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Objection Deadline: May 10, 2011 at 4:00 p.m.

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**UNITED STATES BANKRUPTCY COURT  
THE SOUTHERN DISTRICT OF NEW YORK**

In re:

JENNIFER CONVERTIBLES, INC., et al.,<sup>1</sup>

Debtors.

Chapter 11

Case No. 10-13779 (ALG)

(Jointly Administered)

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**MOTION OF MICO ARCHIBALD PARTNERS, LLC FOR  
ALLOWANCE AND PAYMENT OF ADMINISTRATIVE EXPENSE CLAIM**

Creditor MICO Archibald Partners, LLC ("MICO" or "Landlord") – by and through its undersigned counsel – hereby requests that this Court enter an order, pursuant to sections

<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, if applicable, are: (i) Jennifer Convertibles, Inc. (4646); (ii) Jennifer Convertibles Boylston MA, Inc. (7904); (iii) Jennifer Chicago Ltd. (0505); (iv) Elegant Living Management, Ltd. (5049); (v) Hartsdale Convertibles, Inc. (1681); (vi) Jennifer Management III Corp. (3552); (vii) Jennifer Purchasing Corp. (7319); (viii) Jennifer Management II Corp. (9177); (ix) Jennifer Management V Ltd. (9876); (x) Jennifer Convertibles Natick, Inc. (2227); (xi) Nicole Convertibles, Inc. (5985); (xii) Washington Heights Convertibles, Inc. (0783).

503(b)(1)(A) and 365(d)(3) of title 11 of the United States Code (the "**Bankruptcy Code**"), allowing and directing payment of MICO's administrative expense claim, as further described below. In support of this Motion, MICO states as follows:

I.  
**JURISDICTION AND VENUE**

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334, and pursuant to Section 13.01 of the *Second Amended Joint Chapter 11 Plan of Reorganization for Jennifer Convertibles, Inc. and Its Affiliated Debtors*, dated January 24, 2011 [Docket No. 466], confirmed by this Court on February 9, 2011 [Docket No. 491]. Venue in this district is proper pursuant to 28 U.S.C. § 1409(a). This motion concerns a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

2. The statutory predicates for the relief requested in this Motion are sections 503(b)(1)(A) and 365(d)(3) of the Bankruptcy Code.

II.  
**BACKGROUND**

3. On July 18, 2010 (the "**Petition Date**"), Jennifer Convertibles, Inc. ("**Jennifer**" or "**Tenant**"), along with several affiliated entities (collectively, the "**Debtors**"), filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code, which case is pending before this Court as case number 10-13779 (ALG).

4. Jennifer and the Debtors have continued to operate their business and manage their properties as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

5. MICO, as landlord, and Jennifer, as tenant, entered into a commercial real property lease agreement, dated July 15, 2007, (the "**Lease**") under which Jennifer occupied the

commercial premises located at 2530-A Lindsay Privado, Ontario, California (the "**Premises**").

A true and correct copy of the Lease is attached to this Motion as Exhibit A.

6. Under the Lease, Jennifer agreed and promised to pay all charges for "Base Rent" and "Additional Rent", as those terms are defined in the Lease and as are more specifically described below and in the attached exhibits.

7. Specifically, Section 1.10 of the Lease provides that Base Rent during the period after the Petition Date was to be paid at the rate of \$32,173.93 per month. Under Sections 3.01 and 4.01 of the Lease, all Base Rent and Additional Rent charges are to be paid in full on the first day of each month in advance. Section 4.01 of the Lease also defines Additional Rent as "[a]ll charges payable by Tenant other than Base Rent. . . . The term "rent" or "Rent" shall mean both Base Rent and Additional Rent."

8. Under Section 4.02 of the Lease, Tenant is required to pay, as Additional Rent, all real property taxes assessed against the Premises. Under Section 4.03 of the Lease, Tenant is required to pay, as Additional Rent, all utility charges assessed by Landlord. Under Section 4.05 of the Lease, Tenant is also required to pay, as Additional Rent, all asphalt reserve charges, all painting reserve charges, all roof reserve charges, all common area maintenance charges and all property management charges assessed by Landlord.

9. In addition, Section 12.01 of the Lease requires Tenant to pay any costs, expenses and liability Landlord incurs in any proceeding necessary to protect Landlord's interests under the Lease in a bankruptcy proceeding and to reimburse Landlord for any costs and expenses Landlord incurs in connection with any defaults under the Lease, including without limitation, Landlord's legal fees and costs.

10. Under Section 6.04 of the Lease, Tenant is also required – at Tenant's sole cost and expense – to keep all portions of the Premises "in good condition, order, and repair. . . ." Section 6.04 further provides that "[i]t is the intention of Landlord and Tenant that, at all times during the Lease Term, Tenant shall maintain the Property in an attractive, first-class, and fully operative condition."

11. On August 31, 2010, this Court entered its *Order Approving Expedited Procedures for Rejection of Certain Unexpired Leases of Nonresidential Real Property* [Docket No. 199] (the "**Lease Rejection Procedures Order**").

12. On January 10, 2011, pursuant to the Lease Rejection Procedures Order, Tenant filed its *Notice of Proposed Rejection of Unexpired Leases* [Docket No. 422] (the "**Lease Rejection Notice**") under which it rejected the Lease. Under the terms of the Lease Rejection Procedures Order and the Lease Rejection Notice, the effective date of Tenant's rejection of the Lease was the date Tenant returned the Premises keys to Landlord.

13. On February 8, 2011, Tenant returned the Premises keys to Landlord.

### **III. RELIEF REQUESTED**

14. Section 365(d)(3) of the Bankruptcy Code provides, in pertinent part, that Jennifer shall "timely perform all the obligations...arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title." 11 U.S.C. § 365(d)(3). Section 503(b)(1) of the Bankruptcy Code provides that the actual, necessary costs and expenses of the estate shall be paid as administrative expenses of a bankruptcy estate after notice and a hearing. 11 U.S.C. § 503(b)(1). Until February 8, 2011, the Lease was an unexpired lease of nonresidential real

property, and Jennifer was obligated to timely pay, in full, all post-petition Lease charges accruing from the Petition Date through February 8, 2011 (the "**Pre-Rejection Period**").

15. In this case, Jennifer repeatedly failed to pay post-petition Base Rent and Additional Rent required by both the Bankruptcy Code and the Lease. Those unpaid post-petition lease charges total \$146,562.68 – plus unliquidated amounts for attorney's fees and costs (the "**Claim**") – during the Pre-Rejection Period. Landlord now requests that the Court approve the Claim as an administrative expense of the Debtor's estate under the Lease and pursuant to sections 365(d)(3) and 503(b)(1)(A) of the Bankruptcy Code, and direct that the Claim be paid by the Debtors.

16. The Claim includes (1) \$17,519.88 in "Stub Rent" charges for the post-petition period of July 18, 2010-July 31, 2010, (2) \$14,131.95 in post-petition real property taxes invoiced and owed in November, 2010, (3) \$107,125.71 in unpaid base rent and additional rent lease charges for the post-petition and pre-rejection months of December 2010, January 2011, and February 2011, (4) \$7,785.14 for site repair and maintenance defaults occurring during the post-petition and pre-rejection period, and (5) unliquidated amounts for legal costs recoverable under the Lease as additional rent, further broken down as follows:

July 18-July 31, 2010 ("Stub Rent") Lease Charges	\$17,519.88
November 1, 2010 Real Estate Tax Additional Rent Charges	\$14,131.95
December, 2010 Base Rent Charges	\$32,173.93
December, 2010 Painting Reserve Additional Rent Charges	\$204.06
December, 2010 Roof Reserve Additional Rent Charges	\$1,001.42
December, 2010 CAM Additional Rent Charges	\$758.00
December, 2010 Property Management Additional Rent Charges	\$1,040.10

December, 2010 Utility Additional Rent Charges	\$327.00
January, 2011 Base Rent Charges	\$32,173.93
January, 2011 Painting Reserve Additional Rent Charges	\$204.06
January, 2011 Roof Reserve Additional Rent Charges	\$1,001.42
January, 2011 CAM Additional Rent Charges	\$758.00
January, 2011 Property Management Additional Rent Charges	\$1,040.10
January, 2011 Utility Additional Rent Charges	\$327.00
February, 2010 Base Rent Charges	\$32,173.93
February, 2010 Painting Reserve Additional Rent Charges	\$204.06
February, 2010 Roof Reserve Additional Rent Charges	\$1,001.42
February, 2010 CAM Additional Rent Charges	\$758.00
February, 2010 Property Management Additional Rent Charges	\$1,040.10
February, 2010 Utility Additional Rent Charges	\$327.00
Dock and Door Repair Additional Rent Charges	\$2,695.00
Warehouse Ceiling Foil/Lighting Repair Additional Rent Charges	\$4,908.00
HVAC Repair Additional Rent Charges	\$182.14
<b>TOTAL</b>	<b>\$146,562.68</b>

17. More specifically, the rental rate for the Premises during the "Stub Month" period of July 18-July 31, 2010 amounts to \$1,251.42 per day. Accordingly, the total Base Rent owed by Tenant for the 14-day period of July 18-July 31, 2010 amounts to \$17,519.88. A detailed explanation of the "Stub Rent" calculations is attached to this Motion as Exhibit B.

18. In addition, Tenant failed to keep the Premises "in good condition, order, and repair" and Tenant failed to maintain the Premises "in an attractive, first-class, and fully

operative condition" during the post-petition and pre-rejection period as required by Section 6.04 of the Lease. This default under the Lease has forced Landlord to incur \$7,785.14 in Premises maintenance and repair costs. These costs are completely independent from more than \$13,378.55 in additional site restoration and cleaning costs resulting from Tenant's February 8, 2011 rejection of the Lease and abandonment of the Premises. Accordingly, the \$7,785.14 in repair charges are payable by Tenant as administrative costs.

19. Finally, Landlord has incurred—and is currently incurring—legal costs and expenses in protecting its rights to payment of Base Rent and Additional Rent during the Pre-Rejection Period despite its attempts to collect these amounts without having to resort to the filing of this Motion. As those amounts are continuing to accrue, they are currently unliquidated. Notwithstanding the currently unliquidated nature of this portion of the Claim, Landlord is prepared to provide a liquidated amount upon request, but without prejudice to the Landlord's right to assert additional amounts for on-going costs and expenses of this Motion and any other efforts undertaken to collect the Claim amounts.

#### **IV. ARGUMENT**

20. Section 365(d)(3) of the Bankruptcy Code provides that a debtor "shall timely perform all the obligations of the debtor . . . arising from and after the order for relief under any expired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1)." 11 U.S.C. 365(d)(3); *see Omni Partners, L.P. v. Pudgie's Dev. of NY, Inc. (In re Pudgie's Dev. of NY, Inc.)*, 239 B.R. 688, 692 (S.D.N.Y. 1999); *In re P.J. Clarke's Restaurant Corp.*, 265 B.R. 392, 396-97 (Bankr. S.D.N.Y. 2001); *In re Microvideo Learning Systems, Inc.*, 232 B.R. 602, 604 (Bankr. S.D.N.Y. 1999); *In re Wingspread Corp.*, 116

B.R. 915, 925-26 (Bankr. S.D.N.Y. 1990); *see also Towers v. Chickering & Gregory (In re Pacific-Atlantic Trading Co.)*, 27 F.3d 401, 405 (9th Cir. 1994).

21. Under section 365(d)(3), Tenant was required to pay all post-petition Lease charges in full and on time during the Pre-Rejection Period. Because Tenant repeatedly failed to meet its obligations under the Bankruptcy Code and the Lease, Landlord respectfully requests payment of all outstanding Base Rent, Additional Rent and other Lease charges in the amount of \$146,562.68—plus unliquidated amounts for further costs and fees under Section 12.01 of the Lease—as an administrative expense claim.

22. That those administrative amounts include "Stub Rent" for the post-petition period from July 18, 2010 through July 31, 2010 is clear. In *In re Stone Barn Manhattan LLC*, 398 B.R. 359, 365 (Bankr. S.D.N.Y. 2008), the court ruled that tenants were obligated to pay "Stub Rent" "measured on a daily basis as it accrued after the date of the orders for relief . . . until the end of that month." As explained above, those "Stub Rent" charges total \$17,519.88 in this case.

23. Both the Bankruptcy Code and the Lease require payment of each of the post-petition Lease charges making up the Claim filed by MICO. Accordingly, this Claim is payable as an administrative expenses of the estate. In making this request, MICO reserves the right to amend its Claim to assert additional and other administrative expense claims against the Tenant, or to make any other claims or assert any defenses in these bankruptcy cases.

## V.

### LOCAL RULE 9013-1(a) CERTIFICATION

24. This Motion includes citations to the applicable rules and statutory authorities upon which the relief requested herein is predicated and the legal authorities that support the requested relief. Accordingly, Landlord submits that the Motion satisfies Local Rule 9013-1(a).



**VI.**  
**NO PRIOR REQUEST**

25. No prior motion for the relief requested herein has been made to this Court or any other court.

**VII.**  
**CONCLUSION**

WHEREFORE, for all of the reasons set forth above, MICO Archibald Partners, LLC, as Landlord, respectfully requests that the Court grant the Motion and enter an Order pursuant to sections 365(d)(3) and 503(b)(1)(A) of the Bankruptcy Code, substantially in the form attached hereto as Exhibit C, (i) allowing the Claim as an allowed administrative claim in an amount equal to \$146,562.68, plus unliquidated attorneys' fees and costs; (ii) directing the Debtors to pay the Claim in an amount equal to \$146,562.68, plus unliquidated attorneys' fees and costs; and (iii) granting such other and further relief as may be just and proper.

Dated: New York, New York  
April 25, 2011

SHEPPARD MULLIN RICHTER & HAMPTON LLP

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*Counsel for MICO Archibald Partners, LLC*

**Exhibit A**  
**(Lease)**

**ORIGINAL**

**STANDARD INDUSTRIAL REAL ESTATE LEASE**

**MICO ARCHIBALD PARTNERS, LLC,  
a Delaware limited liability company,**

**as Landlord,**

**and**

**JENNIFER CONVERTIBLES, INC.,  
a Delaware corporation,**

**as Tenant**

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**STANDARD INDUSTRIAL REAL ESTATE LEASE**

**(MULTI-TENANT NET LEASE FORM)**

**ARTICLE ONE: BASIC TERMS**

This Article One contains the Basic Terms of this Lease between the Landlord and Tenant named below. Other Articles, Sections and Paragraphs of this Lease referred to in this Article One explain and define the Basic Terms and are to be read in conjunction with the Basic Terms.

Section 1.01. **Date of Lease:** July 15, 2007

Section 1.02. **Landlord (include legal entity):** MICO ARCHIBALD PARTNERS, LLC,  
a Delaware limited liability company

Address of Landlord: 13191 Crossroads Parkway North  
Sixth Floor  
City of Industry, California 91746  
Attention: Property Manager

Section 1.03. **Tenant (include legal entity):** JENNIFER CONVERTIBLES, INC.,  
a Delaware corporation

Address of Tenant: Jennifer Convertibles, Inc.  
419 Crossways Park Drive  
Woodbury, New York 11797  
Attention: Edward B. Seidner  
Telephone: 516-496-1900 ext. 3228  
Fax: 212-575-8525

with copy to: Law Offices of Wincig & Wincig  
574 Fifth Avenue, 2nd Floor  
New York, NY 10036  
Attention: Owen Wincig, Esq.  
Telephone: 212-575-8333  
Fax: 212-575-8525

Section 1.04 **Park/Building/Property:** The "Park" is Landlord's multi-building real property development situated in Ontario, California, more commonly known as Archibald Business Center, that includes eleven 11 buildings with collectively an approximate 600,576 interior square feet. The Park includes the land, the Building, other buildings and all other improvements located on the land, and the common areas described in Paragraph 4.05(a). The "Building" is located in the Park and consists of an approximately 140,000 square foot building more commonly known as 2530 E. Lindsay Privado, Ontario, California. The "Property" is that approximately 68,021 square foot portion of the Building commonly known as 2530-A E. Lindsay Privado, Ontario, California, and outlined in red on Exhibit "A" attached hereto subject to the nonexclusive use of such area as outlined in green on Exhibit "A", excluding the parking area as outlined and crosshatched in blue on Exhibit "A". The Park, the Building and the Property are depicted on Exhibit "A" attached hereto.

Section 1.05 **Term.**

(a) **Lease Term:** One Hundred Twenty (120) Lease Months

(b) **Lease Commencement Date:** November 15, 2007

(c) **Lease Expiration Date:** November 30, 2017

Section 1.06. **Permitted Uses:** (See Article Five) Only for warehousing, storage and distribution of furniture and for administrative uses related thereto.

Section 1.07. **Initial Security Deposit:** (See Section 3.03) \$29,929.24

Section 1.08. **Tenant's Guarantor: [If none, so state]** None

**Section 1.09. Brokers: (See Article Thirteen)**

Landlord's Broker: Majestic Realty Co.  
13191 Crossroads Parkway North  
Sixth Floor  
City of Industry, California 91746

Tenant's Broker: Jeff Smith, Senior Vice President  
Lee & Associates - Ontario, Inc.  
3535 Inland Empire Boulevard  
Ontario, CA 91784  
Telephone: (909) 989-7771  
Facsimile: (909) 373-2990  
E-mail: [jsmith@lee-assoc.com](mailto:jsmith@lee-assoc.com)

**Section 1.10. Base Rent:**

<u>Lease Month</u>	<u>Monthly Installment of Base Rent</u>
1 through 30	\$29,929.24
31 through 60	\$32,173.93
61 through 90	\$34,587.00
91 through 120	\$37,181.00

**ARTICLE TWO: LEASE TERM**

**Section 2.01. Lease of Property For Lease Term.** The term of this Lease (the "Lease Term") shall be as set forth in Section 1.05(a) and shall commence on the date (the "Lease Commencement Date") set forth in Section 1.05(b) (and shall not be subject to Landlord's completion of the Tenant Improvements as described on Exhibit "F" attached hereto) and shall terminate on the date (the "Lease Expiration Date") set forth in Section 1.05(c), unless sooner terminated or extended as hereinafter provided. At any time during the Lease Term, Landlord may deliver to Tenant a notice of Lease Term Dates in the form as set forth in Exhibit "E", attached hereto, which notice Tenant shall execute and return to Landlord within five (5) days of receipt thereof. The terms and provisions of this Lease shall be effective as of the date of this Lease.

**Section 2.02. No Delay in Commencement.** Tenant accepts delivery of possession of the Property from Landlord as of the Date of Lease.

**Section 2.03. Early Occupancy.** As of the Date of Lease, Tenant shall have the right to occupy the Property for the purposes of installing and/or storing over standard equipment or fixtures, preparing the Property for Tenant's use, and conducting Tenant's business; provided that: (i) Landlord and Tenant shall have fully executed and delivered this Lease; (ii) Landlord has received the Security Deposit and first month's Base Rent; (iii) [intentionally omitted]; (iv) Tenant and its agents do not interfere with Landlord's work on the Property; (v) prior to Tenant's entry into the Property, Tenant shall submit a schedule to Landlord for approval, which schedule shall detail the timing and purpose of Tenant's entry; (vi) Tenant has obtained its insurance policies as set forth in Section 4.04 of this Lease and Landlord is in receipt of Tenant's insurance binder naming Landlord as additional insured; and (vii) all of the terms and conditions of this Lease shall apply, other than Tenant's obligation to pay Base Rent, as though the Lease Commencement Date had occurred (although the Lease Commencement Date shall not actually occur until the occurrence of the same pursuant to the terms of Section 2.01) upon such entry into the Property by Tenant. Tenant shall be responsible for payment of real estate taxes and insurance premiums for the Property and Tenant's Pro Rata Share of Common Area costs during this early entry period. Tenant shall hold Landlord harmless from and indemnify, protect and defend Landlord against any loss or damage to the Property and against injury to any persons caused by Tenant's actions or anyone's actions who are directly or indirectly employed by the Tenant pursuant to this Section 2.03. Tenant shall assume all risk of loss to Tenant's personal property, merchandise and fixtures.

**Section 2.04. Holding Over.** If Tenant holds over after the expiration of the Lease Term hereof, with or without the express or implied consent of Landlord, such tenancy shall be from month-to-month only, and shall not constitute a renewal hereof or an extension for any further term, and in such case Base Rent shall be payable at a monthly rate equal to twice the immediately prior Base Rent applicable during the last rental period of the Lease Term under this Lease. Such month-to-month tenancy shall be subject to every other term, covenant and agreement contained herein. Nothing contained in this Section 2.04 shall be construed as consent by Landlord to any holding over by Tenant, and Landlord expressly reserves the right to require Tenant to surrender possession of the Property to Landlord as provided in this Lease upon the expiration or other termination of this Lease. The provisions of this Section 2.04 shall not be deemed to limit nor constitute a waiver of any other rights or remedies of Landlord provided herein or at law. If Tenant fails to surrender the Property upon the termination or expiration of this Lease, in addition to any other liabilities to Landlord accruing therefrom, Tenant shall protect, defend, indemnify and hold Landlord harmless from all loss, costs (including reasonable attorneys' fees) and liability resulting from such failure, including, without limiting the generality of the foregoing, any claims made by any succeeding tenant founded upon such failure to surrender, and any lost profits to Landlord resulting therefrom.

**Section 2.05. Option to Extend Lease Term.**

**2.05.1 Option Right.** Landlord hereby grants to the Tenant two (2) options (each, an "Option") to extend the Lease Term for a period of five (5) years (an "Option Term") on the same terms and conditions as set forth in this Lease but at an increased Base Rent, as set forth below. Such Option shall be exercisable only by written notice delivered by Tenant to Landlord not more than two hundred seventy (270) days nor less than one hundred eighty (180) days prior to the expiration of the Lease Term. If Tenant fails to deliver Landlord written notice of the exercise of an Option within the above referenced prescribed time period, such Option and any succeeding Options shall lapse, and there shall be no further right to extend the Lease Term. Each Option shall be exercisable by Tenant on the express conditions that, at the time of the exercise, Tenant shall not be in default under any of the provisions of this Lease and, at all times during the Lease Term, Tenant shall not have failed to cure any default within the required period more than once every twelve (12) months.

**2.05.2 Personal.** The Option(s) granted herein are personal to the Tenant named above (the "Original Tenant") and shall not be transferable to any other person or entity, including (but not limited to) any sublessee of all or any portion of the Property and any assignee or other transferee of Tenant's interest in this Lease, whether such interest was assigned or transferred intentionally or by operation of law. If Tenant subleases any portion of the Property or assigns or otherwise transfers any interest under this Lease to an entity prior to the exercise of an Option (whether with or without Landlord's consent), such Option and any succeeding Options shall lapse. If Tenant subleases any portion of the Property or assigns or otherwise transfers any interest of Tenant under this Lease to an entity after the exercise of an Option but prior to the commencement of the respective Option Term (whether with or without Landlord's consent), then such Option and any succeeding Options shall lapse, in Landlord's sole discretion, and the Lease Term shall expire as if such Option were not exercised. If Tenant subleases any portion of the Property or assigns or otherwise transfers any interest of Tenant under this Lease after the exercise of an Option and after the commencement of the Option Term related to such Option, then the term of this Lease shall expire upon the expiration of the Option Term during which such sublease or transfer occurred and only the succeeding Options shall lapse.

**2.05.3 Option Rent.** The Base Rent payable by Tenant during each Option Term (the "Option Rent") shall commence upon the first day of the first month of each respective Option Term (each a "Option Rental Adjustment Date") and shall be an amount equal to the greater of (i) the Base Rent being paid by Tenant under this Lease immediately prior to the Option Term and (ii) the face or stated rent, including all escalations, being quoted by landlords for non-sublease, non-encumbered space comparable in size, location and quality to the Property for a term of five (5) years ("Fair Market Value"). In no event shall Landlord be entitled to provide or consider any tenant improvement or other allowances or concessions in connection with the Option Rent. The "Fair Market Value" of the Property shall be determined in the following manner:

(a) Not later than one hundred (100) days prior to the applicable Option Rental Adjustment Date, Landlord and Tenant shall meet in an effort to negotiate, in good faith, the Fair Market Value of the Property as of such Option Rental Adjustment Date. If Landlord and Tenant have not agreed upon the Fair Market Value of the Property at least ninety (90) days prior to the applicable Option Rental Adjustment Date, the Fair Market Value shall be determined as follows:

(b) If Landlord and Tenant are not able to agree upon the Fair Market Value of the Property within the above referenced prescribed time period, then Landlord and Tenant shall attempt to agree in good faith upon a single appraiser not later than seventy-five (75) days prior to the applicable Option Rental Adjustment Date. If Landlord and Tenant are unable to agree upon a single appraiser within such time period, then Landlord and Tenant shall each appoint one appraiser, as indicated above, not later than sixty-five (65) days prior to the applicable Option Rental Adjustment Date. Within ten (10) days thereafter, the two appointed appraisers shall appoint a third appraiser, as indicated above. If either Landlord or Tenant fails to appoint its appraiser within the prescribed time period, the single appraiser appointed shall determine the Fair Market Value of the Property. If both parties fail to appoint appraisers within the prescribed time periods, then the first appraiser thereafter selected by a party shall determine the Fair Market Value of the Property. Each party shall bear the cost of its own appraiser and the parties shall share equally the cost of the single or third appraiser, if applicable. The above referenced appraisers shall have at least five (5) years' experience in appraising, for sale and lease, of commercial/industrial real property in the area in which the Property is located and shall be members of professional organizations such as the Society of Industrial Realtors or equivalent.

(c) For the purposes of such appraisal, the term "Fair Market Value" shall mean the price that a ready and willing tenant would pay, as of the applicable Option Rental Adjustment Date, and a ready and willing landlord of property comparable to the Property would accept, as monthly rent if such property were exposed for lease on the open market for a reasonable period of time and taking into account all of the purposes for which such property may be used. If a single appraiser is chosen, then such appraiser shall determine the Fair Market Value of the Property. Otherwise, the Fair Market Value of the Property shall be the arithmetic average of the two (2) of the three (3) appraisals which are closest in amount, and the third appraisal shall be disregarded. In no event, however, shall the Base Rent be reduced by reason of such computation below the Base Rent being paid by Tenant under this Lease immediately prior to the applicable Rental Adjustment Date. Landlord and Tenant shall instruct the appraiser(s) to complete their determination of the Fair Market Value not later than thirty (30) days prior to the applicable Option Rental Adjustment Date. If the Fair Market Value is not determined prior to the applicable Option Rental Adjustment Date, then Tenant shall continue to pay to Landlord the Base Rent applicable to the Property immediately prior to such Option Term, until the Fair Market Value is determined. When the Fair Market Value of the Property is determined, Landlord shall deliver notice thereof to Tenant,



and Tenant shall pay to Landlord, within ten (10) days after receipt of such notice, the difference between the Base Rent actually paid by Tenant to Landlord and the new Base Rent determined hereunder.

### ARTICLE THREE: BASE RENT; SECURITY DEPOSIT

**Section 3.01. Time and Manner of Payment.** Upon execution of this Lease, Tenant shall pay Landlord the Base Rent in the amount stated in Paragraph 1.10 above for the first month of the Lease Term. On the first day of the second month of the Lease Term and each month thereafter, Tenant shall pay Landlord the Base Rent, in advance, without offset, deduction or prior demand. The Base Rent shall be payable at Landlord's address or at such other place as Landlord may designate in writing. If any rental payment date (including the Lease Commencement Date) falls on a day of the month other than the first day of such month or if any rental payment is for a period which is shorter than one month, then the rental for any such fractional month shall be a proportionate amount of a full calendar month's rental. All other payments or adjustments required to be made under the terms of this Lease that require proration on a time basis shall be prorated on the same basis. As used herein, the term "Lease Month" shall mean each consecutive month during the Lease Term, with the first Lease Month commencing on the Lease Commencement Date. For purposes of this Lease, the term "Lease Year" shall mean each consecutive twelve (12) month period during the Lease Term commencing with the first Lease Month.

**Section 3.02. CPI Increase. Intentionally deleted.**

**Section 3.03. Security Deposit; Increases.**

(a) Upon the execution of this Lease, Tenant shall deposit with Landlord a cash Security Deposit in the amount set forth in Section 1.07 above. Landlord may apply all or part of the Security Deposit to any unpaid rent or other charges due from Tenant or to cure any other defaults of Tenant. If Landlord uses any part of the Security Deposit, Tenant shall restore the Security Deposit to its full amount within ten (10) days after Landlord's written request. Tenant's failure to do so shall be a material default under this Lease. Tenant is not entitled to any interest on the Security Deposit. Landlord shall not be required to keep the Security Deposit separate from its other accounts and no trust relationship is created with respect to the Security Deposit.

(b) Each time the Base Rent is increased, Tenant shall deposit additional funds with Landlord sufficient to increase the Security Deposit to an amount which bears the same relationship to the adjusted Base Rent as the initial Security Deposit bore to the initial Base Rent.

(c) Upon termination of this Lease, not resulting from Tenant's default, and after Tenant has vacated the Property in the manner required by this Lease, Landlord shall refund or credit to Tenant (or Tenant's successor) the unused portion of the Security Deposit.

### ARTICLE FOUR: OTHER CHARGES PAYABLE BY TENANT

**Section 4.01. Additional Rent.** All charges payable by Tenant other than Base Rent are called "Additional Rent." Unless this Lease provides otherwise, Tenant shall pay all Additional Rent then due with the next monthly installment of Base Rent. The term "rent" or "Rent" shall mean Base Rent and Additional Rent. Without limitation on other obligations of Tenant which shall survive the expiration or earlier termination of the Lease Term, the obligations of Tenant to pay Rent shall survive the expiration or earlier termination of the Lease Term. The failure of Landlord to timely furnish Tenant the amount of the Rent shall not preclude Landlord from enforcing its rights to collect such Rent.

**Section 4.02. Property Taxes.**

(a) **Real Property Taxes.** Tenant shall pay all real property taxes and assessments levied against the Property, as well as any improvements thereto (including any fees, taxes or assessments against, or as a result of, any tenant improvements installed on the Property by or for the benefit of Tenant) during the Lease Term. Subject to Paragraph 4.02(c) and Section 4.08 below, such payment shall be made at least ten (10) days prior to the delinquency date of the taxes. Within such ten (10) day period, Tenant shall furnish Landlord with satisfactory evidence that the real property taxes have been paid. Landlord shall reimburse Tenant for any real property taxes paid by Tenant covering any period of time prior to or after the Lease Term. Alternatively, Landlord may elect to bill Tenant in advance for such taxes and Tenant shall pay Landlord the amount of such taxes, as Additional Rent, at least ten (10) days prior to delinquency date of the taxes. Landlord shall pay such taxes prior to such delinquency date, provided that Tenant has timely made such payments to Landlord. Any penalty caused by Tenant's failure to timely make such payments shall also be Additional Rent owed by Tenant immediately upon demand.

(b) **Definition of "Real Property Tax."** "Real property tax" means: (i) any fee, license fee, license tax, business license fee, commercial rental tax, levy, charge, assessment, penalty or tax imposed by any taxing authority against the Property; (ii) any tax on the Landlord's right to receive, or the receipt of, rent or income from the Property or against Landlord's business of leasing the Property; (iii) any tax or charge for fire protection, streets, sidewalks, road maintenance, refuse or other services provided to the Property by any governmental agency; (iv) any tax imposed upon this transaction or based upon a re-assessment of the Property due to a change of ownership, as defined by applicable law, or other transfer of all or part of Landlord's interest in the Property; and (v) any charge or fee replacing any tax previously included within the definition of real property tax. "Real property tax" does not, however, include Landlord's federal or state income, franchise, inheritance or estate taxes.

(c) **Joint Assessment.** If the Property is not separately assessed, Landlord shall reasonably determine Tenant's share of the real property tax payable by Tenant under Paragraph 4.02(a) from the assessor's worksheets or other reasonably available information. Tenant shall pay such share to Landlord within fifteen (15) days after receipt of Landlord's written statement.

**(d) Personal Property Taxes.**

(i) Tenant shall pay all taxes charged against trade fixtures, furnishings, equipment or any other personal property belonging to Tenant. Tenant shall try to have personal property taxed separately from the Property.

(ii) If any of Tenant's personal property is taxed with the Property, Tenant shall pay Landlord the taxes for the personal property within fifteen (15) days after Tenant receives a written statement from Landlord for such personal property taxes.

(e) **Tenant's Right to Contest Taxes.** Tenant may attempt to have the assessed valuation of the Property reduced or may initiate proceedings to contest the real property taxes. If required by law, Landlord shall join in the proceedings brought by Tenant; however, Tenant shall pay all costs of the proceedings, including any costs or fees incurred by Landlord, and shall receive the full amount of any refund or rebate of real property taxes achieved in such proceedings that Tenant shall have previously paid or shall be obligated to pay. The real property taxes shall be paid when due; provided, however, Tenant shall have the right to pay such taxes under protest.

**Section 4.03. Utilities.** Tenant shall pay, directly to the appropriate supplier, the cost of all natural gas, heat, light, power, sewer service, telephone, water, refuse disposal and other utilities and services supplied to the Property. However, if any services or utilities are jointly metered with other properties, Landlord shall make a reasonable determination of Tenant's proportionate share of the cost of such utilities and services and Tenant shall pay such share to Landlord within fifteen (15) days after receipt of Landlord's written statement.

**Section 4.04. Insurance Policies.**

(a) **Landlord Insurance.** During the Lease Term, Landlord shall maintain policies of insurance covering loss of or damage to the Property in the full amount of its replacement value. Such policy shall provide protection against loss or damage due to fire or other casualties covered within the classification of fire standard extended coverage, vandalism, malicious mischief, sprinkler leakage and any other perils which Landlord, Landlord's lender or ground lessor deems reasonably necessary. Landlord shall have the right to obtain terrorism, flood and earthquake insurance and other forms of insurance as required by any lender holding a security interest in the Property or any ground lessor. Landlord shall not obtain insurance for Tenant's fixtures or equipment or building improvements installed by Tenant on the Property. During the Lease Term, Landlord shall also maintain a rental income insurance policy, with loss payable to Landlord, in an amount equal to one year's Base Rent, plus estimated real property taxes and insurance premiums. Tenant shall be liable for the payment of any deductible amount under Landlord's or Tenant's insurance policies maintained pursuant to this Section 4.04; provided, however, Landlord's insurance deductible shall not exceed Ten Thousand Dollars (\$10,000.00). Tenant shall not do or permit anything to be done which invalidates any such insurance policies. Landlord, at its sole option, may also obtain non-primary comprehensive public liability insurance in an amount and with coverage determined by Landlord, insuring Landlord against liability arising out of ownership, operation, use or occupancy of the Property. The policy obtained by Landlord shall not be contributory nor primary as to Tenant's liability insurance hereunder.

(b) **Tenant Insurance.** During this Lease Term, Tenant, at Tenant's sole cost and expense, shall maintain: (1) Statutory Workers' Compensation and Employer's Liability insurance (or state approved self insurance), with a limit of Two Million Dollars (\$2,000,000), each accident, Two Million Dollars (\$2,000,000) policy limit, and Two Million Dollars (\$2,000,000) each employee for all persons employed by Tenant who may come into or occupy the Building; (2) Commercial Auto Liability with a limit of Two Million Dollars (\$2,000,000) Combined Single Limit for Bodily Injury and Property Damage (such coverage shall include Owned, Non-Owned, and Hired Auto Liability for such vehicles driven on and around the Building, if Tenant does not own company vehicles, a letter to that effect from an officer or principal of Tenant in addition to proof of Non-Owned and Hired Auto Liability as stated above is required); (3) "All Risks" Personal Property insurance, covering the full replacement cost of Tenant's personal property whether owned, leased, or rented, including but not limited to inventory, trade fixtures, furniture, equipment, office contents, any interior improvements constructed within the Property and any alterations to the Property made by Tenant (including such alterations, which according to the terms and conditions of this Lease shall become property of Landlord at the termination of this Lease); and (4) a policy of Commercial General Liability insurance (sometimes known as broad form comprehensive general liability insurance) insuring against liability for bodily injury, property damage (including loss of use of property) and personal injury arising out of the operation, use or occupancy of the Property, with the initial amount of such insurance to be Three Million Dollars (\$3,000,000) per occurrence (collectively, "**Tenant Insurance**"). Tenant Insurance limits shall be subject to periodic increase based upon inflation, increased liability awards, recommendation of Landlord's professional insurance advisers and other relevant factors. Tenant Insurance shall (i) be primary and non-contributing; (ii) contain cross-liability endorsements; (iii) name Landlord as "Additional Insured" and "Loss Payee;" and (iv) insure Landlord against Tenant's performance under Section 5.05. The amount and coverage of such Tenant Insurance shall not limit Tenant's liability nor relieve Tenant of any other obligation under this Lease.

(c) **Payment of Premiums.** Subject to Section 4.08, Tenant shall pay all premiums for the insurance policies described in Paragraphs 4.04(a) and (b) (whether obtained by Landlord or Tenant) within fifteen (15) days after Tenant's receipt of a copy of the premium statement or other evidence of the amount due, except Landlord shall pay all premiums for non-primary comprehensive public liability insurance which Landlord elects to obtain as provided in

Paragraph 4.04(a). If insurance policies maintained by Landlord cover improvements on real property other than the Property, Landlord shall deliver to Tenant a statement of the premium applicable to the Property showing in reasonable detail how Tenant's share of the premium was computed. If the Lease Term expires before the expiration of an insurance policy maintained by Landlord, Tenant shall be liable for Tenant's prorated share of the insurance premiums.

**(d) General Insurance Provisions.**

(i) Before the Lease Commencement Date, Tenant shall deliver to Landlord a copy of any policy of insurance which Tenant is required to maintain under this Section 4.04.

(ii) Any insurance which Tenant is required to maintain under this Lease shall include a provision which requires the insurance carrier to give Landlord not less than thirty (30) days' written notice prior to any cancellation or modification of such coverage.

(iii) If Tenant fails to deliver any policy, certificate or renewal to Landlord required under this Lease within the prescribed time period or if any such policy is canceled or modified during the Lease Term without Landlord's consent, Landlord may obtain such insurance, in which case Tenant shall reimburse Landlord for the cost of such insurance within fifteen (15) days after receipt of a statement that indicates the cost of such insurance.

(iv) Tenant shall maintain all insurance required under this Lease with companies holding a "General Policy Rating" of A-12 or better, as set forth in the most current issue of "Best Key Rating Guide". Landlord and Tenant acknowledge the insurance markets are rapidly changing and that insurance in the form and amounts described in this Section 4.04 may not be available in the future. Tenant acknowledges that the insurance described in this Section 4.04 is for the primary benefit of Landlord. If at any time during the Lease Term, Tenant is unable to maintain the insurance required under this Lease, Tenant shall nevertheless maintain insurance coverage which is customary and commercially reasonable in the insurance industry for Tenant's type of business, as that coverage may change from time to time. Landlord makes no representation as to the adequacy of such insurance to protect Landlord's or Tenant's interests. Therefore, Tenant shall obtain any such additional property or liability insurance which Tenant deems necessary to protect Landlord and Tenant. As an alternative to providing a policy of insurance, Tenant shall have the right to provide Landlord a certificate of insurance, executed by an authorized officer of the insurance company, showing that the insurance which Tenant is required to maintain under this Section 4.04 is in full force and effect and containing such other information which Landlord reasonably requires.

(v) Landlord and Tenant each hereby waives any and all rights of recovery against the other, or against the officers, employees, agents or representatives of the other, for loss of or damage to its property or the property of others under its control, if such loss or damage is covered by any insurance policy in force (whether or not described in this Lease) at the time of such loss or damage. Upon obtaining the required policies of insurance, Landlord and Tenant shall give notice to the insurance carriers of this mutual waiver of subrogation.

**Section 4.05. Common Areas; Use, Maintenance and Costs.**

(a) **Common Areas.** As used in this Lease, "Common Areas" shall mean all areas within the Building and/or Park which are available for the common use of tenants of the Building and/or Park and which are not leased or held for the exclusive use of Tenant or other tenants, including, but not limited to, parking areas, driveways, sidewalks, loading areas, access roads, corridors, landscaping and planted areas. Landlord, from time to time, may change the size, location, nature and use of any of the Common Areas, convert Common Areas into leaseable areas, construct additional parking facilities (including parking structures) in the Common Areas, and increase or decrease Common Area land and/or facilities. Tenant acknowledges that such activities may result in inconvenience to Tenant. Landlord shall use commercially reasonable efforts that such activities do not permanently and materially, negatively impact Tenant's use of the Property.

(b) **Use of Common Areas.** Tenant shall have the nonexclusive right (in common with other tenants and all others to whom Landlord has granted or may grant such rights) to use the Common Areas for the purposes intended, subject to such reasonable rules and regulations as Landlord may establish from time to time. Tenant shall abide by such rules and regulations and shall use its best effort to cause others who use the Common Areas with Tenant's express or implied permission to abide by Landlord's rules and regulations. At any time, Landlord may close any Common Areas to perform any acts in the Common Areas as, in Landlord's judgment, are desirable to improve the Building and/or Park. Tenant shall not interfere with the rights of Landlord, other tenants or any other person entitled to use the Common Areas.

(c) **Maintenance of Common Areas.** Landlord shall maintain the Common Areas in good order, condition and repair, and shall operate the Building and Park, in Landlord's sole discretion, as a first-class industrial/commercial real property development. Tenant shall pay, as Additional Rent, Tenant's Pro Rata Share (as determined below) of all costs incurred by Landlord for the operation and maintenance of the Common Areas. Common Area costs include, but are not limited to, costs and expenses for the following: the landscaping (including without limiting to gardening, tree trimming, replacement or repair of landscaping, landscape irrigation systems, gopher control and similar items); the ESFR fire system (phone line attached thereto) and pump (including testing, monitoring and servicing thereof) Fire sprinkler alarm monitoring system; association dues; outdoor utilities (including without limiting to landscape watering, sewage and lighting); sweeping, cleaning, maintaining, repairing, resurfacing and repaving of driveways, roads, parking areas, yard areas, loading areas, curbs, walkway and other outdoor paved or covered surfaces; insurance (including without limiting to premiums for liability, property damage, fire and other types of casualty insurance on the Common Areas and worker's compensation insurance); all property taxes and assessments levied on or attributable to the Common Areas, all Common

Area improvements and all personal property taxes levied on or attributable to personal property used in connection with the Common Areas; straight-line depreciation on personal property owned by Landlord which is consumed in the operation or maintenance of the Common Areas; rental or lease payments paid by Landlord for rented or leased personal property used in the operation or maintenance of the Common Areas; fees for required licenses and permits; repairing, resurfacing, repaving, maintaining, painting, lighting, cleaning, refuse removal, security and similar items; reserves for roof replacement, exterior painting, resurfacing and repaving or slurring sealing of the parking lot and driveway and other appropriate reserves; and a reasonable management fee. Landlord may cause any or all of such services to be provided by third parties and the cost of such services shall be included in Common Area costs. Common Area costs shall not include depreciation of real property which forms part of the Common Areas.

Notwithstanding the foregoing provisions of Section 4.05(c), Common Area costs for purposes of this Lease shall not, however, include: (A) costs of leasing commissions and attorneys' fees incurred in connection with negotiations or disputes with present or prospective tenants; (B) the costs of tenant improvements installed exclusively for the use of other tenants; (C) the principal payments on mortgages affecting the Project; (D) the costs of capital improvements unless such costs are incurred in connection with the Project and (i) are intended to effect economies in the operation or maintenance of the Project, or any portion thereof, (ii) are required to comply with present or anticipated conservation programs, (iii) are replacements or modifications of nonstructural items located in the Common Areas required to keep the Common Areas in good order or condition, or (iv) are required under any governmental law or regulation provided, however, that any capital expenditure shall be amortized (including interest on the amortized cost) over its useful life as Landlord shall reasonably determine; (E) reserves for bad debts or rent loss; (F) amounts paid as ground rental for the Project by Landlord; (G) all items and services for which any insurer, Tenant or any other tenant in the Project reimburses Landlord or which Landlord provides selectively to one or more tenants (other than Tenant) without reimbursement; and (H) the wages and benefits of any employee who does not devote substantially all of his or her employed time to the Project unless such wages and benefits are prorated to reflect time spent on operating and managing the Project vis-a-vis time spent on matters unrelated to operating and managing the Project.

(d) **Tenant's Share and Payment.** Tenant shall pay Tenant's annual Pro Rata Share of all Common Area costs (prorated for any fractional month) upon written notice from Landlord that such costs are due and payable, and in any event prior to delinquency. Tenant's Pro Rata Share shall be calculated by dividing the square foot area of the Property, as set forth in Section 1.04 of the Lease, by the aggregate square foot area of the Building and/or Park which is leased or held for lease by tenants, as of the date on which the computation is made. Notwithstanding the foregoing, Landlord shall have the right, from time to time, to equitably allocate some or all of the Common Area costs among different tenants of the Park (the "Cost Pools"). Such Cost Pools may include, but shall not be limited to, the pooling of certain buildings as to their location within the Park, any changes in the Common Area costs and/or the aggregate area of the Building and Park leased or held for lease during the Lease Term shall be effective on the first day of the month after such change occurs. Landlord may, at Landlord's election, estimate in advance and charge to Tenant as Common Area costs, all real property taxes for which Tenant is liable under Section 4.02 of this Lease, all utilities under Section 4.03 of this Lease, all insurance premiums for which Tenant is liable under Section 4.04(b) of this Lease, all Common Area costs for which Tenant is liable under Section 4.05 of this Lease, and all maintenance and repair costs for which Tenant is liable for under Section 6.04 of this Lease. At Landlord's election, such statements of estimated Common Area costs shall be delivered monthly, quarterly or at any other periodic intervals to be designated by Landlord. Landlord may adjust such estimates at any time based upon Landlord's experience and reasonable anticipation of costs. Such adjustments shall be effective as of the next rent payment date after notice to Tenant. Within one hundred twenty (120) days after the end of each calendar year of the Lease Term, Landlord shall deliver to Tenant a statement prepared in accordance with generally accepted accounting principles setting forth, in reasonable detail, the Common Area costs paid or incurred by Landlord during the preceding calendar year and Tenant's Pro Rata Share. Upon receipt of such statement, there shall be an adjustment between Landlord and Tenant, with payment to or credit given by Landlord (as the case may be) so that Landlord shall receive the entire amount of Tenant's share of such costs and expenses for such period. The provisions of this Section 4.05(d) shall survive the expiration or earlier termination of the Lease Term.

(e) **Landlord's Estimate.** As of the date of this Lease, Landlord estimates (pursuant to Section 4.05(d)) that Tenant's Pro Rata Share of real property taxes for which Tenant is liable under Section 4.02 of this Lease, insurance premiums for which Tenant is liable under Section 4.04(b) of this Lease, Common Area costs under Section 4.05(d), the reserves for exterior paint, asphalt slurry seal and roof membrane maintenance and replacement and management fee is a monthly amount equal to FIVE THOUSAND SEVEN HUNDRED EIGHTY AND 93/100 DOLLARS (\$5,780.93).

(f) **Tenant's Audit Right.** Within one hundred fifty (150) days after Tenant's receipt of Landlord's statement pursuant given in accordance with Section 4.05(d), if Tenant disputes the amount of Additional Rent set forth in the statement, an independent certified public accountant (which accountant is a member of a nationally recognized accounting firm and is not working on a contingency fee basis), designated and paid for by Tenant, may, after reasonable notice to Landlord and at reasonable times, inspect Landlord's records with respect to such statement at Landlord's offices, provided that Tenant is not then in default under this Lease and Tenant has paid all amounts required to be paid under the applicable statement. In connection with such inspection, Tenant and Tenant's agents must agree in advance to follow Landlord's reasonable rules and procedures regarding inspections of Landlord's records, and shall execute a commercially reasonable confidentiality agreement regarding such inspection. Tenant's failure to dispute the amount of Additional Rent set forth in any Statement within one hundred fifty (150) days of Tenant's receipt of such statement shall be deemed to be Tenant's approval of such statement and Tenant, thereafter, waives the right or ability to dispute the amounts set forth in such statement. If after such inspection, Tenant still disputes such Additional Rent, a determination as to the proper amount shall be made, at Tenant's expense, by an independent certified public accountant (the "Accountant") selected by Landlord and subject to Tenant's reasonable approval; provided that if such determination by

the Accountant proves that Additional Rent was overstated by more than five percent (5%), then the cost of the Accountant and the costs of such determination shall be paid for by Landlord. Tenant hereby acknowledges that Tenant=s sole right to inspect Landlord=s books and records and to contest the amount of Additional Rent payable by Tenant shall be as set forth in this Section 4.05(f). Tenant hereby waives any and all other rights pursuant to applicable law to inspect such books and records and/or to contest the amount of Additional Rent payable by Tenant.

**Section 4.06. Late Charges.** Tenant's failure to pay rent promptly may cause Landlord to incur unanticipated costs. The exact amount of such costs are impractical or extremely difficult to ascertain. Such costs may include, but are not limited to, processing and accounting charges and late charges which may be imposed on Landlord by any ground lease, mortgage or trust deed encumbering the Property. The parties agree that such late charge represents a fair and reasonable estimate of the costs Landlord will incur by reason of such late payment. Therefore, if Landlord does not receive any rent payment within ten (10) days after it becomes due, Tenant shall pay Landlord a late charge equal to ten percent (10%) of the overdue amount; provided, however, Landlord hereby waives its right to collect such late charge with respect to Tenant's first (1st) late rent payment default that Tenant shall have cured after Landlord's three (3)-day Notice thereof during any consecutive twelve (12) month period.

**Section 4.07. Interest on Past Due Obligations.** Any rent owed by Tenant to Landlord which is not paid when due shall bear interest ("Interest") at the annual rate of twelve percent (12%) from the date due until paid; provided, however, Landlord hereby waives its right to collect such Interest with respect to Tenant's first (1st) overdue rent payment default that Tenant shall have cured after Landlord's three (3)-day Notice thereof during any consecutive twelve (12) month period. Interest shall not be payable on late charges to be paid by Tenant under this Lease. The payment of Interest on such amounts shall not excuse or cure any default by Tenant under this Lease. If the interest rate specified in this Lease is higher than the rate permitted by law, the interest rate is hereby decreased to the maximum legal interest rate permitted by law.

**Section 4.08. Impounds for Insurance Premiums and Real Property Taxes.** If requested by any ground lessor or lender to whom Landlord has granted a security interest in the Property, or if Tenant is more than ten (10) days late in the payment of rent more than once in any consecutive twelve (12) month period, Tenant shall pay Landlord a sum equal to one-twelfth (1/12) of the annual real property taxes and insurance premiums payable by Tenant under this Lease, together with each monthly payment of Base Rent. Tenant shall not be entitled to any interest on the impound account. If unknown, Landlord shall reasonably estimate the amount of real property taxes and insurance premiums when due. Tenant shall pay any deficiency of funds in the impound account to Landlord upon written request. If Tenant defaults under this Lease, Landlord may apply any funds in the impound account to any obligation then due under this Lease.

**Section 4.09. Application of Payments.** All payments received by Landlord from Tenant shall be applied to the oldest payment obligation owed by Tenant to Landlord. No designation by Tenant, either in a separate writing or on a check or money order, shall modify this clause or have any force or effect.

## ARTICLE FIVE: USE OF PROPERTY

**Section 5.01. Permitted Uses.** Tenant may use the Property only for the Permitted Uses set forth in Section 1.06 above and for no other purpose whatsoever; provided that such Permitted Use (i) does not create any wear and tear on the building, decrease the value of the Property nor constitute waste thereof; (ii) does not involve the fabrication, assembly, packaging or manufacturing of any product on, in or about the Property; (iii) does not create any risk of Environmental Damages or Hazardous Material contamination on the Property; (iv) does not create obnoxious (as to a reasonable person) odors or noise; (v) does not include storage of tires, chemicals or explosives or other products made with like materials; (vi) does not exceed the load capacity of the floor slab; and (vii) is consistent with the use of other tenants of Landlord in the surrounding area.

**Section 5.02. Manner of Use.** Tenant shall not cause or permit the Property to be used in any way which constitutes a violation of any law, ordinance, or governmental regulation or order, which unreasonably interferes with the rights of other tenants of Landlord, or which constitutes a nuisance or waste. Tenant shall obtain and pay for all permits required for Tenant's occupancy of the Property, alterations and improvements made to the Property, business licenses, and shall promptly take all actions necessary to comply with all applicable statutes, ordinances, rules, regulations, orders and requirements regulating the use by Tenant of the Property, including without limiting to the Occupational Safety and Health Act.

### Section 5.03. Hazardous Materials.

#### 5.03.1 Definitions.

A. "Hazardous Material" means any substance, whether solid, liquid or gaseous in nature:

(i) the presence of which requires investigation or remediation under any federal, state or local statute, regulation, ordinance, order, action, policy or common law; or

(ii) which is or becomes defined as a "hazardous waste," "hazardous substance," pollutant or contaminant under any federal, state or local statute, regulation, rule or ordinance or amendments thereto including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. section 9601 et seq.) and/or the Resource Conservation and Recovery Act (42 U.S.C. section 6901 et seq.), the Hazardous Materials Transportation Act (49 U.S.C. section 1801 et seq.), the Federal Water Pollution Control Act (33 U.S.C. section 1251 et

seq.), the Clean Air Act (42 U.S.C. section 7401 et seq.), the Toxic Substances Control Act, as amended (15 U.S.C. section 2601 et seq.), and the Occupational Safety and Health Act (29 U.S.C. section 651-et seq.), as these laws have been amended or supplemented; or

(iii) which is toxic, explosive, corrosive, flammable, infectious, radioactive, carcinogenic, mutagenic, or otherwise hazardous or is or becomes regulated by any governmental authority, agency, department, commission, board, agency or instrumentality of the United States, the State of California or any political subdivision thereof; or

(iv) the presence of which on the Property causes or threatens to cause a nuisance upon the Property or to adjacent properties or poses or threatens to pose a hazard to the health or safety of persons on or about the Property; or

(v) the presence of which on adjacent properties could constitute a trespass by Tenant; or

(vi) without limitation which contains gasoline, diesel fuel or other petroleum hydrocarbons; or

(vii) without limitation which contains polychlorinated biphenyls (PCBs), asbestos or urea formaldehyde foam insulation; or

(viii) without limitation which contains radon gas.

B. "Environmental Requirements" means all applicable present and future:

(i) statutes, regulations, rules, ordinances, codes, licenses, permits, orders, approvals, plans, authorizations, concessions, franchises, and similar items (including, but not limited to those pertaining to reporting, licensing, permitting, investigation and remediation), of all Governmental Agencies; and

(ii) all applicable judicial, administrative, and regulatory decrees, judgments, and orders relating to the protection of human health or the environment, including, without limitation, all requirements pertaining to emissions, discharges, releases, or threatened releases of Hazardous Materials or chemical substances into the air, surface water, groundwater or land, or relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport, or handling of Hazardous Materials or chemical substances.

C. "Environmental Damages" means all claims, judgments, damages, losses, penalties, fines, liabilities (including strict liability), encumbrances, liens, costs, and expenses (including the expense of investigation and defense of any claim, whether or not such claim is ultimately defeated, or the amount of any good faith settlement or judgment arising from any such claim) of whatever kind or nature, contingent or otherwise, matured or unmatured, foreseeable or unforeseeable (including without limitation reasonable attorneys' fees and disbursements and consultants' fees) any of which are incurred at any time as a result of the existence of Hazardous Material upon, about, or beneath the Property or migrating or threatening to migrate to or from the Property, or the existence of a violation of Environmental Requirements pertaining to the Property and the activities thereon, regardless of whether the existence of such Hazardous Material or the violation of Environmental Requirements arose prior to the present ownership or operation of the Property. Environmental Damages include, without limitation:

(i) damages for personal injury, or injury to property or natural resources occurring upon or off of the Property, including, without limitation, lost profits, consequential damages, the cost of demolition and rebuilding of any improvements on real property, interest, penalties and damages arising from claims brought by or on behalf of employees of Tenant (with respect to which Tenant waives any right to raise as a defense against Landlord any immunity to which it may be entitled under any industrial or worker's compensation laws);

(ii) fees, costs or expenses incurred for the services of attorneys, consultants, contractors, experts, laboratories and all other costs incurred in connection with the investigation or remediation of such Hazardous Materials or violation of such Environmental Requirements, including, but not limited to, the preparation of any feasibility studies or reports or the performance of any cleanup, remediation, removal, response, abatement, containment, closure, restoration or monitoring work required by any Governmental Agency or reasonably necessary to make full economic use of the Property or any other property in a manner consistent with its current use or otherwise expended in connection with such conditions, and including without limitation any attorneys' fees, costs and expenses incurred in enforcing the provisions of this Lease or collecting any sums due hereunder;

(iii) liability to any third person or Governmental Agency to indemnify such person or Governmental Agency for costs expended in connection with the items referenced in subparagraph (ii) above; and

(iv) diminution in the fair market value of the Property including without limitation any reduction in fair market rental value or life expectancy of the Property or the improvements located thereon or the restriction on the use of or adverse impact on the marketing of the Property or any portion thereof.

D. "Governmental Agency" means all governmental agencies, departments, commissions, boards, bureaus or instrumentalities of the United States, states, counties, cities and political subdivisions thereof.

E. The "Tenant Group" means Tenant, Tenant's successors, assignees, guarantors, officers, members, managers, directors, agents, employees, contractors, invitees, permittee or other parties under the supervision or control of

Tenant or entering the Property during the Lease Term with the permission or knowledge of Tenant other than Landlord or Landlord's agents or employees.

**5.03.2 Prohibitions.**

A. Other than normal quantities of general office and cleaning supplies and except as specified on Exhibit "D" attached hereto, Tenant shall not cause, permit or suffer any Hazardous Material to be brought upon, treated, kept, stored, disposed of, discharged, released, produced, manufactured, generated, refined or used upon, about or beneath the Property by the Tenant Group, or any other person without the prior written consent of Landlord. From time to time during the Lease Term, Tenant may request Landlord's approval of Tenant's use of other Hazardous Materials, which approval may be withheld in Landlord's sole discretion. Tenant shall, prior to the Lease Commencement Date, provide to Landlord for those Hazardous Materials described on Exhibit "D": (a) a description of handling, storage, use and disposal procedures; and (b) all "community right to know" plans or disclosures and/or emergency response plans which Tenant is required to supply to local Governmental Agencies pursuant to any Environmental Requirements.

B. Tenant shall not cause, permit or suffer the existence or the commission by Tenant Group, or by any other person, of a violation of any Environmental Requirements upon, about or beneath the Property.

C. Tenant shall neither create or suffer to exist, nor permit Tenant Group to create or suffer to exist any lien, security interest or other charge or encumbrance of any kind with respect to the Property, including without limitation, any lien imposed pursuant to section 107(f) of the Superfund Amendments and Reauthorization Act of 1986 (42 U.S.C. section 9607(l)) or any similar state statute.

D. Tenant shall not install, operate or maintain any above or below grade tank, sump, pit, pond, lagoon or other storage or treatment vessel or device on the Property without Landlord's prior written consent.

**5.03.3 Indemnity.**

A. Tenant, its successors, assigns and guarantors, agree to indemnify, defend, reimburse and hold harmless:

(i) Landlord; and

(ii) any other person who acquires all or a portion of the Property in any manner (including purchase at a foreclosure sale) or who becomes entitled to exercise the rights and remedies of Landlord under this Lease; and

(iii) the directors, officers, shareholders, employees, partners, agents, contractors, subcontractors, experts, licensees, affiliates, lessees, mortgagees, trustees, heirs, devisees, successors, assigns and invitees of such persons, from and against any and all Environmental Damages which exist as a result of the activities or negligence of Tenant Group or which exist as a result of the breach of any warranty or covenant or the inaccuracy of any representation of Tenant contained in this Lease, or by Tenant's remediation of the Property or failure to meet its obligations contained in this Lease.

B. The obligations contained in this Section 5.03 shall include, but not be limited to, the burden and expense of defending all claims, suits and administrative proceedings, even if such claims, suits or proceedings are groundless, false or fraudulent, and conducting all negotiations of any description, and paying and discharging, when and as the same become due, any and all judgments, penalties or other sums due against such indemnified persons. Landlord, at its sole expense, may employ additional counsel of its choice to associate with counsel representing Tenant.

C. Landlord shall have the right but not the obligation to join and participate in, and control, if it so elects, any legal proceedings or actions initiated in connection with Tenant's activities. Landlord may also negotiate, defend, approve and appeal any action taken or issued by any applicable governmental authority with regard to contamination of the Property by a Hazardous Material.

D. The obligations of Tenant in this Section 5.03 shall survive the expiration or termination of this Lease.

E. The obligations of Tenant under this Section 5.03 shall not be affected by any investigation by or on behalf of Landlord, or by any information which Landlord may have or obtain with respect thereto.

**5.03.4 Obligation to Remediate.** In addition to the obligation of Tenant to indemnify Landlord pursuant to this Lease, Tenant shall, upon approval and demand of Landlord, at its sole cost and expense and using contractors approved by Landlord, promptly take all actions to remediate the Property which are required by any Governmental Agency, or which are reasonably necessary to mitigate Environmental Damages or to allow full economic use of the Property, which remediation is necessitated from the presence upon, about or beneath the Property, at any time during or upon termination of this Lease (whether discovered during or following the Lease Term), of a Hazardous Material or a violation of Environmental Requirements existing as a result of the activities or negligence of the Tenant Group. Such actions shall include, but not be limited to, the investigation of the environmental condition of the Property, the preparation of any feasibility studies, reports or remedial plans, and the performance of any cleanup, remediation, containment, operation, maintenance, monitoring or restoration work, whether on or off the Property, which shall be performed in a manner approved by Landlord. Tenant shall take all actions necessary to restore the Property to the

condition existing prior to the introduction of Hazardous Material upon, about or beneath the Property, notwithstanding any lesser standard of remediation allowable under applicable law or governmental policies.

5.03.5 **Right to Inspect.** Landlord shall have the right in its sole and absolute discretion, but not the duty, to enter and conduct an inspection of the Property, including invasive tests, at any reasonable time to determine whether Tenant is complying with the terms of this Lease, including but not limited to the compliance of the Property and the activities thereon with Environmental Requirements and the existence of Environmental Damages as a result of the condition of the Property or surrounding properties and activities thereon. Landlord shall have the right, but not the duty, to retain any independent professional consultant (the "Consultant") to enter the Property to conduct such an inspection or to review any report prepared by or for Tenant concerning such compliance. The cost of the Consultant shall be paid by Landlord unless such investigation discloses a violation of any Environmental Requirement by the Tenant Group or the existence of a Hazardous Material on the Property or any other property caused by the activities or negligence of the Tenant Group (other than Hazardous Materials used in compliance with all Environmental Requirements and previously approved by Landlord), in which case Tenant shall pay the cost of the Consultant. Tenant hereby grants to Landlord, and the agents, employees, consultants and contractors of Landlord the right to enter the Property and to perform such tests on the Property as are reasonably necessary to conduct such reviews and investigations. Landlord shall use commercially reasonable efforts to minimize interference with the business of Tenant.

5.03.6 **Notification.** If Tenant shall become aware of or receive notice or other communication concerning any actual, alleged, suspected or threatened violation of Environmental Requirements, or liability of Tenant for Environmental Damages in connection with the Property or past or present activities of any person thereon, including but not limited to notice or other communication concerning any actual or threatened investigation, inquiry, lawsuit, claim, citation, directive, summons, proceeding, complaint, notice, order, writ, or injunction, relating to same, then Tenant shall deliver to Landlord within ten (10) days of the receipt of such notice or communication by Tenant, a written description of said violation, liability, or actual or threatened event or condition, together with copies of any documents evidencing same. Receipt of such notice shall not be deemed to create any obligation on the part of Landlord to defend or otherwise respond to any such notification.

If requested by Landlord, Tenant shall disclose to Landlord the names and amounts of all Hazardous Materials other than general office and cleaning supplies referred to in Section 5.03.2 of this Lease, which were used, generated, treated, handled, stored or disposed of on the Property or which Tenant intends to use, generate, treat, handle, store or dispose of on the Property. The foregoing in no way shall limit the necessity for Tenant obtaining Landlord's consent pursuant to Section 5.03.2 of this Lease.

5.03.7 **Surrender of Property.** In the ninety (90) days prior to the expiration or termination of the Lease Term, and for up to ninety (90) days after the later to occur of: (i) Tenant fully surrenders to Landlord exclusive possession of the Property; and (ii) the termination of this Lease, Landlord may have an environmental assessment of the Property performed in accordance with Section 5.03.5 of this Lease. Tenant shall perform, at its sole cost and expense, any clean-up or remedial work recommended by the Consultant which is necessary to remove, mitigate or remediate any Hazardous Materials and/or contamination of the Property caused by the activities or negligence of the Tenant Group.

5.03.8 **Assignment and Subletting.** In the event this Lease provides that Tenant may assign this Lease or sublet the Property subject to Landlord's consent and/or certain other conditions, and if the proposed assignee's or sublessee's activities in or about the Property involve the use, handling, storage or disposal of any Hazardous Materials other than those used by Tenant and in quantities and processes similar to Tenant's uses in compliance with this Lease, (i) it shall be reasonable for Landlord to withhold its consent to such assignment or sublease in light of the risk of contamination posed by such activities and/or (ii) Landlord may impose an additional condition to such assignment or sublease which requires Tenant to reasonably establish that such assignee's or sublessee's activities pose no materially greater risk of contamination to the Property than do Tenant's permitted activities in view of: (a) the quantities, toxicity and other properties of the Hazardous Materials to be used by such assignee or sublessee; (b) the precautions against a release of Hazardous Materials such assignee or sublessee agrees to implement; (c) such assignee's or sublessee's financial condition as it relates to its ability to fund a major clean-up; and (d) such assignee's or sublessee's policy and historical record respecting its willingness to respond to the clean up of a release of Hazardous Materials.

5.03.9 **Survival of Hazardous Materials Obligation.** Tenant's breach of any of its covenants or obligations under this Lease shall constitute a material default under this Lease. The obligations of Tenant under this Lease shall survive the expiration or earlier termination of this Lease without any limitation, and shall constitute obligations that are independent and severable from Tenant's covenants and obligations to pay rent under this Lease.

5.03.10 **Limitation of Tenant Liability.** Except for Environmental Damages the Tenant Group causes, Tenant shall have no liability of any kind to Landlord as to any Hazardous Materials on the Property (a) existing on the Property as of the Date of Lease, or (b) caused by Landlord, its agents, employees or contractors.

Section 5.04. **Auctions and Signs.** Tenant shall not conduct or permit any auctions or sheriff's sales at the Property. Subject to Landlord's prior written approval, which shall not be unreasonably withheld, delayed or conditioned, and provided all signs are in keeping with the quality, design and style of the industrial park within which the Property is located, Tenant, at its sole cost and expense, may install an identification sign ("sign") at the Property; provided, however, that (i) the size, color, location, materials and design of such sign shall be subject to Landlord's prior written consent, which shall not be unreasonably withheld, delayed or conditioned; (ii) such sign shall comply with all applicable governmental rules, codes, ordinances and regulations, and the Property's covenants, conditions, restrictions and signage criteria; (iii) such sign shall not be painted directly on the building or attached or placed on the roof or exterior of the



building; and (iv) Tenant's continuing signage right shall be contingent upon Tenant maintaining such sign in a first-class condition. Tenant shall be responsible for all costs incurred in connection with the design, construction, installation, repair and maintenance of Tenant's sign. Upon the expiration or earlier termination of this Lease, Tenant shall cause Tenant's sign to be removed and shall repair any damage caused by such removal (including without limiting to patching and painting). Any signs, notices, logos, pictures, names or advertisements which are installed and that have not been separately approved by Landlord, may be removed by Landlord, without notice by Landlord to Tenant at Tenant's sole cost and expense.

**Section 5.05. Indemnity.** Tenant shall indemnify, defend, and hold Landlord, together with its parent and affiliated companies, and/or constitute partners/entities, its and their respective officers, directors and employees (the "Indemnified Parties") free and harmless against and from any and all claims, damages, liabilities, losses, actions or causes of action, costs and expenses, including reasonable attorneys' fees, investigation costs and costs of court (if any) by reason of death, bodily or personal injury (including death or injury to Tenant's employees) or property damage arising out of or relating to: (a) Tenant's use of the Property; (b) the conduct of Tenant's business or anything else done or permitted by Tenant to be done in or about the Property, including any contamination of the Property or any other property resulting from the presence or use of Hazardous Material caused or permitted by Tenant; (c) any breach or default in the performance of Tenant's obligations under this Lease; (d) any misrepresentation or breach of warranty by Tenant under this Lease; or (e) other acts or omissions of Tenant. As a material part of the consideration to Landlord, Tenant assumes all risk of damage to property or injury to persons in or about the Property arising from any cause, and Tenant hereby waives all claims in respect thereof against Landlord, except to the extent of any claim arising out of Landlord's gross negligence or willful misconduct. As used in this Section, the term "Tenant" shall include Tenant's employees, agents, contractors, servants, licensees and invitees, if applicable. The provisions of this Section 5.05 shall survive the expiration or sooner termination of this Lease with respect to any claims or liability occurring prior to such expiration or termination.

**Section 5.06. Landlord's Access.** Landlord reserves the right at all reasonable times and upon reasonable notice to the Tenant to enter the Property to (i) inspect it; (ii) show the Property to prospective purchasers, mortgagees or tenants, or to the ground or underlying lessors; (iii) post notices of non-responsibility; (iv) alter, improve or repair the Property; and (v) place "For Sale" or "For Lease" signs on the Property. Notwithstanding anything to the contrary contained in this Section 5.06, Landlord may enter the Property at any time to (A) perform services required of Landlord; (B) take possession due to any breach of this Lease in the manner provided herein; and (C) perform any covenants of Tenant which Tenant fails to perform. Any such entries shall be without the abatement of Rent and shall include the right to take such reasonable steps as required to accomplish the stated purposes. Tenant hereby waives any claims for damages or for any injuries or inconvenience to or interference with Tenant's business, lost profits, any loss of occupancy or quiet enjoyment of the Property, and any other loss occasioned thereby. For each of the above purposes, Landlord shall at all times have a key with which to unlock all the doors in the Property. In an emergency, Landlord shall have the right to use any means that Landlord may deem proper to open the doors in and to the Property. Any entry into the Property in the manner hereinbefore described shall not be deemed to be a forcible or unlawful entry into, or a detainer of, the Property, or an actual or constructive eviction of Tenant from any portion of the Property.

**Section 5.07. Vehicle Parking.** Tenant shall be entitled to non-exclusive use of the vehicle parking area in the Property as outlined in red on Exhibit "A" attached hereto without paying any Additional Rent. Tenant shall not have the right to park in such area as outlined and crosshatched in blue on Exhibit "A" attached hereto. Tenant's parking shall not be reserved and shall be limited to vehicles no larger than standard size automobiles or pickup utility vehicles. Tenant shall not cause large trucks or other large vehicles to be parked within the Property (other than in designated areas) or on the adjacent public streets. Temporary parking of large delivery vehicles in the Property may be permitted by the rules and regulations established by Landlord. Vehicles shall be parked only in striped parking spaces and not in driveways, loading areas or other locations not specifically designated for parking. Handicapped spaces shall only be used by those legally permitted to use them. If Tenant parks more vehicles in the parking area than as set forth on Exhibit "A" attached hereto or parks outside the area outlined in red on Exhibit "A", then such conduct shall be a material breach of this Lease. In addition to Landlord's other remedies under this Lease, Tenant shall pay a daily charge determined by Landlord for each such additional vehicle.

**Section 5.08. Quiet Possession.** If Tenant pays the rent and complies with all other terms of this Lease, Tenant may occupy and enjoy the Property for the full Lease Term, subject to the provisions of this Lease.

**Section 5.09. Compliance with Laws.** Tenant shall not do anything, or suffer anything to be done, in or about the Property that will in any way conflict with any law, statute, ordinance or other governmental rule, regulation or requirement now in force or which may hereafter be enacted or promulgated (collectively, "Applicable Laws"). Tenant shall, at its sole cost and expense, promptly comply with any Applicable Laws which relate to, or are triggered by: (i) Tenant's use of the Property or (ii) any alteration or any tenant improvements made by Tenant. Landlord shall comply with all Applicable Laws relating to the improvements on the Property if, as of the Date of Lease compliance with such Applicable Laws is required by a governmental agency and provided that compliance with such Applicable Laws is not the responsibility of Tenant under this Lease, and provided further that Landlord's failure to comply therewith would unreasonably and materially affect the safety of Tenant's employees, create a significant health hazard for Tenant's employees, or materially and adversely affect Tenant's use of the Property. Landlord and Tenant shall share equally the cost of complying with future Applicable Laws that have general application to the Property; provided that compliance with such Applicable Laws is not the responsibility of Landlord or Tenant as set forth above. Should any standard or regulation now or hereafter be imposed on Landlord or Tenant by any state, federal or local governmental body charged with the establishment, regulation and enforcement of occupational, health or safety standards for employers, employees, landlords or tenants, then Landlord and Tenant, as applicable, agree, at its sole cost and expense to comply promptly with such standards or regulations. The judgment of any court of competent jurisdiction or the admission of Tenant in any

judicial action, regardless of whether Landlord is a party thereto, that Tenant has violated any of said governmental measures, shall be conclusive of that fact as between Landlord and Tenant.

#### ARTICLE SIX: CONDITION OF PROPERTY; MAINTENANCE, REPAIRS AND ALTERATIONS

**Section 6.01. Existing Conditions.** Tenant accepts the Property in its "as-is" condition as of the execution of this Lease, subject to all recorded matters, laws, ordinances, and governmental regulations and orders. Except as specifically provided herein, Tenant acknowledges that neither Landlord nor any agent of Landlord has made any representation as to the condition of the Property or the suitability of the Property for Tenant's intended use. Tenant represents and warrants that Tenant has made its own inspection of and inquiry regarding the condition of the Property and is not relying on any representations of Landlord or any Broker with respect thereto.

**Section 6.02. Exemption of Landlord from Liability.** Landlord shall not be liable for any damage or injury to the person, business (or any loss of income therefrom), goods, wares, merchandise or other property of Tenant, Tenant's employees, invitees, customers or any other person in or about the Property, whether such damage or injury is caused by or results from: (a) fire, steam, electricity, water, gas or rain; (b) the breakage, leakage, obstruction or other defects of pipes, sprinklers, wires, appliances, plumbing, air conditioning or lighting fixtures or any other cause; (c) conditions arising in or about the Property or upon other portions of the Building, or from other sources or places; or (d) any act or omission of any other tenant of Landlord. Landlord shall not be liable for any such damage or injury even though the cause of or the means of repairing such damage or injury are not accessible to Tenant. The provisions of this Section 6.02 shall not, however, exempt Landlord from liability to the extent of Landlord's gross negligence or willful misconduct.

#### Section 6.03. Landlord's Obligations.

(a) Except as provided in Article Seven (Damage or Destruction) and Article Eight (Condemnation), Landlord shall keep the following in good order, condition and repair (subject to ordinary wear and tear): structural portions of the foundations, exterior walls and roof (including roof membrane) of the Property (including painting the exterior surface of the exterior walls of the Property not more often than once every five (5) years, if necessary) and all components of electrical, mechanical, plumbing, heating and air conditioning systems and facilities located in the Property which are concealed or used in common by tenants of the Building. However, Landlord shall not be obligated to maintain or repair floor, windows, doors, plate glass or the interior surfaces of exterior walls. Landlord shall make repairs under this Section 6.03 within a reasonable time after receipt of written notice from Tenant of the need for such repairs.

(b) Tenant shall pay or reimburse Landlord for all costs Landlord incurs under Paragraph 6.03(a) above as Common Area costs as provided for in Section 4.05 of this Lease. Tenant waives the benefit of any statute in effect now or in the future which might give Tenant the right to make repairs at Landlord's expense or to terminate this Lease due to Landlord's failure to keep the Property in good order, condition and repair.

(c) Notwithstanding the foregoing, Landlord shall, at Landlord's expense, cause the existing plumbing, lighting, air conditioning, heating, and ventilating systems, fire sprinkler system, and loading doors in the Property, to be in good operating condition on the Lease Commencement Date, except to the extent such repairs are required due to the negligence or willful misconduct of Tenant or as a result of alterations, additions or improvements to the Property made by Tenant or for Tenant. Landlord shall be deemed to have delivered the Property in the condition required by this Section 6.03 unless Tenant gives Landlord written notice and sets forth with specificity the nature and extent of any items requiring repair, within thirty (30) days after the Lease Commencement Date from Landlord's delivery of the Property to Tenant.

(d) Notwithstanding the foregoing, subject to Tenant's timely maintenance, Landlord shall, at Landlord's sole cost and expense, repair all heating, ventilating and air conditioning units for the first (1<sup>st</sup>) twelve (12) months of occupancy.

#### Section 6.04. Tenant's Obligations.

(a) Except as provided in Section 6.03, Article Seven (Damage or Destruction) and Article Eight (Condemnation), Tenant, at Tenant's sole cost and expense, shall keep all portions of the Property (including structural, nonstructural, interior, exterior, systems and equipment) in good order, condition and repair (including, without limitation to repainting the walls and repaving the paved areas, as needed). If any portion of the Property or any system or equipment in the Property which Tenant is obligated to repair cannot be fully repaired or restored, Tenant shall promptly replace (subject to Landlord's right to undertake such responsibility) such portion of the Property or system or equipment in the Property. The cost of such replacement shall be amortized (including Interest on the unamortized amount) over the useful life as reasonably determined by Landlord. Tenant shall be liable for that portion of the cost which is applicable to the remaining Lease Term (as may be extended). Tenant shall maintain a preventive maintenance contract providing for the regular inspection and maintenance of the heating and air conditioning system each by a respective licensed contractor. Landlord shall have the right, upon written notice to Tenant, to undertake the responsibility for preventive maintenance of the heating and air conditioning system at Tenant's expense. If any part of the Property or the Building is damaged by any act or omission of Tenant, Tenant shall pay Landlord the cost of repairing or replacing such damaged property, whether or not Landlord would otherwise be obligated to pay the cost of maintaining or repairing such property. It is the intention of Landlord and Tenant that, at all times during the Lease Term, Tenant shall maintain the Property in an attractive, first-class and fully operative condition.

(b) Tenant shall fulfill all of Tenant's obligations under this Section 6.04 at Tenant's sole expense. If Tenant fails to maintain, repair or replace those portions of the Property as required by this Section 6.04, Landlord may, upon ten (10)

days' prior notice to Tenant (except that no notice shall be required in the case of an emergency), enter the Property and perform such maintenance or repair (including replacement, as needed) on behalf of Tenant. In such case, Tenant shall reimburse Landlord for all costs incurred in performing such maintenance or repair immediately upon demand.

**Section 6.05. Alterations, Additions, and Improvements.**

(a) Tenant shall not make any alterations, additions, or improvements to the Property ("Alteration") without Landlord's prior written consent, except for non-structural alterations that (i) do not exceed Twenty-Five Thousand Dollars (\$25,000.00) in cost; (ii) are not visible from the outside of the building; and (iii) do not alter or penetrate the floor slab or roof. Landlord may require Tenant to provide demolition and/or lien and completion bonds in form and amount satisfactory to Landlord. Tenant shall promptly remove any Alterations constructed in violation of this Paragraph 6.05(a) upon Landlord's written request. All Alterations shall be done in a good and workmanlike manner, in conformity with all Applicable Laws and regulations, and all contractors and subcontractors shall be licensed by the State where the Property is located for their particular trade and approved by Landlord. Upon completion of any such work, Tenant shall provide Landlord with "as built" plans, copies of all construction contracts, and proof of payment for all labor and materials.

(b) Tenant shall pay when due all claims for labor and material furnished to the Property. Tenant shall give Landlord at least twenty (20) days' prior written notice of the commencement of any work on the Property, regardless of whether Landlord's consent to such work is required. Landlord may elect to record and post notices of non-responsibility on the Property. Tenant shall cause any mechanic's lien or other claim of lien filed against the Property to be released and removed within ten (10) days of such filing either by satisfaction or by the posting of a bond in the statutory amount. Should Tenant fail to remove any such lien within the required period or time, Landlord may (at its sole election) pay such claim and the amount paid, together with any attorney's fees and costs incurred by Landlord in connection therewith, shall be immediately due from Tenant to Landlord as Additional Rent. In the event Landlord, at Tenant's request, performs any work hereunder in the capacity of general contractor or otherwise, Landlord shall be entitled to receive from Tenant, as Additional Rent, Landlord's actual costs for design, construction, and permits, plus Twenty Percent (20%) of said actual costs for Landlord's overhead and profit.

**Section 6.06. Condition upon Termination.** Upon the termination of this Lease, Tenant shall surrender the Property to Landlord, broom clean and in the same condition as received (including without limitation to the removal of all floor striping and the resealing of the floor). However, Tenant shall not be obligated to repair any damage which Landlord is required to repair under Article Seven (Damage or Destruction). In addition, Landlord may require Tenant to remove any alterations, additions, improvement, machinery or equipment (whether or not made with Landlord's consent) prior to the expiration or early termination of this Lease and to restore the Property to its prior condition, all at Tenant's expense. All alterations, additions and improvements which Landlord has not required Tenant to remove shall become Landlord's property and shall be surrendered to Landlord upon the expiration or earlier termination of this Lease. Tenant shall repair, at Tenant's expense, any damage to the Property caused by the removal of any such alterations, additions, improvements, machinery or equipment (including without limitation to the complete removal of all studs and bolts that penetrate the floor or walls and filling and patching the holes as set forth in more detail in Section 6.07). In no event, however, shall Tenant remove any of the following materials or equipment (which shall be deemed Landlord's property) without Landlord's prior written consent: any power wiring and power panels; lighting and lighting fixtures; wall coverings; drapes, blinds and other window coverings; carpets and other floor coverings; heaters, air conditioners and any other heating and air conditioning equipment; fencing and security gates; load levelers, dock lights, dock locks and dock seals; and other similar building operating equipment and decorations.

**Section 6.07 Floor Bolts.** Prior to anchoring any racking or equipment to the floor of the Property, Tenant shall drill the holes for any anchor bolts to a depth that is one inch (1") deeper than normally required for such anchoring mechanism. Upon the expiration or earlier termination of this Lease, Tenant shall cut the top of the anchor bolts, pound the remaining bolt into the one inch (1") space described above, and pour epoxy filler into the existing hole so that the epoxy filler is flush with the floor, all at Tenant's sole cost and expense.

**Section 6.08 Landlord's Work.** Landlord, at its sole cost and expense, shall construct those improvements to the Property described in Exhibit "F". Since Tenant will be occupying the Property pursuant to this Lease while Landlord is performing Landlord's Work, Landlord agrees that it shall use commercially reasonable efforts to perform Landlord's Work in a manner so as to minimize interference with Tenant's business. Tenant hereby acknowledges that, notwithstanding Tenant's occupancy of the Property during the performance of Landlord's Work, Landlord shall be permitted to perform Landlord's Work during normal business hours, and Tenant shall provide a clear working area for Landlord's Work (including, but not limited to, the moving of furniture, fixtures and Tenant's property away from the area Landlord is conducting Landlord's Work). Tenant hereby agrees that the performance of Landlord's Work shall in no way constitute a constructive eviction of Tenant nor entitle Tenant to, if any, abatement of rent. Landlord shall have no responsibility or for any reason be liable to Tenant for any direct or indirect injury to or interference with Tenant's business arising from Landlord's Work, nor shall Tenant be entitled to any compensation or damages from Landlord for loss of the use of whole or any part of the Property, for loss of or damage to Tenant's personal property, merchandise, fixtures or improvements, or for any inconvenience or annoyance resulting from Landlord's Work or for Landlord's actions in connection with Landlord's Work.

**ARTICLE SEVEN: DAMAGE OR DESTRUCTION**

**Section 7.01. Damage or Destruction to Property.**

(a) Tenant shall notify Landlord in writing ("**Damage Notice**") immediately upon the occurrence of any damage to the Property. If the insurance proceeds received by Landlord from the insurance policies described in Paragraph 4.04(b) are sufficient to pay for the necessary repairs, this Lease shall remain in effect and Landlord shall repair the damage as soon as reasonably possible. Landlord may elect (but is not required) to repair any damage to Tenant's fixtures, equipment, or improvements.

(b) If the insurance proceeds received by Landlord are not sufficient to pay the entire cost of repair, or if the cause of the damage is not covered by the insurance policies which Landlord maintains under Paragraph 4.04(b), Landlord may elect either to: (i) repair the damage as soon as reasonably possible, in which case this Lease shall remain in full force and effect; or (ii) terminate this Lease as of the date the damage occurred. Landlord shall notify Tenant within thirty (30) days after receipt of Damage Notice whether Landlord elects to repair the damage or terminate this Lease. If Landlord elects to repair the damage, Tenant shall pay Landlord the "deductible amount" (not to exceed Ten Thousand and No/100 Dollars (\$10,000.00) under Landlord's insurance policies) and, if the damage was due to an act or omission of Tenant, or Tenant's employees, agents, contractors or invitees, the difference between the actual cost of repair and any insurance proceeds received by Landlord. If Landlord elects to terminate this Lease, Tenant may elect to continue this Lease in full force and effect, in which case Tenant shall repair any damage to the Property and any building in which the Property is located. Tenant shall pay the cost of such repairs, except that upon satisfactory completion of such repairs, Landlord shall deliver to Tenant any insurance proceeds received by Landlord for the damage repaired by Tenant. Tenant shall give Landlord written notice of such election within ten (10) days after receiving Landlord's termination notice.

(c) If the repairs to the Property would require more than six (6) months (subject to force majeure) from Landlord's receipt of insurance proceeds and building permits ("**Repair Period**") to be substantially completed then either Landlord or Tenant shall have the right to terminate this Lease as of the later to occur of: (i) the date Landlord receives the Damage Notice; and (ii) the date Tenant ceases to do business on the Property and delivers exclusive possession thereof to Landlord. Tenant shall have the right, at any time and from time to time to require Landlord to deliver to Tenant a written notice (the "**Contractor Certificate**") certifying to both Landlord and Tenant, in the reasonable opinion of Landlord's contractor, the amount of time required to repair or complete the repair of the Property. If in the Contractor Certificate, the contractor certifies that the repair of the Property will take a period in excess of the Repair Period, then within five (5) days after the delivery of the Contractor Certificate to Tenant, Tenant or Landlord may terminate this Lease by delivering written notice of such termination to the other party within such five (5) day period. Notwithstanding the foregoing, Tenant shall not have any right to terminate this Lease under this Section 7.01 if the damage to the Property was caused by the acts or omissions of Tenant.

(d) If the damage to the Property occurs during the last six (6) months of the Lease Term and the repair of such damage will require more than thirty (30) days to substantially complete, then either Landlord or Tenant may elect to terminate this Lease as of the date the damage occurred, regardless of the sufficiency of any insurance proceeds. The party electing to terminate this Lease, pursuant to this Section 7.01(d), shall give written notification to the other party of such election within thirty (30) days after Tenant's Damage Notice.

**Section 7.02. Temporary Reduction of Rent.** If the Property is destroyed or damaged and Landlord or Tenant repairs or restores the Property pursuant to the provisions of this Article Seven, any rent payable during the Repair Period shall be reduced according to the degree, if any, to which Tenant's use of the Property is impaired. However, the reduction shall not exceed the sum of one year's payment of Base Rent, insurance premiums and real property taxes. Except for such possible reduction in Base Rent, insurance premiums and real property taxes, Tenant shall not be entitled to any compensation, reduction, or reimbursement from Landlord as a result of any damage, destruction, repair, or restoration of or to the Property.

**Section 7.03. Waiver.** Tenant waives the protection of any statute, code or judicial decision (including but not limited to those contained in California Civil Code Sections 1932(2), 1933(4), and 1942 and Section 1265.130 of the California Code of Civil Procedure) which may grant to Tenant the right of set-off or to terminate a lease in the event of the destruction of the leased property. Tenant agrees that the provisions of Article Seven above shall govern the rights and obligations of Landlord and Tenant in the event of any destruction to the Property.

#### ARTICLE EIGHT: CONDEMNATION

If all or any portion of the Property is taken under the power of eminent domain or sold under the threat of that power (all of which are called "**Condemnation**"), this Lease shall terminate as to the part taken or sold on the date the condemning authority takes title or possession, whichever occurs first. If more than twenty percent (20%) of the floor area of the Building, is taken, either Landlord or Tenant may terminate this Lease as of the date the condemning authority takes title or possession, by delivering written notice to the other within ten (10) days after receipt of written notice of such taking (or in the absence of such notice, within ten (10) days after the condemning authority takes title or possession). If neither Landlord nor Tenant terminates this Lease, this Lease shall remain in effect as to the portion of the Property not taken, except that the Base Rent and Additional Rent shall be reduced in proportion to the reduction in the floor area of the Property. Landlord shall be entitled to receive the entire award or payment in connection therewith, except that Tenant shall have the right to file any separate claim available to Tenant for any taking of Tenant's personal property and fixtures belonging to Tenant and removable by Tenant upon expiration of the Lease Term pursuant to the terms of this Lease, and for moving expenses, so long as such claim does not diminish the award available to Landlord and/or its ground lessor with respect to the real property or its mortgagee, and such claim is payable separately to Tenant. If this Lease is not terminated, Landlord shall repair any damage to the Property caused by the Condemnation, except that Landlord shall not be obligated to repair any damage for which Tenant has been reimbursed by the condemning authority. If the severance damages received by Landlord are not sufficient to pay for such repair, Landlord shall have the right to

either terminate this Lease or make such repair at Landlord's expense. Tenant hereby waives any and all rights it might otherwise have pursuant to Section 1265.130 of the California Code of Civil Procedure.

#### ARTICLE NINE: ASSIGNMENT AND SUBLETTING

**Section 9.01. Transfers.** Tenant shall not, without the prior written consent of Landlord, assign, mortgage, pledge, encumber or otherwise transfer, this Lease or any interest hereunder, permit any assignment or other such foregoing transfer of this Lease or any interest hereunder by operation of law, or sublet the Property or any part thereof (all of the foregoing are hereinafter sometimes referred to collectively as "Transfers" and any person to whom any Transfer is made or sought to be made is hereinafter sometimes referred to as a "Transferee"). Tenant shall notify Landlord in writing, which notice (the "Transfer Notice") shall include (i) the proposed effective date of the Transfer, which shall not be less than forty-five (45) days after the date of delivery of the Transfer Notice, (ii) a description of the portion of the Property to be transferred (the "Subject Space"), (iii) all of the terms of the proposed Transfer and the consideration therefor, including a calculation of the "Transfer Premium," as that term is defined in Section 9.03 below, in connection with such Transfer, the name and address of the proposed Transferee, and a copy of all existing and/or proposed documentation pertaining to the proposed Transfer, including all existing operative documents to be executed to evidence such Transfer or the agreements incidental or related to such Transfer, and (iv) current financial statements of the proposed Transferee certified by an officer, partner or owner thereof, and any other information required by Landlord, which will enable Landlord to determine the financial responsibility, character, and reputation of the proposed Transferee, nature of such Transferee's business and proposed use of the Subject Space, and such other information as Landlord may reasonably require. Any Transfer made without Landlord's prior written consent shall, at Landlord's option, be null, void and of no effect, and shall, at Landlord's option, constitute a default by Tenant under this Lease. Whether or not Landlord shall grant consent, Tenant shall pay Landlord's review and processing fees, as well as any reasonable legal fees incurred by Landlord, within thirty (30) days after written request by Landlord.

**Section 9.02. Landlord's Consent.** Landlord shall not unreasonably withhold its consent to any proposed Transfer of the Subject Space to the Transferee on the terms specified in the Transfer Notice. The parties hereby agree that it shall be reasonable under this Lease and under any applicable law for Landlord to withhold consent to any proposed Transfer where one or more of the following apply, without limitation as to other reasonable grounds for withholding consent:

9.02.1 The Transferee's character or reputation is significantly less prestigious than that of the Tenant;

9.02.2 The Transferee's business or use of the Subject Space is not permitted under this Lease;

9.02.3 The financial worth and/or financial stability of the Transferee is not at least equal to the greater of (a) the financial worth and/or financial stability of the Tenant on the date of this Lease or (b) the financial worth and/or financial stability of the Tenant on the date of the Transfer Notice;

9.02.4 The proposed Transfer would cause Landlord to be in violation of another lease or agreement to which Landlord is a party; or

9.02.5 The terms of the proposed Transfer will allow the Transferee to exercise a right of renewal, right of expansion, right of first offer, or other similar right held by Tenant (or will allow the Transferee to occupy space leased by Tenant pursuant to any such right).

If Landlord's consent to any Transfer is required pursuant to the terms of this Section 9.02 (and Landlord does not exercise any recapture rights Landlord may have under Section 9.04 of this Lease), Tenant may within six (6) months after Landlord's consent, but not later than the expiration of said six-month period, enter into such Transfer of the Property or portion thereof, upon substantially the same terms and conditions as are set forth in the Transfer Notice furnished by Tenant to Landlord pursuant to Section 9.01 of this Lease.

**Section 9.03. Transfer Premium.** If Landlord consents to a Transfer, as a condition thereto which the parties hereby agree is reasonable, Tenant shall pay to Landlord fifty percent (50%) of any "Transfer Premium," as that term is defined in this Section 9.03, received by Tenant from such Transferee. "Transfer Premium" shall mean all rent, additional rent or other consideration payable by such Transferee in excess of the Rent and Additional Rent payable by Tenant under this Lease on a per rentable square foot basis if less than all of the Property is transferred. "Transfer Premium" shall also include, but not be limited to, key money and bonus money paid by Transferee to Tenant in connection with such Transfer, and any payment in excess of fair market value for services rendered by Tenant to Transferee or for assets, fixtures, inventory, equipment, or furniture transferred by Tenant to Transferee in connection with such Transfer. Landlord or its authorized representatives shall have the right at all reasonable times to audit the books, records and papers of Tenant relating to any Transfer, and shall have the right to make copies thereof. If the Transfer Premium respecting any Transfer shall be found understated, Tenant shall, within thirty (30) days after demand, pay the deficiency and Landlord's costs of such audit, and if understated by more than ten percent (10%), Landlord shall have the right to cancel this Lease upon thirty (30) days' notice to Tenant.

**Section 9.04. Landlord's Option as to Subject Space.** Notwithstanding anything to the contrary contained in this Article Nine, Landlord shall have the option, by giving written notice to Tenant within thirty (30) days after receipt of any Transfer Notice, to recapture the Subject Space. Such recapture notice shall cancel and terminate this Lease with respect to the Subject Space as of the effective date of the proposed Transfer. In the event of a recapture by Landlord, if this Lease shall be canceled with respect to less than the entire Property, the Rent reserved herein shall be prorated on the basis of the number of rentable square feet retained by Tenant in proportion to the number of rentable square feet

contained in the Property, and this Lease as so amended shall continue thereafter in full force and effect, and upon request of either party, the parties shall execute written confirmation of the same. In the event of a recapture, Landlord may, if it elects, enter into a new lease covering the Subject Space with the intended Transferee on such terms as Landlord and such person or entity may agree or enter into a new lease covering the Subject Space with any other person or entity; in such event, Tenant shall not be entitled to any portion of the Transfer Premium, if any, which Landlord may realize on account of such termination and reletting.

**Section 9.05. Effect of Transfer.** If Landlord consents to a Transfer, (i) the terms and conditions of this Lease shall in no way be deemed to have been waived or modified, (ii) such consent shall not be deemed consent to any further Transfer by either Tenant or a Transferee, (iii) Tenant shall deliver to Landlord, promptly after execution, an original executed copy of all documentation pertaining to the Transfer in form reasonably acceptable to Landlord, (iv) Tenant shall furnish upon Landlord's request a complete statement, certified by an independent certified public accountant, or Tenant's chief financial officer, setting forth in detail the computation of any Transfer Premium Tenant has derived and shall derive from such Transfer, and (v) no Transfer relating to this Lease or agreement entered into with respect thereto, whether with or without Landlord's consent, shall relieve Tenant or any guarantor of the Lease from liability under this Lease, which liability shall be primary and not secondary (i.e. Tenant and Transferee shall be jointly and severally liable under the terms of this Lease). Tenant shall also remain liable for the payment of all bills rendered by Landlord for the charges incurred by the Transferee for services and material supplied to the Property.

**Section 9.06. Additional Transfers.** For purposes of this Lease, the term "Transfer" shall also include (i) if Tenant is a partnership, the withdrawal or change, voluntary, involuntary or by operation of law, of twenty-five percent (25%) or more of the partners, or transfer of twenty-five percent or more of partnership interests, within a twelve (12)-month period, or the dissolution of the partnership without immediate reconstitution thereof, and (ii) if Tenant is a closely held corporation (i.e., whose stock is not publicly held and not traded through an exchange or over the counter), (A) the dissolution, merger, consolidation or other reorganization of Tenant, (B) the sale or other transfer of more than an aggregate of twenty-five percent (25%) of the voting shares of Tenant (other than to immediate family members by reason of gift or death), within a twelve (12)-month period, or (C) the sale, mortgage, hypothecation or pledge of more than an aggregate of twenty-five percent (25%) of the value of the unencumbered assets of Tenant within a twelve (12) month period.

**Section 9.07. Tenant Affiliate.** Notwithstanding anything to the contrary contained in Section 9.01 of this Lease, a Transfer of (a) all or a portion of the Property to an affiliate of Tenant (defined herein as an entity which is controlled by, controls, or is under common control with, Tenant) or to any corporation resulting from a merger of, consolidation with or acquisition of Tenant (collectively, "Tenant Affiliate"), or (b) substantially all of the assets of Tenant in California shall not be deemed a Transfer under Article Nine for which consent is required, provided that: (i) Tenant notifies Landlord of any such Transfer; (ii) promptly supplies Landlord with any documents or information requested by Landlord regarding such Transfer; (iii) if requested by Landlord, have an affiliate corporation of Tenant Affiliate guaranty this Lease using Landlord's standard guaranty form; (iv) Tenant Affiliate assumes all of Tenant's obligations under this Lease; and (v) such Transfer is not a subterfuge by Tenant to avoid its obligations under this Lease. "Control," as used herein, shall mean the ownership, directly or indirectly, of at least fifty-one percent (51%) of the voting securities of, or possession of the right to vote, in the ordinary direction of its affairs, of at least fifty-one percent (51%) of the voting interest in, any person or entity.

**Section 9.08. No Merger.** No merger shall result from Tenant's sublease of the Property under this Article Nine, Tenant's surrender of this Lease or the termination of this Lease in any other manner. In any such event, Landlord may terminate any or all subtenancies or succeed to the interest of Tenant as sublandlord under any or all subtenancies.

#### ARTICLE TEN: DEFAULTS; REMEDIES

**Section 10.01. Covenants and Conditions.** Tenant's performance of each of Tenant's obligations under this Lease is a condition as well as a covenant. Tenant's right to continue in possession of the Property is conditioned upon such performance. Time is of the essence in the performance of all covenants and conditions.

**Section 10.02. Defaults.** Tenant shall be in material default under this Lease:

(a) If Tenant abandons the Property or if Tenant's vacation of the Property results in the cancellation of any insurance described in Section 4.04;

(b) If Tenant fails to pay rent or any other charge when due unless such failure is cured within three (3) days after Landlord provides Tenant Notice of such monetary default. Notwithstanding the foregoing, Landlord shall only be required to provide Tenant with one (1) late notice during any consecutive twelve (12) month period;

(c) If Tenant fails to perform any of Tenant's non-monetary obligations under this Lease for a period of thirty (30) days after written notice from Landlord; provided that if more than thirty (30) days are required to complete such performance, Tenant shall not be in default if Tenant commences such performance within the thirty (30) day period and thereafter diligently pursues its completion. However, Landlord shall not be required to give such notice if Tenant's failure to perform constitutes a non-curable breach of this Lease. The notice required by this Paragraph is intended to satisfy any and all notice requirements imposed by law on Landlord and is not in addition to any such requirement.

(d) (i) If Tenant makes a general assignment or general arrangement for the benefit of creditors; (ii) if a petition for adjudication of bankruptcy or for reorganization or rearrangement is filed by or against Tenant and is not dismissed within

thirty (30) days; (iii) if a trustee or receiver is appointed to take possession of substantially all of Tenant's assets located at the Property or of Tenant's interest in this Lease and possession is not restored to Tenant within thirty (30) days; or (iv) if substantially all of Tenant's assets located at the Property or of Tenant's interest in this Lease is subjected to attachment, execution or other judicial seizure which is not discharged within thirty (30) days. If a court of competent jurisdiction determines that any of the acts described in this subparagraph (d) is not a default under this Lease, and a trustee is appointed to take possession (or if Tenant remains a debtor in possession) and such trustee or Tenant transfers Tenant's interest hereunder, then Landlord shall receive, as Additional Rent, the excess, if any, of the rent (or any other consideration) paid in connection with such assignment or sublease over the rent payable by Tenant under this Lease.

(e) If any guarantor of this Lease revokes or otherwise terminates, or purports to revoke or otherwise terminate, any guaranty of all or any portion of Tenant's obligations under this Lease. Unless otherwise expressly provided, no guaranty of this Lease is revocable.

**Section 10.03. Remedies.** On the occurrence of any material default by Tenant, Landlord may, at any time thereafter, with or without notice or demand and without limiting Landlord in the exercise of any right or remedy which Landlord may have:

(a) Terminate Tenant's right to possession of the Property by any lawful means, in which case this Lease shall terminate and Tenant shall immediately surrender possession of the Property to Landlord. If Tenant shall be served with a demand for the payment of past due rent or any other charge, any payments rendered thereafter to cure any default by Tenant shall be made only by cashier's check. In such event, Landlord shall be entitled to recover from Tenant all damages incurred by Landlord by reason of Tenant's default, including (i) the worth at the time of the award of the unpaid Base Rent, Additional Rent and other charges which Landlord had earned at the time of the termination; (ii) the worth at the time of the award of the amount by which the unpaid Base Rent, Additional Rent and other charges which Landlord would have earned after termination until the time of the award exceeds the amount of such rental loss that Tenant proves Landlord could have reasonably avoided with reasonable efforts in the market at that time; (iii) the worth at the time of the award of the amount by which the unpaid Base Rent, Additional Rent and other charges which Tenant would have paid for the balance of the Lease Term after the time of award exceeds the amount of such rental loss that Tenant proves Landlord could have reasonably avoided with reasonable efforts in the market at that time; and (iv) any other amount necessary to compensate Landlord for all the detriment proximately caused by Tenant's failure to perform its obligations under this Lease or which in the ordinary course of things would be likely to result therefrom, including, but not limited to, any costs or expenses Landlord incurs in maintaining or preserving the Property after such default, the cost of recovering possession of the Property, expenses of reletting, including necessary renovation or alteration of the Property, Landlord's reasonable attorneys' fees incurred in connection therewith, and any real estate commission paid or payable. As used in subparts (i) and (ii) above, the "worth at the time of the award" is computed by allowing interest on unpaid amounts at the rate of fifteen percent (15%) per annum, or such lesser amount as may then be the maximum lawful rate. As used in subpart (iii) above, the "worth at the time of the award" is computed by discounting such amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of the award, plus one percent (1%). If Tenant has abandoned the Property, Landlord shall have the option of (i) retaking possession of the Property and recovering from Tenant the amount specified in this Paragraph 10.03(a), and/or (ii) proceeding under Paragraph 10.03(b);

(b) Maintain Tenant's right to possession, in which case this Lease shall continue in effect whether or not Tenant has abandoned the Property. In such event, Landlord shall be entitled to enforce all of Landlord's rights and remedies under this Lease, including the right to recover the rent as it becomes due. Landlord shall have the remedy described in California Civil Code Section 1951.4 (lessor may continue lease in effect after lessee's breach and abandonment and recover rent as it becomes due, if lessee has the right to sublet or assign, subject only to reasonable limitations);

(c) Pursue any other remedy now or hereafter available to Landlord under the laws or judicial decisions of the state in which the Property is located.

**Section 10.04. [INTENTIONALLY OMITTED]**

**Section 10.05. Automatic Termination.** Notwithstanding any other term or provision hereof to the contrary, and provided further Notice has been provided if required and the default remains uncured, this Lease shall terminate on the occurrence of any act which affirms the Landlord's intention to terminate this Lease as provided in Section 10.03 hereof, including the filing of an unlawful detainer action against Tenant. On such termination, Landlord's damages for default shall include, without limitation to all costs and fees, including reasonable attorneys' fees that Landlord incurs in connection with the filing, commencement, pursuing and/or defending of any action in any bankruptcy court or other court with respect to this Lease; the obtaining of relief from any stay in bankruptcy restraining any action to evict Tenant; or the pursuing of any action with respect to Landlord's right to possession of the Property. All such damages suffered (apart from Base Rent and other rent payable hereunder) shall constitute pecuniary damages which must be reimbursed to Landlord prior to assumption of this Lease by Tenant or any successor to Tenant in any bankruptcy or other proceeding.

**Section 10.06. Cumulative Remedies.** Landlord's exercise of any right or remedy shall not prevent it from exercising any other right or remedy.

**Section 10.07. Surrender.** No act or thing done by the Landlord or its agents during the lease term hereof shall be deemed an acceptance of a surrender of the Property, and no agreement to accept a surrender of the Property shall be valid unless made in writing and signed by the Landlord.



**Section 10.08. Removal of Tenant's Property.** All furniture, equipment, and other personal property of Tenant not removed from the Property upon the vacation or abandonment thereof following an uncured default by Tenant or upon the termination of this Lease for any cause whatsoever shall conclusively be deemed to have been abandoned by Tenant, and may be appropriated, sold, stored, destroyed or otherwise disposed of by Landlord without notice to Tenant and without obligation to account therefore. Tenant shall reimburse Landlord for all reasonable expenses reasonably incurred in connection with the disposition of such personal property.

**Section 10.09. Consequential Damages.** Notwithstanding anything to the contrary contained in this Lease, nothing in this Lease shall impose any obligations on Tenant or Landlord to be responsible or liable for, and each hereby releases the other from all liability for, consequential damages other than those consequential damages incurred by Landlord in connection with a holdover of the Property by Tenant after the expiration or earlier termination of this Lease; incurred by Landlord in connection with the contamination of the Property or any property resulting from the presence or use of Hazardous Materials caused or permitted by the Tenant Group; or incurred by Landlord in connection with any repair, physical construction or improvement work performed by or on behalf of Tenant in the Property.

#### ARTICLE ELEVEN: PROTECTION OF LENDERS

**Section 11.01. Subordination.** This Lease is subject and subordinate to all present and future ground or underlying leases of the real property and to the lien of any mortgages or trust deeds, now or hereafter in force against the real property and the building, if any, and to all renewals, extensions, modifications, consolidations and replacements thereof, and to all advances made or hereafter to be made upon the security of such mortgages or trust deeds, unless the holders of such mortgages or trust deeds, or the lessors under such ground lease or underlying leases, require in writing that this Lease be superior thereto by giving notice thereof to Tenant at least five (5) days before the election becomes effective. Tenant covenants and agrees in the event any proceedings are brought for the foreclosure of any such mortgage, or if any ground or underlying lease is terminated, to attorn, without any deductions or set-offs whatsoever, to the purchaser upon any such foreclosure sale, or to the lessor of such ground or underlying lease, as the case may be, if so requested to do so by such purchaser or lessor, and to recognize such purchaser or lessor as the lessor under this Lease, provided such lienholder or purchaser or ground lessor shall agree to accept this Lease and not disturb Tenant's occupancy, so long as Tenant timely pays the rent and observes and performs all of the terms, covenants and conditions of this Lease to be observed and performed by Tenant. Landlord's interest herein may be assigned as security at any time to any lienholder. Tenant shall, within five (5) days of request by Landlord, execute such further instruments or assurances in the form attached hereto as Exhibit "B" or such other form as is then required by Landlord's lender to evidence or confirm the subordination or superiority of this Lease to any such mortgages, trust deeds, ground leases or underlying leases. Tenant hereby irrevocably authorizes Landlord to execute and deliver in the name of Tenant any such instrument or instruments if Tenant fails to do so, provided that such authorization shall in no way relieve Tenant from the obligation of executing such instruments of subordination or superiority. Tenant waives the provisions of any current or future statute, rule or law which may give or purport to give Tenant any right or election to terminate or otherwise adversely affect this Lease and the obligations of the Tenant hereunder in the event of any foreclosure proceeding or sale.

#### Section 11.02. Estoppel Certificates.

(a) Upon Landlord's written request, Tenant shall execute, acknowledge and deliver to Landlord a written statement, in the form attached hereto as Exhibit "C" or such other form as is then required by Landlord's lender, certifying: (i) that none of the terms or provisions of this Lease have been changed (or if they have been changed, stating how they have been changed); (ii) that this Lease has not been cancelled or terminated; (iii) the last date of payment of the Base Rent and other charges and the time period covered by such payment; (iv) that Landlord is not in default under this Lease (or, if Landlord is claimed to be in default, stating why); and (v) such other representations or information with respect to Tenant or this Lease as Landlord may reasonably request or which any prospective purchaser or encumbrancer of the Property may require. Tenant shall deliver such statement to Landlord within ten (10) days after Landlord's request. Landlord may give any such statement by Tenant to any prospective purchaser or encumbrancer of the Property. Such purchaser or encumbrancer may rely conclusively upon such statement as true and correct.

(b) If Tenant does not deliver such statement to Landlord within such ten (10)-day period, Landlord, and any prospective purchaser or encumbrancer, may conclusively presume and rely upon the following facts: (i) that the terms and provisions of this Lease have not been changed except as otherwise represented by Landlord; (ii) that this Lease has not been canceled or terminated except as otherwise represented by Landlord; (iii) that not more than one month's Base Rent or other charges have been paid in advance; and (iv) that Landlord is not in default under the Lease. In such event, Tenant shall be estopped from denying the truth of such facts.

**Section 11.03. Tenant's Financial Condition.** Within ten (10) days after written request from Landlord which Landlord shall have the right to request no more than once every twelve (12) Lease Months, Tenant shall deliver to Landlord such financial statements, as Landlord reasonably requires, to verify the net worth of Tenant or any assignee, subtenant, or guarantor of Tenant. In addition, Tenant shall deliver to any lender designated by Landlord any financial statements required by such lender to facilitate the financing or refinancing of the Property. Tenant represents and warrants to Landlord that each such financial statement is a true and accurate statement as of the date of such statement. All financial statements shall be confidential and shall be used only for the purposes set forth in this Lease.

#### ARTICLE TWELVE: LEGAL COSTS

**Section 12.01. Legal Proceedings.** If Tenant or Landlord shall be in breach or default under this Lease, such party (the "Defaulting Party") shall reimburse the other party (the "Non-defaulting Party") upon demand for any costs or



expenses that the Non-defaulting Party incurs in connection with any breach or default of the Defaulting Party under this Lease, whether or not suit is commenced or judgment entered. Such costs shall include legal fees and costs incurred for the negotiation of a settlement, enforcement of rights or otherwise. Furthermore, if any action for breach of or to enforce the provisions of this Lease is commenced, the court in such action shall award to the party in whose favor a judgment is entered, a reasonable sum as attorneys' fees and costs. The losing party in such action shall pay such attorneys' fees and costs. Tenant shall also indemnify Landlord against and hold Landlord harmless from all costs, expenses, demands and liability Landlord may incur if Landlord becomes or is made a party to any claim or action (a) instituted by Tenant against any third party, or by any third party against Tenant, or by or against any person holding any interest under or using the Property by license of or agreement with Tenant; (b) for foreclosure of any lien for labor or material furnished to or for Tenant or such other person; (c) otherwise arising out of or resulting from any act or transaction of Tenant or such other person; or (d) necessary to protect Landlord's interest under this Lease in a bankruptcy proceeding, or other proceeding under Title 11 of the United States Code, as amended. Tenant shall defend Landlord against any such claim or action at Tenant's expense with counsel reasonably acceptable to Landlord or, at Landlord's election, Tenant shall reimburse Landlord for any legal fees or costs Landlord incurs in any such claim or action.

Section 12.02. **Landlord's Consent.** Tenant shall pay Landlord's reasonable attorneys' fees incurred in connection with Tenant's request for Landlord's consent under Article Nine (Assignment and Subletting), or in connection with any other act which Tenant proposes to do and which requires Landlord's consent or other Landlord action.

#### ARTICLE THIRTEEN: **BROKERS**

Landlord and Tenant hereby warrant to each other that they have had no dealings with any real estate broker or agent in connection with the negotiation of this Lease, and that they know of no other real estate broker or agent who is entitled to a commission in connection with this Lease, excepting only the real estate brokers or agents named in Section 1.09 (the "Brokers"). Each party agrees to indemnify and defend the other party against and hold the other party harmless from any and all claims, demands, losses, liabilities, lawsuits, judgments, and costs and expenses (including without limitation reasonable attorneys' fees) with respect to any leasing commission or equivalent compensation alleged to be owing on account of the indemnifying party's dealings with any real estate broker or agent, other than the Brokers. Landlord's Broker hereby discloses to Landlord and Tenant, and Landlord and Tenant hereby consent to Landlord's Broker acting in this transaction as the agent of Landlord exclusively.

#### ARTICLE FOURTEEN: **MISCELLANEOUS PROVISIONS**

Section 14.01. **Non-Discrimination.** Tenant promises, and it is a condition to the continuance of this Lease, that there will be no discrimination against, or segregation of, any person or group of persons on the basis of race, color, sex, creed, national origin or ancestry in the leasing, subleasing, transferring, occupancy, tenure or use of the Property or any portion thereof.

##### Section 14.02. **Landlord's Liability; Certain Duties.**

(a) As used in this Lease, the term "Landlord" means only the current owner or owners of the fee title to the Property or the leasehold estate under a ground lease of the Property at the time in question. Each Landlord is obligated to perform the obligations of Landlord under this Lease only during the time such Landlord owns such interest or title. Any Landlord who transfers its title or interest is relieved of all liability with respect to the obligations of Landlord under this Lease to be performed on or after the date of transfer. However, each Landlord shall deliver to its transferee all funds that Tenant previously paid if such funds have not yet been applied under the terms of this Lease.

(b) Tenant shall give written notice of any failure by Landlord to perform any of its obligations under this Lease to Landlord and to any ground lessor, mortgagee or beneficiary under any deed of trust encumbering the Property whose name and address have been furnished to Tenant in writing. Landlord shall not be in default under this Lease unless Landlord (or such ground lessor, mortgagee or beneficiary) fails to cure such non-performance within thirty (30) days after receipt of Tenant's notice. However, if such non-performance reasonably requires more than thirty (30) days to cure, Landlord shall not be in default if such cure is commenced within such thirty (30)-day period and thereafter diligently pursued to completion.

(c) Notwithstanding any term or provision herein to the contrary, the liability of Landlord for the performance of its duties and obligations under this Lease is limited to Landlord's interest in the Property, and neither the Landlord nor its partners, members, managers, shareholders, officers or other principals shall have any personal liability under this Lease.

Section 14.03. **Severability.** A determination by a court of competent jurisdiction that any provision of this Lease or any part thereof is illegal or unenforceable shall not cancel or invalidate the remainder of such provision or this Lease, which shall remain in full force and effect.

Section 14.04. **Interpretation.** The captions of the Articles or Sections of this Lease are to assist the parties in reading this Lease and are not a part of the terms or provisions of this Lease. Whenever required by the context of this Lease, the singular shall include the plural and the plural shall include the singular. The masculine, feminine and neuter genders shall each include the other. In any provision relating to the conduct, acts or omissions of Tenant, the term "Tenant" shall include Tenant's agents, employees, contractors, invitees, successors or others using the Property with Tenant's expressed or implied permission.

**Section 14.05. Incorporation of Prior Agreements; Modifications.** This Lease is the only agreement between the parties pertaining to the lease of the Property and no other agreements are effective. All amendments to this Lease shall be in writing and signed by all parties. Any other attempted amendment shall be void.

**Section 14.06. Notices.** All notices, demands, statements or communications (collectively, "Notices") given or required to be given by either party to the other hereunder shall be in writing, shall be sent by United States certified or registered mail, postage prepaid, return receipt requested, commercial overnight courier, or delivered personally (i) to Tenant at the appropriate address set forth in Section 1.03, except that upon Tenant's taking possession of the Property, the Property shall be Tenant's address for notice purposes, or (ii) to Landlord at the addresses set forth in Section 1.02. Landlord and Tenant shall have the right to change its respective Notice address upon giving Notice to the other party. Any Notice will be deemed given on the date it is mailed as provided in this Section 14.06 or upon the date personal delivery is made. If Tenant is notified of the identity and address of Landlord's mortgagee or ground or underlying lessor, Tenant shall give to such mortgagee or ground or underlying lessor written notice of any default by Landlord under the terms of this Lease by registered or certified mail, and such mortgagee or ground or underlying lessor shall be given a reasonable opportunity to cure such default prior to Tenant's exercising any remedy available to Tenant. Notices required hereunder may be given by either an agent or attorney acting on behalf of Landlord or Tenant.

**Section 14.07. Waivers.** Without limiting the generality of the foregoing provisions of this Section 14.07, the failure of Landlord to insist upon the strict performance, in any of one or more instances, of any term, covenant or condition of this Lease shall not be deemed to be a waiver by Landlord of such term, covenant or condition. No waiver by Landlord of any breach by Tenant of any term, provision and covenant contained herein shall be deemed or construed to constitute a waiver of provision or covenant contained herein shall be deemed or construed to constitute a waiver of any other or subsequent breach by Tenant of any term, provision or covenant contained herein. Landlord's acceptance of the payment of rent (or portions thereof) or any other payments hereunder after the occurrence of and during the continuance of a default (or with knowledge of a breach of any term or provision of this Lease which with the giving of notice and the passage of time, or both, would constitute a default) shall not be construed as a waiver of such default. Forbearance by Landlord to enforce one or more of the remedies herein provided upon the occurrence of a default shall not be deemed or construed to constitute a waiver of such default.

**Section 14.08. No Recordation.** Tenant shall not record this Lease without prior written consent from Landlord. However, either Landlord or Tenant may require that a "Short Form" memorandum of this Lease executed by both parties be recorded. The party requiring such recording shall pay all transfer taxes and recording fees.

**Section 14.09. Binding Effect; Choice of Law.** This Lease binds any party who legally acquires any rights or interest in this Lease from Landlord or Tenant. However, Landlord shall have no obligation to Tenant's successor unless the rights or interests of Tenant's successor are acquired in accordance with the terms of this Lease. The laws of the state in which the Property is located shall govern this Lease.

**Section 14.10. Corporate Authority; Partnership Authority.** If Tenant is a corporation or partnership, each individual executing this Lease on behalf of Tenant hereby represents and warrants that Tenant is a duly formed and existing entity qualified to do business in the state in which the Property is located and that Tenant has full right and authority to execute and deliver this Lease and that each person signing on behalf of Tenant is authorized to do so. If Tenant is a corporation, within thirty (30) days after this Lease is signed, Tenant shall deliver to Landlord a certified copy of a resolution of Tenant's Board of Directors authorizing the execution of this Lease or other evidence of such authority reasonably acceptable to Landlord. If Tenant is a limited liability company, within thirty (30) days after this Lease is signed, Tenant shall deliver to Landlord a certified copy of a resolution of Tenant's managers or members authorizing the execution of this Lease, or other evidence of such authority reasonably acceptable to Landlord. If Tenant is a partnership, within thirty (30) days after this Lease is signed, Tenant shall deliver to Landlord a copy of Tenant's recorded statement of partnership or certificate of limited partnership. Tenant shall give written notice to Landlord of any general partner's withdrawal or addition.

**Section 14.11. Joint and Several Liability.** All parties signing this Lease as Tenant shall be jointly and severally liable for all obligations of Tenant.

**Section 14.12. Force Majeure.** A "Force Majeure" event shall occur if Landlord or Tenant cannot perform any of its obligations due to events beyond such applicable party's control, except with respect to the obligations imposed with regard to Base Rent, Additional Rent and other charges to be paid by Tenant pursuant to this Lease, the time provided for performing such obligations shall be extended by a period of time equal to the duration of such events. Events beyond Landlord's or Tenant's control include, but are not limited to, acts of God, war, civil commotion, terrorist acts, labor disputes, strikes, fire, flood or other casualty, shortages of labor or material, government regulation or restriction, waiting periods for obtaining governmental permits or approval or weather conditions.

**Section 14.13. Execution of Lease.** This Lease may be executed in counterparts and, when all counterpart documents are executed, the counterparts shall constitute a single binding instrument. Landlord's delivery of this Lease to Tenant shall not be deemed to be an offer to lease and shall not be binding upon either party until executed and delivered by both parties.

**Section 14.14. Survival.** All representations and warranties of Landlord and Tenant shall survive the termination of this Lease.

Section 14.15. **Relationship of Parties.** Nothing contained in this Lease shall be deemed or construed by the parties hereto or by any third party to create the relationship of principal and agent, partnership, joint venturer or any association between Landlord and Tenant, it being expressly understood and agreed that neither the method of computation of Rent nor any act of the parties hereto shall be deemed to create any relationship between Landlord and Tenant other than the relationship of landlord and tenant.

Section 14.16. **Application of Payments.** Landlord shall have the right to apply payments received from Tenant pursuant to this Lease, regardless of Tenant's designation of such payments, to satisfy any obligations of Tenant hereunder, in such order and amounts as Landlord, in its sole discretion, may elect.

Section 14.17. **No Warranty.** In executing and delivering this Lease, Tenant has not relied on any representation, including, but not limited to, any representation whatsoever as to the amount of any item comprising Additional Rent or the amount of the Additional Rent in the aggregate or that Landlord is furnishing the same services to other tenants, at all, on the same level or on the same basis, or any warranty or any statement of Landlord which is not set forth herein or in one or more of the exhibits attached hereto.

Section 14.18. **Waiver of Redemption by Tenant.** Tenant hereby waives, for Tenant and for all those claiming under Tenant, all rights now or hereafter existing to redeem by order or judgment of any court or by any legal process or writ, Tenant's right of occupancy of the Property after any termination of this Lease.

Section 14.19. **Independent Covenants.** This Lease shall be construed as though the covenants herein between Landlord and Tenant are independent and not dependent and Tenant hereby expressly waives the benefit of any statute to the contrary and agrees that if Landlord fails to perform its obligations set forth herein, Tenant shall not be entitled to make any repairs or perform any acts hereunder at Landlord's expense or to any setoff of the Rent or other amounts owing hereunder against Landlord.

Section 14.20. **Confidentiality.** Tenant acknowledges that the content of this Lease and any related documents are confidential information. Tenant shall keep such confidential information strictly confidential and shall not disclose such confidential information to any person or entity other than Tenant's financial, legal, and space planning consultants.

Section 14.21. **Revenue and Expense Accounting.** Landlord and Tenant agree that, for all purposes (including any determination under Section 467 of the Internal Revenue Code), rental income will accrue to the Landlord and rental expenses will accrue to the Tenant in the amounts and as of the dates rent is payable under this Lease.

**ARTICLE FIFTEEN: NO OPTION**

THE SUBMISSION OF THIS LEASE BY LANDLORD, ITS AGENT OR REPRESENTATIVE FOR EXAMINATION OR EXECUTION BY TENANT DOES NOT CONSTITUTE AN OPTION OR OFFER TO LEASE THE PROPERTY UPON THE TERMS AND CONDITIONS CONTAINED HEREIN OR A RESERVATION OF THE PROPERTY IN FAVOR OF TENANT, IT BEING INTENDED HEREBY THAT THIS LEASE SHALL ONLY BECOME EFFECTIVE UPON THE EXECUTION HEREOF BY LANDLORD AND DELIVERY OF A FULLY EXECUTED LEASE TO TENANT. NEITHER PARTY SHALL HAVE ANY OBLIGATION TO CONTINUE DISCUSSIONS OR NEGOTIATIONS OF THIS LEASE.

*[Signatures on following page]*

Landlord and Tenant have signed this Lease at the place and on the dates specified adjacent to their signatures below.

Executed on 7-17 2007

"LANDLORD"

MICO ARCHIBALD PARTNERS, L.L.C., a  
Delaware limited liability company

By: Majestic Realty Co., a  
California corporation  
its manager



By: [Signature]  
Its: DAVID A. WHEELER  
President

By: [Signature]  
Its: KEVIN D. MCCARTHY  
Vice President  
Director of Development

Executed on July 13 2007

"TENANT"

JENNIFER CONVERTIBLES, INC.  
a Delaware corporation

By: [Signature]  
Its: EXECUTIVE V.P.

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

Its: \_\_\_\_\_

EXHIBIT A

PROPERTY

{to be Attached}

SITE PLAN

BUILDING 8

**ARCHIBALD AIRPORT CENTER**  
2530 E. LINDSAY PRIVADO, ONTARIO, CALIFORNIA

DRAWN BY DATE  
BR 8/22/06

JOB NO.  
**6081**

SHEET NO.  
**MS1**  
OF SHTS.

M:\Sketches\6081\MS1.Site.dwg

**EXHIBIT B**

Prudential Loan No. \_\_\_\_\_

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

THIS AGREEMENT ("Agreement") made as of the \_\_\_\_ day of \_\_\_\_\_, 200\_\_, between THE PRUDENTIAL INSURANCE COMPANY OF AMERICA (together with its successors or assigns in interest, collectively "Lender") \_\_\_\_\_ ("Tenant").

**RECITALS:**

A. Lender is the owner and the holder of a loan evidenced by a promissory note (the "Note") dated \_\_\_\_\_ in the face amount of \$ \_\_\_\_\_. The Note is secured by a [here insert the name of the security instrument] (the "Mortgage") dated the same date as said Note, and recorded at [insert recording information] of the Real Property Records of \_\_\_\_\_, covering the real property described therein (the "Mortgaged Premises").

B. Tenant is the tenant under that certain Lease Agreement dated \_\_\_\_\_ (the "Lease"), between Tenant and \_\_\_\_\_ as landlord (said landlord and its successors and assigns under the Lease hereinafter called "Landlord"), covering all or part of the Mortgaged Premises as set forth under the Lease (hereinafter called the "Demised Premises").

C. Tenant and Lender desire to confirm their understanding with respect to the Lease and the Mortgage.

THEREFORE, in consideration of the mutual covenants and agreements herein contained and other good valuable consideration, the receipt and sufficiency of which are hereby acknowledged by all parties, Lender and Tenant agree as follows:

1. **Subordination.** The Lease is now, and will at all times and for all purposes be, subject and subordinate, in every respect, to the Mortgage, with the provisions of the Mortgage and this Agreement controlling over the provisions of the Lease. The Lease is subordinate and subject, in each and every respect, to any and all increases, renewals, modifications, extensions, substitutions, replacements and/or consolidations of the Mortgage, (collectively a "Modification"), and all other loan documents securing the Note, provided that any and all Modifications shall nevertheless be subject to the terms of this Agreement.

2. **Non-Disturbance.** So long as Tenant complies with all of the terms, provisions, agreements, covenants, and obligations set forth in the Lease, Tenant's possession of the Demised Premises under said Lease shall not be disturbed or interfered with by Lender.

3. **Attornment.** If Lender or any other party succeeds to the interest of Landlord under the Lease in any manner, including but not limited to foreclosure, exercise of any power of sale, succession by deed in lieu or other conveyance (a "Succession"), Tenant will attorn to and be bound to such party (whether Lender or another party) upon such Succession and will recognize Lender or such other party as the landlord under the Lease. Such attornment is effective and self-operative without the execution of any further instrument. Tenant, upon request, will sign and deliver any instruments reasonably requested to evidence such attornment. Tenant 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 such foreclosure or trustee's sale.

4. **Limitation On Lender's Liability.** Upon any Succession, Lender shall not be (a) liable for any act or omission of the Landlord under said Lease, (b) subject to any offsets or defenses which Tenant may have against the Landlord arising or occurring prior to the Succession, (c) bound by any rent or additional rent which Tenant may have paid to Landlord for more than the current month, (d) bound by any amendment or modification of the Lease made without Lender's prior written consent, (e) liable for any security deposit paid by Tenant to Landlord unless such deposit is delivered to Lender, (f) liable for or obligated to pay for repairs, replacements, damages or allowances not made, performed or paid by the Landlord if such performance or payment was due prior to the Succession, or (g) liable for the payment of any leasing commissions, the triggering event for which arose or occurred prior to the Succession. Any reference to Landlord includes all prior landlords under the Lease. Neither Lender nor any party taking under a Succession shall be liable for the performance of the obligations of the Landlord under the Lease, except for those obligations which arise during the period of Lender's or such entity's or person's ownership of the Mortgaged Premises.

5. Tenant's Warranty. Tenant warrants to Lender, as of the date hereof, that (a) attached is a true, correct and complete copy of the Lease, (b) there are no known defaults on the part of Landlord, (c) the Lease is a complete statement of the agreement of the parties with respect to the leasing of the Demised Premises, (d) the Lease is validly executed by Tenant and in full force and effect, and (e) all conditions to the effectiveness or continuing effectiveness thereof required to be satisfied as of the date hereof have been satisfied. Tenant acknowledges and warrants to Lender that it has not subordinated the Lease or any of its rights under the Lease to any lien or mortgage other than the Mortgage.

6. Lender Cure Rights. Thirty (30) days before exercising any of its rights and remedies under the Lease for a landlord default, Tenant will send written notice to Lender at 2200 Ross Avenue, Suite 4900E, Dallas, Texas 75201, referencing Loan Number \_\_\_\_\_ by certified mail, return receipt requested, of the occurrence of any default by Landlord and will specify with reasonable clarity the events constituting such default. If the referenced default would entitle Tenant to cancel the Lease or abate the rent payable thereunder, no such cancellation or abatement of rent will be effective unless Lender receives notice in the form and manner required by this Paragraph 6 and fails (a) within thirty (30) days of the date of the receipt of such notice by Lender to cure or cause to be cured any default which can be cured by the payment of money and (b) to cure or cause to be cured within sixty (60) days of the receipt of such notice any default which cannot be cured by the payment of money ("Non-Monetary Default"); provided, however, that if the Non-Monetary Default is not capable of cure within such sixty-day period, no cancellation or abatement by Tenant will be effective as to Lender unless Lender fails within the original sixty (60) day period to commence and diligently prosecute the cure of such default to completion. Tenant will accept cure of any Landlord default by Lender.

7. Rent Payment. Immediately upon written notice to Tenant (a) that Lender is exercising its rights under the Mortgage or any other loan documents acting to secure the Note following a default under the Loan, or (b) of Lender's succeeding to the Landlord's interest under the Lease, Tenant agrees to pay all rents due under the Lease directly to Lender (in accordance with the Lease).

8. Complete Agreement. This Agreement supersedes, as between the parties hereto, all of the terms and provisions of the Lease which are inconsistent herewith.

9. No Oral Modification/Binding Effect. This Agreement may not be modified orally or in any manner other than by an agreement in writing signed by the parties hereto or their respective successors in interest. This Agreement shall inure to the benefit of and be binding upon the parties hereto and their successors and assigns.

10. Laws. This Agreement shall be construed in accordance with the laws of the State where the Mortgaged Premises are located.

11. Automatic Amendment of Lease. Upon a Succession, the Lease is automatically amended as follows:

a. Hazardous Materials. All representations, warranties, indemnities or hold harmless provisions in favor of Tenant from Landlord dealing with the presence, use, transportation, disposal, contamination, exposure to or in any way arising out of hazardous or toxic materials, chemicals or wastes ("Hazardous Materials") are deleted as to Lender. Lender, however, as Landlord, covenants and agrees to (a) comply with all laws governing Hazardous Materials ("Hazardous Materials Laws"), (b) store, use and dispose of all Hazardous Materials at the Mortgaged Premises in accordance with all applicable Hazardous Materials Laws, and (c) remove, remediate and/or clean up, as applicable, in accordance with all applicable Hazardous Materials Laws, all Hazardous Materials at the Mortgaged Premises (to the extent not caused by Tenant or its employees, contractors or agents) impairing Tenant's use or access to the Demised Premises.

b. Insurance. Tenant will at all times carry comprehensive general liability coverage for its activities and operations at the Demised Premises, listing Lender and Landlord as additional insureds, in such coverage amounts as are required by the Lease but in no event less than One Million Dollars. Lender will have no liability to Tenant for any indemnity or hold harmless provision under the Lease where Lender is otherwise covered by Tenant's comprehensive general liability coverage(s) as carried by Tenant or which Tenant is required to carry under the Lease. All insurance required to be carried by Landlord under the Lease may be effected by Lender by self-insurance or by a policy or policies of blanket insurance covering additional items or locations or assureds and with such deductibles as Lender may from time to time determine. Tenant has no rights in any policy or policies maintained by Lender.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed the day and year first above written.

LENDER:

THE PRUDENTIAL INSURANCE COMPANY  
OF AMERICA

By: \_\_\_\_\_  
Vice President

TENANT:

[Tenant's Name].

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



EXHIBIT A

[ATTACHED]

**EXHIBIT C**

**ESTOPPEL CERTIFICATE**

The Prudential Insurance Company of America  
c/o Prudential Asset Resources  
2200 Ross Avenue, Suite 4900E  
Dallas, TX 75201

Re: Prudential Loan No. \_\_\_\_\_  
Loan to \_\_\_\_\_  
[Property Name] \_\_\_\_\_  
[Property Address] \_\_\_\_\_  
\_\_\_\_\_ ("Property")

The undersigned, \_\_\_\_\_, as Tenant of approximately \_\_\_\_\_ rentable square feet of the property situated at \_\_\_\_\_, under that certain lease agreement (the "Lease") dated \_\_\_\_\_, between \_\_\_\_\_, as Tenant, and \_\_\_\_\_, as Landlord, has been advised that the Lease will be assigned to The Prudential Insurance Company of America, a New Jersey corporation ("Prudential") as security in connection with a mortgage loan that has been or may be made by Prudential to Landlord. The undersigned hereby certifies to Prudential as follows, with full knowledge that Prudential, and its successors and assigns (collectively "Lender"), are relying upon the truth, accuracy and completeness of such statements:

1. The Lease has not been changed, modified, amended or supplemented, and the interest of the Tenant has not been assigned, encumbered or otherwise transferred, except as set forth below. The Lease, including any modifications or amendments set forth below, contains all of the understandings and agreements between Tenant and Landlord.

2. The Lease is in full force and effect and free from any default by either party. There are also no existing conditions, which upon the giving of notice or lapse of time, or both, would constitute a default under the Lease.

3. All improvements to the leased premises required to be built by Landlord have been fully and satisfactorily completed by Landlord; all allowances and contributions (if any) payable by Landlord for Tenant's improvements (or for any other purpose) have been paid; and Tenant has accepted the leased premises and is in full occupancy thereof, paying rent and actively conducting its business therein.

4. The term of the Lease commenced on \_\_\_\_\_, and expires on \_\_\_\_\_, unless renewed or extended in accordance with any renewal or extension provisions of the Lease.

5. The current monthly rent installment is \$ \_\_\_\_\_ which has been paid through and including \_\_\_\_\_. Tenant is presently making monthly payments of \$ \_\_\_\_\_ for common area maintenance charges, taxes, insurance and any other additional rent obligations under the lease, using the terms defined in the Lease for such items. No rent is prepaid for more than 30 days in advance. If applicable, Tenant is presently making monthly payments of percentage rent of \$ \_\_\_\_\_ (State none, if none and initial here \_\_\_\_\_).

6. As of the date hereof, Tenant has no outstanding offsets or credits against, or deductions from, or "free rent" period entitlements with respect to its future rent obligations, except as set forth below:

7. Tenant has paid Landlord a security deposit of \$ \_\_\_\_\_ (if none, insert "0"). Tenant has made no advance payment of rent other than for the current month.

8. There are no actions, whether voluntary or otherwise, pending against Tenant under the bankruptcy, debtor reorganization, moratorium or similar laws of the United States, any state thereof or any other jurisdiction.

9. Tenant has no expansion rights, purchase options or rights of first refusal with respect to renting additional space or acquiring any additional interest in the above-referenced property except as follows (State none, if none and initial here \_\_\_\_\_):

---

10. (a) As used here, "Hazardous Substance" means any substance, material or waste (including petroleum and petroleum products) which is designated, classified or regulated as being "toxic" or "hazardous" or a "pollutant" or which is similarly designated, classified or regulated, under any federal, state or local law, regulation or ordinance.

(b) Tenant represents and warrants that it has not used, generated, released, discharged, stored or disposed of any Hazardous Substances on, under, in or about the Building or the land on which the Building is located (*IF APPLICABLE*) [other than Hazardous Substances used in the ordinary and commercially reasonable course of Tenant's business in compliance with all Applicable Laws.] (*IF APPLICABLE*) [Except for such commercially reasonable use by Tenant,] Tenant has no actual knowledge that any Hazardous Substance is present, or has been used, generated, released, discharged, stored or disposed of by any party, on, under, in or about such Building or land.

11. If Lender or its designee succeeds to Landlord's interest in the leased premises or if a sale by power of sale or foreclosure occurs, Tenant shall attorn to Lender or its designee or a purchaser at such sale as its landlord.

12. Tenant has no right set forth in the Lease to terminate the Lease prior to the expiration of the term of the Lease except, to the extent provided in the Lease, in connection with a casualty or condemnation.

13. Tenant will not seek to terminate the Lease or seek or assert any set-off or counterclaim against the rent or additional rent by reason of any act or omission of Landlord, until (i) Tenant shall have given written notice (a "Termination Notice") of such act or omission to Lender or its designee, at such address as may be provided by such party to Tenant from time to time in writing, and (ii) the cure period, if any, afforded Landlord under the Lease has expired. Tenant shall deliver a Termination Notice to Lender at the same time a notice of Landlord's default is required to be given to Landlord under the Lease.

14. Upon receipt by Tenant of any written notice from Lender to do so, all base rent, additional rent and all other charges or payments that are to be made to Landlord under the Lease, shall be paid by Tenant directly to Lender or its designee until further notice from Lender in writing.

15. Neither Lender nor any purchaser at a sale by power of sale or foreclosure will be bound by any modification of the Lease including, without limitation, any reduction in rent or term, unless such party has consented thereto in writing.

16. Tenant has attached hereto as Exhibit A a true, correct and complete copy of the Lease and all amendments or modifications thereto.

This certification shall inure to the benefit of and be enforceable by The Prudential Insurance Company of America, its successors and assigns, and shall be binding upon the undersigned and its successors and assigns as Tenant under the Lease.

TENANT:

\_\_\_\_\_

Date: \_\_\_\_\_, 2007

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

**EXHIBIT D**

**HAZARDOUS MATERIALS**

[To be attached by Tenant prior to execution.]

**EXHIBIT E**  
**LEASE TERM DATES**

To: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Re: Standard Industrial Real Estate Lease dated \_\_\_\_\_, 200\_, between  
\_\_\_\_\_, a \_\_\_\_\_ ("Landlord"), and  
\_\_\_\_\_, a \_\_\_\_\_ ("Tenant") concerning the  
property commonly known as \_\_\_\_\_, California  
("Property").

Gentlemen:

In accordance with the Standard Industrial Real Estate Lease (the "Lease"), we wish to advise you and/or confirm as follows:

1. The Lease Term shall commence as of \_\_\_\_\_ for a term of \_\_\_\_\_ ending on \_\_\_\_\_.
2. That in accordance with the Lease, Rent commenced to accrue on \_\_\_\_\_.
3. The total Base Rent to be paid pursuant to the terms of said Lease is not less than \$ \_\_\_\_\_ and no Base Rent has been paid more than one month in advance.
4. Rent is due and payable in advance on the first day of each and every month during the Lease Term. Your rent checks should be made payable to \_\_\_\_\_ at \_\_\_\_\_.

"Landlord":

\_\_\_\_\_  
a \_\_\_\_\_

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

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

Agreed to and Accepted as of \_\_\_\_\_, 200\_.

"Tenant":

[TENANT NAME AND LEGAL ENTITY],

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

Its: \_\_\_\_\_

## EXHIBIT F

### TENANT WORK LETTER

This Tenant Work Letter shall set forth the terms and conditions relating to the construction of the tenant improvements in the Property. This Tenant Work Letter is essentially organized chronologically and addresses the issues of the construction of the tenant improvements, in sequence, as such issues will arise during the actual construction of the tenant improvements. All references in this Tenant Work Letter to Articles or Sections of "this Lease" shall mean such relevant portions of the Industrial Real Estate Lease to which this Tenant Work Letter is attached as Exhibit "F" and of which this Tenant Work Letter forms a part, and all references in this Tenant Work Letter to Sections of "this Tenant Work Letter" shall mean such relevant portions of this Tenant Work Letter.

#### SECTION 1 TENANT IMPROVEMENTS

At Landlord's sole cost, Landlord shall construct the following improvements to the Property (the "Tenant Improvements"):

- A. Paint and re-carpet the existing offices, replace any stained or damaged ceiling tiles, and combine the existing break room with the neighboring office space to create a larger break room, including an extension of the existing kitchen type counter with lower cabinets and outlets for counter top appliances and wall outlets.
- B. Floor joints shall be caulked with MM80 joint sealer.
- C. Install eighteen (18), "Z" guards at all dock high loading positions. Ground level doors shall be equipped with two (2) bollards at the interior and exterior of each door.
- D. Provide power distribution to one dock high door sufficient for a trash compactor and power distribution for an interior baler at locations to be mutually agreed to between Landlord and Tenant.
- E. Install 400 square feet of epoxy coating and a wall mounted, self contained eye wash station at the existing battery charging area.

Notwithstanding the foregoing, the color of the carpet and the paint shall be mutually agreed upon by Landlord and Tenant from Landlord's building standard colors and finishes. Landlord shall use Landlord's standard building components, materials and finishes in the construction of the Tenant Improvements. Notwithstanding the foregoing, the exact location of Tenant Improvements shall be in Landlord's sole discretion. Tenant shall make no changes or modifications to the Tenant Improvements without the prior written consent of Landlord, which consent may be withheld in Landlord's sole discretion if such change or modification would directly or indirectly delay the "Substantial Completion," as that term is defined in Section 5.1 of this Tenant Work Letter, of the Tenant Improvements or increase the cost of designing or constructing the Tenant Improvements.

#### SECTION 2 OVER-ALLOWANCE AMOUNT

In the event that after Tenant's execution of this Lease, any revisions, changes, or substitutions shall be made to the Tenant Improvements, any additional costs which arise in connection with such revisions, changes or substitutions shall be paid by Tenant to Landlord immediately upon Landlord's request as an over-allowance amount (the "Over-Allowance Amount"). The Over-Allowance Amount shall be disbursed by Landlord prior to the disbursement of any portion of Landlord's contribution to the construction of the Tenant Improvements.

#### SECTION 3 CONTRACTOR'S WARRANTIES AND GUARANTIES

Landlord hereby assigns to Tenant all warranties and guaranties by the contractor who constructs the Tenant Improvements (the "Contractor") relating to the Tenant Improvements, and Tenant hereby waives all claims against Landlord relating to, or arising out of the construction of, the Tenant Improvements.

#### SECTION 4 BUILDING STANDARD SPECIFICATIONS

Landlord shall use Landlord's standard components and materials in constructing the Tenant Improvements in the Property.

SECTION 5.  
COMPLETION OF THE TENANT IMPROVEMENTS:  
LEASE COMMENCEMENT DATE

5.1. Substantial Completion. For purposes of this Lease, "Substantial Completion" of the Tenant Improvements shall occur upon the completion of construction of the Tenant Improvements in the Property with the exception of any punch list items and any tenant fixtures, work-stations, built-in furniture, or equipment to be installed by Tenant or under the supervision of Contractor.

5.2. Delay of the Substantial Completion of the Tenant Improvements. The Lease Commencement Date shall occur as set forth in Article 2 of the Lease and is not conditioned upon Landlord's completion of the Tenant Improvements. If there shall be a delay or there are delays in the Substantial Completion of the Tenant Improvements as a direct, indirect, partial, or total result of:

- 5.2.1. Tenant's failure to timely approve any matter requiring Tenant's approval;
- 5.2.2. A breach by Tenant of the terms of this Tenant Work Letter or the Lease;
- 5.2.3. Tenant's request for changes in the Tenant Improvements;
- 5.2.4. Changes in any of the Tenant Improvements because the same do not comply with Applicable Laws;
- 5.2.5. Tenant's requirement for materials, components, finishes or improvements which are not available in a commercially reasonable time given the anticipated date of Substantial Completion of the Tenant Improvements, as set forth in the Lease, or which are different from, or not included in, Landlord's standard improvement package items for the Property;
- 5.2.6. Changes to the base, shell and core work of the building required by the Tenant Improvements; or
- 5.2.7. Any other acts or omissions of Tenant, or its agents, or employees;
- 5.2.8. Force majeure (as defined in Section 14.12 of this Lease);
- 5.2.9. The period of time waiting for governmental approval of the Tenant Improvements;

(collectively, "Tenant Delay") then, notwithstanding anything to the contrary set forth in the Lease or this Tenant Work Letter and regardless of the actual date of the Substantial Completion of the Tenant Improvements, the Substantial Completion of the Tenant Improvements shall be deemed to be the date the Substantial Completion of the Tenant Improvements would have occurred if no Tenant delay or delays, as set forth above, had occurred.

SECTION 6  
MISCELLANEOUS

6.1. Tenant's Representative. Tenant has designated [PLEASE PROVIDE] STEVE FANTLAN as its sole representative with respect to the matters set forth in this Tenant Work Letter, who, until further notice to Landlord, shall have full authority and responsibility to act on behalf of the Tenant as required in this Tenant Work Letter.

6.2. Landlord's Representative. Landlord has designated Trent Wylde as its sole representative with respect to the matters set forth in this Tenant Work Letter, who, until further notice to Tenant, shall have full authority and responsibility to act on behalf of the Landlord as required in this Tenant Work Letter.

6.3. Time of the Essence in This Tenant Work Letter. Unless otherwise indicated, all references herein to a "number of days" shall mean and refer to calendar days. In all instances where Tenant is required to approve or deliver an item, if no written notice of approval is given or the item is not delivered within the stated time period, at Landlord's sole option, at the end of such period the item shall automatically be deemed approved or delivered by Tenant and the next succeeding time period shall commence.

6.4. Tenant's Lease Default. Notwithstanding any provision to the contrary contained in this Lease, if an event of default as described in the Lease, or a default by Tenant under this Tenant Work Letter, has occurred at any time on or before the Substantial Completion of the Tenant Improvements, then (i) in addition to all other rights and remedies granted to Landlord pursuant to the Lease, Landlord shall have the right to cause Contractor to cease the construction of the Tenant Improvements (in which case, Tenant shall be responsible for any delay in the Substantial Completion of the Tenant Improvements caused by such work stoppage as set forth in Section 5 of this Tenant Work Letter), and (ii) all other obligations of Landlord under the terms of this Tenant Work Letter shall be forgiven until such time as such default is cured pursuant to the terms of the Lease.

6.5. Landlord's Construction of the Tenant Improvements. Tenant hereby acknowledges that Tenant may be occupying the Property pursuant to the Lease while Landlord is constructing the Tenant Improvements and that Landlord

shall be permitted to construct the Tenant Improvements during normal business hours, and Tenant shall provide a clear working area for Landlord's construction of the Tenant Improvements (including, but not limited to, the moving of furniture, fixtures and Tenant's property away from the area Landlord is constructing the Tenant Improvements). Tenant hereby agrees that the construction of the Tenant Improvements shall in no way constitute a constructive eviction of Tenant nor entitle Tenant to, if any, abatement of rent. Landlord shall have no responsibility or for any reason be liable to Tenant for any direct or indirect injury to or interference with Tenant's business arising from Landlord's construction of the Tenant Improvements, nor shall Tenant be entitled to any abatement of rent, compensation or damages from Landlord for loss of the use of whole or any part of the Property, for loss of or damage to Tenant's personal property, merchandise, fixtures or improvements, or for any inconvenience or annoyance resulting from Landlord's construction of the Tenant Improvements or for Landlord's actions in connection with Landlord's construction of the Tenant Improvements.



**Exhibit B**  
**("Stub Rent" Calculations)**

In re:	Chapter 11
JENNIFER CONVERTIBLES, INC., et al.,	Case No. 10-13779 (ALG)
Debtors.	(Jointly Administered)

**ITEMIZED CLAIMS FOR LEASE DEFAULT DAMAGES ARISING  
FROM UNPAID LEASE CHARGES**

LANDLORD: MICO ARCHIBALD PARTNERS, LLC

TENANT: JENNIFER CONVERTIBLES, INC.

LEASE DATE: JULY 15, 2007

PREMISES: 2530-A EAST LINDSAY PRIVADO, ONTARIO,  
CALIFORNIA 91761

LEASE EXPIRATION DATE: NOVEMBER 30, 2017

I.

**LEASE DEFAULT DAMAGES—CALCULATION OF DAILY LEASE CHARGES FOR  
STUB RENT PERIOD OF JULY 18-JULY 31, 2010**

1. Monthly Lease Charges—Base Rent and Additional Rent Per Sections 1.10, 3.01, 4.01, 4.02, 4.03, 4.05, and 12.01 of the July 15, 2007 Lease Agreement Relating to Base Rent, Asphalt Reserve Charges, Painting Reserve Charges, Roof Reserve Charges, Common Area Maintenance Charges, Property Management Charges, and Utility Charges

Base Rent	\$32,173.93
Asphalt Reserve Charges	\$204.06
Painting Reserve Charges	\$204.06
Roof Reserve Charges	\$1,001.42
Common Area Maintenance Charges	\$758.00
Property Management Charges	\$1,040.10
Utility Charges	\$327.00
Real Property Tax Charges	\$2,355.31
SUBTOTAL	<u>\$38,063.88</u>

2. Daily Lease Charge Calculation

$\$38,063.88 \times 12 \text{ months} = \$456,766.56 / 365 \text{ days} = \$1,251.42 \text{ per day}$

3. Unpaid Post-Petition Base Rent and Additional Rent Owed for Stub Rent Period of July 18-July 31, 2010

$\$1,251.42 \times 14 \text{ days} = \$17,519.88$

SUBTOTAL

\$17,519.88

**Exhibit C**  
**(Proposed Order)**

**UNITED STATES BANKRUPTCY COURT  
THE SOUTHERN DISTRICT OF NEW YORK**

In re:

JENNIFER CONVERTIBLES, INC., et al.,

Debtors.

Chapter 11

Case No. 10-13779 (ALG)

(Jointly Administered)

**ORDER GRANTING THE MOTION OF MICO ARCHIBALD PARTNERS LLC  
FOR ALLOWANCE AND PAYMENT OF ADMINISTRATIVE CLAIM**

Upon the motion, dated April 25, 2011 (the "**Motion**"),<sup>1</sup> of MICO Archibald Partners, LLC ("**MICO**"), pursuant to sections 365(d)(3) and 503(b)(1)(A) of title 11 of the United States Code (the "**Bankruptcy Code**"), for the Allowance and Payment of Administrative Claim; and the Court having read and considered the Motion, objections to the Motion, if any, and arguments of any counsel appearing regarding the relief requested in the Motion at any hearing on the Motion, the Court finds and determines the following:

- A. Consideration of the Motion and the relief requested therein is a core proceeding pursuant to 28 U.S.C. § 157(b).
- B. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.
- C. The Court has jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334.
- D. Due and proper notice of the Motion has been provided and no further notice is necessary.

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<sup>1</sup> Terms capitalized but not otherwise defined herein shall have the meaning ascribed to them in the Motion.

E. The legal and factual bases set forth in the Motion establish just and sufficient cause to grant the relief requested therein.

F. The relief granted herein is in the best interests of the Debtor, its estate, creditors, and all parties in interest.

Therefore, it is hereby ORDERED that:

1. The Motion is hereby GRANTED.
2. MICO shall have and is hereby granted an allowed administrative expense claim in the amount of \$146,562.68 for unpaid rent due under the Lease, plus unliquidated amounts for accruing attorneys' fees and costs (the "**Claim**").
3. The Debtors are directed to pay the Claim due to MICO within ten (10) days after the entry of this Order.
4. This Court shall retain jurisdiction over any and all matters arising from the interpretation or implementation of this Order.

Dated: \_\_\_\_\_, 2011  
New York, New York

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The Honorable Allan L. Gropper  
United States Bankruptcy Judge

Hearing Date: May 17, 2011 at 10:00 a.m.  
Objection Deadline: May 10, 2011 at 4:00 p.m.

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*Counsel for MICO Archibald Partners, LLC*

**UNITED STATES BANKRUPTCY COURT  
THE SOUTHERN DISTRICT OF NEW YORK**

In re:

JENNIFER CONVERTIBLES, INC., *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 10-13779 (ALG)

(Jointly Administered)

**NOTICE OF MOTION OF MICO ARCHIBALD PARTNERS, LLC FOR  
ALLOWANCE AND PAYMENT OF ADMINISTRATIVE EXPENSE CLAIM**

**PLEASE TAKE NOTICE** that a hearing (the "**Hearing**") shall be held before the  
Honorable Allan L. Gropper, United States Bankruptcy Judge, at the United States Bankruptcy

<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, if applicable, are: (i) Jennifer Convertibles, Inc. (4646); (ii) Jennifer Convertibles Boylston MA, Inc. (7904); (iii) Jennifer Chicago Ltd. (0505); (iv) Elegant Living Management, Ltd. (5049); (v) Hartsdale Convertibles, Inc. (1681); (vi) Jennifer Management III Corp. (3552); (vii) Jennifer Purchasing Corp. (7319); (viii) Jennifer Management II Corp. (9177); (ix) Jennifer Management V Ltd. (9876); (x) Jennifer Convertibles Natick, Inc. (2227); (xi) Nicole Convertibles, Inc. (5985); (xii) Washington Heights Convertibles, Inc. (0783).

Court, Alexander Hamilton Customs House, Courtroom 617, One Bowling Green, New York, New York 10004, on **May 17, 2011 at 10:00 a.m. (Prevailing Eastern Time)**, or as soon thereafter as counsel may be heard, to consider the *Motion of MICO Archibald Partners, LLC for Allowance and Payment of Administrative Expense Claim* (the "**Motion**") filed by MICO Archibald Partners, LLC ("**MICO**").

**PLEASE TAKE FURTHER NOTICE**, that objections, if any, to the Motion shall be in writing, shall conform to the Federal Rules of Bankruptcy Procedure and the Local Rules of the Bankruptcy Court for the Southern District of New York, shall set forth the name of the objecting party, the basis for the objection and the specific grounds thereof, shall be filed with the Bankruptcy Court electronically in accordance with General Order M-242 (which can be found at [www.nysb.uscourts.gov](http://www.nysb.uscourts.gov)) by registered users of the Bankruptcy Court's case filing system and by all other parties in interest, on a 3.5 inch disk, preferably in Portable Document Format (PDF), Microsoft Word, or any other Windows-based word processing format (with two hard copies delivered directly to Chambers), and shall be served upon: (i) the chambers of the Honorable Allan L. Gropper, United States Bankruptcy Court for the Southern District of New York, Alexander Hamilton Custom House, Courtroom 617, One Bowling Green, New York, New York 10004; (ii) Olshan Grundman Frome Rosenzweig & Wolosky, LLP (Attn: David Y. Wolnerman, Jordanna L. Nadritch and Michael S. Fox), 65 East 55th Street, New York, New York 10022, counsel for the Debtors; (iii) the Office of the United States Trustee for the Southern District of New York (Attn: Nazar Khodorovsky), 33 Whitehall Street, 21st Floor, New York, New York 10004; and (iv) Sheppard Mullin Richter & Hampton LLP (Attn: Malani J. Cademartori, Esq.), 30 Rockefeller Plaza, New York, New York, 10112 and The Reimann Law Group (Attn: David W. Reimann, Esq.), 1960 East Grand Ave, Suite 1165, El Segundo,



California 90245, counsel to MICO, so as to be received no later than May 10, 2011 at 4:00 p.m. (Prevailing Eastern Time) (the "Objection Deadline").

**PLEASE TAKE FURTHER NOTICE** that if an objection to the Motion is not received by the Objection Deadline in accordance with this notice, the Court may grant the relief requested in the Motion without further notice and hearing.

**PLEASE TAKE FURTHER NOTICE** that objecting parties are required to attend the Hearing, and failure to appear may result in relief being granted or denied upon default.

**PLEASE TAKE FURTHER NOTICE** that the Hearing may be adjourned from time to time without notice to any creditor or other party in interest other than by announcement of the adjourned date in open court on the date of the Hearing.

Dated: New York, New York  
April 25, 2011

**SHEPPARD MULLIN RICHTER & HAMPTON LLP**

By: /s/ Malani J. Cademartori

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