by way of a facsimile machine or electronic mail will be considered for all purposes as an original signature. Any such faxed document will be considered to have the same binding legal effect as an original document. At the request of any party, any faxed or electronically transmitted document will be re-executed by each signatory party in an original form.

13. If any term or provision of this Agreement shall to any extent be held invalid or unenforceable, the remaining terms and provisions hereof shall not be affected thereby, but each term and provision hereof shall be valid and enforceable to the fullest extent permitted by law. This Agreement shall be governed by and construed under the laws of the state in which the Property is located and applicable laws of the United States.

14. All notices, requests demands or other communications required or permitted to be given pursuant to this Agreement shall be in writing and given by (i) personal delivery, (ii) expedited delivery service with proof of delivery (e.g. FedEx), or (iii) registered or certified mail, return receipt requested, sent to the intended addressee at the address set forth on the first page hereof and will be deemed to have been received either, in the case of personal delivery, as of the time of personal delivery, in the case of expedited delivery service or registered or certified mail, as of the date of first attempted delivery at the address and in the manner provided herein. Either party will have the right to change its address for notice hereunder to any other location within the continental United States by notice to the other party of such new address at least 30 days prior to the effective date of such new address.

The parties agree that for purposes of this Agreement no notices or other communications by electronic means between such parties or their representatives in connection with this Agreement or any instrument executed in connection herewith shall constitute a transaction, agreement, contract or electronic signature under the Electronic Signatures in Global and National Commerce Act, any version of the Uniform Electronic Transactions Act or any other statute governing electronic transactions, unless otherwise specifically agreed to in writing.

15. All exhibits attached to this Agreement are incorporated herein for all purposes. The Lease attached as Exhibit "B" may be omitted from the counterpart of this Agreement filed in the real property records, but shall be retained in the files of Lender at the address stated above.

16. WAIVER OF RIGHT TO TRIAL BY JURY. EACH PARTY HERETO HEREBY IRREVOCABLY WAIVES, TO THE FULLEST EXTENT NOT PROHIBITED BY APPLICABLE GOVERNMENTAL REQUIREMENT, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL PROCEEDING DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS AGREEMENT (WHETHER BASED ON CONTRACT, TORT OR ANY OTHER THEORY). EACH PARTY HERETO (A) CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PERSON HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PERSON WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER AND (B) ACKNOWLEDGES THAT IT AND THE OTHER PARTIES HERETO HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION.

*[Signature Pages Follow]*





**LENDER:**

**FROST BANK,**  
a Texas state bank

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

STATE OF TEXAS                    §  
                                          §  
COUNTY OF \_\_\_\_\_ §

      This instrument was acknowledged before me on this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by  
\_\_\_\_\_, \_\_\_\_\_ of Frost Bank.

\_\_\_\_\_  
Notary Public, State of Texas

*[Signatures Continue on Following Page]*

**LANDLORD:**

**ER SOUTH BY SOUTH CONGRESS, LLC,**  
a Delaware limited liability company

By: ER South Congress, LP,  
a Delaware limited partnership  
its sole member

By: ER South Congress GP, LLC,  
a Delaware limited liability company  
its general partner

By: Encore Commercial, LLC,  
a Delaware limited liability company  
its sole member

By: \_\_\_\_\_  
Name: Nicholas K. Barber  
Title: \_\_\_\_\_

STATE OF TEXAS

§

COUNTY OF \_\_\_\_\_

§  
§

This instrument was acknowledged before me on this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by Nicholas K. Barber, \_\_\_\_\_ of Encore Commercial, LLC, the sole member of ER South Congress GP, LLC, the general partner of ER South Congress, LP, the sole member of ER South by South Congress, LLC.

\_\_\_\_\_  
Notary Public, State of Texas

Schedule of Exhibits:  
Exhibit "A" - Property  
Exhibit "B" - Lease

Exhibit "A" - Property

BEING 7.558 ACRES OF LAND, MORE OR LESS, OUT OF AND A PORTION OF THE F. M. HODGES SURVEY NO. 22 AND THE STEPHEN H. SLAUGHTER LEAGUE BOTH IN THE CITY OF AUSTIN, TRAVIS COUNTY, TEXAS, AND BEING ALL OF THAT CERTAIN CALLED 1.682 ACRE TRACT OF LAND CONVEYED BY DEED TO CAPITAL CITY WAREHOUSING, INC. AS RECORDED IN TRACT TWO OF VOLUME 12962, PAGE 125 OF THE REAL PROPERTY RECORDS OF TRAVIS COUNTY, TEXAS AND BEING OUT OF AND A PORTION OF LOT 3 OF THE TOM F. DUNNAHOO SUBDIVISION AS RECORDED IN VOLUME 683, PAGE 1 OF THE PLAT RECORDS OF TRAVIS COUNTY, TEXAS, SAID LOT 3 BEING CONVEYED BY DEED TO CAPITAL CITY WAREHOUSING INC. IN TRACT 1 OF SAID VOLUME 12962, PAGE 125 OF THE DEED RECORDS OF TRAVIS COUNTY, TEXAS, SAID 7.558 ACRES OF LAND BEING MORE PARTICULARLY DESCRIBED BY METES AND BOUNDS AS FOLLOWS:

BEGINNING at a found 112" iron rod on the westerly right-of-way line of South Congress Avenue (120 foot wide ROW) for the northeast corner of said 1.682 acre tract of land, same being the southeast corner of Lot 1, Block "A" of Penske South Subdivision as recorded in Document Number 200600272 of the Official Public Records of Travis County, Texas, and being the most easterly northeast corner of this tract of land;

THENCE S 45' 18' 46" W, along said right-of-way line, a distance of 21.73 feet to a mag nail set in the remains of a TXDOT Highway Concrete Monument at the point of curvature of a curve to the left (concave to the east);

THENCE along said curve, having the following elements: a central angle of 45' 38' 57", a radius of 859.83 feet and an arc length of 685.05 feet, the chord of which bears S 22° 39' 09" W a distance of 667.08 feet to a 112" iron rod found for the south corner of said 1.682 acre tract of land and this tract of land said point also being on the east line of Lot 5 of said Dunnahoo Subdivision;

THENCE N 02° 36' 35" W, along the common dividing line between said 1.682 acre tract of land and said Lot 5, a distance of 273.33 feet to a 112" iron rod found for the northeast corner of said Lot 5, same being the southeast corner of said Lot 3;

THENCE S 87° 36' 22" W, along the common dividing line between said Lot 5 and said Lot 3, a distance of 82.66 feet to a 112" iron rod found for the most easterly southwest corner of this tract of land;

THENCE through said Lot 3 the following three (3) courses and distances to a 112" iron rod found at the terminus of each course:

- 1) N 02° 05' 54" W 249.49 feet
- 2) N 76° 07' 09" W 72.96 feet, and
- 3) S 87° 36' 47" W 366.23 feet to a 112" iron rod found at the point of intersection with the east right-of-way line of Cullen Lane (ROW varies) same being the east line of a Street Deed to the city of Austin as recorded in Volume 12925, Page 93 of the Real Property Records of Travis County, Texas, and being the farthest west southwest corner of this tract of land;

THENCE N 07° 40' 16" E, along said right-of-way line, same being the east line of said street deed and the west line of this tract of land, a distance of 500.76 feet to a 1/2" iron rod found for the northeast corner of said street deed at the point of intersection with the north line of said Lot 3, same being the south line of tract 1 of the E. K. Stegall Subdivision conveyed by deed to Gary D. Rhodes as recorded in Document No. 2014061989 of the Official Public Records of Travis County, Texas;

THENCE N 87° 21' 54" E, along the common dividing line between Lot 3 and said Tract 1, a distance of 427.25 feet to a 1/2" iron rod found for the northeast corner of said Lot 3, same being on the west line of that certain tract of land conveyed by deed to the Pennington Limited Partnership as recorded in Document number 2007095447;

THENCE S 02° 36' 35" E, along the common dividing line between Lot 3 said Pennington Limited Partnership Tract of land and the west line of Lot 1, Block "A" of the Penske South Subdivision as recorded in Document No. 200600272 of the Official Public Records of Travis County, Texas, a distance of 330.63 feet to a 1/2" iron rod found for the southwest corner of said Lot 1, same being the northwest corner of said called 1.682 acre tract of land;

THENCE S 76°00'23" E (Basis of Bearings) along the common dividing line between said Lot 1 and said called 1.682 acre tract of land, a distance of 313.89 feet to THE POINT OF BEGINNING and containing 7.558 acres of land, more or less.

Exhibit "B" - Lease

[to be attached]