IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY J. WILLARD, individually and as; Trustee of the Larry James Willard Trust Fund; and OVERLAND DEVELOPMENT CORPORATION, a California corporation,

Appellants,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual,

Respondents.

_____/

NO. 77780

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APPENDIX TO APPELLANTS' OPENING BRIEFS

VOLUME 4 OF 19

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NO.	DOCUMENT	DATE	VOL.	PAGE NO.
(cont 31)	Exhibit 28: Deposition of L. Willard Excerpt		12	2765-2770
	Exhibit 29: April 12, 2013 Letter		12	2771-2773
	Exhibit 30: Declaration of G. Gordon		12	2774-2776
	Exhibit 31: Declaration of C. Kemper		12	2777-2780
32.	Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich	11/14/17	12	2781-2803
	Exhibit 1: Plaintiffs' Initial Disclosures		12	2804-2811
	Exhibit 2: Plaintiffs' Initial Disclosures of Expert Witnesses		12	2812-2820
	Exhibit 3: December 5, 2016 Email		12	2821-2827
	Exhibit 4: December 9, 2016 Email		12	2828-2829
	Exhibit 5: December 23, 2016 Email		12	2830-2833
	Exhibit 6: December 27, 2016 Email		12	2834-2837
	Exhibit 7: February 3, 2017 Letter		13	2838-2865
	Exhibit 8: Deposition Excerpts of D. Gluhaich		13	2866-2875
	Exhibit 9: Declaration of Brain Irvine		13	2876-2879
33.	Defendants' Motion for Partial Summary Judgment – Oral Argument Requested	11/15/17	13	2880-2896
	Exhibit 1: Highway 50 Lease		13	2897-2940
	Exhibit 2: Declaration of Chris Kemper		13	2941-2943
	Exhibit 3: Wooley Deposition at 41		13	2944-2949
	Exhibit 4: Virginia Lease		13	2950-2985

NO.	DOCUMENT	DATE	VOL.	PAGE NO.
(cont 33)	Exhibit 5: Little Caesar's Sublease		13	2986-3005
	Exhibit 6: Willard Response to Defendants' Second Set of Interrogatories		13	3006-3014
	Exhibit 7: Willard Deposition at 89		13	3015-3020
34.	Defendants'/Counterclaimants' Motion for Sanctions – Oral Argument Requested	11/15/17	13	3021-3058
	Exhibit 1: Plaintiffs' Initial Disclosures		13	3059-3066
	Exhibit 2: November 2014 Email Exchange		13	3067-3076
	Exhibit 3: January 2015 Email Exchange		13	3077-3082
	Exhibit 4: February 12, 2015 Letter		13	3083-3085
	Exhibit 5: Willard July 2015 Interrogatory Reponses		14	3086-3097
	Exhibit 6: Wooley July 2015 Interrogatory Responses		14	3098-3107
	Exhibit 7: August 28, 2015 Letter		14	3108-3119
	Exhibit 8: March 3, 2016 Letter		14	3120-3208
	Exhibit 9: March 15, 2016 Letter		14	3209-3300
	Exhibit 10: April 20, 2016 Letter		14	3301-3327
	Exhibit 11: December 2, 2016 Expert Disclosure		15	3328-3336
	Exhibit 12: December 5, 2016 Email		15	3337-3343
	Exhibit 13: December 9, 2016 Email		15	3344-3345
	Exhibit 14: December 23, 2016 Email		15	3346-3349
	Exhibit 15: December 27, 2016 Email		15	3350-3353
	Exhibit 16: February 3, 2017 Letter		15	3354-3381

NO.	DOCUMENT	DATE	VOL.	PAGE NO.
(cont 34)	Exhibit 17: Willard Responses to Defendants' First Set of Requests for Production of Documents 17		15	3382-3391
	Exhibit 18: Wooley Deposition Excerpts		15	3392-3397
	Exhibit 19: Highway 50 Lease		15	3398-3441
	Exhibit 20: April 1, 2016 Email		15	3442-3444
	Exhibit 21: May 3, 2016 Email Exchange		15	3445-3446
	Exhibit 22: June 21, 2016 Email Exchange		15	3447-3453
	Exhibit 23: July 21, 2016 Letter		15	3454-3471
	Exhibit 24: Defendants' First Set of Interrogatories on Wooley		15	3472-3480
	Exhibit 25: Defendants' Second Set of Interrogatories on Wooley		15	3481-3490
	Exhibit 26: Defendants' First Request for Production of Documents on Wooley		15	3491-3498
	Exhibit 27: Defendants' Second Request for Production of Documents on Wooley		15	3499-3506
	Exhibit 28: Defendants' Third Request for Production of Documents on Wooley		15	3507-3512
	Exhibit 29: Defendants' Requests for Admission on Wooley		15	3513-3518
	Exhibit 30: Defendants' First Set of Interrogatories on Willard		15	3519-3528
	Exhibit 31: Defendants' Second Set of Interrogatories on Willard		15	3529-3539
	Exhibit 32: Defendants' First Request for Production of Documents on Willard		15	3540-3547

NO.	DOCUMENT	DATE	VOL.	PAGE NO.
(cont 34)	Exhibit 33: Defendants' Second Request for Production of Documents on Willard		15	3548-3555
	Exhibit 34: Defendants' Third Request for Production of Documents on Willard		15	3556-3561
	Exhibit 35: Defendants' Requests for Admission on Willard		15	3562-3567
35.	Plaintiffs' Request for a Brief Extension of Time to Respond to Defendants' Three Pending Motions and to Extend the Deadline for Submissions of Dispositive Motions	12/06/17	15	3568-3572
36.	Notice of Non-Opposition to Defendants/Counterclaimants' Motion for Sanctions	12/07/17	16	3573-3576
37.	Notice of Non-Opposition to Defendants/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich	12/07/17	16	3577-3580
38.	Notice of Non-Opposition to Defendants/Counterclaimants' Motion for Partial Summary Judgment	12/07/17	16	3581-3584
39.	Order Granting Defendants/ Counterclaimants' Motion for Sanctions [Oral Argument Requested]	01/04/18	16	3585-3589
40.	Order Granting Defendants/ Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich	01/04/18	16	3590-3594
41.	Notice of Entry of Order re Defendants' Motion for Partial Summary Judgment	01/05/18	16	3595-3598

NO.	DOCUMENT	DATE	VOL.	PAGE NO.
42.	Notice of Entry of Order re Defendants' Motion for Exclude the Expert Testimony of Daniel Gluhaich	01/05/18	16	3599-3602
43.	Notice of Entry of Order re Defendants' Motion for Sanctions	01/05/18	16	3603-3606
44.	Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions	03/06/18	16	3607-3640
45.	Notice of Entry of Findings of Facts, Conclusions of Law and Order	03/06/18	16	3641-3644
46.	Request for Entry of Judgment	03/09/18	16	3645-3649
	Exhibit 1: Judgment		16	3650-3653
47.	Notice of Withdrawal of Local Counsel	03/15/18	16	3654-3656
48.	Notice of Appearance – Richard Williamson, Esq. and Jonathan Joe Tew, Esq.	03/26/18	16	3657-3659
49.	Opposition to Request for Entry of Judgment	03/26/18	16	3660-3665
50.	Reply in Support of Request for Entry of Judgment	03/27/18	16	3666-3671
51.	Order Granting Defendant/ Counterclaimants' Motion to Dismiss Counterclaims	04/13/18	16	3672-3674
52.	Willard Plaintiffs' Rule 60(b) Motion for Relief	04/18/18	16	3675-3692
	Exhibit 1: Declaration of Larry J. Willard		16	3693-3702
	Exhibit 2: Lease Agreement dated 11/18/05		16	3703-3738
	Exhibit 3: Letter dated 4/12/13 from Gerald M. Gordon to Steven Goldblatt		16	3739-3741

NO.	DOCUMENT	DATE	VOL.	PAGE NO.
(cont 52)	Exhibit 4: Operation and Management Agreement dated 5/1/13		16	3742-3746
	Exhibit 5: 13 Symptoms of Bipolar Disorder		16	3747-3749
	Exhibit 6: Emergency Protective Order dated 1/23/18		16	3750-3752
	Exhibit 7: Pre-Booking Information Sheet dated 1/23/18		16	3753-3755
	Exhibit 8: Request for Domestic Violence Restraining Order, filed 1/31/18		16	3756-3769
	Exhibit 9: Motion for Summary Judgment of Plaintiffs Larry J. Willard and Overland Development Corporation, filed October 18, 2017		16	3770-3798
53.	Opposition to Rule 60(b) Motion for Relief	05/18/18	17	3799-3819
	Exhibit 1: Declaration of Brain R. Irvine		17	3820-3823
	Exhibit 2: Transfer of Hearing, January 10, 2017		17	3824-3893
	Exhibit 3: Transfer of Hearing, December 12, 2017		17	3894-3922
	Exhibit 4: Excerpt of deposition transcript of Larry Willard, August 21, 2015		17	3923-3924
	Exhibit 5: Attorney status according to the California Bar		17	3925-3933
	Exhibit 6: Plaintiff's Initial Disclosures, December 12, 2014		17	3934-3941
54.	Reply in Support of the Willard Plaintiffs' Rule 60(b) Motion for Relief	05/29/18	17	3942-3950

NO.	DOCUMENT	DATE	VOL.	PAGE NO.
(cont 54)	Exhibit 1: Declaration of Larry J. Willard in Response to Defendants' Opposition to Rule 60(b) Motion for Relief		17	3951-3958
	Exhibit 2: Text messages between Larry J. Willard and Brian Moquin Between December 2 and December 6, 2017		17	3959-3962
	Exhibit 3: Email correspondence between David O'Mara and Brian Moquin		17	3963-3965
	Exhibit 4: Text messages between Larry Willard and Brian Moquin between December 19 and December 25, 2017		17	3966-3975
	Exhibit 5: Receipt		17	3976-3977
	Exhibit 6: Email correspondence between Richard Williamson and Brian Moquin dated February 5 through March 21, 2018			3978-3982
	Exhibit 7: Text messages between Larry Willard and Brian Moquin between March 30 and April 2, 2018		17	3983-3989
	Exhibit 8: Email correspondence Between Jonathan Tew, Richard Williamson and Brian Moquin dated April 2 through April 13, 2018		17	3990-3994
	Exhibit 9: Letter from Richard Williamson to Brian Moquin dated May 14, 2018		17	3995-3997
	Exhibit 10: Email correspondence between Larry Willard and Brian Moquin dated May 23 through May 28, 2018		17	3998-4000
	Exhibit 11: Notice of Withdrawal of Local Counsel		17	4001-4004
55.	Order re Request for Entry of Judgment	06/04/18	17	4005-4009

NO.	DOCUMENT	DATE	VOL.	PAGE NO.
56.	Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply	06/06/18	17	4010-4018
	Exhibit 1: Sur-Reply in Support of Opposition to the Willard Plaintiffs' Rule 60(b) Motion for Relief		17	4019-4036
57.	Opposition to Defendants' Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply	06/22/18	18	4037-4053
58.	Reply in Support of Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply	06/29/18	18	4054-4060
59.	Order Denying Plaintiffs' Rule 60(b) Motion for Relief	11/30/18	18	4061-4092
60.	Notice of Entry of Order re Order Denying Plaintiffs' Rule 60(b) Motion for Relief	12/03/18	18	4093-4096
	Exhibit 1: Order Denying Plaintiffs' Rule 60(b) Motion for Relief		18	4097-4129
61.	Judgment	12/11/18	18	4130-4132
62.	Notice of Entry of Order re Judgment	12/11/18	18	4133-4136
	Exhibit 1: December 11, 2018 Judgment		18	4137-4140
63.	Notice of Appeal	12/28/18	18	4141-4144
	Exhibit 1: Finding of Fact, Conclusion of Law, and Order on Defendants' Motions for Sanctions, entered March 6, 2018		18	4145-4179
	Exhibit 2: Order Denying Plaintiffs' Rule 60(b) Motion for Relief, entered November 30, 2018		18	4180-4212
	Exhibit 3: Judgment, entered December 11, 2018		18	4213-4216

NO.	DOCUMENT	DATE	VOL.	PAGE NO.
TRANSCRIPTS				
64.	Transcript of Proceedings – Status Hearing	08/17/15	18	4217-4234
65.	Transcript of Proceedings - Hearing on Motion for Partial Summary Judgment	01/10/17	19	4235-4303
66.	Transcript of Proceedings - Pre-Trial Conference	12/12/17	19	4304-4331
67.	Transcript of Proceedings - Oral Arguments – Plaintiffs' Rule 60(b) Motion (condensed)	09/04/18	19	4332-4352
ADDITIONAL DOCUMENTS				
68.	Order Granting Defendants' Motion for Partial Summary Judgment [Oral Argument Requested][1]	01/04/18	19	4353-4357

[1] This document was inadvertently omitted earlier. It was added here because al of the other papers in the 19-volume appendix had already been numbered.

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Jacqueline Bryant
Clerk of the Court
Transaction # 5636821 : csulezic

EXHIBIT 17

EXHIBIT 17

APN: 030-041-08
Recording Requested By and
When Recorded Return to:
Brian L. Ballard
HAWLEY TROXELL ENNIS & HAWLEY LLP
P.O. Box 1617
Boise, Idaho 83701

SPACE ABOVE THIS LINE FOR RECORDER'S USE ONLY

ASSIGNMENT AND ASSUMPTION OF LEASE

This ASSIGNMENT AND ASSUMPTION OF LEASE (this "Assignment") is made as of this 29 day of DECEMBER 2009, by **BERRY-HINCKLEY INDUSTRIES, INC., a Nevada corporation ("Assignor"), and JACKSONS FOOD STORES, INC., a Nevada corporation ("Assignee").**

RECITALS:

A. Assignor is presently the "tenant" under that certain Lease Agreement dated May of 2006, by and between Assignor and Edward Wooley and Judith Wooley as Trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust Year 2000 (collectively, the "Landlord"), as amended by that certain First Amendment to Lease Agreement dated March 12, 2007 (collectively, the "Lease"), which Lease affects the real property located in the County of Washoe, State of Nevada more particularly described in Exhibit A attached hereto and incorporated herein by this reference (the "Property"); and

B. Pursuant to that certain Asset Transfer Agreement, dated as of August 31, 2009 (the "Agreement"), by and between Assignor and Assignee, Assignor has agreed to assign, and Assignee has agreed to accept, all of Assignor's rights, title, estate, interest, duties and obligations under the Lease.

NOW, THEREFORE, in order to carry out the terms of the Agreement, and in consideration of the mutual covenants and agreements herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged. Assignor and Assignee hereby agree as follows:

1. Assignment. Assignor hereby grants, transfers, conveys and assigns to Assignee all of Assignor's right, title, estate and interest in, to and under the Lease, together with any right, title, and interest of Assignor in and to any subleases, if any, relating to any portion of the Property.

2. Assumption. Assignee hereby accepts such assignment of Assignor's right, title, estate and interest in, to and under the Lease, and, in addition, (i) assumes and agrees to be bound by all of the terms of the Lease, and (ii) agrees to keep, perform, fulfill, and observe all of the terms, covenants, obligations, agreements, and conditions required to be kept, performed,

fulfilled, and observed by the Assignor or tenant under the Lease or any sublease thereof from and after the execution and delivery of this Assignment.

3. Indemnification of Assignor. Assignee hereby agrees to indemnify, defend, and hold Assignor harmless from and against any and all liability, losses, costs, damages and expenses (including, without limitation, reasonable attorneys' fees and costs including reasonable attorneys' fees and costs on appeal) directly or indirectly arising out of or based upon Assignee's failure to keep, perform, fulfill and observe any of the terms, covenants, obligations, agreements, and conditions required to be kept, performed, fulfilled, and observed by the tenant under the Lease from and after the execution and delivery of this Assignment.

4. Indemnification of Assignee. Assignor hereby agrees to indemnify, defend, and hold Assignee harmless from and against any and all liability, loss, cost, damage and expense (including, without limitation, reasonable attorneys' fees and costs, including reasonable attorneys' fees and costs on appeal) directly or indirectly arising out of or based upon Assignor's failure to keep, perform, fulfill, and observe any of the terms covenants, obligations, agreements, and conditions required to be kept, performed, fulfilled, and observed by the tenant under the Lease prior to the execution and delivery of this Assignment by Assignor and Assignee.

5. Rentals. All rents payable under or pursuant to the Lease shall be prorated as between Assignor and Assignee pursuant to, and in accordance with, the terms of the Agreement.

6. Further Assurances. Assignor hereby covenants that it will, at any time and from time to time following a written request therefor, execute and deliver to Assignee and its successors and assigns, any additional or confirmatory instruments and take such further acts as Assignee may reasonably request to evidence fully the assignment contained herein.

7. Binding Effect. This Assignment shall inure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns.

8. Survival of Certain Provisions. The provisions of Sections 2, 3, 4, 5 and 6 hereof shall survive the execution and delivery of this Assignment by Assignor and Assignee and the assignment of the Lease pursuant hereto.

9. Governing Law. This Assignment shall be construed in accordance with and governed by the laws of the State of Nevada.

10. Counterparts. This Assignment may be executed in any number of counterparts, each of which shall be deemed an original, but all of which when taken together shall constitute one and the same instrument.

[Signatures Appear on Following Page]

ASSIGNOR:

BERRY-HINCKLEY INDUSTRIES,
a Nevada corporation

By: _____
Name: Jerry Herbst
Title: President

STATE OF NEVADA)
) ss.
County of Clark)

On this 17 day of December, 2009, before me, Jenifer E Cannon, a Notary Public in and for said State, personally appeared Jerry Herbst, known or identified to me to be the President [title] of Berry-Hinckley Industries, the corporation that executed the within instrument or the person who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

_____
Notary Public for the State of Nevada
Residing at Las Vegas, NV
My commission expires _____

JENIFER E. CANNON
NOTARY PUBLIC
STATE OF NEVADA
APPT. NO. 03-80018-1
MY APPT. EXPIRES FEB. 12, 2011

ASSIGNEE:

JACKSONS FOOD STORES, INC.,
a Nevada corporation

By: _____
John D. Jackson, CEO

STATE OF IDAHO)
) ss.
County of Ada)

On this 23 day of December, 2009, before me, TIMOTHY W. TYREE, a Notary Public in and for said State, personally appeared John D. Jackson, known or identified to me to be the CEO of Jacksons Food Stores, Inc., the corporation that executed the within instrument or the person who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

TIMOTHY W. TYREE
NOTARY PUBLIC
STATE OF IDAHO

_____
Notary Public for the State of Idaho
Residing at BOISE ID
My commission expires 12-14-2010

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CONSENT AND AGREEMENT

OF

EDWARD C. WOOLEY AND JUDITH A. WOOLEY,
AS TRUSTEES OF THE EDWARD C. WOOLEY AND JUDITH A. WOOLEY INTERVIVOS REVOCABLE TRUST YEAR 2000

The undersigned, being the current Landlord under the above referenced Lease which is being assigned from BERRY-HINCKLEY INDUSTRIES, a Nevada corporation, to and for the benefit of JACKSONS FOOD STORES, INC., a Nevada corporation, hereby acknowledge the above and agree and consent to the assignment of the Lease on the terms of the foregoing Assignment.

Date:_____

_____
Edward C. Wooley, Trustee of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust Year 2000

Date:_____

_____
Judith A. Wooley, Trustee of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust Year 2000

STATE OF _____)
) ss.
County of _____)

On this _____ day of _____, 20__, before me, _____, a Notary Public in and for said State, personally appeared Edward C. Wooley, known or identified to me to be the trustee of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust Year 2000, and acknowledged to me that he executed the instrument in his capacity as trustee.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

_____
Notary Public for the State of_____
Residing at_____
My commission expires_____

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A.App.725

STATE OF _____)
) ss.
County of _____)

On this _____ day of _____, 20__, before me, _____, a Notary Public in and for said State, personally appeared Judith A. Wooley, known or identified to me to be the trustee of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust Year 2000, and acknowledged to me that she executed the instrument in her capacity as trustee.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

_____
Notary Public for the State of_____
Residing at_____
My commission expires_____

Exhibit A

LEGAL DESCRIPTION
1365 Baring Blvd., Sparks, NV

All that certain real property situate in the County of Washoe, State of Nevada, described as follows:

PARCEL 1:

All that portion of the Southeast Quarter (SE ¼) of Section 34, Township 20 North, Range 20 East, M.D.M., Washoe County, Nevada, further described as follows:

Beginning at the intersection of the Westerly line of Sorenson Way with the Southerly line of Baring Boulevard, as shown on the "Parcel Map for Foothill Investment Co. and Lewis Building Co., Inc.", recorded January 26, 1983 in the office of the County Recorder of Washoe County, Nevada, as Parcel Map No. 1418, File No. 835532 and proceeding thence Southerly along the Westerly line of Sorenson Way on the arc of a curve to the right, from a tangent bearing South 89°11'14" East, with a radius of 30.00 feet, through a central angle of 90°00'00", an arc distance of 47.12 feet, said arc being subtended by a chord bearing south 44°11'14" East 42.45 feet; thence South 0°48'46: West 15.00 feet; thence along the arc of a curve to the right with a radius of 122.50 feet, through a central angle of 42°01'02", an arc distance of 89.83 feet, said arc being subtended by a chord which bears South 21°49'17" West 87.83 feet; thence along the arc of a reverse curve to the left with a radius of 227.50 feet, through a central angle of 7°23'23", an arc distance of 29.34 feet, said arc being subtended by a chord which bears South 39°08'05" West 29.32 feet; thence leaving Sorenson Way North 89°11'14" West 150.00 feet; thence North 0°48'46" East 150.00 feet to the Southerly line of Baring Boulevard; thence along Baring Boulevard South 89°11'14" East 169.67 feet to the point of beginning.

PARCEL 2:

An easement for ingress and egress for pedestrians and vehicles as described and conveyed in the access Easement Agreement recorded May 26, 1988 in Book 2742, Page 321, under Document No. 128846, Official Records.

APN: 030-041-08

Document Number 3291758 provided pursuant to the requirements of Section 1.NRS 111.312

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Jacqueline Bryant
Clerk of the Court
Transaction # 5636821 : csulezic

EXHIBIT 18

EXHIBIT 18

A. Settlement Statement

U.S. Department of Housing and Urban Development

OMB No. 2502-0265

B. Type of Loan

1. ☐ FHA 2. ☐ FmHA 3. ☐ Conv Unins
4. ☐ VA 5. ☐ Conv Ins. 6. ☐ Seller Finance

6. File Number: 062749-PAH
7. Loan Number:
8. Mortgage Ins Case Number:

C. Note: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p.o.c.)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.

D. Name & Address of Borrower
Asset Exchange Company As QI for The Richard Wray 1981 Family Trust

E. Name & Address of Seller
The Edward C. Wooley and Judith A. Wooley Intervivos Revocable Living Trust

F. Name & Address of Lender

G. Property Location
1365 Baring Blvd
Sparks, NV 89436

H. Settlement Agent Name
Western Title Company, LLC
5390 Kietzke Ln, Suite 101
Reno, NV 89511 Tax ID: 80-0263542
Underwritten By: First American Title Company

Place of Settlement
Western Title Company
Kietzke Office
5390 Kietzke Ln Suite 101
Reno, NV 89511

I. Settlement Date
5/20/2014
Fund:

J. Summary of Borrower's Transaction		K. Summary of Seller's Transaction	
100. Gross Amount Due from Borrower		400. Gross Amount Due to Seller	
101. Contract Sales Price	$3,100,000.00	401. Contract Sales Price	$3,100,000.00
102. Personal Property		402. Personal Property	
103. Settlement Charges to borrower	$8,695.00	403.	
104.		404.	
105.		405.	
Adjustments for items paid by seller in advance		Adjustments for items paid by seller in advance	
106. County Property Taxes 05/20/14 to 06/30/14	$1,225.34	406. County Property Taxes 05/20/14 to 06/30/14	$1,225.34
107. Sewer Use Fee 05/20/14 to 05/31/14	$156.49	407. Sewer Use Fee 05/20/14 to 05/31/14	$156.49
108. HOA Dues		408. HOA Dues	
109. Assessments		409. Assessments	
110. RENTS		410. RENTS	
111.		411.	
112.		412.	
113.		413.	
114.		414.	
115.		415.	
116.		416.	
120. Gross Amount Due From Borrower	$3,110,076.83	420. Gross Amount Due to Seller	$3,101,381.83
200. Amounts Paid By Or In Behalf Of Borrower		500. Reductions in Amount Due to Seller	
201. Deposit or earnest money	$100,000.00	501. Excess Deposit	
202. Principal amount of new loan(s)		502. Settlement Charges to Seller (line 1400)	$147,847.30
203. Existing loan(s) taken subject to		503. Existing Loan(s) Taken Subject to	
204. Loan Amount 2nd Lien		504. Payoff of first mortgage loan	
205.		505. Payoff of second mortgage loan	
206. EXCHANGE FUNDS -		506. PAYOFF UNION BANK	$2,975,236.35
207.		507.	
208.		508.	
209.		509.	
Adjustments for items unpaid by seller		Adjustments for items unpaid by seller	
210. County Property Taxes		510. County Property Taxes	
211. Sewer Use Fee		511. Sewer Use Fee	
212. HOA Dues		512. HOA Dues	
213. Assessments		513. Assessments	
214. RENTS 05/20/14 to 05/31/14	$7,453.79	514. RENTS 05/20/14 to 05/31/14	$7,453.79
215.		515.	
216.		516.	
217.		517.	
218.		518.	
219.		519.	
220. Total Paid By/For Borrower	$107,453.79	520. Total Reduction Amount Due Seller	$2,230,537.44
300. Cash At Settlement From/To Borrower		600. Cash At Settlement To/From Seller	
301. Gross Amount due from borrower (line 120)	$3,110,076.83	601. Gross Amount due to seller (line 420)	$3,101,381.83
302. Less amounts paid by/for borrower (line 220)	$107,453.79	602. Less reductions in amt. due seller (line 520)	$2,230,537.44
303. Cash From Borrower	$3,002,623.04	603. Cash To Seller	$870,844.39

Section 5 of the Real Estate Settlement Procedures Act (RESPA) requires the following: • HUD must develop a Special Information Booklet to help persons borrowing money to finance the purchase of residential real estate to better understand the nature and costs of real estate settlement services; • Each lender must provide the booklet to all applicants from whom it receives or for whom it prepares a written application to borrow money to finance the purchase of residential real estate; • Lenders must prepare and distribute with the Booklet a Good Faith Estimate of the settlement costs that the borrower is likely to incur in connection with the settlement. These disclosures are mandatory.

Section 4(a) of RESPA mandates that HUD develop and prescribe this standard form to be used at the time of loan settlement to provide full disclosure of all charges imposed upon the borrower and seller. These are third party disclosures that are designed to provide the borrower with pertinent information during the settlement process in order to be a better shopper.

The Public Reporting Burden for this collection of information is estimated to average one hour per response, including the time for reviewing instructions searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

This agency may not collect this information, and you are not required to complete this form, unless it displays a currently valid OMB control number. The information requested does not lend itself to confidentiality.

File No. 062749-PAH

L. Settlement Charges				Paid From Borrower's Funds at Settlement	Paid From Seller's Funds at Settlement
700. Total Sales/Broker's Commission based on price	$3,190,000.00	@4.25 % = $131,750.00			
Division of Commission (line 700) as follows:					
701. $65,875.00	to	Colliers International			
702. $65,875.00	to	Perkins Company of Nevada			
703. Commission Paid at Settlement				$0.00	$131,750.00
800. Items Payable in Connection with Loan					
801. Loan Origination Fee %	to				
802. Loan Discount %	to				
803. Appraisal Fee	to				
804. Credit Report	to				
805. Lender's Inspection Fee	to				
806. Mortgage Insurance Application	to				
807. Assumption Fee	to				
900. Items Required by Lender To Be Paid in Advance					
901. Interest from 5/20/2014 to 6/1/2014 @ $0/day					
902. Mortgage Insurance Premium for months	to				
903. Hazard Insurance Premium for years	to				
1000. Reserves Deposited With Lender					
1001. Hazard insurance	months @		per month		
1002. Homeowner's Insurance	months @		per month		
1003. County Property Taxes	months @		per month		
1004. Sewer Use Fee	months @		per month		
1005. HOA Dues	months @		per month		
1006. Assessments	months @		per month		
1007.	months @		per month		
1008.	months @		per month		
1011. Aggregate Adjustment					
1100. Title Charges					
1101. Escrow Fee	to	Western Title Company FEES		$2,000.00	$2,000.00
1102. Abstract or title search	to				
1103. Title examination	to	Western Title Company FEES			
1104. Title insurance binder	to	Western Title Company FEES			
1105. Document preparation	to	Western Title Company FEES			
1106. Notary fees	to				
1107. Attorney's fees	to				
(includes above items numbers:			)		
1108. Title insurance	to	Western Title Company FEES			$6,617.00
(includes above items numbers:			)		
1109. Lender's coverage	$0.00/$0.00				
1110. Owner's coverage	$3,100,000.00/$6,617.00				
1111. Wire Fees	to	Western Title Company FEES		$20.00	$20.00
1112. Courier/Messenger Fee	to	Western Title Company FEES		$20.00	$40.00
1113. E-mail Documents	to	Western Title Company FEES			
1200. Government Recording and Transfer Charges					
1201. Recording Fees Deed $30.00 , Mortgage , Rel $20.00		to Western Title Company FEES		$30.00	$20.00
1202. City/county tax/stamps Deed $2,710.00 , Mortgage		to Western Title Company FEES		$6,355.00	$6,355.00
1203. State tax/stamps Deed , Mortgage		to			
1204. Tax certificates	to				
1205. Misc. Recordings- IF ANY-ESTIMATE	to	Western Title Company FEES		$50.00	$50.00
1206. Recording Subdivision Fee-ESTIMATE	to	Western Title Company FEES		$20.00	$20.00
1300. Additional Settlement Charges					
1301. Survey	to				
1302. Pest inspection	to				
1303. PAY SEWER CURRENT	to	City of Sparks			$723.58
1304. PAY WASTE MANAGEMENT to 5-16-14	to	Waste Management of Nevada			$251.72
1305. EXCHANGE FEE	to	ASSET EXCHANGE COMPANY	POC (B) $200.00		
1306. PAD IF NEEDED	to	Western Title Company		$200.00	
1400. Total Settlement Charges (enter on lines 103, Section J and 502, Section K)				58,695.00	$147,847.30

I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a completed copy of pages 1, 2 and 3 of this HUD-1 Settlement Statement.

F I L E D
Electronically
CV14-01712
2016-08-01 04:21:31 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5636821 : csulezic

EXHIBIT 19

EXHIBIT 19

Mina Reel

From:	Brian R. Irvine
Sent:	Wednesday, November 26, 2014 12:55 PM
To:	'David O'Mara, Esq.'; Brian Moquin
Cc:	Stephanie J. Glantz
Subject:	RE: Willard v. Berry-Hinckley
Attachments:	Assignment and Assumption of Lease.pdf

Dear Brian and David-

I have been reviewing documents for disclosure in this case this week. Yesterday, I came across documents showing that the lease for the 1365 Baring Blvd. in Sparks, Nevada location was assigned from Berry Hinckley Industries, Inc. ("BHI") to Jacksons Food Stores, Inc. ("Jacksons") in late 2009. I contacted both my client and counsel for Jacksons about this issue and learned that Jacksons has been operating that location since 2010, and that the Wooley plaintiffs collected rent from Jacksons from 2010 forward. In addition, I am informed that when the Wooley plaintiffs sold the Baring Blvd. location earlier this year, the rent for the site was fully-paid and up to date. Now, I understand Jacksons continues to pay rent to the new owner at that location.

Based upon these facts, it is clear to me that your clients have no basis to maintain a claim in this case for breach of the Baring Blvd. lease. Your clients were paid in full for the rent to which they were entitled prior to the sale of that location, and they have no standing to seek damages for future rent at that location because they no longer own it. I assume that both of you had no knowledge of these facts, or you would not have filed the complaint as written. However, it seems apparent that your clients must have known all of these facts, and therefore the complaint should never have been filed with any claims related to Baring Blvd.

I note that the amended complaint that you drafted does not appear to have been filed, so it seems to be a good time to clean up plaintiffs' complaint to remove all claims related to Baring Blvd. as part of plaintiffs' amended complaint. Please confirm that your clients will agree to remove all claims for relief related to Baring Blvd., and send me a new amended complaint to consider at your earliest convenience.

I have attached the Assignment and Assumption of Lease document for your convenience. I also expect to receive a letter from counsel for Jacksons with some accounting documentation showing rental payments for the last several years early next week, and I can forward that to you if you wish.

Please do not hesitate to contact me with any questions or concerns.

Sincerely,

Brian Irvine

From: David O'Mara, Esq. [mailto:david@omaralaw.net]
Sent: Monday, November 03, 2014 11:24 AM
To: Brian Moquin; Brian R. Irvine
Subject: Willard v. Berry-Hinckley

Brian,

I apologize for the delay in getting you the First Amended Compliant but I thought I sent this before the Nevada day holiday. While you review the document, I will work on a simple stipulation for your review.

Additionally, I would like to set up a time to conduct the 16.1 Case Conference. Would you be available next week. I was supposed to be in San Francisco for mediations on Monday and Tuesday but those were cancelled. Please let me know if you are available.

If you have any questions, please do not hesitate to contact me.

David

David C. O'Mara, Esq.
The O'Mara Law Firm, P.C.
311 East Liberty Street
Reno, Nevada 89501
Telephone: (775) 323-1321
Facsimile: (775) 323-4082
david@omaralaw.net
www.omaralaw.net

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APN: 030-041-08
Recording Requested By and
When Recorded Return to:
Brian L. Ballard
HAWLEY TROXELL ENNIS & HAWLEY LLP
P.O. Box 1617
Boise, Idaho 83701

SPACE ABOVE THIS LINE FOR RECORDER'S USE ONLY

ASSIGNMENT AND ASSUMPTION OF LEASE

This ASSIGNMENT AND ASSUMPTION OF LEASE (this "Assignment") is made as of this 23 day of December 2009, by BERRY-HINCKLEY INDUSTRIES, INC., a Nevada corporation ("Assignor"), and JACKSONS FOOD STORES, INC., a Nevada corporation ("Assignee").

RECITALS:

A. Assignor is presently the "tenant" under that certain Lease Agreement dated May of 2006, by and between Assignor and Edward Wooley and Judith Wooley as Trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust Year 2000 (collectively, the "Landlord"), as amended by that certain First Amendment to Lease Agreement dated March 12, 2007 (collectively, the "Lease"), which Lease affects the real property located in the County of Washoe, State of Nevada more particularly described in Exhibit A attached hereto and incorporated herein by this reference (the "Property"); and

B. Pursuant to that certain Asset Transfer Agreement, dated as of August 31, 2009 (the "Agreement"), by and between Assignor and Assignee, Assignor has agreed to assign, and Assignee has agreed to accept, all of Assignor's rights, title, estate, interest, duties and obligations under the Lease.

NOW, THEREFORE, in order to carry out the terms of the Agreement, and in consideration of the mutual covenants and agreements herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged. Assignor and Assignee hereby agree as follows:

1. Assignment. Assignor hereby grants, transfers, conveys and assigns to Assignee all of Assignor's right, title, estate and interest in, to and under the Lease, together with any right, title, and interest of Assignor in and to any subleases, if any, relating to any portion of the Property.

2. Assumption. Assignee hereby accepts such assignment of Assignor's right, title, estate and interest in, to and under the Lease, and, in addition, (i) assumes and agrees to be bound by all of the terms of the Lease, and (ii) agrees to keep, perform, fulfill, and observe all of the terms, covenants, obligations, agreements, and conditions required to be kept, performed,

fulfilled, and observed by the Assignor or tenant under the Lease or any sublease thereof from and after the execution and delivery of this Assignment.

3. Indemnification of Assignor. Assignee hereby agrees to indemnify, defend, and hold Assignor harmless from and against any and all liability, losses, costs, damages and expenses (including, without limitation, reasonable attorneys' fees and costs including reasonable attorneys' fees and costs on appeal) directly or indirectly arising out of or based upon Assignee's failure to keep, perform, fulfill and observe any of the terms, covenants, obligations, agreements, and conditions required to be kept, performed, fulfilled, and observed by the tenant under the Lease from and after the execution and delivery of this Assignment.

4. Indemnification of Assignee. Assignor hereby agrees to indemnify, defend, and hold Assignee harmless from and against any and all liability, loss, cost, damage and expense (including, without limitation, reasonable attorneys' fees and costs, including reasonable attorneys' fees and costs on appeal) directly or indirectly arising out of or based upon Assignor's failure to keep, perform, fulfill, and observe any of the terms covenants, obligations, agreements, and conditions required to be kept, performed, fulfilled, and observed by the tenant under the Lease prior to the execution and delivery of this Assignment by Assignor and Assignee.

5. Rentals. All rents payable under or pursuant to the Lease shall be prorated as between Assignor and Assignee pursuant to, and in accordance with, the terms of the Agreement.

6. Further Assurances. Assignor hereby covenants that it will, at any time and from time to time following a written request therefor, execute and deliver to Assignee and its successors and assigns, any additional or confirmatory instruments and take such further acts as Assignee may reasonably request to evidence fully the assignment contained herein.

7. Binding Effect. This Assignment shall inure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns.

8. Survival of Certain Provisions. The provisions of Sections 2, 3, 4, 5 and 6 hereof shall survive the execution and delivery of this Assignment by Assignor and Assignee and the assignment of the Lease pursuant hereto.

9. Governing Law. This Assignment shall be construed in accordance with and governed by the laws of the State of Nevada.

10. Counterparts. This Assignment may be executed in any number of counterparts, each of which shall be deemed an original, but all of which when taken together shall constitute one and the same instrument.

[Signatures Appear on Following Page]

ASSIGNOR:

BERRY-HINCKLEY INDUSTRIES,
a Nevada corporation

By: _____
Name: Jerry Herbst
Title: President

STATE OF NEVADA)
) ss.
County of Clark)

On this 17 day of December, 2009, before me, Jenifer E Cannon, a Notary Public in and for said State, personally appeared Jerry Herbst, known or identified to me to be the President [title] of Berry-Hinckley Industries, the corporation that executed the within instrument or the person who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

_____
Notary Public for the State of Nevada
Residing at Las Vegas, NV
My commission expires _____

JENIFER E. CANNON
NOTARY PUBLIC
STATE OF NEVADA
APPT. NO. 03-80018-1
MY APPT. EXPIRES FEB. 12, 2011

BHI-WW000314

ASSIGNEE:

JACKSONS FOOD STORES, INC.,
a Nevada corporation

By: _____
John D. Jackson, CEO

STATE OF IDAHO)
) ss.
County of Ada)

On this 23 day of December, 2009, before me, TIMOTHY W. TYREE, a Notary Public in and for said State, personally appeared John D. Jackson, known or identified to me to be the CEO of Jacksons Food Stores, Inc., the corporation that executed the within instrument or the person who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

TIMOTHY W. TYREE NOTARY PUBLIC STATE OF IDAHO

_____
Notary Public for the State of Idaho
Residing at BOISE ID
My commission expires 12-14-2010

1762106_1.DOC

06259.0002.1762106.1

CONSENT AND AGREEMENT

OF

EDWARD C. WOOLEY AND JUDITH A. WOOLEY,
AS TRUSTEES OF THE EDWARD C. WOOLEY AND JUDITH A. WOOLEY INTERVIVOS REVOCABLE TRUST YEAR 2000

The undersigned, being the current Landlord under the above referenced Lease which is being assigned from BERRY-HINCKLEY INDUSTRIES, a Nevada corporation, to and for the benefit of JACKSONS FOOD STORES, INC., a Nevada corporation, hereby acknowledge the above and agree and consent to the assignment of the Lease on the terms of the foregoing Assignment.

Date:_____

_____
Edward C. Wooley, Trustee of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust Year 2000

Date:_____

_____
Judith A. Wooley, Trustee of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust Year 2000

STATE OF _____)
)ss.
County of _____)

On this _____ day of _____, 20__, before me, _____, a Notary Public in and for said State, personally appeared Edward C. Wooley, known or identified to me to be the trustee of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust Year 2000, and acknowledged to me that he executed the instrument in his capacity as trustee.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

_____
Notary Public for the State of_____
Residing at_____
My commission expires_____

1782306_1.DOC

08258.0002.1782306.1

BHI-WW000316

STATE OF _____)
) ss.
County of _____)

On this _____ day of _____, 20__, before me, _____, a Notary Public in and for said State, personally appeared Judith A. Wooley, known or identified to me to be the trustee of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust Year 2000, and acknowledged to me that she executed the instrument in her capacity as trustee.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

_____
Notary Public for the State of_____
Residing at_____
My commission expires_____

1762306_1.DOC

00253.0058.1762306.1

BHI-WW000317

Exhibit A

LEGAL DESCRIPTION
1365 Baring Blvd., Sparks, NV

All that certain real property situate in the County of Washoe, State of Nevada, described as follows:

PARCEL 1:

All that portion of the Southeast Quarter (SE ¼) of Section 34, Township 20 North, Range 20 East, M.D.M., Washoe County, Nevada, further described as follows:

Beginning at the intersection of the Westerly line of Sorenson Way with the Southerly line of Baring Boulevard, as shown on the "Parcel Map for Foothill Investment Co. and Lewis Building Co., Inc.", recorded January 26, 1983 in the office of the County Recorder of Washoe County, Nevada, as Parcel Map No. 1418, File No. 835532 and proceeding thence Southerly along the Westerly line of Sorenson Way on the arc of a curve to the right, from a tangent bearing South 89°11'14" East, with a radius of 30.00 feet, through a central angle of 90°00'00", an arc distance of 47.12 feet, said arc being subtended by a chord bearing south 44°11'14" East 42.45 feet; thence South 0°48'46: West 15.00 feet; thence along the arc of a curve to the right with a radius of 122.50 feet, through a central angle of 42°01'02", an arc distance of 89.83 feet, said arc being subtended by a chord which bears South 21°49'17" West 87.83 feet; thence along the arc of a reverse curve to the left with a radius of 227.50 feet, through a central angle of 7°23'23", an arc distance of 29.34 feet, said arc being subtended by a chord which bears South 39°08'05" West 29.32 feet; thence leaving Sorenson Way North 89°11'14" West 150.00 feet; thence North 0°48'46" East 150.00 feet to the Southerly line of Baring Boulevard; thence along Baring Boulevard South 89°11'14" East 169.67 feet to the point of beginning.

PARCEL 2:

An easement for ingress and egress for pedestrians and vehicles as described and conveyed in the access Easement Agreement recorded May 26, 1988 in Book 2742, Page 321, under Document No. 128946, Official Records.

APN: 010-041-08

Document Number 3291758 provided pursuant to the requirements of Section 1.NRS 111.312

176E06_1.DOC

06288.0088.1762306.1

BHI-WW000318

F I L E D
Electronically
CV14-01712
2016-08-01 04:21:31 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5636821 : csulezic

EXHIBIT 20

EXHIBIT 20

Mina Reel

From: Brian R. Irvine
Sent: Wednesday, January 14, 2015 9:25 AM
To: 'Brian Moquin'; 'David O'Mara, Esq.'
Cc: Stephanie J. Glantz
Subject: RE: Willard v. Berry-Hinckley

Dear Brian and David-

It has now been about six weeks since I first communicated with you about the need to dismiss the portion of the case related to the Baring Boulevard location, but I still have not seen an amended complaint. We need to proceed with written discovery, and the lack of a proper set of pleadings is impeding our ability to frame that discovery and prepare the case. Please provide me with a draft amended complaint to review by Tuesday, January 20, 2015. If I do not see it by then, I will move to dismiss and will also seek sanctions for being forced to file an unnecessary motion. Please let me know where you are on this.

Thank you,

Brian Irvine

From: Brian Moquin [mailto:bmoquin@lawprism.com]
Sent: Tuesday, December 30, 2014 12:41 PM
To: Brian R. Irvine; 'David O'Mara, Esq.'
Cc: Stephanie J. Glantz
Subject: Re: Willard v. Berry-Hinckley

Hi, Brian. My overseas trip turned out to be more cumbersome and less productive than I'd anticipated, and consequently I have not finished putting the draft together. I return to the States tomorrow and will have the amended pleading finished by this coming Monday. I apologize for the delay and appreciate your patience.

Brian

On 12/30/14 11:53 AM, Brian R. Irvine wrote:

Dear Brian and David-

I have not seen a new draft of the amended complaint from you and wanted to make sure I had not missed it. I would like to get the pleading amended and our answer to that pleading filed so we can proceed with discovery with the appropriate scope in mind.

Please let me know where we are.

Thanks,

Brian Irvine

From: Brian R. Irvine
Sent: Thursday, December 18, 2014 11:26 AM
To: 'Brian Moquin'; 'David O'Mara, Esq.'

Cc: Stephanie J. Glantz
Subject: RE: Willard v. Berry-Hinckley

Brian-

Thanks for the email. I will look for another draft amended complaint from you early next week.

Thanks,

Brian Irvine

From: Brian Moquin [mailto:bmoquin@lawprism.com]
Sent: Friday, December 12, 2014 3:00 PM
To: Brian R. Irvine; 'David O'Mara, Esq.'
Cc: Stephanie J. Glantz
Subject: Re: Willard v. Berry-Hinckley

Mr. Irvine--

I left a voicemail for you earlier today, am in the middle of a deposition and have been occupied with depositions every day for the past week and a half.

I agree that there is an issue in terms of the allegations in the complaint related to the Baring Blvd. location. We plan to amend the complaint to correct this. Unfortunately, I'm occupied with an expert witness deposition this coming Monday and fly to Germany for two weeks on Tuesday, so realistically the earliest date I can commit to having the amended complaint to you is Monday, December 22, 2014. If you find that unacceptable, please let me know.

Best,
Brian

Brian P. Moquin, Esq.
Law Offices of Brian P. Moquin
3506 La Castellet Court
San Jose, CA 95148

skype: brianmoquin
408.300.0022
408.460.7787 cell
408.843.1678 fax

On 12/9/14, 12:06 PM, Brian R. Irvine wrote:

> Dear Brian and David-
>
> I have not received any response from you regarding my email below. As you are now aware, the allegations in the complaint made by the Wooley plaintiffs regarding the Baring Boulevard property are baseless and must be dismissed. Please find attached a letter and rent roll that we received from corporate counsel for Jacksons showing that the rent at that location has been paid throughout all of 2013-2014 by Jacksons, and that

such rent was received by the Wooley plaintiffs until they sold the property.

Please contact me about how you wish to proceed, or provide me with an updated draft amended complaint with claims related to the Baring Boulevard location removed. If I do not hear from you by the close of business this Friday, December 12, 2014, we will file a motion seeking dismissal of those claims and will also request sanctions for being forced to bring a motion to dismiss these claims.

Thank you,

Brian Irvine

From: Brian R. Irvine
Sent: Wednesday, November 26, 2014 12:55 PM
To: 'David O'Mara, Esq.'; Brian Moquin
Cc: Stephanie J. Glantz
Subject: RE: Willard v. Berry-Hinckley

Dear Brian and David-

I have been reviewing documents for disclosure in this case this week. Yesterday, I came across documents showing that the lease for the 1365 Baring Blvd. in Sparks, Nevada location was assigned from Berry Hinckley Industries, Inc. ("BHI") to Jacksons Food Stores, Inc. ("Jacksons") in late 2009. I contacted both my client and counsel for Jacksons about this issue and learned that Jacksons has been operating that location since 2010, and that the Wooley plaintiffs collected rent from Jacksons from 2010 forward. In addition, I am informed that when the Wooley plaintiffs sold the Baring Blvd. location earlier this year, the rent for the site was fully-paid and up to date. Now, I understand Jacksons continues to pay rent to the new owner at that location.

Based upon these facts, it is clear to me that your clients have no basis to maintain a claim in this case for breach of the Baring Blvd. lease. Your clients were paid in full for the rent to which they were entitled prior to the sale of that location, and they have no standing to seek damages for future rent at that location because they no longer own it. I assume that both of you had no knowledge of these facts, or you would not have filed the complaint as written. However, it seems apparent that your clients must have known all of these facts, and therefore the complaint should never have been filed with any claims related to Baring Blvd.

I note that the amended complaint that you drafted does not appear to have been filed, so it seems to be a good time to clean up plaintiffs' complaint to remove all claims related to Baring Blvd. as part of plaintiffs' amended complaint. Please confirm that your clients will agree to remove all claims for relief related to Baring Blvd., and send me a new amended complaint to consider at your earliest convenience.

I have attached the Assignment and Assumption of Lease document for your convenience. I also expect to receive a letter from counsel for Jacksons with some accounting documentation showing rental payments for the last several years early next week, and I can forward that to you if you wish.

Please do not hesitate to contact me with any questions or concerns.

Sincerely,

Brian Irvine

From: David O'Mara, Esq.
[mailto:david@omaralaw.net]
Sent: Monday, November 03, 2014 11:24 AM
To: Brian Moquin; Brian R. Irvine
Subject: Willard v. Berry-Hinckley

Brian,

I apologize for the delay in getting you the First Amended Compliant but I thought I sent this before the Nevada day holiday. While you review the document, I will work on a simple stipulation for your review.

Additionally, I would like to set up a time to conduct the 16.1 Case Conference. Would you be available next week. I was supposed to be in San Francisco for mediations on Monday and Tuesday but those were cancelled. Please let me know if you are available.

If you have any questions, please do not hesitate to contact me.

David

David C. O'Mara, Esq.
The O'Mara Law Firm, P.C.

311 East Liberty Street
Reno, Nevada 89501
Telephone: (775) 323-1321
Facsimile: (775) 323-4082
david@omaralaw.net
www.omaralaw.net

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Gordon Silver Standard Disclaimer
DO NOT read, copy or disseminate this communication unless you are the intended addressee. This e-mail communication may contain confidential and/or privileged information intended only for 'David O'Mara, Esq.','Brian Moquin',Stephanie J. Glantz. If you have received this communication in error, please call us (collect) immediately at 775.343.7500 and ask to speak to Brian Irvine Esq. Also please e-mail the sender and notify the sender immediately that you have received the communication in error.

Tax Opinion Disclaimer
To comply with IRS regulations, we advise that any discussion of Federal tax issues in this E-mail was not intended or written to be used, and cannot be used by you, i) to avoid any penalties imposed under the Internal Revenue Code or, ii) to promote, market or recommend to another party any transaction or matter addressed herein.

F I L E D
Electronically
CV14-01712
2016-08-01 04:21:31 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5636821 : csulezic

EXHIBIT 21

EXHIBIT 21

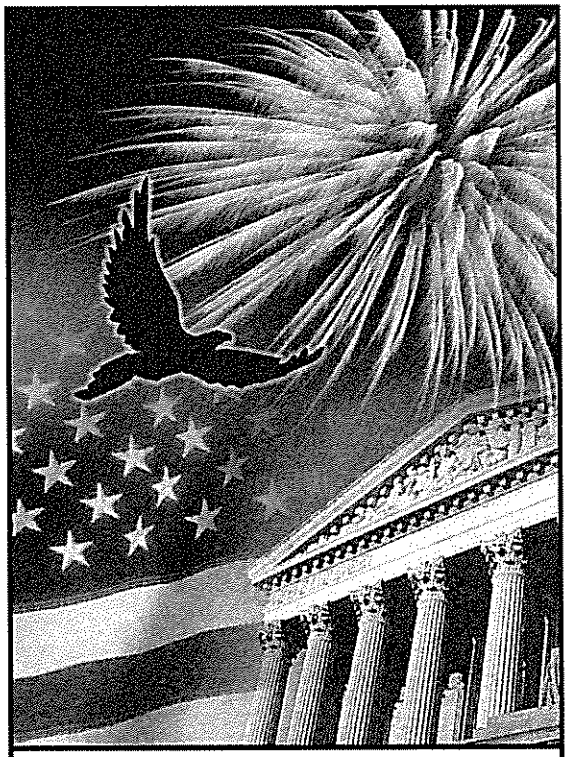
Department of the Treasury
Internal Revenue Service

Publication 4681
Cat. No. 51508F

Canceled Debts, Foreclosures, Repossessions, and Abandonments

(for Individuals)

For use in preparing
2015 Returns



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Future Developments

For the latest information about developments related to Pub. 4681, such as legislation enacted after it was published, go to *www.irs.gov/pub4681*.

Reminder

Photographs of missing children. The Internal Revenue Service is a proud partner with the National Center for Missing and Exploited Children. Photographs of missing children selected by the Center may appear in this publication on

Jan 11, 2016

pages that otherwise would be blank. You can help bring these children home by looking at the photographs and calling 1-800-THE-LOST (1-800-843-5678) if you recognize a child.

Introduction

This publication explains the federal tax treatment of canceled debts, foreclosures, repossessions, and abandonments.

Generally, if you owe a debt to someone else and they cancel or forgive that debt for less than its full amount, you are treated for income tax purposes as having income and may have to pay tax on this income.

Note. This publication generally refers to debt that is canceled, forgiven, or discharged for less than the full amount of the debt as "canceled debt."

Sometimes a debt, or part of a debt, that you don't have to pay isn't considered canceled debt. These exceptions are discussed later under *Exceptions*.

Sometimes a canceled debt may be excluded from your income. But if you do exclude canceled debt from income, you may be required to reduce your "tax attributes." These exclusions and the reduction of tax attributes associated with them are discussed later under *Exclusions*.

Foreclosure and repossession are remedies that your lender may exercise if you fail to make payments on your loan and you have previously granted that lender a mortgage or other security interest in some of your property. These remedies allow the lender to seize or sell the property securing the loan. When your property is foreclosed upon or repossessed and sold, you are treated as having sold the property and you may recognize taxable gain. Whether you also recognize income from canceled debt depends in part on whether you are personally liable for the debt and in part on whether the outstanding loan balance is more than the fair market value (FMV) of the property. Figuring your gain or loss and income from canceled debt arising from a foreclosure or repossession is discussed later under *Foreclosures and Repossessions*.

Generally, you abandon property when you voluntarily and permanently give up possession and use of property you own with the intention of ending your ownership but without passing it on to anyone else. Figuring your gain or loss and income from canceled debt arising from an abandonment is discussed later under *Abandonments*.

Comments and suggestions. We welcome your comments about this publication and your suggestions for future editions.

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Although we can't respond individually to each comment received, we do appreciate your feedback and will consider your comments as we revise our tax products.

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Tax questions. If you have a tax question not answered by this publication, check IRS.gov and *How To Get Tax Help* at the end of this publication.

Useful Items

You may want to see:

Publication

- ❑ **225** Farmer's Tax Guide
- ❑ **334** Tax Guide for Small Business (For Individuals Who Use Schedule C or C-EZ)
- ❑ **523** Selling Your Home
- ❑ **525** Taxable and Nontaxable Income
- ❑ **536** Net Operating Losses (NOLs) for Individuals, Estates, and Trusts
- ❑ **542** Corporations
- ❑ **544** Sales and Other Dispositions of Assets
- ❑ **551** Basis of Assets
- ❑ **908** Bankruptcy Tax Guide

Form (and Instructions)

- ❑ **982** Reduction of Tax Attributes Due to Discharge of Indebtedness (and Section 1082 Basis Adjustment)
- ❑ **1099-C** Cancellation of Debt
- ❑ **1099-DIV** Dividends and Distributions
- ❑ **3800** General Business Credit

Common Situations Covered In This Publication

The sections of this publication that apply to you depend on the type of debt canceled, the tax attributes you have, and whether or not you continue to own the property that was subject to the debt. Some examples of common circumstances are provided in the following paragraphs to help guide you through this publication. These examples don't cover every situation but are intended to provide general guidance for the most common situations.

Nonbusiness credit card debt cancellation. If you had a nonbusiness credit card debt canceled, you may be able to exclude the canceled debt from income if the cancellation occurred in a title 11 bankruptcy case or you were insolvent immediately before the cancellation. You should read *Bankruptcy* or *Insolvency* under *Exclusions* in chapter 1 to see if you can exclude the canceled debt from income under one of those provisions. If you can exclude part or all of the canceled debt from income, you should also read *Bankruptcy and Insolvency* under *Reduction of Tax Attributes* in chapter 1.

Personal vehicle repossession. If you had a personal vehicle repossessed and disposed of by the lender during the year, you will need to determine your gain or nondeductible loss on the disposition. This is explained in chapter 2. If the lender also canceled all or part of the remaining amount of the loan, you may be able to exclude the canceled debt from income if the cancellation occurred in a title 11 bankruptcy case or you were insolvent immediately before the cancellation. You should read *Bankruptcy* or *Insolvency* under *Exclusions* in chapter 1 to see if you can exclude the canceled debt from income under one of those provisions. If you can exclude part or all of the canceled debt from income, you should also read *Bankruptcy and Insolvency* under *Reduction of Tax Attributes* in chapter 1.

Main home foreclosure or abandonment. If a lender foreclosed on your main home during the year, you will need to determine your gain or loss on the foreclosure. Foreclosures are explained in chapter 2 and abandonments are explained in chapter 3. If the lender also canceled all or part of the remaining amount on the mortgage loan, and you were personally liable for the debt, you should also read *Qualified Principal Residence Indebtedness* under *Exclusions* in chapter 1 to see if you can exclude part or all of the canceled debt from income.

Main home loan modification (workout agreement). If a lender agrees to a mortgage loan modification (a "workout") that includes a reduction in the principal balance of the loan, you should read *Qualified Principal Residence Indebtedness* under *Exclusions* in chapter 1 to see if you can exclude part or all of the canceled debt from income. If you can exclude part or all of the canceled debt from income, you should also read *Qualified Principal Residence Indebtedness* under *Reduction of Tax Attributes* in chapter 1.

1.

Canceled Debts

This chapter discusses the tax treatment of canceled debts.

General Rules

Generally, if a debt for which you are personally liable is forgiven or discharged for less than the full amount owed, the debt is considered canceled in whatever amount it remained unpaid. There are exceptions to this rule, discussed under *Exceptions*, later. Generally, you must include the canceled debt in your income. However, you may be able to exclude the canceled debt. See *Exclusions*, later.

Example. John owed $1,000 to Mary. Mary agreed to accept and John paid $400 in satisfaction of the entire debt. John has canceled debt of $600.

Example. Margaret owed $1,000 to Henry. Henry and Margaret agreed that Margaret would provide Henry with services (instead of money) in full satisfaction of the debt. Margaret doesn't have canceled debt. Instead, she has income from services.

A debt includes any indebtedness:

- For which you are liable, or
- Subject to which you hold property.

Debt for which you are personally liable is recourse debt. All other debt is nonrecourse debt.

If you aren't personally liable for the debt, you don't have ordinary income from the cancellation of debt unless you retain the collateral and either:

- The lender offers a discount for the early payment of the debt, or
- The lender agrees to a loan modification that results in the reduction of the principal balance of the debt.

See *Discounts and Loan Modifications*, later.

However, upon the disposition of the property securing a nonrecourse debt, the amount realized includes the entire unpaid amount of the debt, not just the FMV of the property. As a result, you may realize a gain or loss if the outstanding debt immediately before the disposition is more or less than your adjusted basis in the property. For more details on figuring your gain or loss, see chapter 2 of this publication or see Pub. 544, Sales and Other Dispositions of Assets.

There are several exceptions and exclusions that may result in part or all of a canceled debt being nontaxable. See *Exceptions* and *Exclusions*, later. You must report any taxable canceled debt as ordinary income on:

- Form 1040 or Form 1040NR, line 21, if the debt is a nonbusiness debt;
- Schedule C (Form 1040), line 6 (or Schedule C-EZ (Form 1040), line 1), if the debt is related to a nonfarm sole proprietorship;
- Schedule E (Form 1040), line 3, if the debt is related to nonfarm rental of real property;
- Form 4835, line 6, if the debt is related to a farm rental activity for which you use Form 4835 to report farm rental income based on crops or livestock produced by a tenant; or
- Schedule F (Form 1040), line 8, if the debt is farm debt and you are a farmer.

Form 1099-C

If you receive a Form 1099-C, that means an applicable entity has reported an identifiable event to the IRS regarding a debt you owe. The identifiable event may be an actual cancellation of the debt or it may be an event the applicable entity is required, solely for purposes of reporting to the IRS, to treat as a cancellation of debt. For information on the reasons an applicable entity files Form 1099-C, see *Identifiable event codes*, next. Unless you meet one of the exceptions or exclusions discussed later, this canceled debt is ordinary income and must be reported on the appropriate form discussed above.

An applicable entity includes:

1. A financial institution.
2. A credit union.
3. Any of the following, its successor, or subunit of one of the following:
   a. The Federal Deposit Insurance Corporation (FDIC),
   b. The Resolution Trust Corporation (RTC),
   c. The National Credit Union Administration (NCUA), or
   d. Any other federal executive agency, including government corporations, any military department, the U.S. Postal Service, or the Postal Rate Commission.
4. A corporate subsidiary of a financial institution or credit union (if the affiliation subjects the subsidiary to federal or state regulation).
5. A federal government agency, including a department, an agency, a court or court administrative office, or a judicial or legislative instrumentality.
6. Any organization a significant trade or business of which is lending money.

For more information on the applicable entities that must file a Form 1099-C, see the Instructions for Forms 1099-A and 1099-C, available at *www.irs.gov/instructions/i1099ac*.

Identifiable event codes. Box 6 of Form 1099-C should indicate the reason the creditor filed this form. The codes shown in box 6 are explained below. Also see the chart after the explanation for a quick reference guide for the codes used in box 6.

Note. Codes A through G and I identify specific occurrences involving an actual discharge of indebtedness. However, Code H, *Expiration of nonpayment testing period*, identifies an occurrence that doesn't necessarily involve an actual discharge of indebtedness.

Code A — Bankruptcy. Code A is used to identify cancellation of debt as a result of a title 11 bankruptcy case. See *Bankruptcy*, later.

Code B — Other judicial debt relief. Code B is used to identify cancellation of debt as a result of a receivership, foreclosure, or similar federal or state court proceeding other than bankruptcy.

Code C — Statute of limitations or expiration of deficiency period. Code C is used to identify cancellation of debt either when the statute of limitations for collecting the debt expires or when the statutory period for filing a claim or beginning a deficiency judgment proceeding expires. In the case of the expiration of a statute of limitations, an identifiable event occurs only if and when your affirmative defense of the statute of limitations is upheld in a final judgment or decision in a judicial proceeding, and the period for appealing the judgment or decision has expired.

Code D — Foreclosure election. Code D is used to identify cancellation of debt when the creditor elects foreclosure remedies that statutorily end or bar the creditor's right to pursue collection of the debt. This event applies to a mortgage lender or holder who is barred from pursuing debt collection after a power of sale in the mortgage or deed of trust is exercised.

Code E — Debt relief from probate or similar proceeding. Code E is used to identify cancellation of debt as a result of a probate court or similar legal proceeding.

Code F — By agreement. Code F is used to identify cancellation of debt as a result of an agreement between the creditor and the debtor to cancel the debt at less than full consideration.

Code G — Decision or policy to discontinue collection. Code G is used to identify cancellation of debt as a result of a decision or a defined policy of the creditor to discontinue collection activity and cancel the debt. For purposes of this identifiable event, a defined policy includes both a written policy and the creditor's established business practice.

Code H — Expiration of nonpayment testing period. Code H is used to indicate that the creditor hasn't received a payment on the debt during a testing period ending on December 31, 2015. The testing period is a 36-month period increased by the number of months the creditor was prevented from engaging in collection activity by a stay in bankruptcy or similar bar under state or local law. This identifiable event applies only for a creditor that is a financial institution or credit union (and certain of their subsidiaries), the FDIC, the RTC, the NCUA, any other federal executive agencies, and any successor or subunit of the FDIC, the RTC, the NCUA, or a federal executive agency.

Expiration of the nonpayment testing period doesn't necessarily result from an actual discharge of indebtedness.

Code I — Other actual discharge before identifiable event. Code I is used to identify an actual cancellation of debt that occurs before any of the identifiable events described in codes A through H.

Form 1099-C Reference Guide for Box 6 Identifiable Event Codes

A	Bankruptcy
B	Other judicial debt relief
C	Statute of limitations or expiration of deficiency period
D	Foreclosure election
E	Debt relief from probate or similar proceeding
F	By agreement
G	Decision or policy to discontinue collection
H	Expiration of nonpayment testing period
I	Other actual discharge before identifiable event

CAUTION *Even if you didn't receive a Form 1099-C, you must report canceled debt as gross income on your tax return unless one of the exceptions or exclusions described later applies.*

Amount of canceled debt. The amount in box 2 of Form 1099-C may represent some or all of the debt that has been canceled or treated as canceled. The amount in box 2 will include principal and may include interest and other nonprincipal amounts (such as fees or penalties). Unless you meet one of the exceptions or exclusions discussed later, the amount of the debt that has been canceled is ordinary income and must be reported on the appropriate form as discussed earlier.

Interest included in canceled debt. If any interest is included in the amount of canceled debt in box 2, it will be shown in box 3. Whether the interest portion of the canceled debt must be included in your income depends on whether the interest would be deductible if you paid it. See *Deductible Debt* under *Exceptions*, later.

Persons who each receive a Form 1099-C showing the full amount of debt. If you and another person were jointly and severally liable for a canceled debt, each of you may get a Form 1099-C showing the entire amount of the canceled debt. However, you may not have to report that entire amount as income. The amount, if any, you must report depends on all the facts and circumstances, including:

- State law,
- The amount of debt proceeds each person received,
- How much of any interest deduction from the debt was claimed by each person,
- How much of the basis of any co-owned property bought with the debt proceeds was allocated to each co-owner, and
- Whether the canceled debt qualifies for any of the exceptions or exclusions described in this publication.

See *Example 3* under *Insolvency*, later.

Discounts and Loan Modifications

If a lender discounts (reduces) the principal balance of a loan because you pay it off early, or agrees to a loan modification (a "workout") that includes a reduction in the principal balance of a loan, the amount of the discount or the amount of principal reduction is canceled debt. However, if the debt is nonrecourse and you didn't retain the collateral, you don't have cancellation of debt income. The amount of the canceled debt must be included in income unless one of the exceptions or exclusions described later applies. For more details, see *Exceptions* and *Exclusions*, later.

Sales or Other Dispositions (Such as Foreclosures and Repossessions)

Recourse debt. If you owned property that was subject to a recourse debt in excess of the FMV of the property, the lender's foreclosure or repossession of the property is treated as a sale or disposition of the property by you and may result in your realization of gain or loss. The gain or loss on the disposition of the property is measured by the difference between the FMV of the property at the time of the disposition and your adjusted basis (usually your cost) in the property. The character of the gain or loss (such as ordinary or capital) is determined by the character of the property. If the lender forgives all or part of the amount of the debt in excess of the FMV of the property, the cancellation of the excess debt may result in ordinary income. The ordinary income from the cancellation of debt (the excess of the canceled debt over the FMV of the property) must be included in your gross income reported on your tax return unless one of the exceptions or exclusions described later applies. For more details, see *Exceptions* and *Exclusions*, later.

Nonrecourse debt. If you owned property that was subject to a nonrecourse debt in excess of the FMV of the property, the lender's foreclosure on the property doesn't result in ordinary income from the cancellation of debt. The entire amount of the nonrecourse debt is treated as an amount realized on the disposition of the property. The gain or loss on the disposition of the property is measured by the difference between the total amount realized (the entire amount of the nonrecourse debt plus the amount of cash and the FMV of any property received) and your adjusted basis in the property. The character of the gain or loss is determined by the character of the property.

More information. See chapter 2 of this publication and Pubs. 523, 544, and 551 for more details.

Abandonments

Recourse debt. If you abandon property that secures a debt for which you are personally liable (recourse debt) and the debt is canceled, you will realize ordinary income equal to the canceled debt. You must report this income on your tax return unless one of the exceptions or exclusions described later applies. For more details, see *Exceptions* and *Exclusions*, later. This income is separate from any amount realized from the abandonment of the property. For more details, see chapter 3.

Nonrecourse debt. If you abandon property that secures a debt for which you aren't personally liable (nonrecourse debt), you may realize gain or loss but won't have cancellation of indebtedness income.

Stockholder Debt

If you are a stockholder in a corporation and the corporation cancels or forgives your debt to it, the canceled debt is a constructive distribution. For more information, see Pub. 542, Corporations.

Exceptions

There are several exceptions to the requirement that you include canceled debt in income. These exceptions apply before the exclusions discussed later and don't require you to reduce your tax attributes.

Gifts, Bequests, Devises, and Inheritances

In most cases, you don't have income from canceled debt if the debt is canceled as a gift, bequest, devise, or inheritance.

Student Loans

Certain student loans provide that all or part of the debt incurred to attend a qualified educational institution will be canceled if the person who received the loan works for a certain period of time in certain professions for any of a broad class of employers.

If your student loan is canceled as the result of this type of provision, the cancellation of this debt isn't included in your gross income. To qualify for this treatment, the loan must have been made by:

1. The Federal Government, a state or local government, or an instrumentality, agency, or subdivision of one of those governments,
2. A tax-exempt public benefit corporation that has assumed control of a state, county, or municipal hospital, and whose employees are considered public employees under state law, or
3. An educational institution (defined later):
   a. Under an agreement with an entity described in (1) or (2) that provided the funds to the institution to make the loan, or
   b. As part of a program of the institution designed to encourage students to serve in occupations or areas with unmet needs and under which the services provided are for or under the direction of a governmental unit or a tax-exempt section 501(c)(3) organization (defined later).

A loan to refinance a qualified student loan also will qualify if it was made by an educational institution or a tax-exempt section 501(a) organization under its program designed as described in (3)(b).

Exception. Generally, the cancellation of a student loan made by an educational institution because of services you performed for that institution or another organization that provided funds for the loan must be included in the gross income on your tax return.

Education loan repayment assistance. Education loan repayments made to you by the National Health Service Corps Loan Repayment Program or a state education loan repayment program eligible for funds under the Public Health Service Act aren't taxable if you agree to provide primary health services in health professional shortage areas.

Amounts you received after 2008 under any other state loan repayment or loan forgiveness program also aren't taxable. The program must be intended to increase the availability of health care services in underserved areas or areas with a shortage of health professionals.

Educational institution. An educational institution is an organization with a regular faculty and curriculum and a regularly enrolled body of students in attendance at the place where the educational activities are carried on.

Section 501(c)(3) organization. A section 501(c)(3) organization is a tax-exempt corporation, community chest, fund, or foundation organized and operated exclusively for one or more of the following purposes.

- Charitable.
- Educational.
- Fostering national or international amateur sports competition (but only if none of the organization's activities involve providing athletic facilities or equipment).
- Literary.
- Preventing cruelty to children or animals.
- Religious.
- Scientific.
- Testing for public safety.

Deductible Debt

If you use the cash method of accounting, you don't realize income from the cancellation of debt if the payment of the debt would have been a deductible expense. This exception applies before the price reduction exception discussed next.

Example. In December 2014, you get accounting services for your farm on credit. In early 2015, you have trouble paying your farm debts and your accountant forgives part of the amount you owe for the accounting services. How you treat the canceled debt depends on your method of accounting.

- Cash method. You don't include the canceled debt in income because payment of the debt would have been deductible as a business expense in 2015.
- Accrual method. Unless another exception or exclusion applies, you must include the canceled debt in ordinary income because the expense was deductible in 2014 when you incurred the debt.

Price Reduced After Purchase

If debt you owe the seller for the purchase of property is reduced by the seller at a time when you aren't insolvent and the reduction doesn't occur in a title 11 bankruptcy case, the reduction doesn't result in cancellation of debt income. However, you must reduce your basis in the property by the amount of the reduction of your debt to the seller. The rules that apply to bankruptcy and insolvency are explained in *Exclusions*, later.

Home Affordable Modification Program

Pay-for-Performance Success Payments and PRA investor incentive payments that reduce the principal balance of your home mortgage under the Home Affordable Modification Program (HAMP) are generally not taxable.

However, reductions of the principal balance of your home mortgage under HAMP's Principal Reduction Alternative may be taxable as cancellation of debt income. You may be able to recognize this income over a 3-year period. For more information, see *www.irs.gov/uac/Principal-Reduction-Alternative-Under-the-Home-Affordable-Modification-Program* and Revenue Procedure 2013-16, available at *www.irs.gov/irb/2013-07_IRB/ar09.html*.

Exclusions

After you have applied any exceptions to the general rule that a canceled debt is included in your income, there are several reasons why you might still be able to exclude a canceled debt from your income. These exclusions are explained next. If a canceled debt is excluded from your income, it is nontaxable. In most cases, however, if you exclude canceled debt from income under one of these provisions, you must also reduce your tax attributes (certain credits, losses, and basis of assets) as explained later under *Reduction of Tax Attributes*.

CAUTION ***Reacquisition of business debt.*** *If you elected to defer and ratably include income from the cancellation of business debt arising from the reacquisition of certain business debt in 2009 and/or 2010, you must include the second portion of the deferred debt in gross income on your 2015 return.*

Bankruptcy

Debt canceled in a title 11 bankruptcy case isn't included in your income. A title 11 bankruptcy case is a case under title 11 of the United States Code (including all chapters in title 11 such as chapters 7, 11, and 13), but only if the debtor is under the jurisdiction of the court and the cancellation of the debt is granted by the court or occurs as a result of a plan approved by the court.

How to report the bankruptcy exclusion. To show that your debt was canceled in a bankruptcy case and is excluded from income, attach Form 982 to your federal income tax return and check the box on line 1a. Lines 1b through 1e don't apply to a cancellation that occurs in a title 11 bankruptcy case. Enter the total amount of debt canceled in your title 11 bankruptcy case on line 2. You must also reduce your tax attributes in Part II of Form 982 as explained under *Reduction of Tax Attributes*, later.

Insolvency

Don't include a canceled debt in income to the extent that you were insolvent immediately before the cancellation. You were insolvent immediately before the cancellation to the extent that the total of all of your liabilities was more than the FMV of all of your assets immediately before the cancellation. For purposes of determining insolvency, assets include the value of everything you own (including assets that serve as collateral for debt and exempt assets which are beyond the reach of your creditors under the law, such as your interest in a pension plan and the value of your retirement account). Liabilities include:

- The entire amount of recourse debts,
- The amount of nonrecourse debt that isn't in excess of the FMV of the property that is security for the debt, and
- The amount of nonrecourse debt in excess of the FMV of the property subject to the nonrecourse debt to the extent nonrecourse debt in excess of the FMV of the property subject to the debt is forgiven.

TIP *You can use the Insolvency Worksheet, to help calculate the extent that you were insolvent immediately before the cancellation.*

Note. This exclusion doesn't apply to a cancellation of debt that occurs in a title 11 bankruptcy case. It also doesn't apply if the debt is qualified principal residence indebtedness (defined in this section under *Qualified Principal Residence Indebtedness*, later) unless you elect to apply the insolvency exclusion instead of the qualified principal residence indebtedness exclusion.

How to report the insolvency exclusion. To show that you are excluding canceled debt from income under the insolvency exclusion, attach Form 982 to your federal income tax return and check the box on line 1b. On line 2, include the smaller of the amount of the debt canceled or the amount by which you were insolvent immediately before the cancellation. You can use the Insolvency Worksheet, later, to help calculate the extent that you were insolvent immediately before the cancellation. You must also reduce your tax attributes in Part II of Form 982 as explained under *Reduction of Tax Attributes*, later.

Example 1—amount of insolvency more than canceled debt. In 2015, Greg was released from his obligation to pay his personal credit card debt in the amount of $5,000. Greg received a 2015 Form 1099-C from his credit card lender showing the entire amount of discharged debt of $5,000 in box 2. None of the exceptions to the general rule that canceled

debt is included in income apply. Greg uses the Insolvency Worksheet to determine that his total liabilities immediately before the cancellation were $15,000 and the FMV of his total assets immediately before the cancellation was $7,000. This means that immediately before the cancellation, Greg was insolvent to the extent of $8,000 ($15,000 total liabilities minus $7,000 FMV of his total assets). Because the amount by which Greg was insolvent immediately before the cancellation was more than the amount of his debt canceled, Greg can exclude the entire $5,000 canceled debt from income.

When completing his tax return, Greg checks the box on line 1b of Form 982 and enters $5,000 on line 2. Greg completes Part II to reduce his tax attributes as explained under *Reduction of Tax Attributes*, later. Greg doesn't include any of the $5,000 canceled debt on line 21 of his Form 1040. None of the canceled debt is included in his income.

Example 2—amount of insolvency less than canceled debt. The facts are the same as in Example 1 except that Greg's total liabilities immediately before the cancellation were $10,000 and the FMV of his total assets immediately before the cancellation was $7,000. In this case, Greg is insolvent to the extent of $3,000 ($10,000 total liabilities minus $7,000 FMV of his total assets) immediately before the cancellation. Because the amount of the canceled debt was more than the amount by which Greg was insolvent immediately before the cancellation, Greg can exclude only $3,000 of the $5,000 canceled debt from income under the insolvency exclusion.

Greg checks the box on line 1b of Form 982 and includes $3,000 on line 2. Also, Greg completes Part II to reduce his tax attributes as explained under *Reduction of Tax Attributes*, later. Additionally, Greg must include $2,000 of canceled debt on line 21 of his Form 1040 (unless another exclusion applies).

Example 3—joint debt and separate returns. In 2015, James and his wife Robin were released from their obligation to pay a debt of $10,000 for which they were jointly and severally liable. None of the exceptions to the general rule that canceled debt is included in income apply. They incurred the debt (originally $12,000) to finance James's purchase of a $9,000 motorcycle and Robin's purchase of a laptop computer and software for personal use for $3,000. They each received a 2015 Form 1099-C from the bank showing the entire canceled debt of $10,000 in box 2. Based on the use of the loan proceeds, they agreed that James was responsible for 75% of the debt and Robin was responsible for the remaining 25%. Therefore, James's share of the debt is $7,500 (75% of $10,000), and Robin's share is $2,500 (25% of $10,000). By completing the Insolvency Worksheet, James determines that, immediately before the cancellation of the debt, he was insolvent to the extent of $5,000 ($15,000 total liabilities minus $10,000 FMV of his total assets). He can exclude $5,000 of his $7,500 canceled debt. Robin completes a separate insolvency worksheet and determines she was insolvent to the extent of $4,000 ($9,000 total liabilities minus $5,000 FMV of her total assets). She can exclude her entire canceled debt of $2,500.

When completing his separate tax return, James checks the box on line 1b of Form 982 and enters $5,000 on line 2. He completes Part II to reduce his tax attributes as explained under *Reduction of Tax Attributes*, later. He must include the remaining $2,500 ($7,500 – $5,000) of canceled debt on line 21 of his Form 1040 (unless another exclusion applies).

When completing her return, Robin checks the box on line 1b of Form 982 and enters $2,500 on line 2. She completes Part II to reduce her tax attributes as explained under *Reduction of Tax Attributes*, later. She doesn't include any of the canceled debt on line 21 of her Form 1040. None of the canceled debt has to be included in her income.

Qualified Farm Indebtedness

You can exclude canceled farm debt from income on your 2015 return if all of the following apply.

- The debt was incurred directly in connection with your operation of the trade or business of farming.
- Fifty percent or more of your total gross receipts for 2012, 2013, and 2014 were from the trade or business of farming.
- The cancellation was made by a qualified person. A qualified person is an individual, organization, partnership, association, corporation, or other person, who is actively and regularly engaged in the business of lending money. A qualified person also includes any federal, state, or local government or agency or instrumentality of one of those governments. For example, the United States Department of Agriculture is a qualified person. A qualified person can't be related to you, can't be the person from whom you acquired the property (or a person related to this person), and can't be a person who receives a fee due to your investment in the property (or a person related to this person).

For the definition of the term "related person," see *Related persons* under *At-Risk Amounts* in Pub. 925, Passive Activity and At-Risk Rules.

Note. This exclusion doesn't apply to a cancellation of debt in a title 11 bankruptcy case or to the extent you were insolvent immediately before the cancellation. If qualified farm debt is canceled in a title 11 case, you must apply the bankruptcy exclusion rather than the exclusion for canceled qualified farm debt. If you were insolvent immediately before the cancellation of qualified farm debt, you must apply the insolvency exclusion before applying the exclusion for canceled qualified farm debt.

Exclusion limit. The amount of canceled qualified farm debt you can exclude from income under this exclusion is limited. It can't be more than the sum of:

- Your adjusted tax attributes, and
- The total adjusted bases of qualified property you held at the beginning of 2016.

If you excluded canceled debt under the insolvency exclusion, the adjusted basis of any qualified property and adjusted tax attributes are determined after any reduction of tax attributes required under the insolvency exclusion.

Any canceled qualified farm debt that is more than this limit must be included in your income.

For more information about the basis of property, see Pub. 551, Basis of Assets.

Adjusted tax attributes. Adjusted tax attributes means the sum of the following items.

1. Any net operating loss (NOL) for 2015 and any NOL carryover to 2015.
2. Any net capital loss for 2015 and any capital loss carryover to 2015.
3. Any passive activity loss carryover from 2015.
4. Three times the sum of any:
   a. General business credit carryover to or from 2015,
   b. Minimum tax credit available as of the beginning of 2016,
   c. Foreign tax credit carryover to or from 2015, and
   d. Passive activity credit carryover from 2015.

Qualified property. This is any property you use or hold for use in your trade or business or for the production of income.

How to report the qualified farm indebtedness exclusion. To show that all or part of your canceled debt is excluded from income because it is qualified farm debt, check the box on line 1c of Form 982 and attach it to your Form 1040. On line 2 of Form 982, include the amount of the qualified farm debt canceled, but not more than the exclusion limit (explained earlier). You must also reduce your tax attributes in Part II of Form 982 as explained under *Reduction of Tax Attributes*, later.

Example 1. In 2015, Chuck was released from his obligation to pay a $10,000 debt that was incurred directly in connection with his trade or business of farming. Chuck received a Form 1099-C from the qualified lender showing discharged debt of $10,000 in box 2. For his 2012, 2013, and 2014 tax years, at least 50% of Chuck's total gross receipts were from the trade or business of farming. Chuck's adjusted tax attributes are $5,000 and Chuck has $3,000 total adjusted bases in qualified property at the beginning of 2016. Chuck had no other debt canceled during 2015 and no other exception or exclusion relating to canceled debt income applies.

Chuck can exclude $8,000 ($5,000 of adjusted tax attributes plus $3,000 total adjusted bases in qualified property at the beginning of 2016) of the $10,000 canceled debt from income. Chuck checks the box on line 1c of Form 982 and enters $8,000 on line 2. Also, Chuck completes Part II to reduce his tax attributes as explained under *Reduction of Tax Attributes*, later. The remaining $2,000 of canceled qualified farm debt is included in Chuck's income on Schedule F, line 8.

Example 2. On March 2, 2015, Bob was released from his obligation to pay a $10,000 business credit card debt that was used directly in connection with his farming business. For his 2012, 2013, and 2014 tax years, at least 50% of Bob's total gross receipts were from the trade or business of farming. Bob received a 2015 Form 1099-C from the qualified lender showing discharged debt of $10,000 in box 2. The FMV of Bob's total assets on March 2, 2015 (immediately before the cancellation of the credit card debt), was $7,000 and Bob's total liabilities at that time were $11,000. Bob's adjusted tax attributes (a 2015 NOL) are $7,000 and Bob has $4,000 total adjusted bases in qualified property at the beginning of 2016.

Bob qualifies to exclude $4,000 of the canceled debt under the insolvency exclusion because he is insolvent to the extent of $4,000 immediately before the cancellation ($11,000 total liabilities minus $7,000 FMV of total assets). Bob must reduce his tax attributes under the insolvency rules before applying the rules for qualified farm debt.

Bob also qualifies to exclude the remaining $6,000 of canceled qualified farm debt. The limit on Bob's exclusion from income of canceled qualified farm debt is $7,000, the sum of his adjusted tax attributes of $3,000 (the $7,000 NOL minus the $4,000 reduction of tax attributes required because of the $4,000 exclusion of canceled debt under the insolvency exclusion) plus $4,000 (Bob's total adjusted bases in qualified property at the beginning of 2016).

Bob checks the boxes on lines 1b and 1c of Form 982 and enters $10,000 on line 2. Bob completes Part II to reduce his tax attributes as explained under *Reduction of Tax Attributes*, later. Bob doesn't include any of his canceled debt in income.

Example 3. The facts are the same as in Example 2 except that immediately before the cancellation Bob was insolvent to the extent of the full $10,000 canceled debt. Because the exclusion for qualified farm debt doesn't apply to the extent that Bob was insolvent immediately before the cancellation, he checks only the box on line 1b of Form 982 and enters $10,000 on line 2. Bob completes Part II to reduce his tax attributes based on the insolvency exclusion as explained under *Reduction of Tax Attributes*, later. Bob doesn't include any of the canceled debt in income.

Qualified Real Property Business Indebtedness

You can elect to exclude canceled qualified real property business indebtedness from income. Qualified real property business indebtedness is debt (other than qualified farm debt) that meets all of the following conditions.

1. It was incurred or assumed in connection with real property used in a trade or business.
2. It is secured by that real property. As long as certain other requirements are met, indebtedness that is secured by 100% of the ownership interest in a disregarded entity holding real property will be treated as indebtedness that is secured by real property. For more information, and for the requirements that must be met, see Revenue Procedure 2014-20 available at *www.irs.gov/irb/2014-9_IRB/ar09.html*.
3. It was incurred or assumed:
   a. Before 1993, or
   b. After 1992, if the debt is either (i) qualified acquisition indebtedness (defined next), or (ii) debt incurred to refinance qualified real property business debt incurred or assumed before 1993 (but only to the extent the amount of such debt doesn't exceed the amount of debt being refinanced).
4. It is debt to which you elect to apply these rules.

TIP *Residential rental property generally qualifies as real property used in a trade or business unless you also use the dwelling as a home. For more information, see* Dwelling Unit Used as a Home *in Pub. 527.*

Definition of qualified acquisition indebtedness. Qualified acquisition indebtedness is:

- Debt incurred or assumed to acquire, construct, reconstruct, or substantially improve real property that is used in a trade or business and secures the debt, or
- Debt resulting from the refinancing of qualified acquisition indebtedness, to the extent the amount of the debt doesn't exceed the amount of debt being refinanced.

Note. This exclusion doesn't apply to a cancellation of debt in a title 11 bankruptcy case or to the extent you were insolvent immediately before the cancellation. If qualified real property business debt is canceled in a title 11 bankruptcy case, you must apply the bankruptcy exclusion rather than the exclusion for canceled qualified real property business debt. If you were insolvent immediately before the cancellation of qualified real property business debt, you must apply the insolvency exclusion before applying the exclusion for canceled qualified real property business debt.

Exclusion limit. The amount of canceled qualified real property business debt you can exclude from income under this exclusion is limited to the excess (if any) of:

- The outstanding principal amount of the qualified real property business debt (immediately before the cancellation), over
- The FMV (immediately before the cancellation) of the business real property securing the debt, reduced by the outstanding principal amount of any other qualified real property business debt secured by that property (immediately before the cancellation).

In addition to this limit, a second overall limit applies. The amount of canceled qualified real property business debt you can exclude from income can't be more than the total adjusted bases of depreciable real property you held immediately before the cancellation of the qualified real property business indebtedness (other than depreciable real property acquired in contemplation of the cancellation). When figuring this overall limit, use the adjusted basis of the depreciable real property after any reductions in basis required because of the exclusion of debt canceled under the bankruptcy, insolvency, or farm debt provisions described in this publication.

For more information about the basis of property, see Pub. 551.

How to elect the qualified real property business debt exclusion. You must make an election to exclude canceled qualified real property business debt from gross income. The election must be made on a timely filed (including extensions) federal income tax return for 2015 and can be revoked only with IRS consent. The election is made by completing Form 982 in accordance with its instructions. Attach Form 982 to your federal income tax return for 2015 and check the box on line 1d. Include the amount of canceled qualified real property business debt (but not more than the amount of the exclusion limit, explained earlier) on line 2 of Form 982. You must also reduce your tax attributes in Part II of Form 982 as explained under *Reduction of Tax Attributes*, later.

If you timely filed your tax return without making this election, you can still make the election by filing an amended return within 6 months of the due date of the return (excluding extensions). Enter "Filed pursuant to section 301.9100-2" on the amended return and file it at the same place you filed the original return.

Example. In 2009, Curt bought a retail store for use in a business he operated as a sole proprietorship. Curt made a $20,000 down payment and financed the remaining $200,000 of the purchase price with a bank loan. The bank loan was a recourse loan and was secured by the property. Curt used the property in his business continuously since he bought it. He had no other debt secured by that depreciable real property. In addition to the retail store, Curt owned depreciable equipment and furniture with an adjusted basis of $50,000.

Curt's business encountered financial difficulties in 2015. On September 25, 2015, the bank financing the retail store loan entered into a workout agreement with Curt under which it canceled $20,000 of the debt. Immediately before the cancellation, the outstanding principal balance on the retail store loan was $185,000, the FMV of the store was $165,000, and the adjusted basis was $210,000 ($220,000 cost minus $10,000 accumulated depreciation).

The bank sent him a 2015 Form 1099-C showing discharged debt of $20,000 in box 2. Curt had no tax attributes other than basis to reduce and didn't qualify for any exception or exclusion other than the qualified real property business debt exclusion.

Curt elects to apply the qualified real property business debt exclusion to the canceled debt. The amount of canceled qualified real property business debt that he can exclude from income is limited to $20,000 (the excess of the $185,000 outstanding principal amount of his qualified real property business debt immediately before the cancellation over the $165,000 FMV of the business real property securing the debt). Curt's exclusion is also subject

Insolvency Worksheet

Keep for Your Records

Date debt was canceled (mm/dd/yy)		
Part I. Total liabilities immediately before the cancellation (don't include the same liability in more than one category)		
	Liabilities (debts)	**Amount Owed Immediately Before the Cancellation**
1.	Credit card debt	$
2.	Mortgage(s) on real property (including first and second mortgages and home equity loans) (mortgage(s) can be on personal residence, any additional residence, or property held for investment or used in a trade or business)	$
3.	Car and other vehicle loans	$
4.	Medical bills owed	$
5.	Student loans	$
6.	Accrued or past-due mortgage interest	$
7.	Accrued or past-due real estate taxes	$
8.	Accrued or past-due utilities (water, gas, electric)	$
9.	Accrued or past-due child care costs	$
10.	Federal or state income taxes remaining due (for prior tax years)	$
11.	Judgments	$
12.	Business debts (including those owed as a sole proprietor or partner)	$
13.	Margin debt on stocks and other debt to purchase or secured by investment assets other than real property	$
14.	Other liabilities (debts) not included above	$
15.	**Total liabilities immediately before the cancellation. Add lines 1 through 14.**	$
Part II. Fair market value (FMV) of assets owned immediately before the cancellation (don't include the FMV of the same asset in more than one category)		
	Assets	**FMV Immediately Before the Cancellation**
16.	Cash and bank account balances	$
17.	Real property, including the value of land (can be main home, any additional home, or property held for investment or used in a trade or business)	$
18.	Cars and other vehicles	$
19.	Computers	$
20.	Household goods and furnishings (for example, appliances, electronics, furniture, etc.)	$
21.	Tools	$
22.	Jewelry	$
23.	Clothing	$
24.	Books	$
25.	Stocks and bonds	$
26.	Investments in coins, stamps, paintings, or other collectibles	$
27.	Firearms, sports, photographic, and other hobby equipment	$
28.	Interest in retirement accounts (IRA accounts, 401(k) accounts, and other retirement accounts)	$
29.	Interest in a pension plan	$
30.	Interest in education accounts	$
31.	Cash value of life insurance	$
32.	Security deposits with landlords, utilities, and others	$
33.	Interests in partnerships	$
34.	Value of investment in a business	$
35.	Other investments (for example, annuity contracts, guaranteed investment contracts, mutual funds, commodity accounts, interests in hedge funds, and options)	$
36.	Other assets not included above	$
37.	**FMV of total assets immediately before the cancellation. Add lines 16 through 36.**	$
Part III. Insolvency		
38.	**Amount of Insolvency.** Subtract line 37 from line 15. If zero or less, you aren't insolvent.	$

to an overall $210,000 limit equal to the adjusted basis of depreciable real property he held immediately before the cancellation.

Thus, Curt can exclude the entire $20,000 of canceled qualified real property business debt from income. Curt checks the box on line 1d of Form 982 and enters $20,000 on line 2. Curt must also use line 4 of Form 982 to reduce his basis in depreciable real property by the $20,000 of canceled qualified real property business debt excluded from his income as explained under *Reduction of Tax Attributes*, later.

Qualified Principal Residence Indebtedness

You can exclude canceled debt from income if it is qualified principal residence indebtedness. Qualified principal residence indebtedness is any mortgage you took out to buy, build, or substantially improve your main home. It also must be secured by your main home. Qualified principal residence indebtedness also includes any debt secured by your main home that you used to refinance a mortgage you took out to buy, build, or substantially improve your main home, but only up to the amount of the old mortgage principal just before the refinancing.

Example 1. In 2009, Becky bought a main home for $315,000. She took out a $300,000 mortgage loan to buy the home and made a down payment of $15,000. The loan was secured by the home. In 2010, Becky took out a second mortgage loan in the amount of $50,000 that she used to add a garage to her home

In 2015, when the outstanding principal of her first and second mortgage loans was $325,000, Becky refinanced the two loans into one loan in the amount of $400,000. The FMV of the home at the time of the refinancing was $430,000. She used the additional $75,000 debt proceeds ($400,000 new mortgage loan minus $325,000 outstanding principal balances of her first and second mortgage loans immediately before the refinancing) to pay off personal credit cards and to pay college tuition for her daughter.

After the refinancing, Becky's qualified principal residence indebtedness is $325,000 because the debt resulting from the refinancing is qualified principal residence indebtedness only to the extent it isn't more than the old mortgage principal just before the refinancing.

Example 2. In 2012, Steve acquired his main home for $200,000, subject to a mortgage of $175,000. In 2013, he took out a home equity loan for $10,000, secured by his main home, which he used to pay off personal credit cards.

In 2014, when the outstanding principal on his mortgage was $170,000 and the outstanding principal on his home equity loan was $9,000, he refinanced the two loans into one loan in the amount of $200,000. The FMV of the home at the time of refinancing was $210,000. He used the additional $21,000 ($200,000 new mortgage loan minus $179,000 outstanding principal balances on the mortgage and home equity loan) to cover medical expenses.

After refinancing, Steve's qualified principal residence indebtedness is $170,000 because the debt resulting from the refinancing is qualified principal residence indebtedness only to the extent it refinances debt that had been secured by the main home and was used to buy, build, or substantially improve the main home.

Main home. Your main home is the one in which you live most of the time. You can have only one main home at any one time.

Note. This exclusion doesn't apply to a cancellation of debt in a title 11 bankruptcy case. If qualified principal residence indebtedness is canceled in a title 11 bankruptcy case, you must apply the bankruptcy exclusion rather than the exclusion for qualified principal residence indebtedness. If you were insolvent immediately before the cancellation, you can elect to apply the insolvency exclusion (as explained under *Insolvency*, earlier) instead of applying the qualified principal residence indebtedness exclusion. To do this, check the box on line 1b of Form 982 instead of the box on line 1e.

Exclusion limit. The maximum amount you can treat as qualified principal residence indebtedness is $2 million ($1 million if married filing separately). You can't exclude canceled qualified principal residence indebtedness from income if the cancellation was for services performed for the lender or on account of any other factor not directly related to a decline in the value of your home or to your financial condition.

Ordering rule. If only a part of a loan is qualified principal residence indebtedness, the exclusion applies only to the extent the amount canceled is more than the amount of the loan (immediately before the cancellation) that is not qualified principal residence indebtedness. The remaining part of the loan may qualify for another exclusion.

Example. Ken incurred recourse debt of $800,000 when he bought his main home for $880,000. When the FMV of the property was $1,000,000, Ken refinanced the debt for $850,000. At the time of the refinancing, the principal balance of the original mortgage loan was $740,000. Ken used the $110,000 he obtained from the refinancing ($850,000 minus $740,000) to pay off his credit cards and to buy a new car.

About 2 years after the refinancing, Ken lost his job and was unable to get another job paying a comparable salary. Ken's home had declined in value to between $700,000 and $750,000. Based on Ken's circumstances, the lender agreed to allow a short sale of the property for $735,000 and to cancel the remaining $115,000 of the $850,000 debt. Under the ordering rule, Ken can exclude only $5,000 of the canceled debt from his income under the exclusion for canceled qualified principal residence indebtedness ($115,000 canceled debt minus the $110,000 amount of the debt that wasn't qualified principal residence indebtedness). Ken must include the remaining $110,000 of canceled debt in income on line 21 of his Form 1040 (unless another exclusion applies).

How to report the qualified principal residence indebtedness exclusion. To show that all or part of your canceled debt is excluded from income because it is qualified principal residence indebtedness, attach Form 982 to your federal income tax return and check the box on line 1e. On line 2 of Form 982, include the amount of canceled qualified principal residence indebtedness, but not more than the amount of the exclusion limit (explained earlier). If you continue to own your home after a cancellation of qualified principal residence indebtedness, you must reduce your basis in the home as explained under *Reduction of Tax Attributes*, next.

Reduction of Tax Attributes

If you exclude canceled debt from income, you must reduce certain tax attributes (but not below zero) by the amount excluded. Use Part II of Form 982 to reduce your tax attributes. The order in which the tax attributes are reduced depends on the reason the canceled debt was excluded from income. If the total amount of canceled debt excluded from income (line 2 of Form 982) was more than your total tax attributes, the total reduction of tax attributes in Part II of Form 982 will be less than the amount on line 2.

Qualified Principal Residence Indebtedness

If you exclude canceled qualified principal residence indebtedness from income and you continue to own the home after the cancellation, you must reduce the basis of the home (but not below zero) by the amount of the canceled qualified principal residence indebtedness excluded from income. Enter the amount of the basis reduction on line 10b of Form 982.

For more details on determining the basis of your main home, see Pub. 523, Selling Your Home.

Bankruptcy and Insolvency

No tax attributes other than basis of personal-use property. If the canceled debt you are excluding isn't qualified principal residence indebtedness and you have no tax attributes other than the adjusted basis of personal-use property (see the list of seven tax attributes, later), you must reduce the basis of the personal-use property you held at the beginning of 2016 (in proportion to adjusted basis). Personal-use property is any property that isn't used in your trade or business nor held for investment (such as your home, home furnishings, and car). Include on line 10a of Form 982 the smallest of:

- The bases of your personal-use property held at the beginning of 2016,
- The amount of canceled nonbusiness debt (other than qualified principal residence indebtedness) that you are excluding from income on line 2 of Form 982, or
- The excess of the total bases of the property and the amount of money you held immediately after the cancellation over your

total liabilities immediately after the cancellation.

For general information about the basis of property, see Pub. 551.

Example. In 2013, Mya bought a car for personal use. The cost of the car was $12,000. Mya put down $2,000 and took out a loan of $10,000 to buy the car. The loan was a recourse loan, meaning that Mya was personally liable for the full amount of the debt.

On December 7, 2015, when the balance of the loan was $8,500, the lender repossessed and sold the car because Mya had stopped making payments on the loan. The FMV of the car was $7,000 at the time the lender repossessed and sold it. The lender applied the $7,000 it received on the sale of the car against Mya's loan and forgave the remaining loan balance of $1,500 ($8,500 outstanding balance immediately before the repossession minus the $7,000 FMV of the car).

Mya's only other assets at the time of the cancellation are the furniture in her apartment which has a basis of $5,000 and an FMV of $3,000, jewelry with a basis of $500 and an FMV of $1,000, and a $600 balance in her savings account. Thus, the FMV of Mya's total assets immediately before the cancellation was $11,600 ($7,000 car plus $3,000 furniture plus $1,000 jewelry plus $600 savings). Mya also had an outstanding student loan balance of $6,000 immediately before the cancellation, bringing her total liabilities at that time to $14,500 ($8,500 balance on car loan plus $6,000 student loan balance). Other than the car, which was repossessed, Mya held all of these assets at the beginning of 2016. The FMV and bases of the assets remained the same at the beginning of 2016.

Mya received a 2015 Form 1099-C showing $1,500 in box 2 (amount of debt that was canceled) and $7,000 in box 7 (FMV of the property). Mya can exclude all $1,500 of canceled debt from income because at the time of the cancellation, she was insolvent to the extent of $2,900 ($14,500 of total liabilities immediately before the cancellation minus $11,600 FMV of total assets at that time).

Mya checks box 1b on Form 982 and enters $1,500 on line 2. She enters $100 on line 10a, the smallest of:

- The $5,500 bases of her personal-use property held at the beginning of 2016 ($5,000 furniture plus $500 jewelry),
- The $1,500 nonbusiness debt she is excluding from income on line 2 of Form 982, or
- The $100 excess of the total bases of the property and the amount of money Mya held immediately after the cancellation over her total liabilities at that time ($5,500 bases of property held immediately after the cancellation plus $600 savings minus $6,000 student loan).

Mya must reduce her bases in each item of property in proportion to her total adjusted bases in all her property. Thus, she reduces her basis in the furniture by $91 ($100 x $5,000/$5,500) and her basis in the jewelry by $9 ($100 x $500/$5,500).

All other tax attributes. If the canceled debt is excluded by reason of the bankruptcy or insolvency exclusions, you must use the excluded debt to reduce the following tax attributes (but not below zero) in the order listed unless you elect to reduce the basis of depreciable property first, as explained later. Reduce your tax attributes after you figure your income tax liability for 2015.

1. ***Net operating loss (NOL).*** First reduce any 2015 NOL and then reduce any NOL carryover to 2015 (after taking into account any amount used to reduce 2015 taxable income) in the order of the tax years from which the carryovers arose, starting with the earliest year. Reduce the NOL or carryover by one dollar for each dollar of excluded canceled debt.
2. ***General business credit carryover.*** Reduce the credit carryover to or from 2015. Reduce the credit carryovers to 2015 in the order in which they are taken into account for 2015. For more information on the credit ordering rules for 2015, see the Instructions for Form 3800, General Business Credit. Reduce the carryover by 33⅓ cents for each dollar of excluded canceled debt.
3. ***Minimum tax credit.*** Reduce the minimum tax credit available at the beginning of 2016. Reduce the credit by 33⅓ cents for each dollar of excluded canceled debt.
4. ***Net capital loss and capital loss carryovers.*** First reduce any 2015 net capital loss and then any capital loss carryover to 2015 (after taking into account any amount used to reduce 2015 taxable income) in the order of the tax years from which the carryovers arose, starting with the earliest year. Reduce the net capital loss or carryover by one dollar for each dollar of excluded canceled debt.
5. ***Basis.*** Reduce the bases of the property you hold at the beginning of 2016 in the following order (and, within each category, in proportion to adjusted basis).
   a. Real property used in your trade or business or held for investment (other than real property held for sale to customers in the ordinary course of business) if it secured the canceled debt.
   b. Personal property used in your trade or business or held for investment (other than inventory and accounts and notes receivable) if it secured the canceled debt.
   c. Any other property used in your trade or business or held for investment (other than inventory, accounts receivable, notes receivable, and real property held for sale to customers in the ordinary course of business).
   d. Inventory, accounts receivable, notes receivable, and real property held primarily for sale to customers in the ordinary course of business.
   e. Personal-use property (property not used in your trade or business nor held for investment).

   Reduce the basis by one dollar for each dollar of excluded canceled debt. However, the reduction can't be more than the excess of the total bases of the property and the amount of money you held immediately after the debt cancellation over your total liabilities immediately after the cancellation.

   For allocation rules that apply to basis reductions for multiple canceled debts, see Regulations section 1.1017-1(b)(2). Also see *Election to reduce the basis of depreciable property before reducing other tax attributes*, later.
6. ***Passive activity loss and credit carryovers.*** Reduce the passive activity loss and credit carryovers from 2015. Reduce the loss carryover by one dollar for each dollar of excluded canceled debt. Reduce the credit carryover by 33⅓ cents for each dollar of excluded canceled debt.
7. ***Foreign tax credit.*** Reduce the credit carryover to or from 2015. Reduce the credit carryovers to 2015 in the order in which they are taken into account for 2015. Reduce the carryover by 33⅓ cents for each dollar of excluded canceled debt.

Election to reduce the basis of depreciable property before reducing other tax attributes. You can elect to reduce the bases of depreciable property you held at the beginning of 2016 before reducing other tax attributes. You can reduce the basis of this property by all or part of the canceled debt. Basis of property is reduced in the following order.

1. Depreciable real property used in your trade or business or held for investment that secured the canceled debt.
2. Depreciable personal property used in your trade or business or held for investment that secured the canceled debt.
3. Other depreciable property used in your trade or business or held for investment.
4. Real property held primarily for sale to customers if you elect to treat it as if it were depreciable property on Form 982.

Basis reduction is limited to the total adjusted bases of all your depreciable property. Depreciable property for this purpose means any property subject to depreciation or amortization, but only if a reduction of basis will reduce the depreciation or amortization otherwise allowable for the period immediately following the basis reduction. If the amount of canceled debt excluded from income is more than the total bases in depreciable property, you must use the excess to reduce the other tax attributes in the order described earlier under *All other tax attributes*. In figuring the limit on the basis reduction in (5), *Basis*, use the remaining adjusted bases of your properties after making this election. See Form 982 for information on how to make this election. The election can be revoked only with IRS consent.

Recapture of basis reductions. If you reduce the basis of property under these provisions and later sell or otherwise dispose of the property at a gain, the part of the gain due to this

basis reduction is taxable as ordinary income under the depreciation recapture provisions. Treat any property that isn't section 1245 or section 1250 property as section 1245 property. For section 1250 property, determine the depreciation adjustments that would have resulted under the straight line method as if there were no basis reduction for debt cancellation. See Pub. 544 or Pub. 225, Farmer's Tax Guide, for more details on sections 1245 and 1250 property and the recapture of gain as ordinary income.

Qualified Farm Indebtedness

If you exclude canceled debt from income under both the insolvency exclusion and the exclusion for qualified farm indebtedness, you must first reduce your tax attributes by the amount excluded under the insolvency exclusion. Then reduce your remaining tax attributes (but not below zero) by the amount of canceled debt that qualifies for the farm debt exclusion.

In most cases, when reducing your tax attributes for canceled qualified farm indebtedness excluded from income, reduce them in the same order explained under *Bankruptcy and Insolvency*, earlier. However, don't follow the rules in item (5), *Basis*. Instead, reduce only the basis of qualified property. Qualified property is any property you use or hold for use in your trade or business or for the production of income. Reduce the basis of qualified property in the following order.

1. Depreciable qualified property. You can elect on Form 982 to treat real property held primarily for sale to customers as if it were depreciable property.
2. Land that is qualified property and is used or held for use in your farming business.
3. Other qualified property.

Qualified Real Property Business Indebtedness

If you make an election to exclude canceled qualified real property business debt from income, you must reduce the basis of your depreciable real property (but not below zero) by the amount of canceled qualified real property business debt excluded from income. The basis reduction is made at the beginning of 2016. However, if you dispose of your depreciable real property before the beginning of 2016, you must reduce its basis (but not below zero) immediately before the disposition. Enter the amount of the basis reduction on line 4 of Form 982.

Example 1. In 2010, Curt bought a retail store for use in a business he operated as a sole proprietorship. Curt made a $20,000 down payment and financed the remaining $200,000 of the purchase price with a bank loan. The bank loan was a recourse loan and was secured by the property. He used the property in his business continuously since he bought it and had no other debt secured by that depreciable real property. In addition to the retail store, Curt owned depreciable equipment and furniture with an adjusted basis of $50,000. His tax attributes included the basis of depreciable property, a net operating loss, and a capital loss carryover to 2015.

Curt's business encountered financial difficulties in 2015. On September 25, 2015, the bank financing the retail store loan entered into a workout agreement with him under which it canceled $20,000 of the principal amount of the debt. Immediately before the bank entered into the workout agreement, he was insolvent to the extent of $12,000. At that time, the outstanding principal balance on the retail store loan was $185,000, the FMV of the store was $165,000, and the adjusted basis was $210,000 ($220,000 cost minus $10,000 accumulated depreciation). The bank sent him a 2015 Form 1099-C showing canceled debt of $20,000 in box 2.

Curt must apply the insolvency exclusion before applying the exclusion for canceled qualified real property business indebtedness. Under the insolvency exclusion rules, he can exclude $12,000 of the canceled debt from income. Curt elects to reduce his basis of depreciable property before reducing other tax attributes. Under that election, he must first reduce his basis in the depreciable real property used in his trade or business that secured the canceled debt. After the basis reduction, his adjusted basis in that property is $198,000 ($210,000 adjusted basis before entering into the workout agreement minus $12,000 of canceled debt excluded from income under the insolvency exclusion).

Curt may be able to exclude the remaining $8,000 of canceled debt from income under the exclusion for qualified real property business indebtedness, if he elects to apply it. The amount he can exclude is subject to both the following limits.

- The excess, if any, of the outstanding principal amount of the qualified real property business indebtedness (immediately before the cancellation) over the FMV (immediately before the cancellation) of the real property securing the debt ($185,000 minus $165,000, which equals $20,000).
- The total adjusted basis (determined after reduction for the canceled debt excluded under the insolvency exclusion) of depreciable real property he held immediately before the cancellation ($198,000).

Since both limits are more than the $8,000 of remaining canceled debt ($20,000 minus $12,000), Curt can exclude $8,000 under the qualified real property business indebtedness exclusion.

Curt checks the boxes on lines 1b and 1d of Form 982. He completes Part II of Form 982 to reduce his basis in the depreciable real property by $20,000, the amount of the canceled debt excluded from income. He enters $8,000 on line 4 and $12,000 on line 5.

Example 2. Bob owns depreciable real property used in his retail business. His adjusted basis in the property is $145,000. The FMV of the property is $120,000. The property is subject to $134,000 of recourse debt which is secured by the property. Bob had no other debt secured by that depreciable real property. Bob also had a $15,000 NOL in 2015.

During 2015, Bob entered into a workout agreement with the lender under which the lender canceled $14,000 of the debt on the real property used in his business. Immediately before the cancellation, Bob was insolvent to the extent of $10,000. He excludes $10,000 of the canceled debt from income under the insolvency exclusion. As a result of that exclusion, he reduced his NOL by $10,000.

Bob may be able to exclude the remaining $4,000 of canceled debt from income under the qualified real property business indebtedness exclusion, if he elects to apply it. The amount he can exclude is subject to both of the following limits.

- The excess, if any, of the outstanding principal amount of the qualified real property business debt (immediately before the cancellation) over the FMV (immediately before the cancellation) of the business real property securing the debt (the excess of $134,000 over $120,000, which equals $14,000).
- The total adjusted bases of depreciable real property held immediately before the cancellation of debt ($145,000).

Since both limits ($14,000 and $145,000) are more than the remaining $4,000 of canceled debt, Bob can also exclude the remaining $4,000 of canceled debt.

Bob checks the boxes on lines 1b and 1d of Form 982 and enters $14,000 on line 2. Bob completes Part II of Form 982 to reduce his basis of depreciable real property and his 2015 NOL by entering $4,000 on line 4 and $10,000 on line 6. None of the canceled debt is included in his income.

2. Foreclosures and Repossessions

If you don't make payments you owe on a loan secured by property, the lender may foreclose on the loan or repossess the property. The foreclosure or repossession is treated as a sale from which you may realize gain or loss. This is true even if you voluntarily return the property to the lender. If the outstanding loan balance was more than the FMV of the property and the lender cancels all or part of the remaining loan balance, you also may realize ordinary income from the cancellation of debt. You must report this income on your return unless certain exceptions or exclusions apply. See chapter 1 for more details.

Table 1-1. **Worksheet for Foreclosures and Repossessions** *Keep for Your Records*

Part 1. Complete Part 1 only if you were personally liable for the debt (even if none of the debt was canceled). Otherwise, go to Part 2.	
1. Enter the amount of outstanding debt immediately before the transfer of property reduced by any amount for which you remain personally liable immediately after the transfer of property	_____
2. Enter the fair market value of the transferred property	_____
3. **Ordinary income from the cancellation of debt upon foreclosure or repossession.*** Subtract line 2 from line 1. If less than zero, enter zero. Next, go to Part 2	_____
Part 2. Gain or loss from foreclosure or repossession.	
4. Enter the **smaller** of line 1 or line 2. If you didn't complete Part 1 (because you weren't personally liable for the debt), enter the amount of outstanding debt immediately before the transfer of property	_____
5. Enter any proceeds you received from the foreclosure sale	_____
6. Add line 4 and line 5	_____
7. Enter the adjusted basis of the transferred property	_____
8. **Gain or loss from foreclosure or repossession.** Subtract line 7 from line 6	_____

* The income may not be taxable. See chapter 1 for more details.

Borrower's gain or loss. You figure and report gain or loss from a foreclosure or repossession in the same way as gain or loss from a sale. The gain is the difference between the amount realized and your adjusted basis in the transferred property (amount realized minus adjusted basis). The loss is the difference between your adjusted basis in the transferred property and the amount realized (adjusted basis minus amount realized). For more information on figuring gain or loss from the sale of property, see *Gain or Loss From Sales and Exchanges* in Pub. 544.

TIP *You can use Table 1-1 to figure your ordinary income from the cancellation of debt and your gain or loss from a foreclosure or repossession.*

Amount realized and ordinary income on a recourse debt. If you are personally liable for the debt, the amount realized on the foreclosure or repossession includes the smaller of:

- The outstanding debt immediately before the transfer reduced by any amount for which you remain personally liable immediately after the transfer, or
- The FMV of the transferred property.

The amount realized also includes any proceeds you received from the foreclosure sale. If the FMV of the transferred property is less than the total outstanding debt immediately before the transfer reduced by any amount for which you remain personally liable immediately after the transfer, the difference is ordinary income from the cancellation of debt. You must report this income on your return unless certain exceptions or exclusions apply. See chapter 1 for more details.

Example 1. Tara bought a new car for $15,000. She made a $2,000 downpayment and borrowed the remaining $13,000 from the dealer's credit company. Tara is personally liable for the loan (recourse debt) and the car is pledged as security for the loan. On August 1, 2015, the credit company repossessed the car because Tara had stopped making loan payments. The balance due after taking into account the payments Tara made was $10,000. The FMV of the car when it was repossessed was $9,000. On November 16, 2015, the credit company forgave the remaining $1,000 balance on the loan due to insufficient assets.

In this case, the amount Tara realizes is $9,000. This is the smaller of:

- The $10,000 outstanding debt immediately before the repossession reduced by the $1,000 for which she remains personally liable immediately after the repossession ($10,000 – $1,000 = $9,000), or
- The $9,000 FMV of the car.

Tara figures her gain or loss on the repossession by comparing the $9,000 amount realized with her $15,000 adjusted basis. She has a $6,000 nondeductible loss. After the cancellation of the remaining balance on the loan in November, Tara also has ordinary income from cancellation of debt in the amount of $1,000 (the remaining balance on the $10,000 loan after the $9,000 amount satisfied by the FMV of the repossessed car). Tara must report this $1,000 on her return unless one of the exceptions or exclusions described in chapter 1 applies.

Example 2. Lili paid $200,000 for her home. She made a $15,000 downpayment and borrowed the remaining $185,000 from a bank. Lili is personally liable for the mortgage loan and the house secures the loan. In 2015, the bank foreclosed on the mortgage because Lili stopped making payments. When the bank foreclosed the mortgage, the balance due was $180,000, the FMV of the house was $170,000, and Lili's adjusted basis was $175,000 due to a casualty loss she had deducted. At the time of the foreclosure, the bank forgave $2,000 of the $10,000 debt in excess of the FMV ($180,000 minus $170,000). She remained personally liable for the $8,000 balance.

In this case, Lili has ordinary income from the cancellation of debt in the amount of $2,000. The $2,000 income from the cancellation of debt is figured by subtracting the $170,000 FMV of the house from the $172,000 difference between her total outstanding debt immediately before the transfer of property and the amount for which she remains personally liable immediately after the transfer ($180,000 minus $8,000). She is able to exclude the $2,000 of canceled debt from her income under the qualified principal residence indebtedness rules discussed earlier.

Lili must also determine her gain or loss from the foreclosure. In this case, the amount that she realizes is $170,000. This is the smaller of: (a) the $180,000 outstanding debt immediately before the transfer reduced by the $8,000 for which she remains personally liable immediately after the transfer ($180,000 – $8,000 = $172,000) or (b) the $170,000 FMV of the house. Lili figures her gain or loss on the foreclosure by comparing the $170,000 amount realized with her $175,000 adjusted basis. She has a $5,000 nondeductible loss.

Amount realized on a nonrecourse debt. If you aren't personally liable for repaying the debt secured by the transferred property, the amount you realize includes the full amount of the outstanding debt immediately before the transfer. This is true even if the FMV of the property is less than the outstanding debt immediately before the transfer.

Example 1. Tara bought a new car for $15,000. She made a $2,000 downpayment and borrowed the remaining $13,000 from the dealer's credit company. Tara isn't personally liable for the loan (nonrecourse), but pledged the new car as security for the loan.

On August 1, 2015, the credit company repossessed the car because Tara had stopped making loan payments. The balance due after taking into account the payments Tara made was $10,000. The FMV of the car when it was repossessed was $9,000.

The amount Tara realized on the repossession is $10,000. That is the outstanding amount of debt immediately before the repossession, even though the FMV of the car is less than $10,000. Tara figures her gain or loss on the repossession by comparing the $10,000 amount realized with her $15,000 adjusted basis. Tara has a $5,000 nondeductible loss.

Example 2. Lili paid $200,000 for her home. She made a $15,000 downpayment and borrowed the remaining $185,000 from a bank. She isn't personally liable for the loan, but grants the bank a mortgage.

The bank foreclosed on the mortgage because Lili stopped making payments. When the bank foreclosed on the mortgage, the balance due was $180,000, the FMV of the house was $170,000, and Lili's adjusted basis was $175,000 due to a casualty loss she had deducted.

The amount Lili realized on the foreclosure is $180,000, the outstanding debt immediately before the foreclosure. She figures her gain or loss by comparing the $180,000 amount realized with her $175,000 adjusted basis. Lili has a $5,000 realized gain. See Pub. 523, Selling

Your Home, to figure and report any taxable amount.

Forms 1099-A and 1099-C. A lender who acquires an interest in your property in a foreclosure or repossession should send you Form 1099-A, Acquisition or Abandonment of Secured Property, showing information you need to figure your gain or loss. However, if the lender also cancels part of your debt and must file Form 1099-C, the lender can include the information about the foreclosure or repossession on that form instead of on Form 1099-A. The lender must file Form 1099-C and send you a copy if the amount of debt canceled is $600 or more and the lender is a financial institution, credit union, federal government agency, or other applicable entity as discussed earlier in chapter 1. For foreclosures or repossessions occurring in 2015, these forms should be sent to you by February 1, 2016.

3.

Abandonments

You abandon property when you voluntarily and permanently give up possession and use of the property with the intention of ending your ownership but without passing it on to anyone else. Whether an abandonment has occurred is determined in light of all the facts and circumstances. You must both show an intention to abandon the property and affirmatively act to abandon the property.

A voluntary conveyance of the property in lieu of foreclosure isn't an abandonment and is treated as the exchange of property to satisfy a debt. For more information, see *Sales and Exchanges* in Pub. 544.

The tax consequences of abandonment of property that secures a debt depend on whether you were personally liable for the debt (recourse debt) or weren't personally liable for the debt (nonrecourse debt).

TIP *See Pub. 544 if you abandoned property that didn't secure debt. This publication only discusses the tax consequences of abandoning property that secured a debt.*

Abandonment of property securing recourse debt. In most cases, if you abandon property that secures debt for which you are personally liable (recourse debt), you don't have gain or loss until the later foreclosure is completed. For details on figuring gain or loss on the foreclosure, see chapter 2.

Example 1—abandonment of personal-use property securing recourse debt. In 2011, Anne purchased a home for $200,000. She borrowed the entire purchase price, for which she was personally liable, and gave the bank a mortgage on the home. In 2015, Anne lost her job and was unable to continue making her mortgage loan payments. Because her mortgage loan balance was $185,000 and the FMV of her home was only $150,000, Anne decided to abandon her home by permanently moving out on August 1, 2015. Because Anne was personally liable for the debt and the bank didn't complete a foreclosure of the property in 2015, Anne has neither gain nor loss in tax year 2015 from abandoning the home. If the bank sells the house at a foreclosure sale in 2016, Anne will have to figure her gain or nondeductible loss for tax year 2016 as discussed earlier in chapter 2.

Example 2—abandonment of business or investment property securing recourse debt. In 2011, Sue purchased business property for $200,000. She borrowed the entire purchase price, for which she was personally liable, and gave the lender a security interest in the property. In 2015, Sue was unable to continue making her loan payments. Because her loan balance was $185,000 and the FMV of the property was only $150,000, Sue abandoned the property on August 1, 2015. Because Sue was personally liable for the debt and the lender didn't complete a foreclosure of the property in 2015, Sue has neither gain nor loss in tax year 2015 from abandoning the property. If the lender sells the property at a foreclosure sale in 2016, Sue will have to figure her gain or deductible loss for tax year 2016 as discussed earlier in chapter 2.

Abandonment of property securing nonrecourse debt. If you abandon property that secures debt for which you aren't personally liable (nonrecourse debt), the abandonment is treated as a sale or exchange.

The amount you realize on the abandonment of property that secured nonrecourse debt is the amount of the nonrecourse debt. If the amount you realize is more than your adjusted basis, then you have a gain. If your adjusted basis is more than the amount you realize, then you have a loss. For more information on how to figure gain and loss, see *Gain or Loss From Sales and Exchanges* in Pub. 544.

Loss from abandonment of business or investment property is deductible as a loss. The character of the loss depends on the character of the property. The amount of deductible capital loss may be limited. For more information, see *Treatment of Capital Losses* in Pub. 544. You can't deduct any loss from abandonment of your home or other property held for personal use.

Example 1—abandonment of personal-use property securing nonrecourse debt. In 2011, Timothy purchased a home for $200,000. He borrowed the entire purchase price, for which he wasn't personally liable, and gave the bank a mortgage on the home. In 2015, Timothy lost his job and was unable to continue making his mortgage loan payments. Because his mortgage loan balance was $185,000 and the FMV of his home was only $150,000, Timothy decided to abandon his home by permanently moving out on August 1, 2015. Because Timothy wasn't personally liable for the debt, the abandonment is treated as a sale or exchange of the home in tax year 2015. Timothy's amount realized is $185,000 and his adjusted basis in the home is $200,000. Timothy has a $15,000 nondeductible loss in tax year 2015. (Had Timothy's adjusted basis been less than the amount realized, Timothy would have had a gain that he would have to include in gross income.) The bank sells the house at a foreclosure sale in 2016. Timothy has neither gain nor loss from the foreclosure sale. Because he wasn't personally liable for the debt, he also has no cancellation of debt income.

Example 2—abandonment of business or investment property securing nonrecourse debt. In 2011, Robert purchased business property for $200,000. He borrowed the entire purchase price, for which he wasn't personally liable, and gave the lender a security interest in the property. In 2015, Robert was unable to continue making his loan payments. Because his loan balance was $185,000 and the FMV of the property was only $150,000, Robert decided to abandon the property on August 1, 2015. Because Robert wasn't personally liable for the debt, the abandonment is treated as a sale or exchange of the property in tax year 2015. Robert's amount realized is $185,000 and his adjusted basis in the property is $180,000 (as a result of $20,000 of depreciation deductions on the property). Robert has a $5,000 gain in tax year 2015. (Had Robert's adjusted basis been greater than the amount realized, he would have had a deductible loss.) The lender sells the property at a foreclosure sale in 2016. Robert has neither gain nor loss from the foreclosure sale. Because he wasn't personally liable for the debt, he also has no cancellation of debt income.

Canceled debt. If the abandoned property secures a debt for which you are personally liable and the debt is canceled, you will realize ordinary income equal to the canceled debt. This income is separate from any amount realized from abandonment of the property. You must report this income on your return unless one of the exceptions or exclusions described in chapter 1 applies.

Forms 1099-A and 1099-C. In most cases, if you abandon

- real property (such as a home),
- intangible property, or
- tangible personal property held (wholly or partly) for use in a trade or business or for investment,

that secures a loan and the lender knows the property has been abandoned, the lender should send you Form 1099-A showing information you need to figure your gain or loss from the abandonment. Also, if your debt is canceled and the lender must file Form 1099-C, the lender can include the information about the abandonment on that form instead of on Form 1099-A. The lender must file Form 1099-C and send you a copy if the amount of debt canceled is $600 or more and the lender is a financial institution, credit union, federal government agency, or other applicable entity as discussed earlier in chapter 1.

For abandonments of property and debt cancellations occurring in 2015, these forms should be sent to you by February 1, 2016.

4.

How To Get Tax Help

If you have questions about a tax issue, need help preparing your tax return, or want to download free publications, forms, or instructions, go to IRS.gov and find resources that can help you right away.

Preparing and filing your tax return. Find free options to prepare and file your return on IRS.gov or in your local community if you qualify.

- Go to IRS.gov and click on the Filing tab to see your options.
- Enter "Free File" in the search box to see whether you can use brand-name software to prepare and *e-file* your federal tax return for free.
- Enter "VITA" in the search box, download the free IRS2Go app, or call 1-800-906-9887 to find the nearest Volunteer Income Tax Assistance or Tax Counseling for the Elderly (TCE) location for free tax preparation.
- Enter "TCE" in the search box, download the free IRS2Go app, or call 1-888-227-7669 to find the nearest Tax Counseling for the Elderly location for free tax preparation.

The Volunteer Income Tax Assistance (VITA) program offers free tax help to people who generally make $54,000 or less, persons with disabilities, the elderly, and limited-English-speaking taxpayers who need help preparing their own tax returns. The Tax Counseling for the Elderly (TCE) program offers free tax help for all taxpayers, particularly those who are 60 years of age and older. TCE volunteers specialize in answering questions about pensions and retirement-related issues unique to seniors.

Getting answers to your tax law questions. On IRS.gov get answers to your tax questions anytime, anywhere.

- Go to *www.irs.gov/Help-&-Resources* for a variety of tools that will help you with your taxes.
- Enter "ITA" in the search box on IRS.gov for the Interactive Tax Assistant, a tool that will ask you questions on a number of tax law topics and provide answers. You can print the entire interview and the final response.
- Enter "Pub 17" in the search box on IRS.gov to get Pub. 17, Your Federal Income Tax for Individuals, which features details on tax-saving opportunities, 2015 tax changes, and thousands of interactive links to help you find answers to your questions.
- Additionally, you may be able to access tax law information in your electronic filing software.

Tax forms and publications. You can download or print all of the forms and publications you may need on *www.irs.gov/formspubs*. Otherwise, you can go to *www.irs.gov/orderforms* to place an order and have forms mailed to you. You should receive your order within 10 business days.

Direct deposit. The fastest way to receive a tax refund is by combining direct deposit and IRS *e-file*. Direct deposit securely and electronically transfers your refund directly into your financial account. Eight in 10 taxpayers use direct deposit to receive their refund. The majority of refunds are received within 21 days or less.

Getting a transcript or copy of a return.

- Go to IRS.gov and click on "Get Transcript of Your Tax Records" under "Tools."
- Call the transcript toll-free line at 1-800-908-9946.
- Mail Form 4506-T or Form 4506T-EZ (both available on IRS.gov).

Using online tools to help prepare your return. Go to IRS.gov and click on the Tools bar to use these and other self-service options.

- The *Earned Income Tax Credit Assistant* determines if you are eligible for the EIC.
- The *Online EIN Application* helps you get an employer identification number.
- The *IRS Withholding Calculator* estimates the amount you should have withheld from your paycheck for federal income tax purposes.
- The *Electronic Filing PIN Request* helps to verify your identity when you do not have your prior year AGI or prior year self-selected PIN available.
- The *First Time Homebuyer Credit Account Look-up* tool provides information on your repayments and account balance.

For help with the alternative minimum tax, go to IRS.gov/AMT.

Understanding identity theft issues.

- Go to *www.irs.gov/uac/Identity-Protection* for information and videos.
- If your SSN has been lost or stolen or you suspect you are a victim of tax-related identity theft, visit *www.irs.gov/identitytheft* to learn what steps you should take.

Checking on the status of a refund.

- Go to *www.irs.gov/refunds*.
- Download the free IRS2Go app to your smart phone and use it to check your refund status.
- Call the automated refund hotline at 1-800-829-1954.

Making a tax payment. The IRS uses the latest encryption technology so electronic payments are safe and secure. You can make electronic payments online, by phone, or from a mobile device. Paying electronically is quick, easy, and faster than mailing in a check or money order. Go to *www.irs.gov/payments* to make a payment using any of the following options.

- *IRS Direct Pay* (for individual taxpayers who have a checking or savings account).
- **Debit or credit card** (approved payment processors online or by phone).
- **Electronic Funds Withdrawal** (available during *e-file*).
- **Electronic Federal Tax Payment System** (best option for businesses; enrollment required).
- **Check or money order.**
- IRS2Go provides access to mobile-friendly payment options like IRS Direct Pay, offering you a free, secure way to pay directly from your bank account. You can also make debit or credit card payments through an approved payment processor. Simply download IRS2Go from Google Play, the Apple App Store, or the Amazon Appstore, and make your payments anytime, anywhere.

What if I can't pay now? Click on the "Pay Your Tax Bill" icon on IRS.gov for more information about these additional options.

- Apply for an *online payment agreement* to meet your tax obligation in monthly installments if you cannot pay your taxes in full today. Once you complete the online process, you will receive immediate notification of whether your agreement has been approved.
- An offer in compromise allows you to settle your tax debt for less than the full amount you owe. Use the *Offer in Compromise Pre-Qualifier* to confirm your eligibility.

Checking the status of an amended return. Go to IRS.gov and click on the Tools tab and then *Where's My Amended Return?*

Understanding an IRS notice or letter. Enter "Understanding your notice" in the search box on IRS.gov to find additional information about your IRS notice or letter.

Visiting the IRS. Locate the nearest Taxpayer Assistance Center using the Office Locator tool on IRS.gov. Enter "office locator" in the search box. Or choose the "Contact Us" option on the IRS2Go app and search Local Offices. Before you visit, use the Locator tool to check hours and services available.

Watching IRS videos. The IRS Video portal *www.irsvideos.gov* contains video and audio presentations for individuals, small businesses, and tax professionals. You'll find video clips of tax topics, archived versions of panel discussions and Webinars, and audio archives of tax practitioner phone forums.

Getting tax information in other languages. For taxpayers whose native language is not English, we have the following resources available.

1. Taxpayers can find information on IRS.gov in the following languages.
   a. *Spanish*.
   b. *Chinese*.
   c. *Vietnamese*.
   d. *Korean*.
   e. *Russian*.

2. The IRS Taxpayer Assistance Centers provide over-the-phone interpreter service in over 170 languages, and the service is available free to taxpayers.

The Taxpayer Advocate Service Is Here To Help You

What is the Taxpayer Advocate Service?

The Taxpayer Advocate Service (TAS) is an ***independent*** organization within the Internal Revenue Service that helps taxpayers and protects taxpayer rights. Our job is to ensure that every taxpayer is treated fairly and that you know and understand your rights under the *Taxpayer Bill of Rights*.

What Can the Taxpayer Advocate Service Do For You?

We can help you resolve problems that you can't resolve with the IRS. And our service is free. If you qualify for our assistance, you will be assigned to one advocate who will work with you throughout the process and will do everything possible to resolve your issue. TAS can help you if:

- Your problem is causing financial difficulty for you, your family, or your business,
- You face (or your business is facing) an immediate threat of adverse action, or
- You've tried repeatedly to contact the IRS but no one has responded, or the IRS hasn't responded by the date promised.

How Can You Reach Us?

We have offices *in every state, the District of Columbia, and Puerto Rico*. Your local advocate's number is in your local directory and at *www.taxpayeradvocate.irs.gov*. You can also call us at 1-877-777-4778.

How Can You Learn About Your Taxpayer Rights?

The Taxpayer Bill of Rights describes ten basic rights that all taxpayers have when dealing with the IRS. Our Tax Toolkit at *www.taxpayeradvocate.irs.gov* can help you understand *what these rights mean to you* and how they apply. These are ***your*** rights. Know them. Use them.

How Else Does the Taxpayer Advocate Service Help Taxpayers?

TAS works to resolve large-scale problems that affect many taxpayers. If you know of one of these broad issues, please report it to us at *www.irs.gov/sams*.

Low Income Taxpayer Clinics

Low Income Taxpayer Clinics (LITCs) serve individuals whose income is below a certain level and need to resolve tax problems such as audits, appeals, and tax collection disputes. Some clinics can provide information about taxpayer rights and responsibilities in different languages for individuals who speak English as a second language. To find a clinic near you, visit *www.irs.gov/litc* or see IRS Publication 4134, *Low Income Taxpayer Clinic List*.

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To help us develop a more useful index, please let us know if you have ideas for index entries. See "Comments and Suggestions" in the "Introduction" for the ways you can reach us.

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Real property business indebtedness 7
Recapture:
Basis reductions 10
Repossessions 11

S
Stockholder debts 4
Student loans 4

T
Tax attributes, reduction of:
Bankruptcy 9
Insolvency 9
Qualified farm indebtedness 11
Qualified Principal Residence Indebtedness 9
Qualified real property business indebtedness 11
Tax help 14

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Clerk of the Court
Transaction # 5636821 : csulezic

EXHIBIT 22

EXHIBIT 22

SECOND AMENDMENT TO LEASE AGREEMENT

THIS SECOND AMENDMENT TO LEASE AGREEMENT ("Amendment") is dated as of May 15, 2014 by and between Edward C Wooley and Judith A. Woolly, as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust Year 2000 ("Lessor") and Jacksons Food Stores, Inc., a Nevada corporation ("Lessee"), together ("Parties").

WHEREAS, Lessor and Lessee are parties to that certain Lease Agreement dated as of May__2006 for the property located at 1365 Baring Boulevard, Sparks, Nevada 89434 ("Premises"), and;

WHEREAS, that certain Lease Agreement was subsequently modified by that certain First Amendment to Lease Agreement dated March 12, 2007, and;

WHEREAS, that certain Lease Agreement was assumed by Jacksons Food Stores, Inc., a Nevada Corporation pursuant to that certain Assignment and Assumption of Lease Dated December 29, 2009.

NOW, THEREFORE, in consideration of the foregoing recitals and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Lessor and Lessee agree as follows:

Paragraph 3. **Lease Term; Extension.** Expiration of the Lease shall be changed from October, 31, 2023 to June 30, 2023, with Extension Option dates changed accordingly.

Paragraph 4. **Rental and other Monetary Obligations.** Parties acknowledge the Base Monthly Rental for the month of June, 2014 shall be $22,808.60 and the Base Monthly Rental for the period July 1, 2014 through June 30, 2015 shall be $23,264.77.

Paragraph 4B. **Adjustments.** Amended as follows: The second sentence ("The Adjustment Date shall be on the annual anniversary of the Effective Date") shall be changed to "The Adjustment Date shall be annually on July 1."

No Other Modification. Except as expressly set forth in this Amendment, nothing herein contained shall be deemed to modify, supplement, supersede or otherwise amend any term or condition in the Lease, and the Parties hereto acknowledge and agree that all terms and conditions of the Lease are and shall remain in full force and effect.

Counterparts. This Amendment may be executed in one or more counterparts, each of which shall be deemed an original.

(SIGNATURE PAGE FOLLOWS)

IN WITNESS WHEREOF, Lessor and Lessee have executed this Amendment on the date first above written.

LESSOR: Edward C. Wooley and Judith A. Wooley, as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust Year 2000.

BY: _____ Trustee
Edward C. Wooley, Trustee

B _____ Trustee
Judith A. Wooley, Trustee

LESSEE: Jacksons Food Stores, Inc., a Nevada corporation.

BY: _____

PRINTED NAME: _____

I T S: _____

W I T N E S S: _____

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Clerk of the Court
Transaction # 5636821 : csulezic

EXHIBIT 23

EXHIBIT 23

THE O'MARA LAW FIRM, P.C.
DAVID C. O'MARA, ESQ.
NEVADA BAR NO. 8599
311 East Liberty Street
Reno, Nevada 89501
Telephone: 775/323-1321
Fax: 775/323-4082

LAW OFFICES OF BRIAN P. MOQUIN
BRIAN P. MOQUIN, ESQ.
Admitted *Pro Hac Vice*
CALIFORNIA BAR NO. 247583
3506 La Castellet Court
San Jose, CA 95148
Telephone: 408.300.0022
Fax: 408.843.1678
bmoquin@lawprism.com

Attorneys for Plaintiffs
LARRY J. WILLARD,
OVERLAND DEVELOPMENT CORPORATION,
EDWARD C. WOOLEY, and JUDITH A. WOOLEY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, Plaintiffs, v. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual, Defendants. AND RELATED COUNTERCLAIM	Case No. CV14-01712 Dept. No. 6 **PLAINTIFFS EDWARD C. WOOLEY AND JUDITH A. WOOLEY'S RESPONSES TO DEFENDANTS' SECOND SET OF INTERROGATORIES**

RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1:

Please identify the provision in the Highway 50 Lease which supports Your contention in paragraph 28 of the First Amended Complaint that the rental rate in the Highway 50 Lease increases by two percent per month.

RESPONSE TO INTERROGATORY NO. 1:

Respondent responds that paragraph 28 contains a typographical error and should have read that the rental rate of the Highway 50 Lease increases by two percent per *year*.

INTERROGATORY NO. 2:

Please explain the basis for Your contention in paragraph 31 of the First Amended Complaint that the Wooley Plaintiffs agreed to amend the Highway 50 Lease and the Baring Lease through shortening the lease term by 30 months in return for Herbst personally guaranteeing that BHI would make all lease payments through the term of the lease.

RESPONSE TO INTERROGATORY NO. 2:

The initial lease duration for the Highway 50 Property was from May 1, 2006 through April 30, 2026. On April 20, 2007, Respondent executed a Memorandum of Lease which states that the term of the Highway 50 Lease is from December 1, 2005 through November 30, 2025.

INTERROGATORY NO. 3:

Please identify and describe in detail any and all facts demonstrating that BHI knew at the time You and BHI entered into the Highway 50 Lease that the Highway 50 Property was "cross-collateralized" with the Baring Property.

RESPONSE TO INTERROGATORY NO. 3:

Respondent is presently unaware of facts responsive to this Request. Respondent reserves the right to amend this Response in light of future discovery.

INTERROGATORY NO. 4:

Please identify and describe in detail any and all facts demonstrating that Jerry Herbst knew at the time You and BHI entered into the Highway 50 Lease that the Highway 50 Property was "cross-collateralized" with the Baring Property.

RESPONSE TO INTERROGATORY NO. 4:

Respondent is presently unaware of facts responsive to this Request. Respondent reserves the right to amend this Response in light of future discovery.

INTERROGATORY NO. 5:

Please identify any Documents which entitle You to the security deposit from the subtenant at the Highway 50 Property in the amount of $2,845 as set forth in paragraph 39 of the First Amended Complaint.

RESPONSE TO INTERROGATORY NO. 5:

Respondent bases this contention on the fact that Propounding Party breached the Highway 50 Lease.

INTERROGATORY NO. 6:

What is Your current balance due on any and all mortgage loans for the Highway 50 Property?

RESPONSE TO INTERROGATORY NO. 6:

The current balance due on the mortgage loan for the Highway 50 Property is $0.00.

INTERROGATORY NO. 7:

Are you presently in default on any mortgage payments for any and all mortgage loans for the Highway 50 Property? If so, when was your last mortgage payment?

RESPONSE TO INTERROGATORY NO. 7:

No.

INTERROGATORY NO. 8:

With regard to each of the Requests for Admission propounded concurrently herewith, for each Request wherein your answer is anything other than an unequivocal "admit," please state the basis of your failure to admit and the facts that support your response, including the names of all witnesses and the identity or description of all documents or evidence supporting a response.

RESPONSE TO INTERROGATORY NO. 8:

With respect to Request for Admission No. 2, Respondent has never heard of nor entered into

any agreements with an entity named Jackson Oil.

VERIFICATION

I, Brian P. Moquin, am an attorney of record in the above-captioned matter for plaintiffs Edward C. Wooley and Judith A. Wooley. To the best of my knowledge, information, and belief formed after a reasonable inquiry, the Responses to Defendants' Second Set of Interrogatories above are complete and correct.

Executed this 18th day of August 2015 at San Jose, California.

LAW OFFICES OF BRIAN P. MOQUIN

DATED: August 18, 2015

By: _____

BRIAN P. MOQUIN
Admitted *Pro Hac Vice*
California Bar No. 257583
3506 La Castellet Court
San Jose, CA 95148
(408) 300-0022
(408) 843-1678 (facsimile)

Attorneys for Plaintiffs

AFFIRMATION

(Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the preceding document filed in the above-referenced matter does not contain the Social Security Number of any person.

LAW OFFICES OF BRIAN P. MOQUIN

DATED: August 18, 2015

By: _____

BRIAN P. MOQUIN
Admitted *Pro Hac Vice*
California Bar No. 257583
3506 La Castellet Court
San Jose, CA 95148
(408) 300-0022
(408) 843-1678 (facsimile)

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Nevada that on this date I served a true and correct copy of the foregoing document as follows:

[X] By depositing for mailing, in a sealed envelope, U.S. postage prepaid at San Jose, California addressed as follows:

DICKINSON WRIGHT
JOHN P. DESMOND
BRIAN R. IRVINE
ANJALI D. WEBSTER
100 West Liberty Street, Suite 940
Reno, Nevada 89505

[X] By sending a true and correct copy of the foregoing document by electronic mail to jdesmond@dickinsonwright.com, birvine@dickinsonwright.com, and awebster@dickinsonwright.com.

DATED: August 18, 2015

BRIAN P. MOQUIN

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Jacqueline Bryant
Clerk of the Court
Transaction # 5636821 : csulezic

EXHIBIT 24

EXHIBIT 24

Form **1120**

Department of the Treasury
Internal Revenue Service

U.S. Corporation Income Tax Return

For calendar year 2013 or tax year beginning 7/01, 2013, ending 6/30, 2014

► Information about Form 1120 and its separate instructions is at www.irs.gov/form1120.

OMB No. 1545-0123

2013

A Check if:
1 a Consolidated return (attach Form 851) ☐
b Life/nonlife consolidated return ☐
2 Personal holding co. (attach Sch PH) ☐
3 Personal service corp (see instrs) ☐
4 Schedule M-3 attached ☐

TYPE OR PRINT

OVERLAND DEVELOPMENT, INC.
826 VANDERBILT PLACE
SAN DIEGO, CA 92103

B Employer identification number [redacted]

C Date incorporated 4/14/1971

D Total assets (see instructions) $ 25,474.

E Check if: (1) ☐ Initial return (2) ☐ Final return (3) ☐ Name change (4) ☐ Address change

INCOME	1 a Gross receipts or sales	1 a		
	b Returns and allowances	1 b		
	c Balance. Subtract line 1b from line 1a		1 c	
	2 Cost of goods sold (attach Form 1125-A)		2	
	3 Gross profit. Subtract line 2 from line 1c		3	
	4 Dividends (Schedule C, line 19)		4	
	5 Interest		5	
	6 Gross rents		6	
	7 Gross royalties		7	
	8 Capital gain net income (attach Schedule D (Form 1120))		8	
	9 Net gain or (loss) from Form 4797, Part II, line 17 (attach Form 4797)		9	358,941.
	10 Other income (see instructions — attach schedule)		10	
	11 **Total income.** Add lines 3 through 10 ►		11	358,941.
DEDUCTIONS (SEE INSTRUCTIONS FOR LIMITATIONS ON DEDUCTIONS)	12 Compensation of officers (see instructions — attach Form 1125-E) ►		12	
	13 Salaries and wages (less employment credits)		13	
	14 Repairs and maintenance		14	
	15 Bad debts		15	
	16 Rents		16	
	17 Taxes and licenses		17	28,371.
	18 Interest		18	
	19 Charitable contributions		19	
	20 Depreciation from Form 4562 not claimed on Form 1125-A or elsewhere on return (attach Form 4562)		20	93,074.
	21 Depletion		21	
	22 Advertising		22	
	23 Pension, profit-sharing, etc, plans		23	
	24 Employee benefit programs		24	
	25 Domestic production activities deduction (attach Form 8903)		25	
	26 Other deductions (attach statement) See Statement 1		26	31,465.
	27 **Total deductions.** Add lines 12 through 26 ►		27	152,910.
	28 Taxable income before net operating loss deduction and special deductions. Subtract line 27 from line 11		28	206,031.
	29 a Net operating loss deduction (see instructions) See St. 2	29 a 206,031.		
	b Special deductions (Schedule C, line 20)	29 b		
	c Add lines 29a and 29b		29 c	206,031.
TAX, REFUNDABLE CRS AND PMTS	30 **Taxable income.** Subtract line 29c from line 28 (see instructions)		30	0.
	31 Total tax (Schedule J, Part I, line 11)		31	0.
	32 Total payments and refundable credits (Schedule J, Part II, line 21)		32	0.
	33 Estimated tax penalty (see instructions). Check if Form 2220 is attached ► ☐		33	
	34 **Amount owed.** If line 32 is smaller than the total of lines 31 and 33, enter amount owed		34	0.
	35 **Overpayment.** If line 32 is larger than the total of lines 31 and 33, enter amount overpaid		35	
	36 Enter amount from line 35 you want: **Credited to 2014 estimated tax** ►	**Refunded** ►	36	

Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

► Signature of officer | Date ► President & CEO Title

May the IRS discuss this return with the preparer shown below (see instructions)? ☒ Yes ☐ No

Paid Preparer Use Only

Print/Type preparer's name	Preparer's signature	Date	Check ☒ if self-employed	PTIN
MITRA EHSANIPOUR CPA	MITRA EHSANIPOUR CPA			P00090914

Firm's name ► MITRA EHSANIPOUR CPA — Firm's EIN ► [redacted]

Firm's address ► 205 PARK RD STE 207, BURLINGAME, CA 94010-4220 — Phone no. 650-348-9444

BAA For Paperwork Reduction Act Notice, see separate instructions.

CPCA0205L 07/30/13 Form 1120 (2013)

Schedule C Dividends and Special Deductions (see instructions)	(a) Dividends received	(b) Percentage	(c) Special deductions (a) x (b)
1 Dividends from less-than-20%-owned domestic corporations (other than debt-financed stock)		70	
2 Dividends from 20%-or-more-owned domestic corporations (other than debt-financed stock)		80	
3 Dividends on debt-financed stock of domestic and foreign corporations		see instructions	
4 Dividends on certain preferred stock of less-than-20%-owned public utilities		42	
5 Dividends on certain preferred stock of 20%-or-more-owned public utilities		48	
6 Dividends from less-than-20%-owned foreign corporations and certain FSCs		70	
7 Dividends from 20%-or-more-owned foreign corporations and certain FSCs		80	
8 Dividends from wholly owned foreign subsidiaries		100	
9 **Total.** Add lines 1 through 8. See instructions for limitation			
10 Dividends from domestic corporations received by a small business investment company operating under the Small Business Investment Act of 1958		100	
11 Dividends from affiliated group members		100	
12 Dividends from certain FSCs		100	
13 Dividends from foreign corporations not included on lines 3, 6, 7, 8, 11, or 12			
14 Income from controlled foreign corporations under subpart F (attach Form(s) 5471)			
15 Foreign dividend gross-up			
16 IC-DISC and former DISC dividends not included on lines 1, 2, or 3			
17 Other dividends			
18 Deduction for dividends paid on certain preferred stock of public utilities			
19 **Total dividends.** Add lines 1 through 17. Enter here and on page 1, line 4 ►			
20 **Total special deductions.** Add lines 9, 10, 11, 12, and 18. Enter here and on page 1, line 29b ►			

Schedule J Tax Computation and Payment (see instructions)

Part I — Tax Computation

1	Check if the corporation is a member of a controlled group (attach Schedule O (Form 1120)) ► ☐			
2	Income tax. Check if a qualified personal service corporation (see instructions) ► ☐		2	0.
3	Alternative minimum tax (attach Form 4626)		3	
4	Add lines 2 and 3		4	0.
5a	Foreign tax credit (attach Form 1118)	5a		
b	Credit from Form 8834 (see instructions)	5b		
c	General business credit (attach Form 3800)	5c		
d	Credit for prior year minimum tax (attach Form 8827)	5d	0.	
e	Bond credits from Form 8912	5e		
6	**Total credits.** Add lines 5a through 5e		6	
7	Subtract line 6 from line 4		7	
8	Personal holding company tax (attach Schedule PH (Form 1120))		8	
9a	Recapture of investment credit (attach Form 4255)	9a		
b	Recapture of low-income housing credit (attach Form 8611)	9b		
c	Interest due under the look-back method — completed long-term contracts (attach Form 8697)	9c		
d	Interest due under the look-back method — income forecast method (attach Form 8866)	9d		
e	Alternative tax on qualifying shipping activities (attach Form 8902)	9e		
f	Other (see instructions — attach statement)	9f		
10	**Total.** Add lines 9a through 9f		10	
11	**Total tax.** Add lines 7, 8, and 10. Enter here and on page 1, line 31		11	0.

Part II — Payments and Refundable Credits

12	2012 overpayment credited to 2013		12	
13	2013 estimated tax payments		13	
14	2013 refund applied for on Form 4466		14	
15	Combine lines 12, 13, and 14		15	0.
16	Tax deposited with Form 7004		16	
17	Withholding (see instructions)		17	
18	**Total payments.** Add lines 15, 16 and 17		18	0.
19	Refundable credits from:			
a	Form 2439	19a		
b	Form 4136	19b		
c	Form 8827, line 8c	19c		
d	Other (attach statement — see instructions)	19d		
20	**Total credits.** Add lines 19a through 19d		20	
21	**Total payments and credits.** Add lines 18 and 20. Enter here and on page 1, line 32		21	0.

Schedule K Other Information (see instructions)

		Yes	No
1	Check accounting method a ☐ Cash b ☒ Accrual c ☐ Other (specify) ►		
2	See the instructions and enter the:		
a	Business activity code no. ► 531390		
b	Business activity ► REAL ESTATE		
c	Product or service ► DEVELOPMENT		
3	Is the corporation a subsidiary in an affiliated group or a parent-subsidiary controlled group?		X
	If 'Yes,' enter name and EIN of the parent corporation ►		
4	At the end of the tax year:		
a	Did any foreign or domestic corporation, partnership (including any entity treated as a partnership), trust, or tax-exempt organization own directly 20% or more, or own, directly or indirectly, 50% or more of the total voting power of all classes of the corporation's stock entitled to vote? If 'Yes,' complete Part I of Schedule G (Form 1120) (attach Schedule G)		X
b	Did any individual or estate own directly 20% or more, or own, directly or indirectly, 50% or more of the total voting power of all classes of the corporation's stock entitled to vote? If 'Yes,' complete Part II of Schedule G (Form 1120) (att Schedule G)	X	

Schedule K Other Information *continued* (see instructions)

	Yes	No
5 At the end of the tax year, did the corporation:		
a Own directly 20% or more, or own, directly or indirectly, 50% or more of the total voting power of all classes of stock entitled to vote of any foreign or domestic corporation not included on **Form 851**, Affiliations Schedule? For rules of constructive ownership, see instructions. If 'Yes,' complete (i) through (iv) below.		X

(i) Name of Corporation	(ii) Employer Identification Number (if any)	(iii) Country of Incorporation	(iv) Percentage Owned in Voting Stock

	Yes	No
b Own directly an interest of 20% or more, or own, directly or indirectly, an interest of 50% or more in any foreign or domestic partnership (including an entity treated as a partnership) or in the beneficial interest of a trust? For rules of constructive ownership, see instructions. If 'Yes,' complete (i) through (iv) below.		X

(i) Name of Entity	(ii) Employer Identification Number (if any)	(iii) Country of Organization	(iv) Maximum Percentage Owned in Profit, Loss, or Capital

6 During this tax year, did the corporation pay dividends (other than stock dividends and distributions in exchange for stock) in excess of the corporation's current and accumulated earnings and profits? (See sections 301 and 316.) If 'Yes,' file **Form 5452**, Corporate Report of Nondividend Distributions. If this is a consolidated return, answer here for the parent corporation and on Form 851 for each subsidiary		X
7 At any time during the tax year, did one foreign person own, directly or indirectly, at least 25% of **(a)** the total voting power of all classes of the corporation's stock entitled to vote or **(b)** the total value of all classes of the corporation's stock? For rules of attribution, see section 318. If 'Yes,' enter: **(i)** Percentage owned ► _____ and **(ii)** Owner's country ► _____ **(c)** The corporation may have to file **Form 5472**, Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business. Enter the number of Forms 5472 attached ► _____		X
8 Check this box if the corporation issued publicly offered debt instruments with original issue discount ► ☐ If checked, the corporation may have to file **Form 8281**, Information Return for Publicly Offered Original Issue Discount Instruments.		
9 Enter the amount of tax-exempt interest received or accrued during the tax year ► $ None		
10 Enter the number of shareholders at the end of the tax year (if 100 or fewer) ► 1		
11 If the corporation has an NOL for the tax year and is electing to forego the carryback period, check here ► ☐ If the corporation is filing a consolidated return, the statement required by Regulations section 1.1502-21(b)(3) must be attached or the election will not be valid.		
12 Enter the available NOL carryover from prior tax years (do not reduce it by any deduction on line 29a.) ► $ 3,877,831.		
13 Are the corporation's total receipts (page 1, line 1a, plus lines 4 through 10) for the tax year **and** its total assets at the end of the tax year less than $250,000? If 'Yes,' the corporation is not required to complete Schedules L, M-1, and M-2. Instead, enter the total amount of cash distributions and the book value property distributions (other than cash) made during the tax year. ► $ _____		X
14 Is the corporation required to file Schedule UTP (Form 1120), Uncertain Tax Position Statement (see instructions)? If 'Yes,' complete and attach Schedule UTP.		X
15a Did the corporation make any payments in 2013 that would require it to file Form(s) 1099?		X
b If 'Yes,' did or will the corporation file required Forms 1099?		
16 During this tax year, did the corporation have an 80% or more change in ownership, including a change due to redemption of its own stock?		X
17 During or subsequent to this tax year, but before the filing of this return, did the corporation dispose of more than 65% (by value) of its assets in a taxable, non-taxable, or tax deferred transaction?		X
18 Did the corporation receive assets in a section 351 transfer in which any of the transferred assets had a fair market basis or fair market value of more than $1 million		X

Form 1120 (2013) OVERLAND DEVELOPMENT, INC. [redacted] Page 5

Schedule L Balance Sheets per Books

Assets	Beginning of tax year (a)	Beginning of tax year (b)	End of tax year (c)	End of tax year (d)
1 Cash		31,367.		11,318.
2a Trade notes and accounts receivable	26,010.		14,010.	
b Less allowance for bad debts		26,010.		14,010.
3 Inventories				
4 U.S. government obligations				
5 Tax-exempt securities (see instructions)				
6 Other current assets (attach statement)				
7 Loans to shareholders				
8 Mortgage and real estate loans				
9 Other investments (attach statement)				
10a Buildings and other depreciable assets	4,103,764.		609.	
b Less accumulated depreciation	1,921,896.	2,181,868.	463.	146.
11a Depletable assets				
b Less accumulated depletion				
12 Land (net of any amortization)		1,025,789.		
13a Intangible assets (amortizable only)	104,659.		104,659.	
b Less accumulated amortization	76,751.	27,908.	104,659.	
14 Other assets (attach statement) See St 3		4,100.		
15 Total assets		3,297,042.		25,474.
Liabilities and Shareholders' Equity				
16 Accounts payable				
17 Mortgages, notes, bonds payable in less than 1 year				
18 Other current liabilities (attach stmt)				
19 Loans from shareholders		648,803.		621,648.
20 Mortgages, notes, bonds payable in 1 year or more		5,041,792.		
21 Other liabilities (attach statement) See St 4		1,872,024.		
22 Capital stock: a Preferred stock				
b Common stock	10,000.	10,000.	10,000.	10,000.
23 Additional paid-in capital		132,201.		132,201.
24 Retained earnings — Approp (att stmt)				
25 Retained earnings — Unappropriated		-4,407,778.		-738,375.
26 Adjmt to shareholders' equity (att stmt)				
27 Less cost of treasury stock				
28 Total liabilities and shareholders' equity		3,297,042.		25,474.

Schedule M-1 Reconciliation of Income (Loss) per Books With Income per Return

Note: Schedule M-3 required instead of Schedule M-1 if total assets are $10 million or more — see instructions

1 Net income (loss) per books	3,669,403.	7 Income recorded on books this year not included on this return (itemize): Tax-exempt interest $	
2 Federal income tax per books		See Stmt 5 3,463,372.	3,463,372.
3 Excess of capital losses over capital gains		8 Deductions on this return not charged against book income this year (itemize):	
4 Income subject to tax not recorded on books this year (itemize):		a Depreciation $	
5 Expenses recorded on books this year not deducted on this return (itemize):		b Charitable contribns $	
a Depreciation $			
b Charitable contributions $			
c Travel & entertainment $			
		9 Add lines 7 and 8	3,463,372.
6 Add lines 1 through 5	3,669,403.	10 Income (page 1, line 28) — line 6 less line 9	206,031.

Schedule M-2 Analysis of Unappropriated Retained Earnings per Books (Line 25, Schedule L)

1 Balance at beginning of year	-4,407,778.	5 Distributions a Cash	
2 Net income (loss) per books	3,669,403.	b Stock c Property	
3 Other increases (itemize):		6 Other decreases (itemize):	
		7 Add lines 5 and 6	
4 Add lines 1, 2, and 3	-738,375.	8 Balance at end of year (line 4 less line 7)	-738,375.

SCHEDULE G (Form 1120)
(Rev December 2011)
Department of the Treasury
Internal Revenue Service

Information on Certain Persons Owning the Corporation's Voting Stock

► Attach to Form 1120.
► See Instructions.

OMB No. 1545-0123

Name: OVERLAND DEVELOPMENT, INC.

Employer identification number (EIN): [redacted]

Part I **Certain Entities Owning the Corporation's Voting Stock.** (Form 1120, Schedule K, Question 4a).
Complete columns (i) through (v) below for any foreign or domestic corporation, partnership (including any entity treated as a partnership), trust, or tax-exempt organization that owns directly 20% or more, or owns, directly or indirectly, 50% or more of the total voting power of all classes of the corporation's stock entitled to vote (see instructions).

(i) Name of Entity	(ii) Employer Identification Number (if any)	(iii) Type of Entity	(iv) Country of Organization	(v) Percentage Owned in Voting Stock

Part II **Certain Individuals and Estates Owning the Corporation's Voting Stock.** (Form 1120, Schedule K, Question 4b).
Complete columns (i) through (iv) below for any individual or estate that owns directly 20% or more, or owns, directly or indirectly, 50% or more of the total voting power of all classes of the corporation's stock entitled to vote (see instructions).

(i) Name of Individual or Estate	(ii) Identifying Number (if any)	(iii) Country of Citizenship (see instructions)	(iv) Percentage Owned in Voting Stock
LARRY J. WILLARD	[redacted]	United States	100.00%

BAA For Paperwork Reduction Act Notice, see the Instructions for Form 1120.

CPCA1901L 06/02/11

Schedule G (Form 1120) (Rev 12-2011)

Form **4562**

Department of the Treasury
Internal Revenue Service (99)

Depreciation and Amortization
(Including Information on Listed Property)

► See separate instructions. ► Attach to your tax return.

OMB No. 1545-0172

2013

Attachment Sequence No. **179**

Name(s) shown on return: OVERLAND DEVELOPMENT, INC.

Identifying number: [redacted]

Business or activity to which this form relates: Form 1120

Part I Election To Expense Certain Property Under Section 179

Note: *If you have any listed property, complete Part V before you complete Part I.*

1	Maximum amount (see instructions)	1	
2	Total cost of section 179 property placed in service (see instructions)	2	
3	Threshold cost of section 179 property before reduction in limitation (see instructions)	3	
4	Reduction in limitation. Subtract line 3 from line 2. If zero or less, enter -0-	4	
5	Dollar limitation for tax year. Subtract line 4 from line 1. If zero or less, enter -0-. If married filing separately, see instructions	5	

6	(a) Description of property	(b) Cost (business use only)	(c) Elected cost

7	Listed property. Enter the amount from line 29	7	
8	Total elected cost of section 179 property. Add amounts in column (c), lines 6 and 7	8	
9	Tentative deduction. Enter the **smaller** of line 5 or line 8	9	
10	Carryover of disallowed deduction from line 13 of your 2012 Form 4562	10	
11	Business income limitation. Enter the smaller of business income (not less than zero) or line 5 (see instrs)	11	
12	Section 179 expense deduction. Add lines 9 and 10, but do not enter more than line 11	12	
13	Carryover of disallowed deduction to 2014. Add lines 9 and 10, less line 12 ►	13	

Note: *Do not use Part II or Part III below for listed property. Instead, use Part V.*

Part II Special Depreciation Allowance and Other Depreciation (Do not include listed property.) (See instructions.)

14	Special depreciation allowance for qualified property (other than listed property) placed in service during the tax year (see instructions)	14	
15	Property subject to section 168(f)(1) election	15	
16	Other depreciation (including ACRS)	16	

Part III MACRS Depreciation (Do not include listed property.) (See instructions.)

Section A

17	MACRS deductions for assets placed in service in tax years beginning before 2013	17	97.
18	If you are electing to group any assets placed in service during the tax year into one or more general asset accounts, check here ► ☐		

Section B — Assets Placed in Service During 2013 Tax Year Using the General Depreciation System

(a) Classification of property	(b) Month and year placed in service	(c) Basis for depreciation (business/investment use only — see instructions)	(d) Recovery period	(e) Convention	(f) Method	(g) Depreciation deduction
19a 3-year property						
b 5-year property						
c 7-year property						
d 10-year property						
e 15-year property						
f 20-year property						
g 25-year property			25 yrs		S/L	
h Residential rental			27.5 yrs	MM	S/L	
property			27.5 yrs	MM	S/L	
i Nonresidential real			39 yrs	MM	S/L	
property				MM	S/L	

Section C — Assets Placed in Service During 2013 Tax Year Using the Alternative Depreciation System

20a Class life					S/L	
b 12-year			12 yrs		S/L	
c 40-year			40 yrs	MM	S/L	

Part IV Summary (See instructions.)

21	Listed property. Enter amount from line 28	21	
22	**Total.** Add amounts from line 12, lines 14 through 17, lines 19 and 20 in column (g), and line 21. Enter here and on the appropriate lines of your return. Partnerships and S corporations — see instructions	22	97.
23	For assets shown above and placed in service during the current year, enter the portion of the basis attributable to section 263A costs	23	

Form **4562**

Department of the Treasury
Internal Revenue Service (99)

Depreciation and Amortization
(Including Information on Listed Property)

► See separate instructions. ► Attach to your tax return.

OMB No. 1545-0172

2013

Attachment Sequence No. **179**

Name(s) shown on return: OVERLAND DEVELOPMENT, INC.

Identifying number: [redacted]

Business or activity to which this form relates: Form 1120 - COMMERCIAL - RENO

Part I Election To Expense Certain Property Under Section 179

Note: *If you have any listed property, complete Part V before you complete Part I.*

1	Maximum amount (see instructions)	1	
2	Total cost of section 179 property placed in service (see instructions)	2	
3	Threshold cost of section 179 property before reduction in limitation (see instructions)	3	
4	Reduction in limitation. Subtract line 3 from line 2. If zero or less, enter -0-	4	
5	Dollar limitation for tax year. Subtract line 4 from line 1. If zero or less, enter -0-. If married filing separately, see instructions	5	

6	(a) Description of property	(b) Cost (business use only)	(c) Elected cost

7	Listed property. Enter the amount from line 29	7	
8	Total elected cost of section 179 property. Add amounts in column (c), lines 6 and 7	8	
9	Tentative deduction. Enter the **smaller** of line 5 or line 8	9	
10	Carryover of disallowed deduction from line 13 of your 2012 Form 4562	10	
11	Business income limitation. Enter the smaller of business income (not less than zero) or line 5 (see instrs)	11	
12	Section 179 expense deduction. Add lines 9 and 10, but do not enter more than line 11	12	
13	Carryover of disallowed deduction to 2014. Add lines 9 and 10, less line 12 ►	13	

Note: *Do not use Part II or Part III below for listed property. Instead, use Part V.*

Part II Special Depreciation Allowance and Other Depreciation (Do not include listed property.) (See instructions.)

14	Special depreciation allowance for qualified property (other than listed property) placed in service during the tax year (see instructions)	14	
15	Property subject to section 168(f)(1) election	15	
16	Other depreciation (including ACRS)	16	

Part III MACRS Depreciation (Do not include listed property.) (See instructions.)

Section A

17	MACRS deductions for assets placed in service in tax years beginning before 2013	17	92,977.
18	If you are electing to group any assets placed in service during the tax year into one or more general asset accounts, check here ► ☐		

Section B — Assets Placed in Service During 2013 Tax Year Using the General Depreciation System

(a) Classification of property	(b) Month and year placed in service	(c) Basis for depreciation (business/investment use only — see instructions)	(d) Recovery period	(e) Convention	(f) Method	(g) Depreciation deduction
19 a 3-year property						
b 5-year property						
c 7-year property						
d 10-year property						
e 15-year property						
f 20-year property						
g 25-year property			25 yrs		S/L	
h Residential rental			27.5 yrs	MM	S/L	
property			27.5 yrs	MM	S/L	
i Nonresidential real			39 yrs	MM	S/L	
property				MM	S/L	

Section C — Assets Placed in Service During 2013 Tax Year Using the Alternative Depreciation System

20 a Class life					S/L	
b 12-year			12 yrs		S/L	
c 40-year			40 yrs	MM	S/L	

Part IV Summary (See instructions.)

21	Listed property. Enter amount from line 28	21	
22	**Total.** Add amounts from line 12, lines 14 through 17, lines 19 and 20 in column (g), and line 21. Enter here and on the appropriate lines of your return. Partnerships and S corporations — see instructions	22	92,977.
23	For assets shown above and placed in service during the current year, enter the portion of the basis attributable to section 263A costs	23	

BAA For Paperwork Reduction Act Notice, see separate instructions.

FDIZ0812L 06/10/13 Form **4562** (2013)

Part V Listed Property (Include automobiles, certain other vehicles, certain computers, and property used for entertainment, recreation, or amusement.)

Note: *For any vehicle for which you are using the standard mileage rate or deducting lease expense, complete* **only** *24a, 24b, columns (a) through (c) of Section A, all of Section B, and Section C if applicable.*

Section A – Depreciation and Other Information (Caution: *See the instructions for limits for passenger automobiles.*)

24a Do you have evidence to support the business/investment use claimed? ☐ Yes ☐ No **24b** If 'Yes,' is the evidence written? ☐ Yes ☐ No

(a) Type of property (list vehicles first)	(b) Date placed in service	(c) Business/ investment use percentage	(d) Cost or other basis	(e) Basis for depreciation (business/investment use only)	(f) Recovery period	(g) Method/ Convention	(h) Depreciation deduction	(i) Elected section 179 cost
25 Special depreciation allowance for qualified listed property placed in service during the tax year and used more than 50% in a qualified business use (see instructions)							**25**	
26 Property used more than 50% in a qualified business use:								
27 Property used 50% or less in a qualified business use:								
28 Add amounts in column (h), lines 25 through 27. Enter here and on line 21, page 1							**28**	
29 Add amounts in column (i), line 26. Enter here and on line 7, page 1								**29**

Section B – Information on Use of Vehicles

Complete this section for vehicles used by a sole proprietor, partner, or other 'more than 5% owner,' or related person. If you provided vehicles to your employees, first answer the questions in Section C to see if you meet an exception to completing this section for those vehicles.

	(a) Vehicle 1		(b) Vehicle 2		(c) Vehicle 3		(d) Vehicle 4		(e) Vehicle 5		(f) Vehicle 6	
30 Total business/investment miles driven during the year (**do not** include commuting miles)												
31 Total commuting miles driven during the year												
32 Total other personal (noncommuting) miles driven												
33 Total miles driven during the year. Add lines 30 through 32												
	Yes	**No**	**Yes**	**No**	**Yes**	**No**	**Yes**	**No**	**Yes**	**No**	**Yes**	**No**
34 Was the vehicle available for personal use during off-duty hours?												
35 Was the vehicle used primarily by a more than 5% owner or related person?												
36 Is another vehicle available for personal use?												

Section C – Questions for Employers Who Provide Vehicles for Use by Their Employees

Answer these questions to determine if you meet an exception to completing Section B for vehicles used by employees who **are not** more than 5% owners or related persons (see instructions).

	Yes	No
37 Do you maintain a written policy statement that prohibits all personal use of vehicles, including commuting, by your employees?		
38 Do you maintain a written policy statement that prohibits personal use of vehicles, except commuting, by your employees? See the instructions for vehicles used by corporate officers, directors, or 1% or more owners		
39 Do you treat all use of vehicles by employees as personal use?		
40 Do you provide more than five vehicles to your employees, obtain information from your employees about the use of the vehicles, and retain the information received?		
41 Do you meet the requirements concerning qualified automobile demonstration use? (See instructions.)		

Note: *If your answer to 37, 38, 39, 40, or 41 is 'Yes,' do not complete Section B for the covered vehicles.*

Part VI Amortization

(a) Description of costs	(b) Date amortization begins	(c) Amortizable amount	(d) Code section	(e) Amortization period or percentage	(f) Amortization for this year
42 Amortization of costs that begins during your 2013 tax year (see instructions):					
43 Amortization of costs that began before your 2013 tax year				**43**	27,908.
44 **Total.** Add amounts in column (f). See the instructions for where to report				**44**	27,908.

Form **4797**

Department of the Treasury
Internal Revenue Service

Sales of Business Property

(Also Involuntary Conversions and Recapture Amounts Under Sections 179 and 280F(b)(2))

► Attach to your tax return.

► Information about Form 4797 and its separate instructions is at *www.irs.gov/form4797.*

OMB No. 1545-0184

2013

Attachment Sequence No. **27**

Name(s) shown on return: OVERLAND DEVELOPMENT, INC.

Identifying number: [redacted]

1 Enter the gross proceeds from sales or exchanges reported to you for 2013 on Form(s) 1099-B or 1099-S (or substitute statement) that you are including on line 2, 10, or 20 (see instructions) ..... 1 | 1,660,646.

Part I Sales or Exchanges of Property Used in a Trade or Business and Involuntary Conversions From Other Than Casualty or Theft – Most Property Held More Than 1 Year (see instructions)

2 (a) Description of property	(b) Date acquired (month, day, year)	(c) Date sold (month, day, year)	(d) Gross sales price	(e) Depreciation allowed or allowable since acquisition	(f) Cost or other basis, plus improvements and expense of sale	(g) Gain or (loss) Subtract (f) from the sum of (d) and (e)
FURNITURE & FIXTURES	3/04/06	3/03/14		5,462.	6,453.	-991.

3 Gain, if any, from Form 4684, line 39	3	
4 Section 1231 gain from installment sales from Form 6252, line 26 or 37	4	
5 Section 1231 gain or (loss) from like-kind exchanges from Form 8824	5	
6 Gain, if any, from line 32, from other than casualty or theft	6	286,508.
7 Combine lines 2 through 6. Enter the gain or (loss) here and on the appropriate line as follows:	7	285,517.
Partnerships (except electing large partnerships) and S corporations. Report the gain or (loss) following the instructions for Form 1065, Schedule K, line 10, or Form 1120S, Schedule K, line 9. Skip lines 8, 9, 11, and 12 below.		
Individuals, partners, S corporation shareholders, and all others. If line 7 is zero or a loss, enter the amount from line 7 on line 11 below and skip lines 8 and 9. If line 7 is a gain and you did not have any prior year section 1231 losses, or they were recaptured in an earlier year, enter the gain from line 7 as a long-term capital gain on the Schedule D filed with your return and skip lines 8, 9, 11, and 12 below.		
8 Nonrecaptured net section 1231 losses from prior years (see instructions)	8	508,294.
9 Subtract line 8 from line 7. If zero or less, enter -0-. If line 9 is zero, enter the gain from line 7 on line 12 below. If line 9 is more than zero, enter the amount from line 8 on line 12 below and enter the gain from line 9 as a long-term capital gain on the Schedule D filed with your return (see instructions)	9	0.

Part II Ordinary Gains and Losses (see instructions)

10 Ordinary gains and losses not included on lines 11 through 16 (include property held 1 year or less):

11 Loss, if any, from line 7	11	
12 Gain, if any, from line 7 or amount from line 8, if applicable	12	285,517.
13 Gain, if any, from line 31	13	73,424.
14 Net gain or (loss) from Form 4684, lines 31 and 38a	14	
15 Ordinary gain from installment sales from Form 6252, line 25 or 36	15	
16 Ordinary gain or (loss) from like-kind exchanges from Form 8824	16	
17 Combine lines 10 through 16	17	358,941.
18 For all except individual returns, enter the amount from line 17 on the appropriate line of your return and skip lines a and b below. For individual returns, complete lines a and b below:		
a If the loss on line 11 includes a loss from Form 4684, line 35, column (b)(ii), enter that part of the loss here. Enter the part of the loss from income-producing property on Schedule A (Form 1040), line 28, and the part of the loss from property used as an employee on Schedule A (Form 1040), line 23. Identify as from 'Form 4797, line 18a.' See instructions	18a	
b Redetermine the gain or (loss) on line 17 excluding the loss, if any, on line 18a. Enter here and on Form 1040, line 14	18b	

BAA For Paperwork Reduction Act Notice, see separate instructions.

Form **4797** (2013)

FDIZ1001L 06/24/13

Part III Gain From Disposition of Property Under Sections 1245, 1250, 1252, 1254, and 1255 (see instructions)

19(a) Description of section 1245, 1250, 1252, 1254, or 1255 property:	(b) Date acquired (mo, day, yr)	(c) Date sold (mo, day, yr)
A BUILDING	3/04/06	3/03/14
B		
C		
D		

These columns relate to the properties on lines 19A through 19D ►		Property A	Property B	Property C	Property D
20 Gross sales price (Note: *See line 1 before completing.*)	20	1,660,646.			
21 Cost or other basis plus expense of sale	21	3,309,759.			
22 Depreciation (or depletion) allowed or allowable	22	2,009,045.			
23 Adjusted basis. Subtract line 22 from line 21	23	1,300,714.			
24 Total gain. Subtract line 23 from line 20	24	359,932.			
25 **If section 1245 property:**					
a Depreciation allowed or allowable from line 22	25a				
b Enter the **smaller** of line 24 or 25a	25b				
26 **If section 1250 property:** If straight line depreciation was used, enter -0- on line 26g, except for a corporation subject to section 291.					
a Additional depreciation after 1975 (see instrs)	26a	1,797.			
b Applicable percentage multiplied by the **smaller** of line 24 or line 26a (see instructions)	26b	1,797.			
c Subtract line 26a from line 24. If residential rental property or line 24 is not more than line 26a, skip lines 26d and 26e	26c	358,135.			
d Additional depreciation after 1969 & before 1976	26d				
e Enter the **smaller** of line 26c or 26d	26e				
f Section 291 amount (corporations only)	26f	71,627.			
g Add lines 26b, 26e, and 26f	26g	73,424.			
27 **If section 1252 property:** Skip this section if you did not dispose of farmland or if this form is being completed for a partnership (other than an electing large partnership).					
a Soil, water, and land clearing expenses	27a				
b Line 27a multiplied by applicable percentage (see instructions)	27b				
c Enter the **smaller** of line 24 or 27b	27c				
28 **If section 1254 property:**					
a Intangible drilling and development costs, expenditures for development of mines and other natural deposits, mining exploration costs, and depletion (see instructions)	28a				
b Enter the **smaller** of line 24 or 28a	28b				
29 **If section 1255 property:**					
a Applicable percentage of payments excluded from income under section 126 (see instructions)	29a				
b Enter the smaller of line 24 or 29a (see instrs)	29b				

Summary of Part III Gains. Complete property columns A through D through line 29b before going to line 30.

30 Total gains for all properties. Add property columns A through D, line 24	30	359,932.
31 Add property columns A through D, lines 25b, 26g, 27c, 28b, and 29b. Enter here and on line 13	31	73,424.
32 Subtract line 31 from line 30. Enter the portion from casualty or theft on Form 4684, line 33. Enter the portion from other than casualty or theft on Form 4797, line 6	32	286,508.

Part IV Recapture Amounts Under Sections 179 and 280F(b)(2) When Business Use Drops to 50% or Less (see instructions)

		(a) Section 179	(b) Section 280F(b)(2)
33 Section 179 expense deduction or depreciation allowable in prior years	33		
34 Recomputed depreciation (see instructions)	34		
35 Recapture amount. Subtract line 34 from line 33. See the instructions for where to report	35		

Form **8827**

Department of the Treasury
Internal Revenue Service

Credit for Prior Year Minimum Tax — Corporations

► Attach to the corporation's tax return.
► Information about Form 8827 and its instructions is at *www.irs.gov/form8827.*

OMB No. 1545-1257

2013

Name: OVERLAND DEVELOPMENT, INC.

Employer identification number: [redacted]

1 Alternative minimum tax (AMT) for 2012. Enter the amount from line 14 of the 2012 Form 4626	1	
2 Minimum tax credit carryforward from 2012. Enter the amount from line 9 of the 2012 Form 8827	2	5,908.
3 Enter any 2012 unallowed qualified electric vehicle credit (see instructions)	3	
4 Add lines 1, 2, and 3	4	5,908.
5 Enter the corporation's 2013 regular income tax liability minus allowable tax credits (see instructions)	5	
6 Is the corporation a 'small corporation' exempt from the AMT for 2013 (see instructions)? • **Yes.** Enter 25% of the excess of line 5 over $25,000. If line 5 is $25,000 or less, enter -0- • **No.** Complete Form 4626 for 2013 and enter the tentative minimum tax from line 12	6	
7a Subtract line 6 from line 5. If zero or less, enter -0-	7a	0.
b For a corporation electing to accelerate the minimum tax credit, enter the bonus depreciation amount attributable to the minimum tax credit (see instructions)	7b	0.
c Add lines 7a and 7b	7c	
8a Enter the **smaller** of line 4 or line 7c. If the corporation had a post-1986 ownership change or has pre-acquisition excess credits, see instructions	8a	
b **Current year minimum tax credit.** Enter the smaller of line 4 or line 7a here and on Form 1120, Schedule J, Part I, line 5d (or the applicable line of your return). If the corporation had a post-1986 ownership change or has pre-acquisition excess credits, see instructions. If you made an entry on line 7b, go to line 8c. Otherwise, skip line 8c	8b	0.
c Subtract line 8b from line 8a. This is the refundable amount for a corporation electing to accelerate the minimum tax credit. Include this amount on Form 1120, Schedule J, Part II, line 19c (or the applicable line of your return)	8c	
9 **Minimum tax credit carryforward to 2014.** Subtract line 8a from line 4. Keep a record of this amount to carry forward and use in future years	9	5,908.

BAA

Form **8827** (2013)

CPCA2201L 06/27/13

Statement 1
Form 1120, Line 26
Other Deductions

Amortization	$ 27,908.
Bank Charges	178.
Insurance	1,087.
Legal and Professional	1,320.
Office Expense	295.
Postage	351.
Travel	326.
Total	$ 31,465.

Statement 2
Form 1120, Line 29a
Net Operating Loss Deduction

Carryover Generated From Year End	6/30/99		$ 76,672.	
Amount Utilized in 2012		54,518.		
Total Utilization			$ 54,518.	
Available for Carryover to 2013				22,154.
Carryover Generated From Year End	6/30/00		$ 281,264.	
Available for Carryover to 2013				281,264.
Carryover Generated From Year End	6/30/04		$ 55,381.	
Available for Carryover to 2013				55,381.
Carryover Generated From Year End	6/30/05		$ 1,468,972.	
Available for Carryover to 2013				1,468,972.
Carryover Generated From Year End	6/30/06		$ 950,365.	
Available for Carryover to 2013				950,365.
Carryover Generated From Year End	6/30/09		$ 46,245.	
Available for Carryover to 2013				46,245.
Carryover Generated From Year End	6/30/11		$ 594,046.	
Available for Carryover to 2013				594,046.
Carryover Generated From Year End	6/30/12		$ 459,404.	

Statement 2 (continued)
Form 1120, Line 29a
Net Operating Loss Deduction

Available for Carryover to 2013	459,404.
Net Operating Losses Available in 2013	$ 3,877,831.
Taxable Income	206,031.
Total Net Operating Loss Deduction (Limited to Taxable Income)	206,031.

Statement 3
Form 1120, Schedule L, Line 14
Other Assets

	Beginning	Ending
DEPOSIT RENO	$ 4,100.	$ 0.
Total	$ 4,100.	$ 0.

Statement 4
Form 1120, Schedule L, Line 21
Other Liabilities

	Beginning	Ending
DEFERRED TAX ON 1031 TRADE	$ 1,872,024.	$ 0.
Total	$ 1,872,024.	$ 0.

Statement 5
Form 1120, Schedule M-1, Line 7
Book Income Not on Return

NONTAXABLE CANCELED DEBT	$ 3,463,372.
Total	$ 3,463,372.

F I L E D
Electronically
CV14-01712
2016-08-01 04:21:31 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5636821 : csulezic

Exhibit 25

Exhibit 25

1520
DICKINSON WRIGHT
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
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Email: Awebster@dickinsonwright.com

Attorney for Defendants
Berry Hinckley Industries, and
Jerry Herbst

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiff,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an Individual

Defendants.
_____/

CASE NO. CV14-01712
DEPT. 6

DECLARATION OF BRIAN R. IRVINE IN SUPPORT OF DEFENDANTS/COUNTERCLAIMANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;

Counterclaimants,

vs

LARRY J. WILLARD, individually and as

trustee of the Larry James Willard Trust Fund;
OVERLAND DEVELOPMENT
CORPORATION, a California corporation;

Counter-defendants.

_____/

I, BRIAN R. IRVINE, do hereby declare as follows:

1. I am an attorney of record for Defendants Berry-Hinckley Industries ("BHI") and Jerry Herbst (collectively, "Defendants") in the above-captioned matter. I am an attorney duly licensed to practice law in the State of Nevada and before this Court, and I have personal knowledge of and am competent to testify concerning the facts stated herein, except for those matters stated upon information and belief, and as to those matters, I believe them to be true. I submit this Declaration in support of the Defendants/Counterclaimants' Motion for Partial Summary Judgment ("Motion").

2. Attached to the Motion as **Exhibit 1** is a true and correct copy of the Affidavit of Tim Herbst.

3. Attached to the Motion as **Exhibit 2** is a true and correct copy of the November 2005 Willard Lease.

4. Attached to the Motion as **Exhibit 3** is a true and correct copy of the March 2007 Willard Guaranty.

5. Attached to the Motion as **Exhibit 4** is a true and correct copy of the Docket Sheet for the action initiated by Plaintiffs in the Superior Court of Santa Clara, Case No. 2013-CV-245021.

6. Attached to the Motion as **Exhibit 5** is a true and correct copy of Defendants' Second Amended Motion to Dismiss filed in Case No 1-13-CV-245021, Superior Court of Santa Clara.

7. Attached to the Motion as **Exhibit 6** is a true and correct copy of selected excerpts from the August 21, 2015, Deposition of Larry Willard.

8. Attached to the Motion as **Exhibit 7** is a true and correct copy of the 2014 Federal Tax Return for Overland produced by Plaintiffs.

9. Attached to the Motion as **Exhibit 8** is a true and correct copy of the 2014 Federal Tax Return for Willard produced by Plaintiffs.

10. Attached to the Motion as **Exhibit 9** is a true and correct copy of the Seller's Final Closing Statement in the sale of the Willard Property produced by Plaintiffs.

11. Attached to the Motion as **Exhibit 11** is a true and correct copy of the 2007 Highway 50 Guaranty.

12. Attached to the Motion as **Exhibit 12** is a true and correct copy of Willard's Responses to Defendants' First Set of Interrogatories.

13. Attached to the Motion as **Exhibit 13** is a true and correct copy of the Baring Purchase and Sale Agreement produced by Plaintiffs.

14. Attached to the Motion as **Exhibit 14** is a true and correct copy of the 2006 Baring Lease.

15. Attached to the Motion as **Exhibit 15** is a true and correct copy of the Baring Property Loan produced by Plaintiffs.

16. Attached to the Motion as **Exhibit 16** is a true and correct copy of selected excerpts from the August 20, 2015, Deposition of Edward Wooley.

17. Attached to the Motion as **Exhibit 17** is a true and correct copy of the December 29, 2009, Assignment of Baring Lease to Jacksons Food Stores.

18. Attached to the Motion as **Exhibit 18** is a true and correct copy of the HUD Statement for the sale of the Baring Property produced by Plaintiffs.

19. Attached to the Motion as **Exhibit 19** is a true and correct copy of the November 26, 2014 email exchange between Brian Irvine and David O'Mara.

20. Attached to the Motion as **Exhibit 20** is a true and correct copy of the email exchange ranging from November 2014 to January 2015 between Brian Irvine, Brian Moquin, and David O'Mara.

21. Attached to the Motion as **Exhibit 21** is a true and correct copy of IRS Publication 4681.

22. Attached to the Motion as **Exhibit 22** is a true and correct copy of the Second Amendment to Baring Lease.

23. Attached to the Motion as **Exhibit 23** is a true and correct copy of Wooley's Responses to Defendants' Second Set of Interrogatories.

24. Attached to the Motion as **Exhibit 24** is a true and correct copy of the 2013 Federal Tax Return for Overland produced by Plaintiffs.

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

DATED this 1st day of August, 2016.

/s/ Brian R. Irvine
BRIAN R. IRVINE

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2016-08-30 11:18:54 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5685608 : tbritton

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Attorneys for Plaintiffs
LARRY J. WILLARD,
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EDWARD C. WOOLEY, and JUDITH A. WOOLEY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, Plaintiffs, v. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; JERRY HERBST, an individual; and JH, INC., a Nevada corporation, Defendants.	Case No. CV14-01712 Dept. 6

AFFIDAVIT OF BRIAN P. MOQUIN

I, Larry J. Willard, declare:

1. I am an attorney licensed to practice law in the State of California and admitted *pro hac vice* to this Court to represent the plaintiff in the above-captioned matter. I am over the age of eighteen years and am otherwise *sui juris*. I have personal knowledge of the following facts, and if called and sworn as a witness I could and would testify to the veracity thereof.

2. I was retained by plaintiffs Larry J. Willard, Overland Development Corporation, Edward C. Wooley and Judith A. Wooley (collectively, "Plaintiffs") in early March 2014 when Plaintiffs' prior counsel, L. Steven Goldblatt ("Goldblatt"), was incapacitated due to an automobile accident. Goldblatt had filed suit against defendants Berry-Hinckley Industries ("BHI"), Jerry Herbst ("Herbst") (collectively, "Defendants") and others in the Superior Court of Santa Clara County, California ("the California case") for breaches of Plaintiffs' commercial leases on properties they owned in Nevada as well as to foreclose the personal guaranties Herbst had signed regarding the leases.

3. When I took over the California case, there were two motions that had been brought by Defendants that were scheduled for hearing. One was a motion to dismiss the California case for lack of proper venue. The other was a motion to quash Goldblatt's discovery requests.

4. I promptly contacted opposing counsel for Defendants, John P. Desmond, Esq. ("Desmond"), and told him that if given leave to file an amended complaint I could probably simplify matters significantly. Desmond agreed, and consequently we executed and filed a joint stipulation under which I would withdraw Goldblatt's discovery requests, I would be given time to draft and file an amended complaint, and Defendants would take the upcoming hearings off-calendar. I filed this joint stipulation on March 13, 2014. A true and correct copy of the joint stipulation is attached hereto as Exhibit 18.

5. On March 14, 2014, I received written confirmation via e-mail from Desmond's legal secretary, Cindy Grinstead ("Grinstead"), that she had "called the Court

and took the hearings currently scheduled on March 18, 2014 @ 9:00 a.m. and April 4, 2014 at 9:00 a.m. off calendar." A true and correct copy of my correspondence with Grinstead is attached hereto as Exhibit 19.

6. On March 21, 2014, while reviewing the online docket I discovered that Defendants had not taken the hearing on their motion to dismiss off calendar, and, with no appearances being made, the Court granted the motion. I immediately called the clerk's office and had them fax a copy of the minute order to me, a true and correct copy of which is attached hereto as Exhibit 20.

7. I then contacted Desmond to ask why the hearing had not been taken off calendar as I had been told it had been. He had no explanation.

8. Subsequently, Desmond and I engaged in numerous discussions regarding the merits of the case, in particular the issue of venue. Because my clients had been financially devastated by Plaintiffs' breaches of their respective leases and were anxious to have the case to move along, my clients agreed to allow me to voluntarily dismiss the California case without prejudice and bring the instant matter in Nevada, an action with which Desmond concurred. A true and correct copy of the request for dismissal without prejudice filed May 19, 2014 is attached hereto as Exhibit 21.

9. Consequently, Defendants' claim that they won their motion to dismiss is a blatant misrepresentation of fact. Defendants' motion to dismiss was granted due to Defendants' failing to comply with the terms of the joint stipulation, which stipulation led to me not filing an opposition nor attending the hearing. This marks the second time in the instant matter that Defendants have made this fraudulent claim.

I swear under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed this 29th day of August 2016.

Brian P. Moquin

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Jacqueline Bryant
Clerk of the Court
Transaction # 5685608 : tbritton

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Attorneys for Plaintiffs
LARRY J. WILLARD,
OVERLAND DEVELOPMENT CORPORATION,
EDWARD C. WOOLEY, and JUDITH A. WOOLEY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, Plaintiffs, v. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; JERRY HERBST, an individual; and JH, INC., a Nevada corporation, Defendants.	Case No. CV14-01712 Dept. 6

AFFIDAVIT OF EDWARD C. WOOLEY

I, Edward C. Wooley, declare:

1. I am a named plaintiff in the above-captioned matter. I am over the age of eighteen years and am otherwise *sui juris*. I have personal knowledge of the following facts, and if called and sworn as a witness I could and would testify to the veracity thereof.

2. I am co-trustee with my wife, named co-plaintiff Judith A. Wooley, of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 (collectively, "we" or "us").

3. On July 1, 2005, as part of a 1031 Exchange, we entered into a Purchase and Sale Agreement to purchase a commercial property located at 1820 East U.S. Highway 50, Carson City, Nevada (the "Highway 50 Property") from Tibarom, Inc. for $3,400,000.00. A true and correct copy of this Purchase and Sale Agreement is attached hereto as Exhibit 1.

4. On December 1, 2005, defendant Berry-Hinckley Industries, Inc. ("BHI") entered into a 20-year lease for the Highway 50 Property (the "Highway 50 Lease") at a base annual rental of $272,000.00, increasing by 2% per annum. A true and correct copy of the Highway 50 Lease is attached hereto as Exhibit 2.

5. On January 19, 2007, we obtained a loan for $2,200,000.00 from Pacific Capital Bank, N.A. d/b/a South Valley National Bank ("South Valley"). A true and correct copy of the Three Year Adjustable Term Note is attached hereto as Exhibit 3. A true and correct copy of the Deed of Trust, Fixture Filing and Security Agreement for this loan dated January 30, 2007 secured by the Highway 50 Property is attached hereto as Exhibit 4.

6. On February 17, 2007, we received a letter from counsel for defendant Jerry Herbst ("Herbst") informing us and other landlords of Herbst's intention to acquire BHI and requesting that we agree to certain modifications to the Highway 50 Lease in return for Herbst signing a guaranty (the "Highway 50 Guaranty") to be personally responsible for the lease. A true and correct copy of this letter and the attachments that stated that Herbst had a net worth in excess of $200 million is attached hereto as Exhibit 5.

7. In consideration for the Highway 50 Guaranty, on March 12, 2007, we executed a

First Amendment to the Highway 50 Lease. A true and correct copy of this instrument is attached hereto as Exhibit 6.

8. Also on March 12, 2007, Herbst executed a Guaranty Agreement regarding the Highway 50 Property, a true and correct copy of which is attached hereto as Exhibit 7.

9. On June 29, 2011, BHI and we executed a Second Amendment to the Highway 50 Lease, which freed up moneys held in escrow for BHI to build out the property and which changed the base monthly rental amount from $25,000.00 per month to $20,025.82 per month. This Second Amendment did not modify the terms of the Highway 50 Guaranty. A true and correct copy of the Second Amendment to the Highway 50 Lease is attached hereto as Exhibit 8.

10. On May 8, 2006, we entered into a Purchase and Sale Agreement to purchase a property located at 1365 Baring Boulevard, Sparks, Nevada (the "Baring Property") from Spirit SPE Portfolio 2005-5, LLC for a purchase price of $3,286,552.00. A true and correct copy of the Purchase and Sale Agreement is attached hereto as Exhibit 9.

11. On July 6, 2006, BHI signed a long-term lease for the Baring Property (the "Baring Lease") at a base monthly rental rate of $19,856.25, increasing by two percent per annum. A true and correct copy of the Baring Lease is attached hereto as Exhibit 10.

12. On July 18, 2006, we obtained a loan from South Valley for $2,100,000.00 which was secured by a Deed of Trust on the Baring Property. A true and correct copy of the Five Year Adjustable Note is attached hereto as Exhibit 11. A true and correct copy of the Deed of Trust, Fixture Filing and Security Agreement dated July 21, 2006 is attached hereto as Exhibit 12.

13. As we had done with the Highway 50 Lease, on March 12, 2007, we agreed to the modifications to the Baring Lease requested by Herbst and executed a First Amendment to the Lease Agreement, a true and correct copy of which is attached hereto as Exhibit 13.

14. In consideration for having agreed to the modifications to the Baring Lease, on March 12, 2007 Herbst signed a personal guaranty of the Baring Lease (the "Baring Guaranty"). A true and correct copy of the Baring Guaranty is attached hereto as Exhibit 14.

15. Unbeknownst to us, on July 5, 2007, in direct violation of the Baring Lease, BHI

entered into an Assignment of Entitlements, Contracts, Rents and Revenues with First National Bank of Nevada. A true and correct copy of this Assignment of Entitlements is attached hereto as Exhibit 15.

16. Also unbeknownst to us and without our permission as was required under the Baring Lease, on December 29, 2009, BHI assigned the Baring Lease to Jacksons Food Stores, Inc. ("Jackson"). A true and correct copy of the Assignment and Assumption of Lease is attached hereto as Exhibit 16.

17. On March 1, 2013, BHI failed to tender rent payments under both the Baring Lease and the Highway 50 Lease. As a result, we engaged the services of attorney L. Steven Goldblatt, Esq. ("Goldblatt") to contact BHI and Herbst and demand payment. It was only after Goldblatt contacted BHI and Herbst regarding their breaches that we learned that the Bering Lease had been assigned to Jackson.

18. BHI and Herbst both failed to cure the breach of the Highway 50 Lease. As a result, on April 17, 2013, Goldblatt filed a lawsuit against BHI, Herbst, and others in Santa Clara County, California (the "California case") for breach of the leases and foreclosure of the Herbst guaranties.

19. After nearly one year of motion practice and representing our interests in negotiations with BHI and Herbst for which I paid Goldblatt and his associates a total of $45,088.00, Goldblatt was seriously injured in an automobile accident and I obtained present counsel, Brian P. Moquin, Esq. ("Moquin") to handle the matter. Moquin substituted into the California case on March 13, 2014. A true and correct copy of this substitution is attached hereto as Exhibit 17.

20. I expressed my frustration to Moquin regarding the fact that nearly a year had gone by and we still didn't seem close to resolving the matter. Moquin informed me that the defendants, including BHI and Herbst, had filed a Motion to Dismiss the matter for lack of proper venue which was to be heard on March 18, 2014. Moquin suggested that he amend the complaint to streamline the issues and potentially agree to transfer venue to Nevada in the interests of reaching resolution in a more timely fashion.

21. On March 13, 2014, Moquin and counsel for Herbst, BHI, and the other defendants entered into a Joint Stipulation to take the pending hearing on defendants' Motion to Dismiss off-calendar and give Moquin an opportunity to draft and file an amended complaint. A true and correct copy of this Joint Stipulation is attached hereto as Exhibit 18.

22. On March 14, 2014, Moquin contacted me and informed me that he had filed the Joint Stipulation and that he had received confirmation from the defendants' attorney that they had taken the hearing off-calendar.

23. On March 21, 2014, Moquin contacted me and informed me that despite having confirmed to Moquin that defendants had taken the hearing off-calendar, the Santa Clara Superior Court had held the hearing on defendants' Motion to Dismiss and had granted it without prejudice. I was very upset by this underhanded behavior by defendants, but Moquin told me that in the interests of expediting litigation he thought it best to refile the complaint in Nevada. I agreed.

24. On January 22, 2014, I received a Notice of Default regarding payments to South Valley, which had since been taken over by Union Bank, N.A., on the Highway 50 Loan and the Baring Loan, both of which I had not been able to pay due to the lack of rental income caused by BHI's breach of the Highway 50 Lease. A true and correct copy of this Notice of Default and Intent to Accelerate is attached hereto as Exhibit 22.

25. I contacted Union Bank and engaged in negotiations with Terri Baron ("Baron"), Union Bank's Vice President and Senior Workout Specialist. She advised me that, per the terms of both the Highway 50 Loan and the Baring Loan, the two properties were cross-collateralized and hence the only way to save either of them was to cure both defaults. A true and correct copy of the e-mail from Baron dated February 5, 2014 is attached hereto as Exhibit 23.

26. As a result of this cross-collateralization, and because BHI and Herbst's breaches of the Highway 50 Lease had left me in a position where we could not cure both defaults, we were forced to sell one of the properties. On May 20, 2014, we sold the Baring Property for a contract price of $3,100,000.00. In addition, we incurred $147,847.30 in settlement charges, $156.49 in sewer use fees, and $1,225.34 in county property taxes. After the Baring Loan was

paid off, we were left with $870,844.39, which was less than the amount of earnest money we had invested in the Baring Property. In fact, the Baring Property had experienced a diminution in value of $186,552.00 compared to the price at which we had purchased it. A true and correct copy of the Settlement Statement regarding the sale of the Baring Property is attached hereto as Exhibit 24.

27. As a direct result of BHI and Herbst breaching the Highway 50 Lease which forced us to sell the Baring Property at a loss in order to save the Highway 50 Property, we also incurred a Federal tax liability of $302,881.00 and a state tax liability of $114,502.00 due to the capital gains imposed on us due to the loss of our 1031 Exchange benefits, which taxes have been paid. A true and correct copy of our 2014 Federal Tax Return is attached hereto as Exhibit 25. A true and correct copy of our 2014 State Tax Return is attached hereto as Exhibit 26.

28. There are numerous other damages that we incurred that are not relevant to the instant motion and consequently have not been addressed here.

I swear under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated this 15th day of August 2016.

EDWARD C. WOOLEY

IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY J. WILLARD, individually and as;
Trustee of the Larry James Willard Trust Fund; NO. 77780
and OVERLAND DEVELOPMENT
CORPORATION, a California corporation,

Appellants,

vs.

BERRY-HINCKLEY INDUSTRIES, a
Nevada corporation; and JERRY HERBST,
an individual,

Respondents.
_____/

APPENDIX TO APPELLANTS' OPENING BRIEFS

VOLUME 4 OF 19

Submitted for all appellants by:

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ATTORNEYS FOR APPELLANTS
LARRY J. WILLARD, et al.

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67.	Transcript of Proceedings - Oral Arguments – Plaintiffs' Rule 60(b) Motion (condensed)	09/04/18	19	4332-4352
ADDITIONAL DOCUMENTS				
68.	Order Granting Defendants' Motion for Partial Summary Judgment [Oral Argument Requested][1]	01/04/18	19	4353-4357

[1] This document was inadvertently omitted earlier. It was added here because al of the other papers in the 19-volume appendix had already been numbered.

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, Plaintiffs, v. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; JERRY HERBST, an individual; and JH, INC., a Nevada corporation, Defendants.	Case No. CV14-01712 Dept. 6

AFFIDAVIT OF LARRY J. WILLARD

I, Larry J. Willard, declare:

1. I am a named plaintiff in the above-captioned matter. I am over the age of eighteen years and am otherwise *sui juris*. I have personal knowledge of the following facts, and if called and sworn as a witness I could and would testify to the veracity thereof.

2. I am the President and sole shareholder of named plaintiff Overland Development Corporation ("Overland").

3. On November 18, 2005, as part of a property exchange pursuant to 26 U.S.C. § 1031 (a "1031 Exchange"), I entered into a Purchase and Sale Agreement with P.A. Morabito & Co, Limited to purchase a commercial property located at 7695 and 7699 South Virginia Street, Reno, Nevada (the "Virginia Property") for a total purchase price of $17,750,000.00. A true and correct copy of the Purchase and Sale Agreement is attached hereto as Exhibit 27.

4. The Purchase and Sale Agreement contained a lease-back provision under which the seller would lease back the Virginia Property for a period of twenty years ("the Virginia Lease Term") from January 2006 through January 2026 at a base annual rental rate of $1,464,375.00 with the annual rental rate increasing by two percent per year compounded annually. [Ex. 27 at p. 1.]

5. On December 2, 2005, Defendant Berry-Hinckley Industries ("BHI"), Overland and I executed a Lease Agreement (the "Virginia Lease") containing the terms mentioned above, a true and correct copy of which is attached hereto as Exhibit 28.

6. As part of a 1031 Exchange, Overland and I paid a total of $4,668,738.49 in earnest money for the Virginia Property from the sale of a property that Overland and I owned in Las Vegas. Overland and I obtained financing for the balance of the purchase price by securing a loan in the amount of $13,250,000.00 from South Valley. Escrow on the purchase of the Virginia Property closed on February 24, 2006. A true and correct copy of the Seller's Final Settlement Statement and the Buyer's Final Settlement Statement are attached hereto as Exhibit 29. A true and correct copy of the Deed of Trust securing the

loan from South Valley is attached hereto as Exhibit 30. A true and correct copy of the Promissory Note securing the loan from South Valley is attached hereto as Exhibit 31.

7. On February 21, 2006, BHI, Overland, and I executed a "Lease Subordination, Non-Disturbance and Attornment Agreement" (the "Subordination Agreement"), which informed BHI of the fact that I was purchasing the Virginia Property with financing from South Valley National Bank ("South Valley"). A true and correct copy of the Subordination Agreement is attached hereto as Exhibit 32.

8. In the Subordination Agreement, BHI expressly acknowledged that South Valley would not make the loan to me without the Subordination Agreement being in place and BHI agreeing to relinquish and subordinate the Virginia Lease in favor of South Valley's rights under the loan. [Ex. 32 at § 2.4.] BHI also consented to and approved all provisions of the Note and the Deed of Trust regarding the loan. [Ex. 32 at § 2.2.]

9. In the Subordination Agreement, BHI certified that the Summary of Lease Terms attached thereto as Appendix 1 was true and correct. [Ex. 32 at p. 2.] This Summary of Lease Terms confirms that the original Virginia Lease Term was through January 2026. [Ex. 32 at Appx. 1, § 2.4.]

10. In the Subordination Agreement, BHI also expressly agreed not to terminate the Virginia Lease without first obtaining the consent of South Valley. [Ex. 32 at § 3.3.]

11. On March 16, 2006, I refinanced the South Valley loan with Telesis Community Credit Union ("Telesis") for a total loan amount of $13,312,500.00. Under this new loan (the "Telesis Loan"), Overland and I were required to pay $87,077.52 per month to Telesis's loan servicing agent, Business Partners, LLC ("Business Partners"). A true and correct copy of the Deed of Trust, Assignment of Rents and Security Agreement executed as part of this refinancing agreement with Telesis is attached hereto as Exhibit 33. A true and correct copy of the mortgage statement from March 2013 showing the monthly charge on the loan of $87,077.52 is attached hereto as Exhibit 34. A true and correct copy of the Substitution of Trustee and Full Reconveyance transferring the loan from South Valley to Telesis is attached hereto as Exhibit 35.

12. On February 17, 2007, BHI sent an offer letter to myself and other landlords indicating that Defendant Jerry Herbst ("Herbst") intended to acquire BHI's convenience store assets, which included the Virginia Property. A true and correct copy of the February 17, 2007 offer letter and the relevant attachments is attached hereto as Exhibit 5.

13. In the offer letter, Herbst offered to personally guarantee BHI's payments and performance under the Virginia Lease if I agreed to amend the Virginia Lease. [Ex. 5 at pp. 3-4.] Included with the offer letter was a statement from Johnson Jacobson Wilcox dated January 31, 2007 attesting to the fact that Herbst's net worth was in excess of $200 million. [Ex. 5 at p. 2.]

14. One of the requirements of Herbst's offer was that Overland and I agree to shorten the Virginia Lease Term by thirty months, thereby forgoing $5,250,045.20 in rent that we would otherwise have received under the Virginia Lease, in return for which Herbst would personally guarantee BHI's payment and performance under the Virginia Lease.

15. On March 9, 2007, based on the representations as to Herbst's net worth and the offer by Herbst to personally guarantee BHI's payments and performance under the Virginia Lease, I accepted Herbst's offer. A true and correct copy of the Amendment to Lease Agreement is attached hereto as Exhibit 36. A true and correct copy of the Herbst Guaranty is attached hereto as Exhibit 37.

16. On March 1, 2013, without any notice whatsoever, BHI defaulted on the Virginia Lease by not sending the monthly rental payment for March 2013.

17. On March 10, 2013, having not received the monthly rental payment from BHI, I called BHI's finance department and I was told that BHI was no longer going to pay rent. I immediately retained L. Steven Goldblatt, Esq. ("Goldblatt"), who sent a letter to Herbst on March 12, 2013 demanding payment of the March 2013 rent. A true and correct copy of that letter is attached hereto as Exhibit 38.

18. On March 18, 2013, counsel for BHI and Herbst responded to my counsel's letter with an unacceptable settlement offer that in no way indicated that BHI and Herbst

intended to cure the breach nor honor the Herbst Guaranty. A true and correct copy of that letter is attached hereto as Exhibit 39.

19. On April 12, 2013, counsel for BHI and Herbst sent a letter to my attorney indicating that BHI did not intend to cure the breach and planned to vacate the Virginia Property on April 30, 2013. A true and correct copy of that letter is attached hereto as Exhibit 40.

20. On April 17, 2013, Goldblatt filed a lawsuit against BHI, Herbst, and others in Santa Clara County, California (the "California case") for breach of the Virginia Lease and foreclosure of the Herbst Guaranty.

21. Shortly thereafter, my real estate agent appealed to BHI to remain on the Virginia Property until we were able to find a buyer or a new tenant so that the Virginia Property would retain its value. Consequently, I entered into an interim "Operation and Management Agreement" with BHI effective May 1, 2013 under which BHI agreed to continue active operations on the Virginia Property. I agreed to this Operation and Management Agreement because I knew that the amount of rent at issue, which, at that point was $140,175.55 per month, would be difficult to obtain from a new tenant if the Virginia Property was "dark." Herbst did not sign the Operation and Management Agreement nor is there any mention in it of the Herbst Guaranty. A true and correct copy of the Operation and Management Agreement is attached hereto as Exhibit 41.

22. I hired consultant Greg Breen ("Breen"), who had previously been the operations manager for BHI, to accompany me to the Virginia Property to assess its condition. Mr. Breen had formerly served as operations manager for BHI. Breen and I visited the Virginia Property on May 26, 2013 and May 27, 2013. We discovered that the Virginia Property was not fully operational. For example, all signage had been removed, there were severe maintenance issues, and several employees told me in person that they did not have enough supplies to conduct operations.

23. On June 1, 2013, BHI vacated the Virginia Property having paid no rent whatsoever since their breach on March 1, 2013. Under the terms of the Operation and

Management Agreement, BHI had until July 20, 2013 to provide me with a profit and loss statement and to remit net profits earned during May 2013 minus $10,000.00. [Ex. 41 at § 4.] However, BHI never provided me with the required profit and loss statement, nor did they ever tender any payment of net profits for the month of May 2013.

24. Because BHI had breached the Virginia Lease, thereby depriving me of more than $140,000.00 per month in income while I remained liable to make payments of $87,077.52 per month under the Telesis Loan, based on the strong advice from Goldblatt that I do so, I engaged bankruptcy attorney Stanley Zlotoff ("Zlotoff") to prepare and file a Chapter 11 bankruptcy petition. I paid Zlotoff $21,213.00 to handle my bankruptcy.

25. On the advice of counsel, I also retained accountant Mitra Ehsanipour ("Ehsanipour") to prepare the accounting required for my bankruptcy petition. I paid Ehsanipour $17,520 for this work.

26. On June 14, 2013, I received a Notice of Intent to Foreclose from Business Partners stating that a monetary default existed due to non-payment of the March 1, 2013, April 1, 2013, May 1, 2013, and June 1, 2013 monthly loan payments as well as non-payment of the 2012 Washoe County real estate property taxes. A true and correct copy of this Notice of Intent to Foreclose is attached hereto as Exhibit 42.

27. On June 17, 2013, I filed a Chapter 11 bankruptcy petition. A true and correct copy of the Notice of Bankruptcy Case Filing is attached hereto as Exhibit 43.

28. On July 24, 2013, Zlotoff filed a motion to dismiss my Chapter 11 bankruptcy case at my direction due to the fact that my having filed for bankruptcy had not facilitated fruitful negotiations with Telesis regarding the outstanding $13 million loan. A true and correct copy of my declaration submitted in support of that motion is attached hereto as Exhibit 44.

29. After nearly one year of motion practice and representing our interests in negotiations with BHI and Herbst for which I paid Goldblatt and his associates a total of $35,000.00, Goldblatt was seriously injured in an automobile accident and I obtained present counsel, Brian P. Moquin, Esq. ("Moquin") to handle the matter. Moquin

substituted into the California case on March 13, 2014. A true and correct copy of this substitution is attached hereto as Exhibit 45.

30. I expressed my frustration to Moquin regarding the fact that nearly a year had gone by and we still didn't seem close to resolving the matter. Moquin informed me that the defendants, including BHI and Herbst, had filed a Motion to Dismiss the matter for lack of proper venue which was to be heard on March 18, 2014. Moquin suggested that he amend the complaint to streamline the issues and potentially agree to transfer venue to Nevada in the interests of reaching resolution in a more timely fashion.

31. On March 13, 2014, Moquin and counsel for Herbst, BHI, and the other defendants entered into a Joint Stipulation to take the pending hearing on defendants' Motion to Dismiss off-calendar and give Moquin an opportunity to draft and file an amended complaint. A true and correct copy of this Joint Stipulation is attached hereto as Exhibit 18.

32. On March 14, 2014, Moquin contacted me and informed me that he had filed the Joint Stipulation and that he had received confirmation from the defendants' attorney that they had taken the hearing off-calendar.

33. On March 21, 2014, Moquin contacted me and informed me that despite having confirmed to Moquin that defendants had taken the hearing off-calendar, the Santa Clara Superior Court had held the hearing on defendants' Motion to Dismiss and had granted it without prejudice. I was very upset by this underhanded behavior by defendants, but Moquin told me that in the interests of expediting litigation he thought it best to refile the complaint in Nevada. I agreed.

34. Because my real estate agent had been unsuccessful in finding a tenant to lease the Virginia Property and had also not been able to find a buyer willing to offer enough for the Virginia Property to cover the outstanding principal balance owed on the Telesis Loan, on January 14, 2014, Overland and I entered into an agreement with Longley Partners, LLC ("Longley") for Longley to purchase the Virginia Property via a short sale. A true and correct copy of the Declaration of Arm's Length Transaction is attached hereto as

Exhibit 46.

35. On February 14, 2014, Longley, Overland, and I executed a Purchase and Sale Agreement under which Longley agreed to purchase the Virginia Property for $4 million. A true and correct copy of this Purchase and Sale Agreement is attached hereto as Exhibit 47.

36. On February 19, 2014, Overland and I entered into a Short Sale Agreement with National Credit Union Administration Board ("NCUAB") in its capacity as liquidating agent for Telesis for the sale of the Virginia Property. A true and correct copy of the Short Sale Agreement is attached hereto as Exhibit 48.

37. On February 25, 2014, I engaged my real estate agent to conduct the short sale of the Virginia Property. A true and correct copy of the Consent to Act is attached hereto as Exhibit 49.

38. On March 3, 2014, the Virginia Property was sold via a short sale for a total of $4,050,354.68. Of that amount, $65,936.98 went to pay the outstanding 2012/2013 Washoe County property taxes, $120,000.00 was paid in commissions to Colliers International, and $14,615.00 was paid in closing costs. A true and correct copy of the Final Closing Statement is attached hereto as Exhibit 50.

39. Following the short sale, NCUAB canceled the outstanding debt owed under the Telesis Loan. This debt cancellation totaled $8,597,250.20. Due to this debt cancelation, both Overland and I incurred a significant tax liability for Fiscal Year 2014. A true and correct copy of the IRS Form 1099-C issued by NCUAB showing the debt cancellation is attached hereto as Exhibit 51. Per IRS regulations, since both my and Overland's total debt were greater than our total assets immediately prior to the debt cancellation, these tax liabilities were not reported as income and consequently are no longer being claimed as damages flowing from Defendants' breach.

40. However, because I was forced to give up the Virginia Property via the short sale, I lost $1,018,200.00 in Capital Loss Carryovers that I had been carrying as an asset and Overland lost $3,671,800.00 in Capital Loss Carryovers that it had been carrying as an asset under the 1031 Exchange through which Overland and I had purchased the Virginia

Property. In addition, due to BHI's abandonment of the Virginia Property and subsequent breach of the Interim Operation and Management Agreement, the Virginia Property suffered a dramatic diminution in value, the amount of which is not relevant to the instant motion.

I swear under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed this 15th day of August 2016.

Larry J. Willard

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, Plaintiffs, v. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; JERRY HERBST, an individual; and JH, INC., a Nevada corporation, Defendants.	Case No. CV14-01712 Dept. 6 **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

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I.

INTRODUCTION

Plaintiffs Larry J. Willard ("Willard"), Overland Development Corporation ("Overland") (collectively, "the Willard Plaintiffs"), and Edward C. Wooley and Judith A. Wooley (collectively, "The Wooley Plaintiffs") herein oppose the Motion for Partial Summary Judgment brought by defendants Berry-Hinckley Industries ("BHI") and Jerry Herbst ("Herbst") (collectively, "Defendants"). Through their Motion, Defendants seek to preemptively foreclose recovery by Plaintiffs of certain categories of damages they claim were a direct result of Defendants' breach of their respective long-term commercial lease agreements and personal guaranties. As illustrated herein, Defendants' contentions are eviscerated by the express terms of the leases and guaranties at issue here—which Defendants completely ignored in their Motion—and are contrary to well-established law.

Given the commonality of claims by the Willard Plaintiffs and the Wooley Plaintiffs and the fact that the leases and guaranties at issue are absolutely identical in pertinent part, Plaintiffs do not object to Defendants' request to have the issues regarding damages recoverable by the Willard Plaintiffs and those recoverable by the Wooley Plaintiffs heard in a single motion.

II.

STATEMENT OF FACTS

A. Properties Of The Wooley Plaintiffs

1. The purchase and renting out of the Highway 50 Property to BHI.

On July 1, 2005, as part of a 1031 Exchange, the Wooley Plaintiffs entered into a Purchase and Sale Agreement to purchase a commercial property located at 1820 East U.S. Highway 50, Carson City, Nevada (the "Highway 50 Property") from Tibarom, Inc. for $3,400,000.00. [Decl. Edward C. Wooley at ¶ 3; Ex. 1.]

On December 1, 2005, BHI entered into a 20-year lease for the Highway 50 Property (the "Highway 50 Lease") at a base annual rental rate of $272,000.00, increasing by 2% per annum. [*Id.* at ¶ 4; Ex. 2.]

On January 19, 2007, the Wooley Plaintiffs obtained a loan for $2,200,000.00 from

Pacific Capital Bank, N.A. d/b/a South Valley National Bank ("South Valley") which was secured by a Deed of Trust on the Highway 50 Property. [*Id.*at ¶ 5; Exs. 3, 4.]

On February 17, 2007, the Wooley Plaintiffs received a letter from counsel for Herbst informing them and other landlords of Herbst's intention to acquire BHI and requesting that the Wooley Plaintiffs agree to certain modifications to the Highway 50 Lease in return for Herbst signing a guaranty (the "Highway 50 Guaranty") to be personally responsible for BHI's performance under the Highway 50 Lease. Included in this letter was a statement from a financial services firm stating that Herbst had a net worth in excess of $200 million. [*Id.* at ¶ 6; Ex. 5.]

On March 12, 2007, in consideration for the security provided by the Highway 50 Guaranty, the Wooley Plaintiffs executed a First Amendment to the Highway 50 Lease, which included the modifications requested by Herbst. [*Id.* at ¶ 7; Ex. 6.] That same day, Herbst executed a guaranty agreement regarding the Highway 50 Property (the "Highway 50 Guaranty"). [*Id.* at ¶ 8; Ex. 7.]

On June 29, 2011, BHI and the Wooley Plaintiffs executed a Second Amendment to the Highway 50 Lease, which freed up moneys held in escrow for BHI to build out the property and which decreased the base monthly rental amount from $25,000.00 per month to $20,025.82 per month. This Second Amendment did not modify the terms of the Highway 50 Guaranty. [*Id.*; Ex. 8.]

2. The purchase and renting out of the Baring Property to BHI.

On May 8, 2006, the Wooley Plaintiffs entered into a Purchase and Sale Agreement to purchase a property located at 1365 Baring Boulevard, Sparks, Nevada (the "Baring Property") from Spirit SPE Portfolio 2005-5, LLC for a purchase price of $3,286,552.00. [*Id*. at ¶ 10; Ex. 9.]

On July 6, 2006, BHI signed a long-term lease for the Baring Property (the "Baring Lease") at a base monthly rental rate of $19,856.25, increasing by two percent per annum. [*Id.* at ¶ 11; Ex. 10.]

On July 18, 2006, the Wooley Plaintiffs obtained a loan from South Valley for

$2,100,000.00 which was secured by a Deed of Trust on the Baring Property. [*Id.* at ¶ 12; Exs. 11, 12.]

On March 12, 2007, the Wooley Plaintiffs agreed to the modifications to the Baring Lease requested by Herbst and executed a First Amendment to the Lease Agreement. [*Id.* at ¶ 13; Ex. 13.]

In consideration for the Wooley Plaintiffs having agreed to the modifications to the Baring Lease, on March 12, 2007, Herbst signed a personal guaranty of the Baring Lease (the "Baring Guaranty"). [*Id.* at ¶ 14; Ex. 14.]

On July 5, 2007, in direct violation of the capitalized prohibition in the Baring Lease, BHI entered into an Assignment of Entitlements, Contracts, Rents and Revenues with First National Bank of Nevada to secure a $74 million line of credit. [*Id.* at ¶ 15; Ex. 15.]

On December 29, 2009, without first seeking and obtaining permission from the Wooley Plaintiffs as required by the Baring Lease, BHI assigned the Baring Lease to Jacksons Food Stores, Inc. ("Jackson"). [*Id.* at ¶ 16; Ex. 16.]

3. Commencement in California of litigation for Defendants' breach.

On March 1, 2013, BHI failed to tender rent payments under both the Baring Lease and the Highway 50 Lease. As a result, the Wooley Plaintiffs engaged the services of attorney L. Steven Goldblatt, Esq. ("Goldblatt") to contact BHI and Herbst and demand payment. [*Id.* at ¶ 17.]

Defendants failed to cure the breach of the Highway 50 Lease. As a result, on April 17, 2013, Goldblatt filed a lawsuit against Defendants and others in Santa Clara County, California (the "California case") for breach of the leases and to foreclose on the Herbst guaranties. [*Id.* at ¶ 18.]

After nearly one year of motion practice and representing the Wooley Plaintiffs' interests in negotiations with BHI and Herbst for which the Wooley Plaintiffs paid Goldblatt and his associates a total of $45,088.00, Goldblatt was seriously injured in an automobile accident and the Wooley Plaintiffs were compelled to hire Brian P. Moquin, Esq. ("Moquin"), to take over the matter. Moquin substituted into the California case on March 13, 2014. [*Id.* at ¶ 19; Ex. 17.]

4. Dismissal of the California case obtained via fraud.

Prior to Moquin substituting into the California case, Defendants had filed a Motion to Dismiss the case for lack of proper venue, which was to be heard on March 18, 2014. [*Id.* at ¶ 20.] Moquin suggested to Defendants that he amend Plaintiffs' complaint to streamline the issues and potentially agree to transfer the matter to Nevada in the interests of expediting resolution. [*Id.*] To that end, Moquin and counsel for Defendants entered into a Joint Stipulation under which Plaintiffs would be given time to amend their complaint, Plaintiffs would withdraw the numerous discover requests that Defendants were seeking to quash, and Defendants would take the pending hearings off-calendar. [*Id.* at ¶ 21; Decl. Brian P. Moquin at ¶ 4; Ex. 18.]

On March 13, 2014, Moquin filed the Joint Stipulation. [*Id.*] Moquin also received written confirmation from Defendants that they had in fact taken the pending hearings off-calendar. [*Id.* at ¶ 5; Ex. 19.]

On March 21, 2014, Moquin learned that Defendants had not taking the hearing on their Motion to Dismiss off-calendar and as a result the court had granted Defendants' motion. [*Id.* at ¶ 6; Ex. 20.]

Subsequently, in the interests of expediting resolution of Plaintiffs' claims, Plaintiffs voluntarily dismissed the California matter without prejudice and brought the instant matter in this Court. [*Id.* at ¶ 8; Ex. 21.]

5. Circumstances necessitating the sale of the Baring Property.

On January 22, 2014, the Wooley Plaintiffs received a Notice of Default regarding payments to South Valley, which had since been taken over by Union Bank, N.A., on the Highway 50 Loan and the Baring Loan, both of which the Wooley Plaintiffs had not been able to pay due to the lack of rental income caused by Defendants' breach of the Highway 50 Lease. [Decl. Wooley at ¶ 24; Ex. 22

The Wooley Plaintiffs contacted Union Bank and engaged in negotiations with Terri Baron ("Baron"), Union Bank's Vice President and Senior Workout Specialist. Baron advised them that, per the terms of both the Highway 50 Loan and the Baring Loan, the two properties were cross-collateralized and hence the only way to save either of them was to cure both

defaults. [*Id.* at ¶ 25; Ex. 23.]

As a result of this cross-collateralization, and because BHI and Herbst's breaches of the Highway 50 Lease had left the Wooley Plaintiffs in a position where they could not cure both defaults, they were forced to sell one of the properties. On May 20, 2014, the Wooley Plaintiffs sold the Baring Property for a contract price of $3,100,000.00, incurring $147,847.30 in settlement charges, $156.49 in sewer use fees, and $1,225.34 in county property taxes as part sale. After the Baring Loan was paid off, the Wooley Plaintiffs were left with $870,844.39, which was less than the amount of earnest money they had invested in the Baring Property. In fact, the Baring Property had experienced a diminution in value of $186,552.00 compared to the price at which the Wooley Plaintiffs had purchased it. [*Id.* at ¶ 26; Ex. 24.]

As a direct result of BHI and Herbst breaching the Highway 50 Lease which forced the Wooley Plaintiffs to sell the Baring Property at a loss in order to save the Highway 50 Property, the Wooley Plaintiffs also incurred a Federal tax liability of $302,881.00 and a state tax liability of $114,502.00 due to the capital gains imposed on them from the loss of their 1031 Exchange benefits. The Wooley Plaintiffs have paid those taxes. [*Id.* at ¶ 27; Exs. 25, 26.]

B. The Willard Plaintiffs' Property

1. The purchase and renting out the Virginia Property to BHI.

On November 18, 2005, as part of a property exchange pursuant to 26 U.S.C. § 1031 (a "1031 Exchange"), the Willard Plaintiffs entered into a Purchase and Sale Agreement with P.A. Morabito & Co, Limited to purchase a commercial property located at 7695 and 7699 South Virginia Street, Reno, Nevada (the "Virginia Property") for a total purchase price of $17,750,000.00. [Decl. Larry J. Willard at ¶ 3; Ex. 27.]

The Purchase and Sale Agreement contained a lease-back provision under which the seller would lease back the Virginia Property for a period of twenty years ("the Virginia Lease Term") from January 2006 through January 2026 at a base annual rental rate of $1,464,375.00 with the annual rental rate increasing by two percent per year compounded annually. [*Id.* at ¶ 4; Ex. 27 at p. 1.]

On December 2, 2005, Defendant Berry-Hinckley Industries ("BHI") and the Willard

Plaintiffs executed a Lease Agreement (the "Virginia Lease"). [*Id.* at ¶ 5; Ex. 28.]

As part of a 1031 Exchange, the Willard Plaintiffs paid a total of $4,668,738.49 in earnest money for the Virginia Property from the sale of a property that they owned in Las Vegas. They obtained financing for the balance of the purchase price by securing a loan in the amount of $13,250,000.00 from South Valley. Escrow on the purchase of the Virginia Property closed on February 24, 2006. [*Id.* at ¶ 6; Exs. 29, 30, 31.]

2. Defendants' express acknowledgment of Willard's loan.

On February 21, 2006, BHI and the Willard Plaintiffs executed a "Lease Subordination, Non-Disturbance and Attornment Agreement" (the "Subordination Agreement"), which informed BHI of the fact that the Willard Plaintiffs were purchasing the Virginia Property with financing from South Valley National Bank ("South Valley"). [*Id.* at ¶ 7; Ex. 32.]

In the Subordination Agreement, BHI expressly acknowledged that South Valley would not make the loan to the Willard Plaintiffs without the Subordination Agreement being in place and BHI agreeing to relinquish and subordinate the Virginia Lease in favor of South Valley's rights under the loan. [Ex. 32 at § 2.4.] BHI also consented to and approved all provisions of the Note and the Deed of Trust regarding the loan. [Ex. 32 at § 2.2.] BHI also certified that the Summary of Lease Terms attached thereto as Appendix 1 was true and correct. [Ex. 32 at p. 2.] This Summary of Lease Terms confirms that the original Virginia Lease Term ran through January 2026. [Ex. 32 at Appx. 1, § 2.4.] BHI also expressly agreed not to terminate the Virginia Lease without first obtaining the consent of South Valley. [Ex. 32 at § 3.3.]

On March 16, 2006, the Willard Plaintiffs refinanced the South Valley loan with Telesis Community Credit Union ("Telesis") for a total loan amount of $13,312,500.00. Under this new loan (the "Telesis Loan"), the Willard Plaintiffs were required to pay $87,077.52 per month to Telesis's loan servicing agent, Business Partners, LLC ("Business Partners"). [*Id.* at ¶ 11; Exs. 33, 34, 35.]

3. Plaintiffs sacrifice $5.25 million to obtain the Herbst's Guaranty.

On February 17, 2007, BHI sent an offer letter to the Willard Plaintiffs and other landlords indicating that Herbst intended to acquire BHI's convenience store assets, which

included the Virginia Property. [*Id.* at ¶ 12; Ex. 5.] Therein, Herbst offered to personally guarantee BHI's payments and performance under the Virginia Lease if the Willard Plaintiffs agreed to amend the Virginia Lease. [*Id.* at ¶ 13; Ex. 5 at pp. 3-4.] Included with the offer letter was a statement from Johnson Jacobson Wilcox dated January 31, 2007 attesting to the fact that Herbst's net worth was in excess of $200 million. [*Id.*; Ex. 5 at p. 2.]

One of the requirements of Herbst's offer was that the Willard Plaintiffs agree to shorten the term of the Virginia Lease by thirty months, thereby forgoing $5,250,045.20 in rent that they would otherwise have received under the Virginia Lease, in return for which Herbst would personally guarantee BHI's payment and performance under the Virginia Lease. [*Id.* at ¶ 14.]

On March 9, 2007, based on the representations as to Herbst's net worth and the offer by Herbst to personally guarantee BHI's payments and performance under the Virginia Lease, the Willard Plaintiffs accepted Herbst's offer, executed an Amended Lease, and Herbst provided a personal guaranty (the "Virginia Guaranty"). [*Id.* at ¶ 15; Exs. 36, 37.]

4. Commencement in California of litigation for Defendants' breach.

On March 1, 2013, without any notice whatsoever, BHI defaulted on the Virginia Lease by not sending the monthly rental payment for March 2013. [*Id.* at ¶ 16.]

On March 10, 2013, having not received the monthly rental payment from BHI, the Willard Plaintiffs called BHI's finance department and were told that BHI was no longer going to pay rent. They immediately retained L. Steven Goldblatt, Esq. ("Goldblatt"), who sent a letter to Herbst on March 12, 2013 demanding payment of the March 2013 rent. [*Id.* at ¶ 17; Ex. 38.]

On March 18, 2013, counsel for Defendants responded to Goldblatt's letter with an unacceptable settlement offer that in no way indicated that BHI and Herbst intended to cure the breach nor honor the Virginia Guaranty. [*Id.* at ¶ 18; Ex. 39.]

On April 12, 2013, counsel for Defendants sent a letter to Goldblatt indicating that BHI did not intend to cure the breach and planned to vacate the Virginia Property on April 30, 2013. [*Id.* at ¶ 19; Ex. 40.]

On April 17, 2013, Goldblatt filed a lawsuit against BHI, Herbst, and others in Santa Clara County, California (the "California case") for breach of the Virginia Lease and foreclosure

of the Virginia Guaranty. [*Id.* at ¶ 20.]

5. Defendants undermine Plaintiffs' attempt to mitigate damages.

Shortly thereafter, the Willard Plaintiffs' real estate agent appealed to BHI to remain on the Virginia Property until a buyer or a new tenant could be obtained so that the Virginia Property would retain its value. Consequently, the Willard Plaintiffs entered into an interim "Operation and Management Agreement" with BHI effective May 1, 2013 under which BHI agreed to continue active operations on the Virginia Property. The Willard Plaintiffs agreed to this Operation and Management Agreement because they knew that the amount of rent at issue, which at that point was $140,175.55 per month, would be difficult to obtain from a new tenant if the Virginia Property was "dark." Herbst did not sign the Operation and Management Agreement nor is there any mention in it of the Virginia Guaranty within it. [*Id.* at ¶ 21; Ex. 41.]

The Willard Plaintiffs hired consultant Greg Breen ("Breen"), who had previously been the operations manager for BHI, to accompany them to the Virginia Property to assess its condition. Mr. Breen had formerly served as operations manager for BHI. They visited the Virginia Property on May 26, 2013 and May 27, 2013 and discovered that the Virginia Property was not fully operational. For example, all signage had been removed, there were severe maintenance issues, and several employees told me in person that they did not have enough supplies to conduct operations. [*Id.* at ¶ 22.]

On June 1, 2013, BHI vacated the Virginia Property having paid no rent whatsoever since their breach on March 1, 2013. Under the terms of the Operation and Management Agreement, BHI had until July 20, 2013 to provide the Willard Plaintiffs with a profit and loss statement and to remit net profits earned during May 2013 minus $10,000.00. [*Id.* at ¶ 23; Ex. 41 at § 4.] However, BHI never provided the Willard Plaintiffs with the required profit and loss statement, nor did they ever tender any payment of net profits for the month of May 2013. [*Id.*]

6. Willard files for Chapter 11 bankruptcy protection.

Because BHI had breached the Virginia Lease, thereby depriving the Willard Plaintiffs of more than $140,000.00 per month in income while they remained liable to make payments of $87,077.52 per month under the Telesis Loan, based on the strong advice from Goldblatt that he

do so, Larry Willard engaged bankruptcy attorney Stanley Zlotoff ("Zlotoff") to prepare and file a Chapter 11 bankruptcy petition. Willard paid Zlotoff $21,213.00 to handle his bankruptcy. [*Id.* at ¶ 24.]

On the advice of counsel, Willard also retained accountant Mitra Ehsanipour ("Ehsanipour") to prepare the accounting required for his bankruptcy petition. He paid Ehsanipour $17,520 for this work. [*Id.* at ¶ 25.]

On June 14, 2013, the Willard Plaintiffs received a Notice of Intent to Foreclose from Business Partners stating that a monetary default existed due to non-payment of the March 1, 2013, April 1, 2013, May 1, 2013, and June 1, 2013 monthly loan payments as well as non-payment of the 2012 Washoe County real estate property taxes. [*Id.* at ¶ 26; Ex. 42.]

On June 17, 2013, Willard filed a Chapter 11 bankruptcy petition. [*Id.* at ¶ 27; Ex. 43.]

On July 24, 2013, Zlotoff filed a motion to dismiss Willard's Chapter 11 bankruptcy case at Willard's direction due to the fact that his having filed for bankruptcy had not facilitated fruitful negotiations with Telesis regarding the outstanding $13 million loan. [*Id.* at ¶ 28; Ex. 44.]

As the Wooley Plaintiffs had done, in March 2014, the Willard Plaintiffs hired Moquin to substitute into the California case. [*Id.* at ¶ 29; Ex. 45.] All facts regarding the wrongful dismissal of the California case noted above also apply to the Willard Plaintiffs, who were co-plaintiffs in that case.

7. Circumstances necessitating the short sale of the Virginia Property.

Because the Willard Plaintiffs' real estate agent had been unsuccessful in finding a tenant to lease the Virginia Property and had also not been able to find a buyer willing to offer enough for the Virginia Property to cover the outstanding principal balance owed on the Telesis Loan, on January 14, 2014, the Willard Plaintiffs entered into an agreement with Longley Partners, LLC ("Longley") for Longley to purchase the Virginia Property via a short sale. [*Id.* at ¶ 34; Ex. 46.]

On February 14, 2014, Longley and the Willard Plaintiffs executed a Purchase and Sale Agreement under which Longley agreed to purchase the Virginia Property for $4 million. [*Id.* at

¶ 35; Ex. 47.]

On February 19, 2014, the Willard Plaintiffs entered into a Short Sale Agreement with National Credit Union Administration Board ("NCUAB") in its capacity as liquidating agent for Telesis for the sale of the Virginia Property. [*Id.* at ¶ 36; Ex. 48.]

On February 25, 2014, the Willard Plaintiffs engaged their real estate agent to conduct the short sale of the Virginia Property. [*Id.* at ¶ 37; Ex. 49.]

On March 3, 2014, the Virginia Property was sold via a short sale for a total of $4,050,354.68. Of that amount, $65,936.98 went to pay the outstanding 2012/2013 Washoe County property taxes, $120,000.00 was paid in commissions to Colliers International, and $14,615.00 was paid in closing costs. [*Id.* at ¶ 38; Ex. 50.]

Following the short sale, NCUAB canceled the outstanding debt owed under the Telesis Loan. This debt cancellation totaled $8,597,250.20. Due to this debt cancelation, the Willard Plaintiffs incurred a significant tax liability for Fiscal Year 2014. [*Id.* at ¶ 39; Ex. 51.] Per IRS regulations, since the Willard Plaintiffs' respective total debt was greater than their respective total assets immediately prior to the debt cancellation, these tax liabilities were not reported as income and consequently are no longer being claimed as damages flowing from Defendants' breach in the instant action.

However, because the Willard Plaintiffs were forced to give up the Virginia Property via the short sale, Willard lost $1,018,200.00 in Capital Loss Carryovers that he had been carrying as an asset and Overland lost $3,671,800.00 in Capital Loss Carryovers that it had been carrying as an asset under the 1031 Exchange through which the Willard Plaintiffs had purchased the Virginia Property. In addition, due to BHI's abandonment of the Virginia Property and subsequent breach of the Interim Operation and Management Agreement, the Virginia Property suffered a dramatic diminution in value, the amount of which is not relevant to the instant motion. [*Id.* at ¶ 40.]

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III.

ARGUMENT

A. Legal Standard

1. Summary Judgment.

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the Court demonstrate that no genuine issue of material fact exist, and the moving party is entitled to judgment as a matter of law. *Pegasus v. Reno Newspapers, Inc*., 118 Nev. 706, 713, 57 P.3d 82, 87 (2002). Substantive law controls whether factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue of material fact is one where the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Valley Bank v. Marble*, 105 Nev. 366, 367, 775 P.2d 1278, 1282 (1989).

The Nevada Supreme Court has held that the non-moving party may not defeat a motion for summary judgment by relying "on gossamer threads of whimsy, speculation and conjecture." *Wood v. Safeway*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005). When a motion for summary judgment is made and supported as required by Nevada Rule of Civil Procedure 56, the non-moving party must not rest upon general allegations and conclusions, but must by affidavit or otherwise set forth specific facts demonstrating the existence of a genuine factual issue. *Id.*

The pleadings and proof offered in a Motion for Summary Judgment are construed in the light most favorable to the non-moving party. *Hoopes v. Hammargren*, 102 Nev. 425, 429, 725 P.2d 238, 241 (1986). However, the non-moving party still "bears the burden to 'do more than simply show that there is some metaphysical doubt' as to the operative facts in order to avoid summary judgment being entered." *Wood*, *supra*, 121 Nev. at 732, 121 P.3d at 1031. "To successfully defend against a summary judgment motion, 'the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact.'" *Torrealba v. Kesmetis*, 124 Nev. 95, 100, 178 P.3d 716, 720 (Nev. 2008) (*quoting Cuzze v. Univ. & Cmty. Coll. Sys. of Nev*., 123 Nev. 598, 72 P.3d 131, 134

(Nev. 2007)).

2. Interpretation of contract terms.

Under Nevada law, there is no right to interpret an agreement as meaning something different from what the parties intended as expressed by the language they saw fit to employ. *Reno Club, Inc. v. Young Investment Co*., 64 Nev. 312, 324, 182 P.2d 1011, 1017 (1947) (citations omitted). When the contract at issue is clear on its face, the Court should enforce the contract as it is written. *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599, 603 (2005). Where a contact is unambiguous, parole evidence may not be introduced to interpret the agreement of the parties. *See Margrave v. Dermody Props*., 110 Nev. 824, 829, 878 P.2d 291, 294 (1994), *citing Farmers Ins. Exchange v. Young*, 108 Nev. 328, 333 n.3, 832 P.2d 376 (1992); *Canfield v. Gill*, 101 Nev. 170, 171 n.1, 693 P.2d 1259 (1985).

3. Interpretation of express indemnity provisions.

An indemnity provision must be interpreted by the Court as a matter of law so long as extrinsic evidence is not required to interpret the indemnity language. *Continental-Heller Corp. v. Amtech Mechanical Services, Inc.,* 53 Cal.App.4th 500, 504, 61 Cal.Rptr.2d 668, 670 (1997). Contractual, or express, indemnity arises when two parties agree, pursuant to a contractual provision, that one party will reimburse the second party for liability from the first party's actions. *See George L. Brown Ins. Agency, Inc. v. Star Ins. Co*., 126 Nev. 316, 237 P.3d 92, 96 (Nev. 2010) (internal citations omitted); *Continental Casualty Co. v. Farnow*, 79 Nev. 428, 386 P.2d 90 (1963).

Where the parties have expressly contracted with respect to the duty to indemnify, the extent of that duty must be determined from the contract. *See George L. Brown, supra*, at 96 (internal citations omitted). Thus, the contract should be read as a whole and given a construction that will accomplish the object of providing indemnity for the losses covered by the contract. *American Excess Inc. Co. v. MGM Grand Hotels, Inc.*, 102 Nev. 601, 604, 729 P.2d 1352 (1986); *National Union Fire Ins. v. Reno's Exec. Air*, 100 Nev. 360, 682 P.2d 1380 (1984).

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B. Relevant Terms And Provisions Of The Leases And Guaranties

In their Motion, Defendants seek to foreclose recovery by Plaintiffs of certain categories of damages. Specifically, Defendants contend that as a matter of law the Willard Plaintiffs cannot recover: 1) damages for attorneys' fees and costs incurred for legal representation in the California case against Defendants and in Bankruptcy Court; 2) the fees and costs associated with the short sale of the Virginia Property; and 3) damages due to the tax consequences of cancellation of the $8.6 million in debt for the Telesis Loan.

With respect to the Wooley Plaintiffs, Defendants argue that the following categories of damages are not recoverable: 1) attorneys' fees and costs incurred in the California case; 2) the costs associated with the sale of the Baring Property, which the Wooley Plaintiffs were forced to sell due to their two properties being cross-collateralized, as well as the loss incurred and the resulting tax liability due to the concomitant termination of 1031 Exchange benefits.

Defendants' contentions are based on three legal arguments: 1) attorney fees are only recoverable as an award to the prevailing party to litigation; 2) damages that were not foreseeable at the time of contract formation are not recoverable; 3) damages that were not actually incurred are not recoverable. With respect to the first two arguments, the express terms of the leases and personal guaranties at issue here render them wholly meritless. In terms of the third argument,

As shown below, based on Nevada law as well as the express language in the leases and personal guaranties at issue here, Defendants' contentions have no merit.

The terms and provisions related to damages for breach in the Virginia Lease and the Highway 50 Lease are absolutely identical, as are the Virginia Guaranty and the Highway 50 Guaranty. Consequently, the following analysis refers to these documents as "the Lease" and "the Guaranty" refers to one copy of each since the relevant terms are identical in versions for both the Willard and the Wooley Plaintiffs.

1. Lease terms regarding breaches and recoverable damages.

Generally, "when a contract is clear on its face, it will be construed from the written language and enforced as written." *Canfora*, *supra*, 121 Nev. at 776 (internal quotations

omitted). Likewise, when a duty to indemnify arises from contractual language, it is generally not subject to equitable considerations; rather, it is enforced in accordance with the terms of the contracting parties' agreement. *United Rentals Hwy. Techs. v. Wells Cargo*, 289 P.3d 221, 128 Nev. Adv. Op. No. 59 (Nev. 2012).

Below are the lease terms relating to remedies for breach by the Lessee and the damages that are recoverable, with references to the Virginia Lease.

a. BHI's Monetary Obligations are unconditional.

The Lease provides very strong protections for the Lessor in the event of a breach by the Lessee. In pertinent part, Section 4(D) of the Lease provides as follows:

> **All Rental and other Monetary Obligations** which Lessee is required to pay hereunder **shall be the *unconditional obligation* of Lessee** and shall be payable in full when due without any setoff, abatement, deferment, deduction or counterclaim whatsoever, except as set forth herein.

(Emphasis added.) [Ex. 28 at p. 2.]

The term "Monetary Obligations" is defined in the Lease as follows:

> [A]ll Rental and all other sums payable or reimbursable by Lessee under this Lease to Lessor, to any third party on behalf of Lessor, or to any Indemnified Party.

[*Id.* at p. 33.]

b. BHI is liable for all taxes flowing from their activities under the Lease.

Section 8 of the Lease requires Lessee to pay all taxes and assessments:

> *Taxes and Assessments.* **Lessee shall pay**, prior to the earlier of delinquency or the accrual of interest on the unpaid balance, **one hundred percent (100%) of the following (collectively, "Taxes"): *all taxes and assessments of every type or nature assessed against or imposed upon the Property*** or Lessee during the Lease Term, including without limitation, all ad valorem taxes, assessments and special assessments upon the Property or any part thereof and upon any personal property, trade fixtures and improvements located on the Property, whether belonging to Lessor or Lessee, or any tax or charge levied in lieu of such taxes and assessments; ***all taxes,*** charges, license fees and or similar fees ***imposed by reason of the use of the Property by Lessee***; and all excise, transaction, privilege, license, sales, use ***and other taxes upon the Rental or other Monetary Obligations hereunder, the leasehold estate of either party or the activities of either party pursuant to this Lease, and all interest, surcharges or service or other fees payable in connection with the foregoing.***

(Emphasis added.) [Ex. 28 at p. 4.]

c. Liquidated damages.

Section 20(B) of the Lease lays out the remedies available to the Lessor in the event of a breach by the Lessee. In pertinent part, it reads as follows:

> *Remedies.* **Upon the occurrence of an Event of Default**, with or without notice or demand, except as otherwise expressly provided herein [. . .], **Lessor shall be entitled to exercise**, at its option, concurrently, successively, or in any combination, **all remedies available at law or in equity, including without limitation, any one or more of the following:**
>
> (i) **To terminate this Lease**, whereupon Lessee's right to possession of the Property shall cease and this Lease, except as to Lessee's liability, shall be terminated. **Upon such termination, Lessor shall be entitled to recover liquidated damages equal to the total of**
>
> (i) the cost of recovering possession of the Property;
>
> [* * *]
>
> (v) costs of operating the Property until relet and the reasonable costs of performing any obligations of Lessee under this Lease to be performed upon termination or expiration of this Lease (including but not limited to the Lessee's obligations under Sections 12.D and 27 hereof); and
>
> (vi) ***any other sum of money and damages reasonably necessary to compensate Lessor for the detriment caused by Lessee's default.***
>
> [* * *]
>
> (iii) To bring an action against Lessee for any damages sustained by Lessor or any equitable relief available to Lessor.
>
> [* * *]
>
> (v) **To recover from Lessee all *Costs* paid or incurred by Lessor as a result of such breach, *regardless of whether or not legal proceedings are actually commenced.***
>
> [* * *]

(Emphasis added.) [*Id.* at pp. 17-18.]

d. "Costs" defined.

The term "Costs" is defined in the Lease as follows:

> **[A]ll reasonable costs and expenses incurred** by a Person, **including without limitation, reasonable attorneys' fees and expenses, court costs, expert witness fees,** costs of tests and analyses, repair and maintenance, travel and

> accommodation expenses, deposition and trial transcripts, copies and other similar costs and fees, **brokerage fees**, **escrow fees**, title insurance and other insurance premiums, appraisal fees, stamp taxes, recording fees and transfer taxes or fees, as the circumstances require.

(Emphasis added.) [*Id.* at p. 30.]

e. Express indemnification against "any and all" Losses.

In addition, the Lease contains an extremely broad express indemnification provision in Section 15, which reads in pertinent part as follows:

> [. . .] In addition to other specific indemnification provisions set forth in this Lease, **Lessee shall indemnify, protect, defend and hold harmless** each of the Indemnified Parties from and **against *any and all* Losses caused by, incurred or resulting from Lessee's** [. . .] **breach of, default under, or failure to perform, any term or provision of this Lease by Lessee** [. . .]

(Emphasis added.) [*Id.* at p. 14.]

The term "Indemnified Parties" is defined in the Lease as follows:

> **Lessor**, any Lessor's Lenders and their members, managers, officers, directors, shareholders, partners, employees, agents, servants, representatives, contractors, subcontractors, affiliates, subsidiaries, participants, successors and assigns, including, but not limited to, any successors by merger, consolidation or acquisition of all or a substantial portion of the assets and business of Lessor or any Lessor's Lenders, as applicable.

[*Id.* at p. 32.]

f. "Losses" defined.

The term "Losses" is defined in the Lease as follows:

> ***[A]ny and all* claims, suits, liabilities** (including, without limitation, strict liabilities), **actions, proceedings, obligations, debts, damages, losses, *Costs*, diminutions in value, fines, penalties, interest, charges, fees,** judgments, awards, amounts paid in settlement ***and damages of whatever kind or nature***, inclusive of bodily injury and property damage to third parties (including, without limitation, attorneys' fees and other Costs of defense).

(Emphasis added.) [*Id.* at p. 33.]

g. Express attorneys' fees provision.

In addition to being recoverable as "Costs" (i.e., special damages) in several sections described above, an award of attorneys' fees is expressly provided for in Section 34 of the

Lease:

> *Attorneys' Fees.* In the event of any judicial or other adversarial proceeding concerning this Lease, to the extent permitted by Law, **Lessor the prevailing party** *[sic]* **shall be entitled to recover all of its reasonable attorneys' fees and other Costs** in addition to any other relief to which it may be entitled. ***In addition, the prevailing party shall, upon demand, be entitled to all attorneys' fees and all other Costs incurred in the preparation and service of any notice or demand hereunder, whether or not a legal action is subsequently commenced.***

(Emphasis added.) [Ex. 28 at p. 24.] It is important to note that under this section, the Lessor is entitled to both reasonable attorneys' fees and other Costs incurred as the prevailing party to litigation *and to all attorneys' fees and Costs incurred prior to the litigation in which they prevail.*

2. Relevant terms and provisions of the Herbst Guaranties.

In February and March of 2007, Herbst negotiated with Plaintiffs to modify some terms of their respective leases in return for which Herbst would provide Plaintiffs with a personal guarantee. Both the Wooley Plaintiffs and the Willard Plaintiffs accepted Herbst's offer. With respect to the Willard Plaintiffs, Herbst demanded that they shorten the lease term by thirty months in return for his personal guaranty; by doing so, the Willard Plaintiffs sacrified $5,250,045.20 in rent they would otherwise have received. [Dec. Willard at ¶ 14.

The terms in Highway 50 Guaranty and the Virginia Guaranty are absolutely identical. [Exs. 7, 37.] Within them, Herbst "unconditionally, absolutely, and irrevocably guarantees the timely payment and performance of each of BHI's obligations arising out of and under the Lease." [Ex. 7 at p. 1; Ex. 37 at p. 1]

In the event of a breach of the Lease by BHI, Herbst "will be directly responsible for the full extent of any unsatisfied Guaranteed Obligations," i.e., for "each of BHI's obligations arising out of and under the Lease." [*Id.* at § 1.]

In addition, Herbst waived "the effect of any fact, circumstance or event of any nature whatsoever that would exonerate, or constitute or give rise to a defense to" his obligations as guarantor." [*Id*. at § 2.]

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C. Plaintiffs Are Entitled To Attorneys' Fees And Costs As Special Damages

Defendants contend that Plaintiffs are not entitled to attorneys' fees and costs incurred prior to commencement of the instant litigation. They also contend that such fees are only ever awardable on motion by a prevailing party. Both of these contentions are incorrect.

Nevada Supreme Court has held:

> [W]hen a party claims it has incurred attorney fees as foreseeable damages arising from tortious conduct or a breach of contract, such fees are considered special damages. They must be pleaded as special damages in the complaint pursuant to NRCP 9(g) and proved by competent evidence just as any other element of damages. . . . [W]hen attorney fees are considered as an element of damages, they must be the natural and proximate consequence of the injurious conduct.

Sandy Valley Assocs. V. Sky Ranch Estates owners Ass'n, 117 Nev. 948, 956-57, 35 P.3d 964, 969 (2001), receded from on other grounds, *Horgan v. Felton*, 123 Nev. 577, 170 P.3d 982 (2007); *see also Am. Fed. Of Musicians v. Reno's Riverside Hotel, Inc.*, 86 Nev. 695, 699, 475 P.2d 220, 222 (1970) ("It is appropriate in some cases to consider attorney's fees as an item of damage").

In their Verified Amended Complaint filed on January 21, 2015, Plaintiffs expressly sought compensation for the attorneys' fees and costs incurred prior to initiation of the instant matter as special damages.

Specifically, in Paragraphs 17 and 25 of Plaintiffs' Verified Amended Complaint, the Willard Plaintiffs alleged that, "As a further direct and proximate result of [BHI|Herbst] breaching the [Willard Lease|Herbst-Willard Guaranty], Willard filed for bankruptcy protection, incurring $22,623.00 in legal fees and $15,000.00 in accounting fees in the process." In Paragraphs 18 and 26, the Willard Plaintiffs alleged, "As a further direct and proximate result of BHI breaching the Willard Lease, the Willard Plaintiffs hired an attorney to file suit against BHI and Herbst in Santa Clara County, California, thereby incurring $35,000.00 in attorney's fees."

Likewise, in Paragraphs 42 and 56 of Plaintiffs' Verified Amended Complaint, the Wooley Plaintiffs alleged that, "As a further direct and proximate result of [BHI|Herbst] breaching [Wooley Lease #1|the Herbst-Wooley Guaranty], the Wooley Plaintiffs hired an attorney to file suit against BHI and Herbst in Santa Clara County, California, thereby incurring

$45,088.00 in attorney's fees."

In addition, under Section 20(B)(v) of the Leases, Plaintiffs are entitled "To recover from Lessee all Costs paid or incurred by Lessor as a result of such breach, regardless of whether or not legal proceedings are actually commenced." [Ex. 28 at p. 18.] The term "Costs" is defined in Appendix "A" of the Leases and includes "all reasonable costs and expenses incurred by a Person, including without limitation, reasonable attorneys' fees and expenses." [*Id.* at p. 30.]

Furthermore, Section 15 of the Leases provides that Defendants shall indemnify Plaintiffs against "any and all Losses caused by, incurred or resulting from [BHI's] . . . breach of, default under, or failure to perform any term or provision of this Lease . . ." [*Id.* at p. 14.]

Also, under the express Attorneys' Fees provision of the Leases, which is found in Section 34, once they have prevailed in litigation, Plaintiffs are entitled not only to recover "all of its reasonable attorneys' fees and other Costs," but is also "entitled to all attorneys' fees and all other costs incurred in the preparation and service of any notice of demand hereunder, whether or not a legal action is subsequently commenced." [*Id.* at p. 24.]

On top of all this, Defendants have once again falsely claimed in a pleading before this Court that they won their Motion to Dismiss in the California case, submitting as evidence in support thereof a "docket sheet" printed off the Web while omitting the fact that the court granted their Motion because Defendants did not take the hearing thereon off-calendar as required under the Joint Stipulation they signed but told Plaintiffs that they had done so. Regardless of whether or not Defendants intended to mislead Plaintiffs at the time, there is no excuse for Defendants fraudulently claiming that the Motion was won on the merits. All claims within Defendant's instant Motion insinuating that Plaintiffs have put forth frivolous claims pale in comparison to that.

Consequently, it is beyond dispute that Plaintiffs are entitled to recover attorneys' fees incurred in dealing with Defendants' breach prior to commencement of the instant action. Contrary to Defendants' assertion, such fees and costs are recoverable as special damages.

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1. Willard is entitled to attorneys' fees and costs incurred in bankruptcy.

Many of the provisions of the Lease discussed above also serve to authorize recovery by Willard of the attorney fees and costs incurred when he filed for bankruptcy. Any argument that it was "unforeseeable" that Willard would take such action if Defendants breached the Virginia Lease and Guaranty is thoroughly refuted by virtue of BHI having signed a *Subordination, Attornment and Nondisturbance Agreement* in which they "consent[ed] to and approve[d] (a) all provisions of the Note and the Deed of Trust in favor of Lender, and (b) all agreements, including but not limited to any loan or escrow agreements, between Borrower and Lender for the disbursement of the proceeds of such Loan" [Ex. 29 at § 2.2] and furthermore acknowledged that but for BHI agreeing to subordinate the Virginia Lease in favor of the Deed of Trust, the loan would not have been made. [*Id.* at § 2.4.]

Having acknowledged and approved of all provisions of the Note securing the Willard Plaintiff's loan in excess of $13 million for the purchase of the Virginia Property for $17.75 million, it was both eminently foreseeable and highly probable that Willard would have to file for bankruptcy in the event that Defendants' breached the Virginia Lease and he was no longer receiving the $140,000.00+/month in rent, $87,000.00 of which went directly to pay the loan.

Consequently, with respect to Plaintiffs' claims for attorneys' fees and costs incurred prior to the instant litigation, Defendant's Motion must be denied.

D. Under The Leases, All Losses Flowing From The Breach Recoverable

Under Nevada law, a plaintiff is not limited to recovery of direct damages for breach of contract but may also recover consequential damages that were contemplated or reasonably foreseeable to the contracting parties when the contract was formed. *See Colo. Env'ts, Inc. v. Valley Grading Corp.*, 105 Nev. 464, 471, 779 P.2d 80, 84 (1989).

"Under well settled rules of contract construction, a court has no power to create a new contract for the parties which they have not created or intended themselves. Parties are presumed to contract with reference to existing statutes. Applicable statutes will generally be incorporated into the contract; however, other legal principles may govern the legal relationship where they are expressly set forth in the contract. Indeed, 'when parties to a contract foresee a condition

which may develop and provide in their contract a remedy for the happening of that condition, the presumption is that the parties intended the prescribed remedy as the sole remedy for that condition.'" *Gilman v. Gilman*, 114 Nev. 416, 426, 956 P.2d 761, 767 (1998) (internal citations omitted).

Here, the Leases contain numerous provisions authorizing Plaintiffs to recover "any and all" damages proximately flowing from a breach. To wit, the liquidated damages clause in Section 20(B)(i)(vi) allows Plaintiffs to recover "any other sum of money and damages reasonably necessary to compensate Lessor for the detriment caused by Lessee's default. . . ." [Ex. 28 at p. 18.] Likewise, Section 15 expressly provides that "Lessee shall indemnify, protect, defend and hold harmless [Lessor] from and against any and all Losses caused by, incurred or resulting from Lessee's [. . .] breach of, default under, or failure to perform any term or provision of this Lease by Lessee." [*Id.* at p. 14.] The "Losses" covered include "any and all claims, suits, liabilities [. . .] actions, proceedings, obligations, debts, damages, losses, Costs, diminutions in value, fines, penalties, interest, charges, fees, [. . .] and damages of whatever kind or nature. . . ." [*Id.* at p. 30.]

Defendants do not dispute the fact that the Baring Property and the Highway 50 Property were cross-collateralized, nor have they countered the fact that as a result, due to Defendants' breach the Wooley Plaintiffs were forced to sell the Baring Property in order to not lose both properties. Consequently, under the provisions discussed above, the Wooley Plaintiffs are clearly entitled to compensation for the losses they incurred.

With respect to Defendant's admitted confusion regarding the Wooley Plaintiffs' claims, the Wooley Plaintiffs incurred a tax liability from the sale of the Baring Property due to the loss of shelter provided by the 1031 Exchange under which it had been purchased, triggering liability for carry-over capital gains. [Decl. Wooley at ¶ 27.]

In their Motion, Defendants claim that "Contrary to Wooley's claim that the Baring Property was sold at a loss, the closing statement for the sale of the Baring Property states that Wooley sold the Baring Property at a gain of $870,844.39, which Wooley admits that he deposited in his bank account." The Wooley Plaintiffs purchased the Baring Property for

$3,286,552.00 [Ex. 9] and sold it for $3,1000,000.000 [Ex. 24]—obviously incurring a net loss. The fact that Wooley received $870,844.39 at close of escrow ignores the fact that he tendered over $1 million in earnest money to purchase it.

Overall, every category of damages Defendants seek to exclude are recoverable under the express terms of the Lease, and, as evidenced by the Affidavits and Exhibits accompanying this Opposition, all of the claimed damages were the direct and proximate result of Defendants' breach.

Consequently, Defendants' Motion for Partial Summary Judgment should be denied.

IV.

CONCLUSION

Based on the foregoing argument, Plaintiffs respectfully request that the Court deny Defendants' Motion for Partial Summary Judgment.

Respectfully submitted,

LAW OFFICES OF BRIAN P. MOQUIN

DATED: August 29, 2016

By:_____

BRIAN P. MOQUIN
Pro Hac Vice Application Pending
California Bar No. 257583
3506 La Castellet Court
San Jose, CA 95148
(408) 300-0022
(408) 843-1678 (facsimile)

DAVID C. O'MARA
Nevada Bar No. 8599
311 East Liberty Street
Reno, Nevada 89501
(775) 323-1321
(775) 323-4082 (facsimile)

Attorneys for Plaintiffs

AFFIRMATION

(Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the preceding document filed in the above-referenced matter does not contain the Social Security Number of any person.

LAW OFFICES OF BRIAN P. MOQUIN

DATED: August 29, 2015

By:_____

BRIAN P. MOQUIN
Admitted *Pro Hac Vice*
California Bar No. 257583
3287 Ruffino Lane
San Jose, CA 95148
(408) 300-0022
(408) 843-1678 (facsimile)

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Nevada that on this date I served a true and correct copy of the foregoing document as follows:

[X] By depositing for mailing, in a sealed envelope, U.S. postage prepaid at San Jose, California addressed as follows:

DICKINSON WRIGHT
JOHN P. DESMOND
BRIAN R. IRVINE
ANJALI D. WEBSTER
100 West Liberty Street, Suite 940
Reno, Nevada 89505

[X] By sending a true and correct copy of the foregoing document by electronic mail to jdesmond@dickinsonwright.com, birvine@dickinsonwright.com, and awebster@dickinsonwright.com.

DATED: August 30, 2016

BRIAN P. MOQUIN

INDEX OF EXHIBITS

EXH. NO.	DESCRIPTION	PAGES
1	*Purchase and Sale Agreement* dated July 1, 2005 for purchase of the Highway 50 Property	13
2	*Lease Agreement* dated December 2, 2005 for the Highway 50 Property	43
3	*Three Year Adjustable Term Note* dated January 19, 2007 in the amount of $2,200,000.00 for the Highway 50 Property	4
4	*Deed of Trust, Fixture Filing and Security Agreement* dated January 30, 2007, Inst. No. 363893, for the Highway 50 Property	17
5	Letter and Attachments from Sujata Yalamanchili, Esq. to Landlords dated February 17, 2007 re Herbst Acquisition of BHI	15
6	*First Amendment to Lease Agreement* dated March 12, 2007 for the Highway 50 Property	7
7	*Guaranty Agreement* dated March 12, 2007 for the Highway 50 Property	4
8	*Second Amendment to Lease* dated June 29, 2011 for the Highway 50 Property	2
9	*Purchase and Sale Agreement* dated July 14, 2006 for the Baring Property	22
10	*Lease Agreement* dated June 6, 2006 for the Baring Property	35
11	*Five Year Adjustable Term Note* dated July 18, 2006 in the amount of $2,100,000.00 for the Baring Property	35
12	*Deed of Trust, Fixture Filing and Security Agreement* dated July 21, 2006, Doc. No. 3415811, for the Highway 50 Property	17
13	*First Amendment to Lease Agreement* dated March 12, 2007 for the Baring Property	7
14	*Guaranty Agreement* dated March 12, 2007 for the Baring Property	4
15	*Assignment of Entitlements, Contracts, Rents and Revenues (1365 Baring)* dated July 5, 2007, Inst. No. 3551275, for the Baring Property	11
16	*Assignment and Assumption of Lease* dated December 29, 2009 between BHI and Jacksons Food Stores, Inc.	7
17	*Substitution of Attorney* forms for the Wooley Plaintiffs filed March 6 and March 13, 2014 in the California case	4
18	*Joint Stipulation to Take Pending Hearings Off Calendar and to Withdraw Written Discovery Requests Propounded by Plaintiffs* filed March 13, 2014 in the California case	3

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20	Civil Minute Order on Motion to Dismiss in the California case dated March 18, 2014 faxed to Brian Moquin by the Superior Court	6
21	*Request for Dismissal* without prejudice filed May 19, 2014 in the California case	2
22	*Notice of Breach and Default and Election to Cause Sale of Real Property Under Deed of Trust* dated March 21, 2014, Inst. No. 443186, regarding the Highway 50 Property	8
23	E-mail message dated February 5, 2014 from Terrilyn Baron of Union Bank to Edward Wooley regarding cross-collateralization of the Baring and Highway 50 Properties	2
24	*Settlement Statement (HUD-1)* dated May 20, 2014 for sale of the Baring Property	2
25	2014 Federal Tax Return for Edward C. and Judith A. Wooley	35
26	2014 State Tax Balance Due Notice for Edward C. and Judith A. Wooley	2
27	*Purchase and Sale Agreement* dated November 18, 2005 for the Virginia Property	22
28	*Lease Agreement* dated November 18, 2005 for the Virginia Property	35
29	*Buyer's and Seller's Final Settlement Statements* dated February 24, 2006 for the Virginia Property	2
30	*Deed of Trust, Fixture Filing and Security Agreement* dated February 21, 2006 re the Virginia Property securing loan for $13,312,500.00	17
31	*Promissory Note* dated February 28, 2006 for $13,312,500.00 by Willard Plaintiffs in favor of Telesis Community Credit Union	4
32	*Subordination, Attornment and Nondisturbance Agreement* dated February 21, 2006 between Willard Plaintiffs, BHI, and South Valley National Bank, Inst. No. 3353293, re the Virginia Property	14
33	*Deed of Trust, Assignment of Rents, and Security Agreement* dated March 16, 2006 re the Virginia Property securing loan for $13,312,500.00	25
34	*Payment Coupon* dated March 1, 2013 from Business Partners to Overland re Virginia Property mortgage	1
35	*Substitution of Trustee and Full Reconveyance* dated April 18, 2006 naming Pacific Capital Bank, N.A. as trustee on the Virginia Property Deed of Trust	1

EXH. NO.	DESCRIPTION	PAGES
36	*Amendment to Lease Agreement* dated March 9, 2007 for the Virginia Property	5
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38	Letter dated March 12, 2013 from L. Steven Goldblatt, Esq. to Jerry Herbst re breach of the Virginia Property lease	4
39	Letter dated March 18, 2013 from Gerald M. Gordon, Esq. to L. Steven Goldblatt, Esq. re breach of the Virginia Property lease	2
40	Letter dated April 12, 2013 from Gerald M. Gordon, Esq. to L. Steven Goldblatt, Esq. re breach of the Virginia Property lease	2
41	*Operation and Management Agreement* dated May 1, 2013 between BHI and the Willard Plaintiffs re the Virginia Property	4
42	*Notice of Intent to Foreclose* dated June 14, 2013 from Business Partners to Overland re default on loan for the Virginia Property	2
43	*Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines* dated June 18, 3013	3
44	*Declaration In Support of Motion to Dismiss Case* filed by Larry James Willard on August 9, 2013, Northern District of California Bankruptcy Court Case No. 13-53293 CN	4
45	*Substitution of Attorney* forms for the Willard Plaintiffs filed March 6, 2014 in the California case	4
46	*Declaration of Arm's Length Transaction* dated January 14, 2014 between Larry James Willard and Longley Partners, LLC re sale of the Virginia Property	10
47	*Purchase and Sale Agreement* dated February 14, 2014 between Longley Partners, LLC and Larry James Willard re purchase of the Virginia Property for $4,000,000.00	6
48	*Short Sale Agreement* dated February 19, 2014 between the National Credit Union Administration Board and the Willard Plaintiffs re short sale of the Virginia Property	19
49	*Consent to Act* dated February 25, 2014 between the Willard Plaintiffs and Daniel Gluhaich re representation for short sale of the Virginia Property	1
50	*Seller's Final Closing Statement* dated March 3, 2014 re the Virginia Property	1
51	IRS Form 1099-C issued by the National Credit Union Administration Board to Overland evidencing discharge of $8,597,250.20 in debt and assessing the fair market value of the Virginia Property at $3,000.000.00	1

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Jacqueline Bryant
Clerk of the Court
Transaction # 5685608 : tbritton

Exhibit 1

Exhibit 1

PURCHASE AND SALE AGREEMENT

This **PURCHASE AND SALE AGREEMENT** ("**Agreement**") is made and entered into effective as of July 1, 2005 ("**Effective Date**") between and among **TIBAROM INC.**, a Delaware corporation ("**Seller**") and **EDWARD C. WOOLEY** and **JUDITH A. WOOLEY**, or assignee ("**Buyer**").

RECITALS

A. Prior to the Closing as contemplated herein, Seller shall own a portion of the real property located in the City of Carson City, Nevada, Carson City County Assessor Parcel Number 02-368-22 consisting of a parcel of approximately 17,000 square feet ("**Property**"), as more particularly described in **Exhibit "A"**.

B. Seller shall develop the Property as follows. Seller shall cause the construction, at Seller's expense, of a mini full-service restaurant or similar use, a quick service restaurant or similar use, a convenience store, and subject to approval by the Nevada Gaming Control Board ("**NGCB**"), slot machines operated by a licensed slot route (collectively, "**Project**"), all conditional on governmental approvals. The Property and Project will be owned by Lessor except for the gaming machines which remain the property of the licensed operator.

C. The Seller will be the "**Lessee**", and Buyer shall be the "**Lessor**", at the Property.

D. Seller desires to lease-back the Property pursuant to the form of lease attached hereto as "**Exhibit B**" ("**Lease**"). The Lease shall be signed at Closing. The parties desire to lease with an initial rent term of twenty (20) years, with two (2) five (5) years options to extend the Lease. The initial annual rent shall be **TWO HUNDRED SEVENTY TWO THOUSAND DOLLARS ($272,000.00)** Lease payments shall commence upon Closing (as defined herein), and shall be prorated for a partial month, as necessary. Lease payments shall thereafter be made monthly on the first day of each month. The minimum rent shall be adjusted upward by two (2) percent compounded annually, on the anniversary date of the first lease payment date under the Lease during each year of the initial and extended terms of the Lease. Buyer and Seller acknowledge that the Lease is a NNN Lease, and Seller as Lessee shall be responsible for all liens and encumbrances. No security deposit from Seller as Lessee to Buyer as Lessor shall be required.

NOW, THEREFORE, in consideration of the mutual promises, and subject to the conditions set forth below, the parties now agree as follows:

1. **Purchase Price**. The total purchase price to be paid by Buyer to Seller for the purchase of the Property shall be the sum of **THREE MILLION FOUR HUNDRED THOUSAND DOLLARS ($3,400,000)** ("**Purchase Price**"). The provisions of this Agreement shall constitute joint instructions to the Title Company.

1.1 **Initial Deposit; Second Deposit**. Within three (3) business days of execution of this Agreement, Buyer shall deposit with the Escrow Holder (as defined below) **FIFTY THOUSAND DOLLARS ($50,000.00)** as an initial, refundable deposit until expiration of the

Due Diligence Period whereupon the deposit shall be nonrefundable, and applicable to the Purchase Price ("**Initial Deposit**"). On or before July 15, 2005, Buyer shall deposit no less than **ONE MILLION FOUR HUNDRED FIFTY THOUSAND DOLLARS ($1,450,000)** as a second deposit ("**Second Deposit**") with Escrow Holder. The Second Deposit and First Deposit are collectively known as "Total Deposit". The Total Deposit is non-refundable and applicable to the Purchase Price, and shall be released to Seller without further written instruction upon written demand by Seller to Escrow Holder. Buyer's signature herein is tacit agreement to this release of funds.

1.2 **Purchase Price Payment; Closing**. At Closing, Buyer shall pay in cash or certified funds payable in the form of certified check or wire transfer of funds to Escrow Holder the amount of **ONE MILLION NINE HUNDRED THOUSAND DOLLARS ($1,900,000)**, or the balance of the Purchase Price due, whichever is greater, including all costs and fees associated with the Closing ("**Balance Due**"), at which time Seller shall transfer title in Property to Buyer.

1.3 **Financing**. Buyer shall have one hundred and twenty (120) days from the day of Closing to obtain financing in the amount of the Balance Due. If Buyer has not obtained financing with the 120 day period, Buyer may request up to two (2) separate, thirty (30) day extensions which must be presented to Seller inn writing not less than ten (10) days prior to Closing. Each thirty (30) day extension shall be accompanied by a non-refundable payment of **FIVE THOUSAND DOLLARS ($5,000)**, payable to Seller, which payment is not applicable to the Purchase Price, and is not refundable under any circumstances.

2. **CLOSING; ESCROW HOLDER**.

2.1 **Escrow Holder; Deposit; Closing Date**. Escrow Holder shall cause, at Buyer's expense, a current commitment for title insurance ("**Title Commitment**") concerning the Property to be issued by First American Title Company. Terri Hovdestad, Escrow Officer, First American Title Insurance Company, 1 First American Way, Santa Ana, CA 92707, 714-800-3167 shall serve as title agent and "**Escrow Holder**" for this transaction. Buyer and Seller shall share equally all reasonable and customary escrow fees and charges. The Closing shall occur no later than at the time Buyer obtains financing and funds for the full amount of the Purchase Price, which shall be no later than ninety (90) days after Closing, unless Buyer obtains an extension as described above.. Promptly after mutual execution of this Agreement, Buyer and Seller shall open an escrow with Escrow Holder, and shall execute such instructions, as Escrow Holder may request which are not inconsistent with the provisions of this Agreement. Escrow Holder is hereby authorized and instructed to conduct the escrow in accordance with this Agreement, applicable law and custom and practice of the community in which Escrow Holder is located, including any reporting requirements of the Internal Revenue Code.

2.2 **Documents Required at or before Closing**. Seller shall deliver to Escrow Holder in time for delivery to Buyer at the Closing, an original ink signed deed duly executed by the appropriate party and in recordable form, conveying fee title to the Property to Buyer. Buyer shall deliver to Escrow Holder in time for delivery to Seller at the Closing, an original ink signed

deed duly executed by the appropriate party and in recordable form, conveying fee title to the Apartment Building to Seller. The parties shall also execute a mutually acceptable Lease based on the Terms in Recital D.

2.3 **Other Obligations at Closing**. At Closing, the parties shall execute and deliver to one another all documents set forth in this Agreement, and, in addition, such other documents as may be necessary or appropriate to accomplish in a complete and proper manner the transaction contemplated by this Agreement.

2.4 **LIQUIDATED DAMAGES**. **IN THE EVENT BUYER FAILS TO COMPLETE THE PURCHASE OF THE PROPERTY AS CONTEMPLATED HEREIN AND SELLER IS READY, WILLING AND ABLE TO CONSUMMATE THE SALE CONTEMPLATED HEREIN, BUYER AND SELLER HEREBY AGREE THAT THE DEPOSIT MADE SHALL BE RETAINED BY SELLER AS LIQUIDATED DAMAGES, WHICH IS NOT INTENDED TO BE A FORFEITURE OR PENALTY WITHIN THE MEANING OF CALIFORNIA CIVIL CODE SECTIONS 1671, 1676 AND 1677, BUT IS INTENDED TO CONSTITUTE LIQUIDATED DAMAGES TO SELLER PURSUANT TO CALIFORNIA CIVIL CODE SECTIONS 1671, 1676 AND 1677. THE PARTIES HEREBY ACKNOWLEDGE AND AGREE THAT SELLER'S ACTUAL DAMAGES, IN THE EVENT OF A MATERIAL DEFAULT HEREUNDER BY BUYER, WOULD BE EXTREMELY DIFFICULT OR IMPRACTICABLE TO DETERMINE. THEREFORE, BY PLACING THEIR INITIALS BELOW, THE PARTIES ACKNOWLEDGE THAT THE AMOUNT AND KIND OF DEPOSIT MADE HAS BEEN AGREED UPON, AFTER NEGOTIATION AND TAKING INTO CONSIDERATION ALL CIRCUMSTANCES EXISTING AS OF THE AGREEMENT DATE AS WELL AS THE RELATIONSHIP OF THE SUM TO THE RANGE OF HARM TO SELLER THAT COULD BE ANTICIPATED, AS THE PARTIES' REASONABLE ESTIMATE OF SELLER'S DAMAGES, AND SUCH SUM SHALL BE PAID TO AND RETAINED BY SELLER AS SELLER'S SOLE AND EXCLUSIVE REMEDY AGAINST BUYER, AT LAW OR IN EQUITY, IN THE EVENT OF A MATERIAL DEFAULT BY BUYER UNDER THIS AGREEMENT. SELLER HEREBY WAIVES THE PROVISIONS OF ANY APPLICABLE LAW TO THE CONTRARY. IN PLACING THEIR INITIALS BELOW, EACH PARTY SPECIFICALLY CONFIRMS THE ACCURACY OF THE STATEMENTS MADE ABOVE AND THE FACT THAT EACH PARTY WAS REPRESENTED BY COUNSEL WHO EXPLAINED THE CONSEQUENCES OF THIS LIQUIDATED DAMAGES PROVISION AT THE TIME THIS AGREEMENT WAS MADE.**

SELLER'S INITIALS: JM **BUYER'S INITIALS:**_____

3. **TITLE REPORT; TITLE**.

3.1 **Title to Property**. Seller will provide Buyer with a preliminary title report on the Property ("**Property Title Report**"), together with full legible copies of all exceptions in the Report upon opening of escrow. Seller, at its expense, shall provide good, valid and marketable

deed duly executed by the appropriate party and in recordable form, conveying fee title to the Apartment Building to Seller. The parties shall also execute a mutually acceptable Lease based on the Terms in Recital D.

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SELLER'S INITIALS:_____ **BUYER'S INITIALS:**_____

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3.1 **Title to Property**. Seller will provide Buyer with a preliminary title report on the Property ("**Property Title Report**"), together with full legible copies of all exceptions in the Report upon opening of escrow. Seller, at its expense, shall provide good, valid and marketable

title to free and clear of all liens and in a form acceptable to Buyer, as evidenced by Escrow Holder's ALTA standard policy of title insurance in the amount of the Purchase Price, showing title in the Property vested in Buyer.

4. **CLOSING COSTS.** All State, County and City transfer taxes and/or documentary transfer taxes, premium for the policy of title insurance, and all other costs and expenses of escrow including escrow fees and recording fees shall be according to the County custom of the Property's jurisdiction.

5. **BUYER'S AND SELLER'S CONDITIONS TO CLOSING.**

5.1 **Buyer's Conditions to Closing**. Buyer's obligation to close shall be conditioned on the satisfaction of only the following conditions at Closing. Buyer's review and all inspections are at Buyer's sole cost and expense. All documentation, including but not limited to reports and records supplied by Seller and Buyer's review and inspection and copying shall be strictly confidential and distribution shall be limited to Buyer's agents and representatives, legal and financial advisors, and/or third parties with an economic interest in the transaction.

A. **Due Diligence Period**. The "**Due Diligence Period**" for review of all documents shall expire **five (5) days** after Buyer's receipt of the following documents: (i) preliminary title report; (ii) survey; and (iii) phase I environmental report. Buyer acknowledges receipt of the above documents at the time of the execution of this Agreement.

B. **Financial Ability.** Buyer shall provide, upon Seller's request, written evidence from Buyer's lender or another financial institution and/or Qualified Intermediary with knowledge of Buyer's ability to purchase this Property.

C. **Deeds and Title Insurance on Property**. Buyer's receipt of Title Insurance on the Property as specified in Section 3 above.

D. **Performance by Seller**. On or before the Closing Date, Seller will have performed, satisfied and complied in all material respects with all covenants, agreements and conditions required of any of them by this Agreement.

E. **Accuracy of Seller's Warranties**. Except as otherwise permitted by this Agreement, all warranties by Seller in this Agreement, or in any written document that will be delivered to Buyer by any of them under this Agreement, must be true in all material respects on the Closing Date as though made at that time.

5.2 **Seller's Condition to Closing**. Seller's obligation to close shall be conditioned on the satisfaction of the following conditions precedent in favor of Seller at Closing:

A. **Performance by Buyer**. On or before the Closing Date, Buyer will have performed, satisfied and complied in all material respects with all covenants, agreements and conditions required by this Agreement.

6. **REPRESENTATIONS AND WARRANTIES OF SELLER**. As a material inducement to Buyer to enter into this Agreement and to consummate the transactions contemplated hereby, Seller makes the following representations and warranties to Buyer:

6.1 **Organization and Qualification**. Tibarom Inc., is a validly existing corporation and in good standing under the laws of the State of Delaware and is qualified to do business in the State of Nevada and has the power and authority to lease and operate its business at the Property.

6.2 **Authority Relative to this Agreement**. Seller has the power and authority to enter into this Agreement and this Agreement and all agreements, instruments of transfer, documents and deeds to be executed in connection with the Closing of this transaction, have been or will be, as applicable, duly executed and delivered by Seller and constitute valid and binding obligations of Seller, enforceable against Seller, in accordance with their terms. Seller has the right, power, legal capacity and authority to enter into and perform its respective obligations under this Agreement, and except as otherwise provided for or disclosed in this Agreement, no approvals or consents of any persons other than Seller are required. The execution and delivery of this Agreement by Seller has been duly authorized by all necessary action on the part of Seller.

6.3 **Title to Assets and the Property**. Except as otherwise provided for or disclosed in this Agreement, Seller has, or will at the time of the Closing have, good and marketable title to the Property. The Property is free and clear of restrictions on or conditions to transfer or assignment, and are or will be as of the Closing Date free and clear of mortgages, liens, mechanics' or materialmen's lien rights, pledges, charges, monetary encumbrances (other than bonds or improvement assessments as provided elsewhere in this Agreement), equities and claims.

6.4 **Buyer's Acceptance of the Property.** Buyer represents to Seller that it has made a visual inspection of the Property. Buyer acknowledges that it has the obligation to conduct studies and investigations of the Property, at its sole cost and expense, for the purposes of becoming familiar with the condition of the Property to the extent it deems necessary.

6.5 **Due Diligence Data**. All due diligence documentation produced by Seller is true and accurate.

6.6 **Litigation**. There is no pending, or, to the best of Seller's knowledge, threatened, suit action, arbitration, or legal, administrative, or other proceeding, or governmental investigation against or affecting the Property.

6.7 **Compliance with Laws and Regulations**. To the best of Seller's present knowledge, the Property is in compliance with all material requirements of law, Federal, State and local, and all material requirements of all governmental bodies or agencies having jurisdiction over the Property. There are no present disputes about taxes of any nature concerning the Property. The Seller has not received any notice, not heretofore complied with,

from any Federal, State or municipal authority or any insurance or inspection body that the Property fails to comply with any applicable law, ordinance, regulation, building or zoning law, or requirement of any public body or authority.

6.8 **Valid and Binding Agreement**. The representations, warranties, and covenants made under this Agreement constitute valid and binding obligations of Seller and are enforceable against Seller.

6.9 **Permits**. Within a commercially reasonable period of time, Seller shall have made application for all necessary grading, building and other permits from all the appropriate governmental agencies for the Project.

6.10 **Construction Indemnities**. Seller shall hold harmless Buyer from and against any future claims whether direct or indirect arising out of or in any way related to the construction of the Project. All construction shall meet all governmental rules and regulations currently in effect on the date Seller obtains the certificate of occupancy for the Project. Seller shall specifically obtain Nevada State Certification for the modular building construction. Seller shall perform or cause Seller's contractor to perform all work in a good and workmanlike manner.

7. **REPRESENTATIONS AND WARRANTIES OF BUYER**. As a material inducement to Seller to enter into this Agreement and to consummate the transactions contemplated hereby, Buyer makes the following representations and warranties to Seller:

7.1 **Organization and Qualification**. The Buyer has the power and authority to own this real property.

7.2 **Authority Relative to this Agreement**. This Agreement and all agreements, instruments of transfer, documents and deeds to be executed in connection with the closing of this transaction, have been or will be, as applicable, duly executed and delivered by Buyer and constitute valid and binding obligations of Buyer, enforceable against Buyer, in accordance with their terms. Seller has the right, power, legal capacity and authority to enter into and perform its respective obligations under this Agreement, and except as otherwise provided for or disclosed in this Agreement, no approvals or consents of any persons other than Buyer are necessary in connection with it.

7.3 **Due Diligence Data**. All due diligence documentation produced by Buyer on the Apartment Building is true and accurate.

7.4 **Valid and Binding Agreement**. The representations, warranties, and covenants made under this Agreement constitute valid and binding obligations of Buyer and are enforceable against Buyer.

8. **CONFIDENTIALITY**. Buyer and Seller shall keep this Agreement and any and all information, materials and documentation, including but not limited to financial statements,

reports, records and asset lists, and information submitted by any party hereto to the other, whether submitted pursuant to the terms of this Agreement, or otherwise, or otherwise discovered in furtherance of this Agreement, confidential and make no public announcement of its content, nor shall either party divulge, communicate, disclose or use to the detriment of the other party, or for the benefit of any other person or persons, such information, documents or materials in any manner nor use such information or materials for any purposes other than as set forth in this Agreement. Disclosure to each party's respective agents, representatives, attorneys, accountants, lenders and/or third parties with an economic interest in the transaction is exempt.

9. **ADDITIONAL AGREEMENTS**.

9.1 **Fees and Expenses**. Buyer, on the one side, and Seller, on the other side, shall each bear their own expenses for legal and accounting fees, costs and expenses incurred in negotiating and preparing this Agreement, negotiating and preparing all of the other paperwork in connection with this Agreement, and carrying out the transactions contemplated by this Agreement.

9.2 **Broker's Fees**. The Buyer is represented by Sperry Van Ness ("**Sperry Van Ness**"). The commission amount shall not exceed three (3) percent of the Purchase Price and shall be paid to Sperry Van Ness at Closing. Seller shall pay all commissions associated with this transaction at the time the Purchase Price is fully funded.

9.3 **Further Acts**. The parties agree to execute and deliver all documents and perform all further acts that may be reasonably necessary to carry out the provisions of this Agreement and to cooperate with each other in connection with the foregoing.

9.4 **Controlling Law**. This Agreement and all questions relating to its validity, interpretation, performance and enforcement (including, without limitation, provisions concerning limitations of actions), shall be governed by and construed in accordance with the laws of State of Nevada.

9.5 **Attorneys' Fees and Costs**. If any party hereto institutes any legal action or proceeding arising out of or related to this Agreement the prevailing party shall be entitled to reasonable attorneys' fees and expenses, and all other recoverable costs and damages, including any and all such costs on appeal.

9.6 **Parties in Interest**. This Agreement shall be binding upon and inure solely to the benefit of each party hereto and their respective successors and permitted assigns, and nothing in this Agreement, express or implied, is intended to confer upon any other person any right or remedies of any nature whatsoever under or by reason of this Agreement.

9.7 **Assignment**. This Agreement (including the other documents and instruments referred to herein) may not be assigned without the written consent of each other party hereto, which consent shall not be unreasonably withheld.

9.8 **Provisions Separable**. The provisions of this Agreement are independent of and separable from each other, and no provision shall be affected or rendered invalid or unenforceable by virtue of the fact that for any reason any other or others of them may be invalid or unenforceable in whole or in part.

9.9 **Integration**. This Agreement contains the entire understanding among the parties hereto with respect to the subject matter hereof, and except as herein contained supersedes all prior and contemporaneous agreements and understandings, inducements or conditions, express or implied, oral or written. This Agreement may not be modified or amended other than by an agreement in writing signed by each of the parties named on the first page of this Agreement.

9.10 **Time is of Essence**. Time is of the essence of this Agreement, all documents and all transactions contemplated herein.

9.11 **Notices**. All notices, requests, demands and other communications required or permitted under this Agreement shall be in writing and shall be deemed to have been duly given, made and received only when (1) delivered (personally, by courier service such as Federal Express, or by other messenger); (2) if transmitted by facsimile transmission, then on the date of transmission as confirmed by the facsimile equipment the recipient location; provided that if transmission is after 5:00 p.m. on any day, then notice shall not be deemed given until the following business day; or (3) or the date mailed, when deposited in the United States mails, certified mail, postage prepaid, return receipt requested, addressed as set forth below:

TO: **Seller:**

Paul Morabito
TIBAROM INC.
668 North Pacific Coast Highway, Suite 517
Laguna Beach, California 92651
P: (949) 464-9251
F: (949) 464-9261

with a copy to:

Jeffrey Eric Langan, Esq.
Sr. Vice President and General Counsel
555 West Fifth Street, 30th Floor
Los Angeles, California 90013
P: (213) 996-8340
F: (213) 996-8341

TO: Buyer:
Edward C. and Janet A. Wooley
41 Peralta Avenue
Los Gatos, California 95030
P: (408) 656-3291

Notice by mail shall be by airmail if posted outside of the continental United States. Any party may alter the address to which communications or copies are to be sent by giving notice of such change of address in conformity with the provisions of this Section for the giving of notice.

9.12 **Execution in Counterparts and Via Facsimile**. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original as against any party whose signature appears thereon, and all of which shall together constitute one and the same instrument. This Agreement shall become binding when one or more counterparts hereof, individually or taken together, bear the signatures of all of the parties reflected hereon as the signatories. A signature on this Agreement sent via facsimile shall be deemed an original signature for the purposes of enforcement.

9.13 **Section Headings**. The section headings in this Agreement are for convenience only; they form no part of this Agreement and shall not affect their interpretation.

9.14 **Number of Days**. In computing the number of days for purposes of this Agreement, all days shall be counted including Saturdays, Sundays and holidays; provided, however, that if the final day of any time period falls on a Saturday, Sunday or holiday on which federal banks are or may elect to be closed, then the final day shall be deemed to be the next day which is not a Saturday, Sunday or such holiday.

9.15 **Construction of Agreement**. This Agreement has been prepared, and negotiations in connection with it have been conducted, by the joint efforts of Seller and Buyer. This Agreement is to be construed simply and fairly, and not strictly for or against any of the parties.

9.16 **Further Acts**. The parties agree to execute and deliver all documents and perform all further acts that may be reasonably necessary to carry out the provisions of this Agreement.

9.17 **Tax Deferred Exchange**. Seller and Buyer are aware and acknowledge that Buyer may be purchasing the Property and Seller may be selling the Property as part of a transaction to qualify as a tax-deferred exchange pursuant to section 1031 of the Internal Revenue Code of 1986, as amended. Buyer and Seller agree to use their best efforts and cooperate in completing any such exchange, including executing and acknowledging all documents reasonably requested by the other party (subject to the reasonable approval of the parties' respective counsel), at no additional liability or cost to the other party. Buyer and Seller shall indemnify and hold one another harmless from any and all claims, liabilities, and costs resulting from each such party's exchange transaction. Seller makes no legal or tax representations regarding Buyer's exchange.

[SIGNATURES APPEAR ON THE FOLLOWING PAGE]

IN WITNESS WHEREOF, the parties have executed this Agreement effective as of the date first written above.

SELLER:

TIBAROM INC.,
a Delaware corporation

By: _____
Jeffrey E. Langan
Sr. Vice President and General Counsel

BUYER:

_____
Edward C. Wooley

_____
Judith A. Wooley

Exhibit "A"

All that real property situated in Carson City, State of Nevada, described as follows:

Parcel 2 of Parcel Map No. 2566, filed in the office of the Recorder of Carson City, State of Nevada, on June 30, 2005, in Book 9, page 2566, as File Number 338929

Exhibit "B"
Lease

F I L E D
Electronically
CV14-01712
2016-08-30 11:18:54 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5685608 : tbritton

Exhibit 2

Exhibit 2

LEASE AGREEMENT

THIS LEASE AGREEMENT (this "Lease") is made as of December ___, 2005 by and between [**EDWARD C. WOOLEY** and **JUDITH A. WOOLEY**], a _____ _____ ("Lessor"), whose address is _____, and **BERRY-HINCKLEY INDUSTRIES**, a Nevada corporation ("Lessee"), whose address is 425 Maestro Drive, Reno, NV 89511

In consideration of the mutual covenants and agreements herein contained, Lessor and Lessee hereby covenant and agree as follows:

1. **Certain Defined Terms**. Capitalized terms not defined herein shall have the meanings set forth in Exhibit A hereto.

2. **Lease of Property; Use; Possession**. In consideration of the Rentals and other Monetary Obligations to be paid by Lessee and of the other terms, covenants and conditions on Lessee's part to be kept and performed, Lessor hereby leases to Lessee, and Lessee hereby takes and leases, the Property (as such term is defined in Exhibit A attached hereto and which Property is located at the address set forth in Exhibit B attached hereto and situated on the real property legally described in Exhibit B attached hereto), subject to the Permitted Encumbrances, all Legal Requirements (including any existing violation thereof), and the condition of the Property as of the Effective Date; *provided, however*, that the recital of the Permitted Encumbrances herein shall not be construed as a revival of any Permitted Encumbrance which may have expired or been terminated. During the Lease Term, the Property shall be used solely for the operation of a Permitted Facility, and related purposes such as ingress, egress and parking.

To the maximum extent permitted by law, Lessee waives the implied warranty of suitability of the Property and Lessee acknowledges that it has accepted the Property "as is," in its current condition, with no representations, warranties or covenants, express or implied, on the part of the Lessor with respect to condition of the same or the suitability of the Property for Lessee's intended use.

3. **Lease Term; Extension**. The initial term of this Lease ("Initial Term") shall commence May 1, 2006 ("Effective Date") and shall expire at midnight on April 30, 2006 ("Expiration Date"), unless terminated sooner as provided in this Lease and as may be extended as provided herein. The time period during which this Lease shall actually be in effect, including any Extension Term, is referred to herein as the "Lease Term." Lessee shall have the right and option (each, an "Extension Option") to extend the Initial Term for two (2) additional successive periods of five (5) years each (each, an "Extension Term"), pursuant to the terms and conditions of this Lease then in effect. Lessee may only exercise the Extension Options by giving written notice thereof to Lessor of its election to do so first, no later than two hundred forty (240) days prior to the Expiration Date and two hundred forty (240) days prior to the immediately preceding Extension Term, as the case may be. If written notice of the exercise of any Extension Option is not received by Lessor by the applicable dates described above, then this Lease shall terminate on the last day of the Initial Term or, if applicable, the last day of the Extension Term then in effect.

4. **Rental and Other Monetary Obligations.**

A. *Base Monthly Rental.* During the Initial Term, on or before the first day of each calendar month, Lessee shall pay in advance the Base Monthly Rental; *provided, however*, if the Effective Date is a date other than the first day of the month, Lessee shall pay to Lessor (or any other party designated by Lessor) on the Effective Date the Base Monthly Rental prorated by multiplying the Base Monthly Rental by a fraction, the numerator of which is the number of days remaining in the month (including the Effective Date) for which Rental is being paid, and the denominator of which is the total number of days in such month. During the Extension Terms, if any, Lessee shall pay the Rental (including the Base Monthly Rental) in the manner set forth in this Section 4. Unless otherwise specifically stated to the contrary herein, Lessee shall perform all its obligations under this Lease at its sole cost and expense and shall pay all Rental and any other Monetary Obligation due hereunder when due and payable, without notice or demand.

B. *Adjustments.* On the first Adjustment Date and on each Adjustment Date thereafter, the Base Annual Rental shall increase by an amount equal to the Rent Adjustment. The "Rent Adjustment" shall be an amount equal to two percent (2%) of the Base Annual Rental in effect immediately prior to the applicable Adjustment Date. The Adjustment Date shall be on the annual anniversary of the Effective Date.

C. *Additional Rental.* Lessee shall pay and discharge, as additional rental ("Additional Rental"), all sums of money required to be paid by Lessee under this Lease which are not specifically referred to as Base Annual Rental or Base Monthly Rental. Lessee shall pay and discharge any Additional Rental when the same shall become due, provided that amounts which are billed to Lessor or any third party, but not to Lessee, shall be paid within five (5) days after Lessor's demand for payment thereof or, if later, when the same are due. In no event shall Lessee be required to pay to Lessor any item of Additional Rental that Lessee is obligated to pay and has paid to any third party pursuant to any provision of this Lease.

D. *Payment of Rental and Other Monetary Obligations.* All Rental and other Monetary Obligations which Lessee is required to pay hereunder shall be the unconditional obligation of Lessee and shall be payable in full when due without any setoff, abatement, deferment, deduction or counterclaim whatsoever, except as set forth herein. All payments of Base Monthly Rental and any other Monetary Obligations payable to Lessor shall be remitted to Lessor at Lessor's address set forth in the first paragraph of this Lease or such other address as Lessor may designate pursuant to Section 24 hereof.

E. *Late Payment Charge.* Lessee acknowledges that late payment by Lessee to Lessor of Rental will cause Lessor to incur costs not contemplated by this Lease, the exact amount of such costs being extremely difficult and impracticable to fix in advance. Such costs include, without limitation, processing and accounting charges, and late charges that may be imposed on Lessor by the terms of any encumbrance and note secured by any encumbrance covering the Property. Therefore, if any payment which is

required to be made by Lessee to Lessor pursuant to the terms of this Lease is made more than ten (10) days after the due date thereof, then Lessee shall pay to Lessor, as a late payment charge, five percent (5%) of the amount of the delinquent payment. Additionally, if any payment which is required to be made by Lessee pursuant to the terms of this Lease is made more than ten (10) days after the due date thereof, such payment shall bear interest at the Default Rate until received by Lessor. The late payment charge and default interest shall be paid to Lessor at the time of payment of the delinquent amount. The late payment charge and the default interest charge shall compensate Lessor for the expenses incurred by Lessor in financing, collecting and processing the late payment. The parties agree that the late charge and the default interest charge represent a fair and reasonable estimate of the costs that Lessor will incur by reason of late payment by Lessee.

5. **Gaming**. Lessor hereby conditionally assigns to Lessee all leases, written or oral, and all agreements for use or occupancy of the Property together with any and all extensions and renewals thereof and any and all further leases, subleases, lettings or agreements (including subleases thereof and tenancies following attornment) upon or covering the use or occupancy of the Property all of which leases, agreements, subleases and tenancies are herein sometimes collectively referred to as the "Assigned Leases"; (ii) the immediate and continuing right to collect and receive all of the rents, income, receipts, revenues, issues and profits now due or which may become due or which may now or hereafter become due from or out of the Assigned Leases or any part thereof, including, but not limited to, security deposits, minimum rents, additional rents, parking rents, deficiency rents and liquidated damages following default, any premium payable by any tenant upon the exercise of a cancellation privilege contained in its Lease; all proceeds payable under any policy of insurance covering loss of rents resulting from untenantability caused by destruction or damage to the Property; any and all rights and claims of any kind which Lessor has or hereafter may have against the tenants under the Assigned Leases and any subtenants and other occupants of the Property; any award granted Lessor after the date hereof in any court proceeding involving any tenant in any bankruptcy, insolvency or reorganization proceedings in any state or federal court and any and all payments made by any tenant in lieu of rent (any and all such moneys, rights and claims identified in this paragraph are herein sometimes referred to as the "Rents" and sometimes as the "Rent"); and (iii) all of the rights, powers and privileges of Lessor (A) to accept prepayment of more than one (1) monthly installment of the Rent thereunder, and (B) except with respect to the Assigned Lease, (I) to cancel, terminate or accept the surrender of any Assigned Lease, and (II) to amend, modify or abridge any of the terms, covenants or conditions of any Assigned Lease. The assignment contained in this Section 5 and Lessee's interest in the Assigned Leases shall become void and of no further force or effect upon the expiration or early termination of this Lease and upon such event, Lessor shall be the sole party with any interest as a landlord or lessor in the Assigned Leases. Furthermore, Lessee shall have no right to collect any amounts under the Assigned Leases upon the occurrence and continuance of an Event of Default and all such amounts shall be paid to Lessor during any such period.

6. **Nevada Gaming Control Board.** Lessor will follow all laws of the State of Nevada and cooperate with WGI in making application to the Nevada Gaming Control Board as may be required.

7. **Rentals To Be Net to Lessor**. The Base Annual Rental payable hereunder shall be net to Lessor, so that this Lease shall yield to Lessor the Rentals specified during the Lease Term, and all Costs and obligations of every kind and nature whatsoever relating to the Property shall be performed and paid by Lessee, including but not limited to all impositions, operating charges, maintenance charges, construction costs and any other charges, costs and expenses now existing or that arise or may be contemplated under the Permitted Encumbrances or otherwise, all maintenance and repair expenses, all utility expenses, all Taxes, all premiums for insurance required to be maintained by Lessee pursuant to the terms hereof and all other expenses, charges, assessments and costs associated with the Property or otherwise provided to be paid by Lessee pursuant to the terms of this Lease. All such charges, costs and expenses shall constitute Additional Rental and upon the failure of Lessee to pay any of such costs, charges or expenses, Lessor shall have the same rights and remedies as otherwise provided in this Lease for the failure of Lessee to pay Base Annual Rental. It is the intention of the parties except as expressly provided herein that this Lease shall not be terminable for any reason by Lessee, and that Lessee shall in no event be entitled to any abatement of, or reduction in, Rental payable under this Lease, except as otherwise expressly provided herein. Any present or future law to the contrary shall not alter this agreement of the parties.

8. **Taxes and Assessments**. Lessee shall pay, prior to the earlier of delinquency or the accrual of interest on the unpaid balance, one hundred percent (100%) of the following (collectively, "Taxes"): all taxes and assessments of every type or nature assessed against or imposed upon the Property or Lessee during the Lease Term, including without limitation, all ad valorem taxes, assessments and special assessments upon the Property or any part thereof and upon any personal property, trade fixtures and improvements located on the Property, whether belonging to Lessor or Lessee, or any tax or charge levied in lieu of such taxes and assessments; all taxes, charges, license fees and or similar fees imposed by reason of the use of the Property by Lessee; and all excise, transaction, privilege, license, sales, use and other taxes upon the Rental or other Monetary Obligations hereunder, the leasehold estate of either party or the activities of either party pursuant to this Lease, and all interest, surcharges or service or other fees payable in connection with the foregoing.

Within thirty (30) days after each tax and assessment payment is required by this Section to be paid and upon request of Lessor, Lessee shall, upon prior written request of Lessor, provide Lessor with evidence reasonably satisfactory to Lessor that such payment was made in a timely fashion. Lessee may, at its own expense, contest or cause to be contested by appropriate legal proceedings conducted in good faith and with due diligence, any above-described item or lien with respect thereto, including, without limitation, the amount or validity or application, in whole or in part, of any such item, provided that (A) neither the Property nor any interest therein would be in any danger of being sold, forfeited or lost by reason of such proceedings, (B) no monetary Event of Default has occurred, (C) Lessee shall promptly provide Lessor with copies of all notices received or delivered by Lessee and filings made by Lessee in connection with such proceeding, and (D) Lessee shall indemnify and hold Lessor harmless against any loss, Costs or damages arising from or related to such contest.

If Lessee shall fail to pay any Taxes when due and before any delinquency, penalty or interest is imposed on such Taxes, Lessor shall have the right to pay the same after notice to

Lessee, in which case Lessee shall repay in full such amount to Lessor with Lessee's next Base Monthly Rental installment together with interest at the Default Rate.

9. **Utilities.** Lessee shall contract, in its own name, for and pay when due (and hold Lessor free and harmless from) all charges for the connection and use of water, gas, electricity, telephone, garbage collection, sewer use and other utility services supplied to the Property during the Lease Term. All utility charges, assessments and fees for the last year of the Lease shall be prorated as of the termination date of this Lease. No full or partial utility deprivation including, but not limited to, blackout, brownout, or rationing, nor any loss of or damage to improvements related to disruption or failure of any utility service shall give rise to any abatement of Rentals nor give rise to any right of Lessee to offset Rentals or to terminate the Lease, unless caused by the gross negligence or willful misconduct of Lessor or its agents, employees or contractors (but not of any other tenants or occupants of the Property). Lessor shall reasonably cooperate with Lessee, but without out-of-pocket expense to Lessor, in Lessee's efforts to restore utility service to the Property; provided, however, that if the utility service was disrupted due to Lessor's gross negligence or willful misconduct, then the cost of such restoration shall be borne by Lessor.

10. **Insurance.** Throughout the Lease Term, Lessee shall maintain, at its sole expense, the following types and amounts of insurance:

A. Insurance against loss or damage to the Property and all buildings and improvements thereon under an "all risk" insurance policy, which shall include coverage against all risks of direct physical loss, including loss by fire, lightning, and other risks normally included in the standard ISO special form (which shall include coverage for all risks commonly insured for properties similar to the Property in the Reno, Nevada area, including insurance coverage for damage caused by earthquake, flood, tornado, windstorm and other disasters for which insurance is customarily maintained for similar commercial properties). Such insurance shall be in amounts sufficient to prevent Lessor from becoming a co-insurer under the applicable policies, and in any event, after application of deductible, in amounts not less than 100% of the full insurable replacement cost. Such insurance shall contain an agreed valuation provision in lieu of any co-insurance clause, an increased cost of construction endorsement, debris removal coverage and a waiver of subrogation endorsement in favor of Lessor. While any portion of the improvements on the Property is being rebuilt on the Land, Lessee shall provide such property insurance in builder's risk completed value form, including coverage available on the so-called "all-risk" non-reporting form of policy in an amount equal to 100% of the full insurable replacement value of the improvements on the Property or such portion as is being rebuilt. The insurance policy shall insure Lessee as loss payee. No parties other than Lessor, Lessor's Lender and Lessee may be named as insureds or loss payees on such property insurance policy.

B. Commercial general liability insurance, including products and completed operation liability, covering Lessor and Lessee against bodily injury liability, property damage liability and personal and advertising injury, liquor liability coverage (to the extent liquor is sold or manufactured at the Property), garage liability coverage including without limitation any liability arising out of the ownership, maintenance, repair, condition or operation of the Property or adjoining ways, streets, parking lots or

sidewalks. Such insurance policy or policies shall contain a broad form contractual liability endorsement under which the insurer agrees to insure Lessee's obligations under Section 15 hereof to the extent insurable, and a "severability of interest" clause or endorsement which precludes the insurer from denying the claim of Lessee, Lessor or Lessor's Lender because of the negligence or other acts of the other, shall be in amounts of not less than $2,000,000 per occurrence for bodily injury and property damage, and $2,000,000 general aggregate per location, or such higher limits as Lessor may reasonably require from time to time or as may be required by the Permitted Encumbrances, and shall be of form and substance satisfactory to Lessor.

C. Workers' compensation insurance in the statutorily mandated limits covering all persons employed by Lessee on the Property or any persons employed by Lessee in connection with any work done on or about any Property for which claims for death or bodily injury could be asserted against Lessor, Lessee or the Property, together with Employers Liability Insurance with limits of not less than $100,000 per accident or disease and $500,000 aggregate by disease.

D. **Rental value insurance, equal to 100% of the Base Annual Rental (as may adjusted hereunder) for a period of not less than twelve (12) months; which insurance shall be carved out of Lessee's business interruption coverage for a separate rental value insurance payable to Lessor, or if rental value insurance is included in Lessee's business interruption coverage, the insurer shall provide priority payment to any Rental obligations, and such obligations shall be paid directly to Lessor. Such insurance is to follow form of the real property "all risk" coverage and is not to contain a co-insurance clause.**

E. Comprehensive Boiler & Machinery Insurance against loss or damage from explosion of any steam or pressure boilers or similar apparatus, if any, located in or about the Property in an amount not less than the actual replacement cost of the Property. Such insurance should be in an amount of the lesser of 25% of the 100% replacement cost or $5,000,000.00.

All insurance policies shall:

(i) Provide (1) for a waiver of subrogation by the insurer as to claims against Lessor, Lessor's Lenders and their employees, officers and agents, (2) that the insurer shall not deny a claim and that such insurance cannot be unreasonably cancelled, invalidated or suspended on account of the conduct of Lessee, its officers, directors, employees or agents, or anyone acting for Lessee or any sublessee or other occupant of the Property, and (3) that any losses otherwise payable thereunder shall be payable notwithstanding any act or omission of Lessor, Lessor's Lenders or Lessee which might, absent such provision, result in a forfeiture of all or a part of such insurance payment;

(ii) Be primary and provide that any "other insurance" clause in the insurance policy shall exclude any policies of insurance maintained by Lessor and

the insurance policy shall not be brought into contribution with insurance maintained by Lessor;

(iii) intentionally omitted

(iv) Contain a standard non-contributory mortgagee clause or endorsement in favor of any Lessor's Lender designated by Lessor;

(v) Provide that the policy of insurance shall not be terminated, cancelled or amended without at least thirty (30) days' prior written notice to Lessor and to any Lessor's Lender covered by any standard mortgagee clause or endorsement;

(vi) Provide that the insurer shall not have the option to restore the Property if Lessor elects to terminate this Lease in accordance with the terms hereof;

(vii) Be in amounts sufficient at all times to satisfy any coinsurance requirements thereof;

(viii) Except for workers' compensation insurance referred to in Section 10.C above, name Lessor and any Lessor Affiliate requested by Lessor, as an "additional insured" (and, with respect to any Lessor's Lender designated by Lessor, as an "additional insured mortgagee") with respect to general liability insurance, and as a "named insured" with respect to real property and "loss payee" with respect to all real property and rent value insurance, as appropriate and as their interests may appear;

(ix) Be evidenced by delivery to Lessor and any Lessor's Lender designated by Lessor of an Acord Form 28 for property coverage (or any other form requested by Lessor) and an Acord Form 25 for liability, workers' compensation and umbrella coverage (or any other form requested by Lessor); provided that in the event that either such form is no longer available, such evidence of insurance shall be in a form reasonably satisfactory to Lessor and any lender designated by Lessor; such certificates of insurance shall be delivered to Lessor prior to the Effective Date; and

(x) Be issued by insurance companies licensed to do business in the states where the Property is located and which are rated A:VIII or better by Best's Insurance Guide or are otherwise approved by Lessor.

It is expressly understood and agreed that (I) if any insurance required hereunder, or any part thereof, shall expire, be withdrawn, become void by breach of any condition thereof by Lessee, or become void or in jeopardy by reason of the failure or impairment of the capital of any insurer, Lessee shall immediately obtain new or additional insurance reasonably satisfactory to Lessor and any lender designated by Lessor; (II) the foregoing minimum limits of insurance coverage shall not limit the liability of Lessee for its acts or omissions as provided in this Lease;

and (III) Lessee shall procure policies for all insurance for periods of not less than one year and shall provide to Lessor and any servicer or lender of Lessor certificates of insurance or, upon Lessor's request, duplicate originals of insurance policies evidencing that insurance satisfying the requirements of this Lease is in effect at all times.

Lessee shall pay as they become due all premiums for the insurance required by this Section 10. In the event that Lessee fails to comply with any of the foregoing requirements of this Section 10 within ten (10) days of the giving of written notice by Lessor to Lessee, Lessor shall be entitled to procure such insurance. Any sums expended by Lessor in procuring such insurance shall be Additional Rental and shall be repaid by Lessee, together with interest thereon at the Default Rate, from the time of payment by Lessor until fully paid by Lessee immediately upon written demand therefor by Lessor.

Anything in this Section 10 to the contrary notwithstanding, any insurance which Lessee is required to obtain pursuant to this Section 10 may be carried under a "blanket" policy or policies covering other properties or liabilities of Lessee provided that such "blanket" policy or policies that otherwise comply with the provisions of this Section 10 and specify the location of the Property.

11. Intentionally Omitted

12. **Compliance With Laws, Restrictions, Covenants, Encumbrances and Agreements.** It is expressly understood and agreed that the obligations of Lessee under this Section shall survive the expiration or earlier termination of this Lease for any reason.

A. *Legal and Gaming Law Compliance.* Lessee's use and occupation of the Property, the use and occupation of the Property by any other person (including but not limited to any subtenants and WGI) and the condition of the Property, shall, at Lessee's sole cost and expense, comply with all Legal Requirements (including without limitation the Americans with Disabilities Act and all Legal Requirements related to gaming operations and the sales of tobacco and liquor on the Property). Lessee shall promptly file, or cause to be filed, and provide to Lessor any notices, reports or other filings that Lessee or any other Person is required to file or provide to any Governmental Authorities regarding the business operations conducted on or from the Property, including but not limited to those described in Subsection D(iii) hereof and those required by Governmental Authorities with respect to gaming operations and the sales of tobacco and liquor on the Property, including any filings required to be made in connection with the change of ownership or control of Lessee and, within fifteen (15) days of Lessee's receipt of written notice from Lessor of any planned or actual change in the ownership or control of Lessor or any planned or actual change in the ownership of the Property.

B. *Acts Resulting in Increased Insurance Rates.* Lessee will use its commercially reasonable efforts to prevent any act or condition to exist on or about the Property which will materially increase any insurance rate thereon, except when such acts are required in the normal course of its business and Lessee shall pay for such increase. Lessee shall comply with all orders and directives of any insurance companies issuing liability, fire, or extended coverage insurance pursuant to Section 10 hereof, and Lessee

shall not do, bring, or keep anything in or about the Property that will cause a cancellation of any insurance covering the Property.

C. *Prevention of Nuisance.* Lessee shall not commit nor cause or permit to be committed any public or private nuisance on the Property.

D. *Environmental.*

(i) *Covenants.* All uses and operations on or of the Property, including the use and operation of UST's on the Property, whether by Lessee or any other Person, shall be in compliance with all Environmental Laws and permits issued pursuant thereto. Lessee shall keep the Property or cause the Property to be kept free and clear of all Environmental Liens, whether due to any act or omission of Lessee or any other Person. Lessee hereby represents and warrants that Lessee shall not install and shall not permit any person to install any asbestos containing materials ("ACM") or materials or equipment containing polychlorinated biphenyl ("PCBs") in the Property, and to the extent any ACM, PCBs or other Hazardous Materials are on or in the Property, the same shall be maintained, stored and used in accordance with all Legal Requirements.

(ii) *Notification Requirements.* Lessee shall immediately notify Lessor in writing upon Lessee obtaining actual knowledge of (1) any Releases or Threatened Releases in, on, under or from the Property other than in Permitted Amounts, or migrating towards any of the Property; (2) any non-compliance with any Environmental Laws related in any way to any of the Property; (3) any actual or potential Environmental Lien; (4) any required or proposed Remediation of environmental conditions relating to any of the Property required by applicable Governmental Authorities; and (5) any written or oral notice or other communication which Lessee becomes aware from any source whatsoever (including but not limited to a Governmental Authority) relating in any way to Hazardous Materials, Regulated Substances or USTs, or Remediation thereof at or on the Property, other than in Permitted Amounts, possible liability of any Person relating to the Property pursuant to any Environmental Law, other environmental conditions in connection with the Property, or any actual or potential administrative or judicial proceedings in connection with anything referred to in this Subsection D.

(iii) *Reports and Investigations.* Lessee shall promptly supply Lessor with copies of all reports of any testing of the Property conducted by or at the request of Lessor or any Governmental Authorities and all submissions by Lessee to any Governmental Authority concerning environmental matters, the USTs, or Hazardous Materials. Lessee shall furnish to Lessor certificates of enrollment issued by the State of Nevada, Division of Environmental Projection, for each UST at the Property no later than October 30 of each year, and gasoline storage tank permits issued by the Department of Air Quality Management of the County in which the Property is located with respect to each UST on the Property no later than May 5 of each year, and such other certificates or permits as may be issued

or required by any other Governmental Authority; all of the foregoing shall evidence continuing compliance of each UST on the Property with all applicable Legal Requirements. Additionally, upon Lessor's reasonable request in the event that Lessor reasonably suspects that Contamination (as hereafter defined) may have occurred or be occurring at the Property, Lessee agrees to perform, at Lessee's sole expense, an environmental assessment of the Property, including soil borings, to confirm whether such Contamination is occurring. Additionally, at least ninety (90) days prior to the expiration of the Lease Term, Lessee agrees to perform an environmental assessment of the Property in order to define the nature and extent of Contamination, if any.

(iv) *Indemnification.* Lessee shall indemnify, defend, protect and hold each of the Indemnified Parties free and harmless from and against any and all Losses, arising from or caused in whole or in part, directly or indirectly, by any of the following, unless arising from or caused by the gross negligence or willful misconduct of the Indemnified Party requesting indemnification: (a) the use, storage, transportation, disposal, release, discharge or generation of Hazardous Materials to, in, on, under or about the Property (whether occurring before or after the date hereof) (any of the foregoing in violation of Legal Requirements is "Contamination"), including diminution in value of the Property; and (b) the cost of any required or necessary repair, remediation, cleanup or detoxification and the preparation of any closure or other required plans or reports, whether such action is required or necessary prior to or following transfer of title to the Property (such acts are sometimes referred to herein as "Corrective Action"), and (c) Lessee's failure to comply with any Legal Requirements. Lessee's obligations to perform Correction Action shall include, without limitation, and whether foreseeable or unforeseeable, all cost of any investigation (including consultants and attorneys fees and testing) required or necessary repair, remediation, restoration clean up, detoxification or decontamination of the Property and the preparation and implementation of any closure, remedial action or other required plans in connection therewith, and shall survive the expiration or earlier termination of the Term of this Lease. This agreement to indemnify, defend, protect and hold harmless each of the Indemnified Parties shall be in addition to any other obligations or liabilities Lessee may have to Lessor or the Indemnified Parties, if any, at common law under all statutes and ordinances or otherwise and survive the termination of the Lease.

In the event that Lessee is required to perform Corrective Action to address any Contamination, Lessee shall perform such activities in a diligent manner. In the event that Lessee has not completed its Corrective Action (if necessary), as required herein, by the expiration of the Lease Term, Lessor shall grant Lessee, and its consultants, contractors and agents a revocable license, at no cost to Lessee except as set forth in the succeeding sentence, to enter upon the Property from and after the date of expiration of the Lease Term to conduct Corrective Action and to place and remove all necessary equipment and improvements on the Property sufficient to satisfy the requirements of all Governmental Authorities regarding the Contamination. If such post-expiration

Corrective Action will unreasonably interfere with a reasonably foreseeable intended commercial use of the Property (i.e., if Lessor cannot reasonably lease the Property for reasonable commercial uses at reasonable market rents), the Lease Term shall be extended until sixty (60) days after the Corrective Action has been performed such that post-expiration Corrective Action by Lessee no longer unreasonably interferes with a reasonably foreseeable commercial use of the Property, and Lessee agrees to keep Lessor apprised of the anticipated completion date of the Corrective Action.

E. *Intentionally Omitted..*

F. *Dealer Requirements.* In addition to the requirements set forth in this Lease, Lessee, in its use, occupancy and maintenance of the Property shall comply with all requirements of its Dealer Agreements with Dealer. Lessee hereby consents to Lessor providing information it obtains to Dealer and to Lessor obtaining from Dealer information which Dealer receives relating to Lessee's operation of its business on the Property.

G. *WGI Agreements.* Lessee represents that the WGI Agreement is in full force and effect, and that the WGI Agreement permits WGI to operate gaming machines on the Property. Lessee shall abide by all the terms and conditions of the WGI Agreement, and Lessee represents and warrants that WGI has approved this Lease, if WGI has such approval rights under the WGI Agreement.

H. *Winner's Corner.* Lessee shall at all times operate the gas station and convenience store on the Property under the trade name "Winner's Corner" and/or under a major oil brand (such as Chevron, BP, Amoco, Shell, Sun Oil, or the such).

13. **Maintenance; Repairs and Reconstruction.** Lessee shall, at its sole cost and expense, be responsible for keeping all of the buildings, structures, improvements and signs erected on the Property in good and substantial order, condition, and repair, including but not limited to replacement, maintenance and repair of all structural or load-bearing elements, roofs, walls, foundations, gutters and downspouts, heating, ventilating and air conditioning systems, any building security and monitoring system, windows, walls, doors, electrical and other utility systems and equipment, mechanical equipment, plumbing and all other components of the buildings, mowing of lawns and care, weeding and replacement of plantings; replacing, resurfacing and striping of walkways, driveways and parking areas, and adjacent public sidewalks; removal of snow and ice from the Property and adjacent public sidewalks, removal of trash, maintenance of utility lines and exterior lighting and signage on Property, and any maintenance, repairs or replacements (or fees or reserves therefor) as may be required by any Permitted Encumbrances. All such replacements, maintenance and repair shall keep the Property in good repair and in a clean, safe, and sanitary condition and in compliance with all Legal Requirements and insurance regulations. Lessee must make all repairs, corrections, replacements, improvements or alterations necessitated by age, Lessee's use, or natural elements or as required pursuant to Governmental Authorities or Legal Requirements. Lessee expressly waives the benefit of any statute now or hereinafter in effect which would otherwise afford

Lessee the right to make repairs, corrections, improvements or alterations at Lessor's expense or to terminate this Lease because of Lessor's failure to keep the Property in good order, condition or repair, or which would otherwise require Lessor to make repairs, corrections, improvements, replacements or alterations. If the buildings or any improvements on the Property violate any Permitted Encumbrances or Legal Requirements, then Lessee shall, upon the written demand of a Governmental Authority or the written demand of a party to or beneficiary of any Permitted Encumbrance, repair, restore, relocate and/or rebuild the same in accordance with Legal Requirements (including any special or conditional use permits or other variances granted specifically for the Property) and the Permitted Encumbrances.

Lessee shall, at its sole cost and expense, be responsible to repair or reconstruct damage or destruction to any buildings, structures or improvements erected on the Property from acts of God or any other catastrophes or causes. Any such repairs or reconstruction shall restore the buildings and all improvements on the Property to substantially the same condition immediately prior to such damages or destruction and this Lease shall remain in full force and effect, provided, however, that Lessee shall have the right to replace the improvements with different structures so long as (a) the value of the Property with such different structures is no less than the value of the Property immediately prior to the date of casualty and the different square footage of the new buildings is no less than the buildings existing as of the date hereof, and (b) the new structure can be built and occupied in compliance with Legal Requirements (including any special or conditional use permits or other variances granted specifically for the Property) and the Permitted Encumbrances. Such repair, restoration, relocation and rebuilding (all of which are herein called a "repair") shall be commenced within a reasonable time however no more than thirty (30) days after the later of (i) the date that such damage or destruction occurred, (ii) the date that all permits and other approvals necessary to authorize such rebuilding have been issued following reasonable pursuit of the same by Lessee, and (iii) the date that any insurance proceeds payable to Lessor or its lender in conjunction with such damage or destruction, if any, have been made available to Lessee as set forth herein; thereafter, the repair shall be diligently pursued to completion. Lessee shall give Lessor at least fifteen (15) days written notice prior to commencing the repair to permit the Lessor to post appropriate notices of non-responsibility, and all such repair work shall be subject to the provisions of Section 14 hereof related to alterations, improvements and additions to the Property.

The proceeds of any insurance maintained under Section 10 hereof shall be made available to Lessee for payment of costs and expense of repair.

14. **Waste; Alterations and Improvements; Trade Fixtures and Equipment.** Lessee shall not commit actual or constructive waste upon the Property. During the Lease Term, Lessee may construct any additions or improvements to the Property and make such structural or non-structural alterations to the Property as are reasonably necessary or desirable for Lessee's use of the Property for a Permitted Facility. All improvements, alterations, or additions shall be constructed by Lessee at Lessee's sole cost and expense. Prior to the commencement of construction of any additions, improvements, or alterations to the Property, Lessee shall give Lessor at least fifteen (15) days written notice to allow Lessor to post appropriate notices of non-responsibility. Notwithstanding anything herein to the contrary, without Lessor's prior written consent, Lessee shall not make any alterations that will decrease the value or function of the improvements located on the Property.

Lessee's right to make any alterations, improvements and additions shall be deemed conditioned upon Lessee acquiring a permit to do so from appropriate Governmental Authorities, the furnishing of a copy thereof to Lessor prior to the commencement of the work and the compliance by Lessee of all conditions of said permit in a prompt and expeditious manner. All alterations, improvements or other construction by Lessee shall be in compliance with all Legal Requirements, and all alterations and improvements shall be done and performed in good and workmanlike manner, using new and first quality materials. All costs of any such improvements shall be paid by Lessee.

Upon completion of any such work, Lessee shall submit to Lessor as-built plans of any structural, mechanical or interior utility improvements and alterations made, a sworn construction statement, lien waivers from all persons or entities providing materials, services or equipment for the work completed and, if available, an endorsement to Lessor's policy of title insurance or other evidence from a title company confirming the absence of any liens or other matters of record related to the work performed.

Unless expressly released by Lessor in writing, all improvements or alterations shall be and remain, at the time of expiration or other termination of this Lease, the property of Lessor without payment or offset unless such improvements are not attached to the Property. Notwithstanding anything herein to the contrary, all plumbing, electrical, HVAC equipment, doors, ceiling and floor tiles, and wall coverings shall become the property of Lessor and remain in place on the Property upon expiration or other termination of this Lease.

During the Lease Term, Lessee shall have the right to locate in the Property such personal property, furniture, trade fixtures, and equipment (hereafter referred to as "Fixtures and Equipment") as shall be considered by Lessee to be appropriate or necessary to Lessee's use and occupancy of the Property.

All Fixtures and Equipment shall be provided by Lessee at Lessee's own cost and expense. During the term of this Lease, Lessee may remove any Fixtures and Equipment installed by Lessee, and any and all such Fixtures and Equipment shall remain the sole property of Lessee. Lessee shall perform (and pay all costs associated with) any and all restoration necessitated by the removal of Lessee's Fixtures and Equipment, including but not limited to damage resulting from removal of any of Lessee's signs in or about the Property.

Lessee shall keep the Property free and clear of all mechanic's, materialmen or similar liens, including, but not limited to, those resulting from the construction of alterations, improvements, additions, trade fixtures, and equipment performed by or for Lessee.

Lessee shall have the right to contest the correctness or validity of any such lien if, Lessee first procures and records a lien release bond issued by a corporation authorized to issue surety bonds in the state in which the Property are located in an amount required by Legal Requirements to remove such lien. The bond or its equivalent shall meet all applicable requirements of the state in which the Property are located. In the event that any lien does so attach, and is not released within thirty (30) days after written notice to Lessee thereof, Lessor, in its sole discretion, may pay and discharge the same and relieve the Property therefrom, and Lessee agrees to repay and reimburse Lessor as Additional Rental upon demand for the amount

so paid by Lessor. On final determination of the lien or claim of lien Lessee will immediately pay any judgment rendered, and all costs and charges, and shall cause the lien to be released or satisfied. In addition, Lessor may require Lessee to pay Lessor's reasonable attorneys' fees and costs in participating in such action if Lessor shall decide it is in its best interest to do so.

15. **Indemnification.** Lessee agrees to use and occupy the Property at its own risk and hereby releases Lessor and Lessor's agents and employees from all claims for any damage or injury to the full extent permitted by law. Lessee agrees that Lessor shall not be responsible or liable to Lessee or Lessee's employees, agents, customers or invitees for bodily injury, personal injury or property damage occasioned by the acts or omissions of any other lessee or such lessee's employees, agents, contractors, customers or invitees. In addition to other specific indemnification provisions set forth in this Lease, Lessee shall indemnify, protect, defend and hold harmless each of the Indemnified Parties from and against any and all Losses caused by, incurred or resulting from Lessee's use and occupancy of the Property, whether relating to its original design or construction, latent defects, alteration, maintenance, use by Lessee or any Person thereon, with supervision or otherwise, or from any breach of, default under, or failure to perform, any term or provision of this Lease by Lessee, its officers, employees, agents or other Persons. It is expressly understood and agreed that Lessee's obligations under this Section shall survive the expiration or earlier termination of this Lease for any reason.

16. **Quiet Enjoyment.** So long as Lessee shall pay the Rental and other Monetary Obligations herein provided and shall keep and perform all of the terms, covenants and conditions on its part herein contained, Lessee shall have, subject and subordinate to Lessor's rights herein, the right to the peaceful and quiet occupancy of the Property, subject to the Permitted Encumbrances, Laws and the WGI Agreement and any use or occupancy agreements, leases or licenses now affecting the Property or hereinafter made by Lessee.

17. **Inspection; Right of Entry.** Lessor and its authorized representatives shall have the right, at all reasonable times and upon giving reasonable prior notice (except in the event of an emergency, in which case no prior notice shall be required), to enter the Property or any part thereof and to inspect the same; to serve, post, or keep posted any notices required or allowed under the provisions of this Lease or by law; to show the Property to prospective brokers, agents, buyers, or persons interested in an exchange, at any time; and to show the Property to prospective tenants within two hundred forty (240) days prior to the expiration of this Lease or any time during the option period and to place upon the Property any "to let" or "for lease" signs at any time within two hundred forty (240) days prior to the expiration of this Lease. Lessee hereby waives any claim for damages for any injury or inconvenience to or interference with Lessee's business, any loss of occupancy or quiet enjoyment of the Property and any other loss occasioned by such entry, but, subject to Section 37, excluding damages arising as a result of the negligence or intentional misconduct of Lessor.

18. **Condemnation and Casualty.**

A. *Damage or Destruction to the Property; No Abatement of Rent.* If the Property is damaged or destroyed as a result of fire or other casualty Lessee shall promptly restore the Property pursuant to the terms of Section 13 hereof. Notwithstanding the partial or total destruction of the Property and any part thereof, and

notwithstanding whether the casualty is insured or not, there shall be no abatement of Rentals or of any other obligation of Lessee hereunder including, without limitation, payment of operating expenses, insurance premiums and Taxes, by reason of such damage or destruction unless the Lease is terminated by virtue of another provision of this Lease.

B. *Option to Terminate.* If the Property is damaged or destroyed during the last one (1) year of the Lease Term to the extent that the Property is untenable, Lessee may terminate this Lease as of the date of such damage or destruction by giving written notice to Lessor of such election within thirty (30) days following the date of such fire or other casualty, in which case, all insurance proceeds related to the Property (other than attributable to Lessee's Fixtures and Equipment) will be paid over to Lessor, or if required by Lessor's Lender, to such lender.

C. *Termination Upon Taking.* If as a consequence of a Taking, (i) any part of the convenience store building on the Property; or (ii) twenty-five percent (25 %) or more of the parking area at the Property shall be taken and Lessee determines in its reasonable discretion that such Taking will have a material adverse impact on the ability of Lessee to conduct its normal business operations from the Property, then, within thirty (30) days after the date on which Lessee receives written notice of such Taking, Lessee may terminate this Lease by written notice to Lessor which termination shall be effective as of the date the condemning authority takes actual possession of the portion of the Property that is subject to the Taking. If Lessee terminates this Lease, Lessor shall promptly refund to Lessee all unearned Annual Base Rental and other amounts paid in advance by Lessee.

D. *Obligation to Restore.* If a Taking does not result in a termination of this Lease pursuant to Subsection C hereof, Lessee shall restore the Property to a condition similar in physical appearance to that which existed immediately prior to the Taking to the extent possible such that Lessee can conduct its normal business operations, Lessee shall commence such restoration within ninety (90) days after the occurrence of the taking and shall complete such restoration within six (6) months after the occurrence of the taking.

E. *Condemnation Award.* Any condemnation award payable during the term of this Lease shall belong to and be paid to Lessor, including but not limited to awards payable with respect to damage to either the fee or leasehold estates, except that Lessee shall receive from the award the following:

i. If Lessee exercises its rights to terminate this Lease, the portion of the award, if any, attributable to Lessee's Equipment or Fixtures that are taken in the Taking and the unamortized cost of any leasehold improvements made to the Property by Lessee after the date hereof that are taken in the Taking.

ii. The portion of the award, if any, attributable to severance damages for the repair or restoration of the Property (herein called "repair"), but only if Lessee does not exercise Lessee's right to terminate the Lease and further

provided, that such damages shall be deposited and disbursed in accordance with the provisions hereof related to the handling of insurance proceeds that are applied to a repair of the Property and Lessee shall promptly commence and diligently complete the repair so that upon completion the Property will have a character and commercial value as nearly as possible equal to the value of the Property immediately prior to the taking, and further provided that, in the event such damages are insufficient to cover the cost of repair, then any amounts required over the amount thereof that are required to complete said repair shall be promptly deposited with the disbursing entity by Lessee in advance of commencing the repair.

iii. Additionally, if this Lease is terminated as a result of any such taking, Lessee shall be permitted to recover its relocation expenses and the going concern value of Lessee's business from the condemning authority (but not from Lessor or the portion of the award otherwise payable to Lessor) as provided by law.

19. Intentionally Deleted.

20. **Default, Conditional Limitations, Remedies and Measure of Damages.**

A. *Event of Default.* Each of the following shall be an event of default by Lessee under this Lease (each, an "Event of Default"):

(i) If any Rental or other Monetary Obligation due under this Lease is not paid within five (5) Business Days of notice it is past due, provided, however, that if within the first twelve (12) months of the Lease Term, Lessor has given two (2) such notices to Lessee, then a default shall be deemed to have occurred when such failure has continued for three (3) business days after the same is due, without notice thereof by Lessor to Lessee; and further, provided, however, that after the first twelve (12) months of the Lease Term, if Lessor has given such notice to Lessee within the preceding twelve (12) months, then a default shall be deemed to have occurred when such failure has continued for three (3) Business Days after the same is due, without notice thereof by Lessor to Lessee;

(ii) if there is an Insolvency Event;

(iii) if Lessee fails to observe or perform any of the other covenants, conditions or obligations of Lessee in this Lease; *provided, however*, if any such failure does not involve the payment of any Monetary Obligation, does not place any rights or property of Lessor in immediate jeopardy, as determined by Lessor in its reasonable discretion, then such failure shall not constitute an Event of Default hereunder, unless otherwise expressly provided herein, unless and until Lessor shall have given Lessee notice thereof and a period of thirty (30) days shall have elapsed, during which period Lessee may correct or cure such failure, upon failure of which an Event of Default shall be deemed to have occurred hereunder without further notice or demand of any kind being required. If such failure

cannot reasonably be cured within such thirty (30) day period, as determined by Lessor in its reasonable discretion, and Lessee is diligently pursuing a cure of such failure, then Lessee shall have a reasonable period to cure such failure beyond such thirty (30) day period. If Lessee shall fail to correct or cure such failure within such period and said period is not extended by the parties, an Event of Default shall be deemed to have occurred hereunder without further notice or demand of any kind being required;

(iv) if Lessee shall be liquidated or dissolved or shall begin proceedings towards its liquidation or dissolution; or

B. *Remedies.* Upon the occurrence of an Event of Default, with or without notice or demand, except as otherwise expressly provided herein or such other notice as may be required by statute and cannot be waived by Lessee, Lessor shall be entitled to exercise, at its option, concurrently, successively, or in any combination, all remedies available at law or in equity, including without limitation, any one or more of the following:

(i) To terminate this Lease, whereupon Lessee's right to possession of the Property shall cease and this Lease, except as to Lessee's liability, shall be terminated. Upon such termination, Lessor shall be entitled to recover liquidated damages equal to the total of (i) the cost of recovering possession of the Property; (ii) the unpaid Rental earned at the time of termination, plus interest at the Default Rate thereon; (iii) late charges and interest at the Default Rate on the unpaid Rental; (iv) the present value of the balance of the Base Annual Rental for the remainder of the Lease Term using a discount rate of four percent (4%), less the present value of the reasonable rental value of the Property for the balance of the Term remaining after a one-year period following repossession using a discount rate of four percent (4%); (v) costs of operating the Property until relet and the reasonable costs of performing any obligations of Lessee under this Lease to be performed upon termination or expiration of this Lease (including but not limited to the Lessee's obligations under Sections 12.D and 27 hereof); and (vi) any other sum of money and damages reasonably necessary to compensate Lessor for the detriment caused by Lessee's default.

(ii) To the extent not prohibited by applicable law, to reenter and take possession of the Property (or any part thereof) without being deemed guilty in any manner of trespass or becoming liable for any loss or damage resulting therefrom, without resort to legal or judicial process, procedure or action. No notice from Lessor hereunder or under a forcible entry and detainer statute or similar law shall constitute an election by Lessor to terminate this Lease unless such notice specifically so states. If Lessee shall, after default, voluntarily give up possession of the Property to Lessor, deliver to Lessor or its agents the keys to the Property, or both, such actions shall be deemed to be in compliance with Lessor's rights and the acceptance thereof by Lessor or its agents shall not be deemed to constitute a termination of the Lease. Lessor reserves the right following any reentry and/or reletting to exercise its right to terminate this Lease by giving

Lessee written notice thereof, in which event this Lease will terminate, and Lessor may recover liquidated damages as set forth in Subsection (i) above.

(iii) To bring an action against Lessee for any damages sustained by Lessor or any equitable relief available to Lessor.

(iv) To relet the Property or any part thereof for such term or terms (including a term which extends beyond the original Lease Term), at such rentals and upon such other terms as Lessor, in its sole discretion, may determine, with all proceeds received from such reletting being applied to the Rental and other Monetary Obligations due from Lessee in such order as Lessor may, in it sole discretion, determine, which other Monetary Obligations include, without limitation, all commercially reasonable repossession costs, brokerage commissions, attorneys' fees and expenses and repair costs. Lessor reserves the right following any reentry and/or reletting to exercise its right to terminate this Lease by giving Lessee written notice thereof, in which event this Lease will terminate as specified in said notice.

(v) To recover from Lessee all Costs paid or incurred by Lessor as a result of such breach, regardless of whether or not legal proceedings are actually commenced.

(vi) To immediately or at any time thereafter, and with or without notice, at Lessor's sole option but without any obligation to do so, correct such breach or default and charge Lessee all Costs incurred by Lessor therein. Any sum or sums so paid by Lessor, together with interest at the Default Rate, shall be deemed to be Additional Rental hereunder and shall be immediately due from Lessee to Lessor. Any such acts by Lessor in correcting Lessee's breaches or defaults hereunder shall not be deemed to cure said breaches or defaults or constitute any waiver of Lessor's right to exercise any or all remedies set forth herein.

(vii) To immediately or at any time thereafter, and with or without notice, except as required herein, set off any money of Lessee held by Lessor under this Lease.

(viii) To seek any equitable relief available to Lessor, including, without limitation, the right of specific performance.

All powers and remedies given by this Section to Lessor, subject to applicable Law, shall be cumulative and not exclusive of one another or of any other right or remedy or of any other powers and remedies available to Lessor under this Lease, by judicial proceedings or otherwise, to enforce the performance or observance of the covenants and agreements of Lessee contained in this Lease, and no delay or omission of Lessor to exercise any right or power accruing upon the occurrence of any Event of Default shall impair any other or subsequent Event of Default or impair any rights or remedies consequent thereto. Every power and remedy given by this Section or by Law to Lessor

may be exercised from time to time, and as often as may be deemed expedient, by Lessor, subject at all times to Lessor's right in its sole judgment to discontinue any work commenced by Lessor or change any course of action undertaken by Lessor.

C. *Default by Lessor.* Lessor shall be in default under this Lease if Lessor fails or refuses to perform any obligation of Lessor under the terms of this Lease, and if the failure to perform the obligation is not cured within thirty (30) days after notice of the default has been given by Lessee to Lessor. If the default cannot reasonably be cured within thirty (30) days, then Lessor shall not be in default if Lessor commences to cure the default within the thirty (30) day period and diligently and in good faith continues to cure the default thereafter.

Lessee, at any time after expiration of the cure period provided above and a subsequent written notice to Lessor, may cure the default at Lessor's cost. If Lessee at any time, as a result of Lessor's default, pays any sum or performs any act that requires the payment of any sum, the sum paid by Lessee shall be due immediately from Lessor to Lessee at the time the sum is paid, and if paid at a later date shall bear interest at the rate of twelve percent (12%) per annum from the date the sum is paid by Lessee until the date Lessee is reimbursed by Lessor. Any amounts due from Lessor to Lessee pursuant to this Section 15 may be deducted or offset against Lessee's Base Monthly Rental.

21. **Mortgage, Subordination and Attornment.** Lessor's interest in this Lease and/or the Property shall not be subordinate to any liens or encumbrances placed upon the Property by or resulting from any act of Lessee, and nothing herein contained shall be construed to require such subordination by Lessor. Notwithstanding the terms of or the parties to the WGI Agreement and any other agreements pursuant to which Persons other than Lessee have the right to occupy any portion of the Property, such agreements shall, as between Lessor and Lessee, be treated as an instrument subordinate to Lessor's interest in the Property and this Lease. Lessee shall keep the Property free from any liens for work performed, materials furnished or obligations incurred by Lessee. NOTICE IS HEREBY GIVEN THAT LESSEE IS NOT AUTHORIZED TO PLACE OR ALLOW TO BE PLACED ANY LIEN, MORTGAGE, DEED OF TRUST, SECURITY INTEREST OR ENCUMBRANCE OF ANY KIND UPON ALL OR ANY PART OF THE PROPERTY OR LESSEE'S LEASEHOLD INTEREST THEREIN, AND ANY SUCH PURPORTED TRANSACTION SHALL BE VOID.

This Lease at all times shall automatically be subordinate to the lien of any and all Deeds of Trust now or hereafter placed upon the Property by Lessor, provided, that the holder of such interest shall not disturb Lessee's use and enjoyment of Lessee's rights under this Lease so long as Lessee is not in default hereunder. Lessee covenants and agrees to execute and deliver, upon demand, such further instruments which are acceptable to Lessee, subordinating this Lease to the lien of any or all such Deeds of Trust as shall be desired by Lessor, or any present or proposed Deeds of Trust; provided, that the terms and provisions of any such instrument are commercially reasonable. The Lessee acknowledges that the terms and provisions of the Instrument attached hereto as Exhibit C are commercially reasonable.

If any Lessor's Lender, mortgagee, receiver or other secured party elects to have this Lease and the interest of Lessee hereunder be superior to any such Deed of Trust and evidences

such election by notice given to Lessee, then this Lease and the interest of Lessee hereunder shall be deemed superior to any such Deed of Trust, whether this Lease was executed before or after such Deed of Trust and in that event such mortgagee, receiver or other secured party shall have the same rights with respect to this Lease as if it had been executed and delivered prior to the execution and delivery of such Deed of Trust and had been assigned to such mortgagee, receiver or other secured party.

In the event any purchaser or assignee of any mortgagee or deed of trust holder at a foreclosure sale acquires title to the Property, or in the event that any mortgagee or any assignee otherwise succeeds to the rights of Lessor as Lessor under this Lease, Lessee shall attorn to mortgagee or deed of trust holder or such purchaser or assignee, as the case may be (a "Successor Lessor"), and recognize the Successor Lessor as lessor under this Lease, and, if the Successor Lessor in its sole discretion elects to recognize Lessee's tenancy under this Lease, this Lease shall continue in full force and effect as a direct lease between the Successor Lessor and Lessee, provided that the Successor Lessor shall only be liable for any obligations of Lessor under this Lease which accrue after the date that such Successor Lessor acquires title. The foregoing provision shall be self-operative and effective without the execution of any further instruments.

Lessee shall give written notice to any Lessor's Lender of whom Lessee is notified of in writing of any breach or default by Lessor of any of its obligations under this Lease and give such lender or mortgagee the same rights to which Lessor might be entitled to cure such default before Lessee may exercise any remedy with respect thereto. Upon request by Lessor, Lessee shall authorize Lessor to release to Lessee's financial statements delivered to Lessor pursuant to this Lease to such Lessor's Lender.

22. **Estoppel Certificate and Other Documents.** At any time, and from time to time, each party shall, promptly and in no event later than ten (10) days after a request from the other execute, acknowledge and deliver to the requesting party, as the case may be, a certificate in the form supplied by the requesting party, certifying: (A) that this Lease is in full force and effect and has not been modified (or if modified, setting forth all modifications), or, if this Lease is not in full force and effect, the certificate shall so specify the reasons therefor; (B) the commencement and expiration dates of the Lease Term; (C) the date to which the Rentals have been paid under this Lease and the amount thereof then payable; (D) whether there are then any existing defaults by Lessee or Lessor in the performance of its obligations under this Lease, and, if there are any such defaults, specifying the nature and extent thereof; (E) that no notice has been received by the certifying party of any default under this Lease which has not been cured, except as to defaults specified in the certificate; (F) the capacity of the person executing such certificate, and that such person is duly authorized to execute the same on behalf of Lessee; and; (G) and any other information reasonably requested by the requesting party.

Lessor and Lessee further agree to reasonably negotiate execute all reasonable documents, including without limitation, estoppel certificates, non-disturbance certificates and other documents requested by WGI, any Lessor's Lender or any lender of Lessee in connection with a loan to be obtained by Lessor or Lessee, or in connection with a sale, assignment, sublease or other disposition of the Lessor's interest under this Lease.

23. **Assignment/Subletting.** Lessee's interest in this Lease shall not, voluntarily, involuntarily, or by operation of law, be assigned to any third person or entity without the prior written consent of Lessor which will not be unreasonably withhold conditioned or delayed.

In the event of an assignment of Lessee's interest under this Lease to a third person or entity which has been approved by the Lessor, the original Lessee shall be relieved from any and all further obligations under the terms of this Lease upon delivery to Lessor of an originally executed assumption of all of Lessee's obligations under this Lease by the assignee, and upon cure of all then existing defaults of Lessee under the terms of this Lease.

Other than for the WGI Agreement and any Replacement WGI Agreement, and any other agreements pursuant to which experienced and reputable operators are permitted to occupy discreet portions of the convenience store building located on the site for uses that are complementary to or extensions of Lessee's gas station and convenience store operations (*e.g.*, quick-service restaurants, deli and sandwich shops, coffee shops, juice shops, postal contract units and/or UPS/Federal Express services) when such uses are not in violation of Legal Requirements or the Permitted Encumbrances(such other agreements are referred to herein as "Permitted Subleases"), Lessee may not sublease all or any part of the Property without the prior written consent of the Lessor, which shall not be unreasonably withheld, conditioned or delayed. In no event will any Permitted Subleases, or any other subleases that Lessor consents to relieve Lessee of any liability hereunder during the period of any such subletting. Additionally, Lessee shall give Lessor at least thirty (30) days advance notice of any proposed Permitted Sublease, which notice shall be accompanied by a copy of the form of the Permitted Sublease.

Each Permitted Sublease, and any other sublease that Lessor may consent to pursuant to the foregoing paragraph shall provide that (i) the term thereof will not exceed the Initial Term hereof and any extensions of the Initial Term that are permitted hereunder; (ii) the sublease and subtenant shall be subject to and bound by all the terms and conditions of this Lease (except that the Lessee shall continue to pay all Rental and Monetary Obligations hereunder and Lessee shall collect any rents owed by the subtenant pursuant to the sublease); (iii) the sublease shall state that, at Lessor's election, the subtenant will attorn to Lessor and recognize Lessor as Lessee's successor under the sublease for the balance of the sublease term if this Lease is surrendered by Lessee or terminated by reason of Lessee's default.

24. **Notices.** All notices, demands, designations, certificates, requests, offers, consents, approvals, appointments and other instruments given pursuant to this Lease (collectively called "Notices") shall be in writing and given by any one of the following: (A) hand delivery, (B) express overnight delivery service, (C) certified or registered mail, return receipt requested or (D) facsimile, provided that a copy of such facsimile is also sent via certified or registered mail, return receipt requested, or by overnight delivery service, within one Business Day of the transmission of such facsimile, and shall be deemed to have been delivered upon (i) receipt, if hand delivered, (ii) the next Business Day, if delivered by a reputable express overnight delivery service, (iii) the third Business Day following the day of deposit of such notice with the United States Postal Service, if sent by certified or registered mail, return receipt requested, or (iv) transmission, if delivered by facsimile pursuant to the requirements of Section 24.D above. Notices shall be provided to the parties and addresses (or electronic mail addresses) specified below:

If to Lessee:	Berry-Hinckley Industries Attn: Paul A. Morabito 425 Maestro Drive Reno, NV 89511 Telephone: (775) 689-1222 Facsimile: (775) 689-1232
With a copy to:	Hodgson Russ LLP Attn: Sujata Yalamanchili One M&T Plaza, Suite 2000 Buffalo, NY 14023 Telephone: (716) 848-1657 Facsimile: (716) 849-0349
If to Lessor:	_____ _____ _____ _____
With a copy to	_____ _____ _____ _____

or to such other address or such other person as either party may from time to time hereafter specify to the other party in a notice delivered in the manner provided above.

25. **Holdover.** If Lessee remains in possession of the Property after the expiration of the term hereof, Lessee, at Lessor's option and within Lessor's sole discretion, may be deemed a Lessee on a month-to-month basis and shall continue to pay Rentals and other Monetary Obligations in the amounts herein provided, except that the Base Monthly Rental shall be automatically increased to one hundred fifty percent (150%) of the last Base Monthly Rental payable under this Lease.

26. **Intentionally Omitted.**

27. **Surrender.** At the expiration of the Lease Term, Lessee may remove from the Property all of Lessee's Fixtures and Equipment. Lessee shall repair any damage caused by such removal and shall leave the Property broom clean and in good and working condition and repair inside and out, and comply with all of the requirements of Section 12.D hereof. Lessor may, in its sole discretion, elect to retain or dispose of in any manner any Fixtures or Equipment, personal property and vehicles to which Lessee is entitled but which Lessee does not remove from the Property pursuant to this Section within ten (10) days after notice, provided, however, that upon demand, Lessee shall reimburse Lessor for all costs incurred by Lessor in removing any Fixtures and Equipment and any all personal property, vehicles and inventory, Hazardous

Materials, USTs and related equipment, located in or about the Property that are left therein by Lessee or in restoring the Property to the condition required by this Lease.

28. **Financial Statements; Compliance Certificate.** Once per calendar year, and within 120 days after the end of Lessee's fiscal year, Lessee shall furnish to Lessor audited financial statements of Lessee for the immediately preceding fiscal year. Lessor shall maintain such statements in confidence but may disclose any financial statements furnished by Lessee to Lessor's lawyers, any prospective purchaser of the Property who has entered into a signed purchase agreement with Lessor, prospective and existing lenders of Lessor, and to Lessor's consultants and accountants; Lessor shall advise such permitted recipients that the financial statements furnished to them are to be held in confidence. In no event shall Lessor knowingly disclose Lessee's financial statements to competitors of Lessee.

29. **Force Majeure.** Any prevention, delay or stoppage due to strikes, lockouts, acts of God, enemy or hostile governmental action, civil commotion, fire or other casualty beyond the control of the party obligated to perform (each, a "Force Majeure Event") shall excuse the performance by such party for a period equal to any such prevention, delay or stoppage, expressly excluding, however, the obligations imposed upon Lessee with respect to Rental and other Monetary Obligations to be paid hereunder.

30. **No Merger.** There shall be no merger of this Lease nor of the leasehold estate created by this Lease with the fee estate in or ownership of the Property by reason of the fact that the same person, corporation, firm or other entity may acquire or hold or own, directly or indirectly, (A) this Lease or the leasehold estate created by this Lease or any interest in this Lease or in such leasehold estate, and (B) the fee estate or ownership of the Property or any interest in such fee estate or ownership. No such merger shall occur unless and until all persons, corporations, firms and other entities having any interest in (i) this Lease or the leasehold estate created by this Lease, and (ii) the fee estate in or ownership of the Property or any part thereof sought to be merged shall join in a written instrument effecting such merger and shall duly record the same.

31. **Characterization.** Lessor and Lessee acknowledge and warrant to each other that each has been represented by independent counsel and has executed this Lease after being fully advised by said counsel as to its effect and significance. This Lease shall be interpreted and construed in a fair and impartial manner without regard to such factors as the party which prepared the instrument, the relative bargaining powers of the parties or the domicile of any party. Whenever in this Lease any words of obligation or duty are used, such words or expressions shall have the same force and effect as though made in the form of a covenant.

32. **Easements.** During the Lease Term, Lessor shall not have the right to grant easements on, over, under and above the Property without the prior consent of Lessee, which consent will not be unreasonably withheld, conditioned or delayed.

33. **Bankruptcy.** Intentionally Omitted.

34. **Attorneys' Fees.** In the event of any judicial or other adversarial proceeding concerning this Lease, to the extent permitted by Law, Lessor the prevailing party shall be

entitled to recover all of its reasonable attorneys' fees and other Costs in addition to any other relief to which it may be entitled. In addition, the prevailing party shall, upon demand, be entitled to all attorneys' fees and all other Costs incurred in the preparation and service of any notice or demand hereunder, whether or not a legal action is subsequently commenced.

35. **Memorandum of Lease.** Concurrently with the execution of this Lease, Lessor and Lessee are executing Lessor's standard form memorandum of lease in recordable form, indicating the names and addresses of Lessor and Lessee, a description of the Property, the Lease Term, but omitting Rentals and such other terms of this Lease as Lessor may not desire to disclose to the public. Further, upon Lessor's request, Lessee agrees to execute and acknowledge a termination of lease and/or quit claim deed in recordable form to be held by Lessor until the expiration or sooner termination of the Lease Term.

36. **No Broker.** Lessor and Lessee represent and warrant to each other that they have had no conversation or negotiations with any broker concerning the leasing of the Property. Each of Lessor and Lessee agrees to protect, indemnify, save and keep harmless the other, against and from all liabilities, claims, losses, Costs, damages and expenses, including attorneys' fees, arising out of, resulting from or in connection with their breach of the foregoing warranty and representation.

37. **Waiver of Jury Trial and Punitive**, Consequential, Special and Indirect Damages. Lessor and Lessee hereby knowingly, voluntarily and intentionally waive the right either may have to a trial by jury with respect to any and all issues presented in any action, proceeding, claim or counterclaim brought by either of the parties hereto against the other or its successors with respect to any matter arising out of or in connection with this Lease, the relationship of Lessor and Lessee, Lessee's use or occupancy of the Property, and/or any claim for injury or damage, or any emergency or statutory remedy. This waiver by the parties hereto of any right either may have to a trial by jury has been negotiated and is an essential aspect of their bargain. Furthermore, Lessee hereby knowingly, voluntarily and intentionally waives the right it may have to seek punitive, consequential, special and indirect damages from Lessor, Lessor's Lenders, and any of the Affiliates, officers, directors, members, managers or employees of Lessor, Lessor's Lenders, or any of their successors with respect to any and all issues presented in any action, proceeding, claim or counterclaim brought with respect to any matter arising out of or in connection with this Lease or any document contemplated herein or related hereto. The waiver by Lessee of any right it may have to seek punitive, consequential, special and indirect damages has been negotiated by the parties hereto and is an essential aspect of their bargain.

38. **Miscellaneous.**

A. *Time Is of the Essence.* Time is of the essence with respect to each and every provision of this Lease.

B. *Waiver and Amendment.* No provision of this Lease shall be deemed waived or amended except by a written instrument unambiguously setting forth the matter waived or amended and signed by the party against which enforcement of such waiver or amendment is sought. Waiver of any matter shall not be deemed a waiver of the same or any other matter on any future occasion. No acceptance by Lessor of an

amount less than the Rental and other Monetary Obligations stipulated to be due under this Lease shall be deemed to be other than a payment on account of the earliest such Rental or other Monetary Obligations then due or in arrears nor shall any endorsement or statement on any check or letter accompanying any such payment be deemed a waiver of Lessor's right to collect any unpaid amounts or an accord and satisfaction.

C. *Successors Bound.* Except as otherwise specifically provided herein, the terms, covenants and conditions contained in this Lease shall bind and inure to the benefit of the respective heirs, successors, executors, administrators and assigns of each of the parties hereto.

D. *Captions.* Captions are used throughout this Lease for convenience of reference only and shall not be considered in any manner in the construction or interpretation hereof.

E. *Severability.* The provisions of this Lease shall be deemed severable. If any part of this Lease shall be held unenforceable by any court of competent jurisdiction, the remainder shall remain in full force and effect, and such unenforceable provision shall be reformed by such court so as to give maximum legal effect to the intention of the parties as expressed therein.

F. *Other Documents.* Each of the parties agrees to sign such other and further documents as may be necessary or appropriate to carry out the intentions expressed in this Lease; provided such documents are reasonably acceptable to each parties' counsel.

G. *Entire Agreement.* This Lease and any other instruments or agreements referred to herein, constitute the entire agreement between the parties with respect to the subject matter hereof, and there are no other representations, warranties or agreements except as herein provided.

H. *Forum Selection; Jurisdiction; Venue; Choice of Law.* For purposes of any action or proceeding arising out of this Lease, the parties hereto expressly submit to the jurisdiction of all federal and state courts located in the State of Nevada. Lessee consents that it may be served with any process or paper by registered mail or by personal service within or without the State of Nevada in accordance with applicable law. Furthermore, Lessee waives and agrees not to assert in any such action, suit or proceeding that it is not personally subject to the jurisdiction of such courts, that the action, suit or proceeding is brought in an inconvenient forum or that venue of the action, suit or proceeding is improper. Nothing contained in this Section shall limit or restrict the right of Lessor to commence any proceeding in the federal or state courts located in the state where each Property is located to the extent Lessor deems such proceeding necessary or advisable to exercise remedies available under this Lease.

I. *Counterparts.* This Lease may be executed in one or more counterparts, each of which shall be deemed an original.

J. *Prohibited Persons and Transactions.* Lessee and Lessor (each a "Representing Party") represents to its current knowledge to the other that the Representing Party is not a person or entity, nor owns property or interests in property, which is blocked pursuant to Executive Order 13224 signed on September 24, 2001 and entitled "Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit or Support Terrorism" or under any rules and regulations related thereto.

39. **Intentionally Omitted.**

40. **Amendments to Accommodate Sale to Tenants In Common.** At the request of Lessor, Lessee shall execute any amendments to this Lease that Lessor deems reasonably necessary to accommodate Lessor's sale of the Property to tenants in common (and subsequent management of the Property by such tenants in common or a manager appointed by them), provided that such amendments do not materially and negatively impact Lessee's obligations hereunder.

[Remainder of page intentionally left blank; signatures follow]

IN WITNESS WHEREOF, Lessor and Lessee have entered into this Lease as of the date first above written.

_____

LESSOR:

EDWARD C. WOOLEY

JUDITH A. WOOLEY

Tax Identification No. [redacted]

STATE OF California)
) ss
COUNTY OF Santa Clara)

The foregoing instrument was acknowledged before me on Dec 2, 2005 by Chris Gonzales, the Notary Public of Edward C. Wooley, Judith A. Wooley, on behalf of the limited liability company.

Notary Public

My Commission Expires: April 1, 2009

CHRIS GONZALES
Commission # 1566164
Notary Public - California
Santa Clara County
My Comm. Expires Apr 1, 2009

LESSEE:

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation

By: _____
Paul Morabito, its Chief Executive Officer
Tax Identification No. 88-0125101

STATE OF ~~NEVADA~~ California)
COUNTY OF ~~WASHOE~~ Orange)ss

The foregoing instrument was acknowledged before me on 1/4/06 by Paul Morabito, as Chief Executive Officer of **BERRY-HINCKLEY INDUSTRIES**, a Nevada corporation, on behalf of the corporation.

_____
Notary Public

My Commission Expires: 2/14/07

EXHIBIT A

DEFINED TERMS

The following terms shall have the following meanings for all purposes of this Lease:

"*Additional Rental*" has the meaning set forth in Section 4.C.

"*Adjustment Date*" means _____, and every anniversary thereafter during the Initial Term, and any Extension Term.

"*Affiliate*" means any Person which directly or indirectly controls, is under common control with or is controlled by any other Person. For purposes of this definition, "controls", "under common control with", and "controlled by" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities or otherwise.

"*Base Annual Rental*" means $272,000.00.

"*Base Monthly Rental*" means an amount equal to 1/12 of the applicable Base Annual Rental.

"*Business Day*" means Monday through Friday, except those days on which the United States Postal Service does not deliver regular first-class mail.

"*Casualty*" means any loss of or damage to any property included within or related to any Property or arising from an adjoining property caused by fire, flood or other casualty.

"*Condemnation*" means a Taking and/or a Requisition.

"*Costs*" means all reasonable costs and expenses incurred by a Person, including without limitation, reasonable attorneys' fees and expenses, court costs, expert witness fees, costs of tests and analyses, repair and maintenance, travel and accommodation expenses, deposition and trial transcripts, copies and other similar costs and fees, brokerage fees, escrow fees, title insurance and other insurance premiums, appraisal fees, stamp taxes, recording fees and transfer taxes or fees, as the circumstances require.

"*Dealer*" means any Person that supplies gasoline and/or diesel fuel to Lessee at the Property for sale to third parties, or its successor or assigns.

"*Dealer Agreement*" means a written agreement or other document granting Lessee the right to operate a gas station operation under the flag, brand or trade name of a Dealer.

"*Default Rate*" means 18% per annum or the highest rate permitted by law, whichever is less.

"*Deed of Trust*" means any and all deeds of trust, mortgages or other liens to secure debts or other security instruments here and after placed by Lessor on the Property or any part thereof (except the Lessee's personal property or trade fixtures), and to any and all renewals, modifications, consolidations, replacements, extensions or substitutions of any such instruments.

"*Effective Date*" has the meaning set forth in Section 3 of this Lease.

"*Environmental Laws*" means federal, state and local laws, ordinances, common law requirements and regulations and standards, rules, policies and other governmental requirements, administrative rulings and court judgments and decrees having the effect of law in effect now or in the future and including all amendments, that relate to Hazardous Materials, Regulated Substances, USTs, and/or the protection of human health or the environment, or relating to liability for or Costs of Remediation or prevention of Releases, and apply to Lessee and/or the Property.

"*Environmental Liens*" means liens that may be imposed pursuant to Environmental Laws, including but not limited to Nevada Revised Statutes Chapters 459 and 618.

"*Event of Default*" has the meaning set forth in Section 20.A.

"*Expiration Date*" has the meaning set forth in Section 3.

"*Extension Option*" has the meaning set forth in Section 3.

"*Extension Term*" has the meaning set forth in Section 3.

"*Force Majeure Event*" has the meaning set forth in Section 29.

"*Governmental Authority*" means any governmental authority, agency, department, commission, bureau, board, instrumentality, court or quasi-governmental authority of the United States, any state or any political subdivision thereof (including but not limited to the Nevada Department of Environmental Protection, the Nevada Gaming Control Board and the Nevada Gaming Commission) with authority to adopt, modify, amend, interpret, give effect to or enforce any federal, state and local laws, statutes, ordinances, rules or regulations, including common law, or to issue court orders.

"*Hazardous Materials*" includes: (a) oil, petroleum products, flammable substances, explosives, radioactive materials, hazardous wastes or substances, toxic wastes or substances or any other materials, contaminants or pollutants which pose a hazard to the Property or to Persons on or about the Property, cause the Property to be in violation of any local, state or federal law or regulation, (including without limitation, any Environmental Law), or are defined as or included in the definition of "hazardous substances", "hazardous wastes", "hazardous materials", "toxic substances", "contaminants", "pollutants", or words of similar import under any applicable local, state or federal law or under the regulations adopted, orders issued, or publications promulgated pursuant thereto, including, but not limited to: (i) the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. §9601, et seq.; (ii) the Hazardous Materials Transportation Act, as amended, 49 U.S.C. §1801, et seq.; (iii) the Resource Conservation and Recovery Act, as amended, 42 U.S.C. §6901, et seq.; and

(iv) regulations adopted and publications promulgated pursuant to the aforesaid laws; (b) asbestos in any form which is or could become friable, urea formaldehyde foam insulation, transformers or other equipment which contain dielectric fluid containing levels of polychlorinated biphenyls in excess of fifty (50) parts per million; (c) underground storage tanks; and (d) any other Regulated Substances, chemical, material or substance, exposure to which is prohibited, limited or regulated by any governmental authority or which may or could pose a hazard to the health and safety of the occupants of the Property or the owners and/or occupants of any adjoining property.

"*Indemnified Parties*" means Lessor, any Lessor's Lenders and their members, managers, officers, directors, shareholders, partners, employees, agents, servants, representatives, contractors, subcontractors, affiliates, subsidiaries, participants, successors and assigns, including, but not limited to, any successors by merger, consolidation or acquisition of all or a substantial portion of the assets and business of Lessor or any Lessor's Lenders, as applicable.

"*Initial Term*" has the meaning set forth in Section 3.

"*Insolvency Event*" means (a) Lessee's (i) failure to generally pay its debts as such debts become due; (ii) admitting in writing its inability to pay its debts generally; or (iii) making a general assignment for the benefit of creditors; (b) any proceeding being instituted by or against Lessee (i) seeking to adjudicate it a bankrupt or insolvent; (ii) seeking liquidation, winding up, reorganization, arrangement, adjustment, protection, relief, or composition of it or its debts under any law relating to bankruptcy, insolvency, or reorganization or relief of debtors; or (iii) seeking the entry of an order for relief or the appointment of a receiver, trustee, or other similar official for it or for any substantial part of its property, and in the case of any such proceeding instituted against Lessee, either such proceeding shall remain undismissed for a period of one hundred twenty (120) days or any of the actions sought in such proceeding shall occur; or (c) Lessee taking any corporate action to authorize any of the actions set forth above in this definition.

"*Law(s)*" means any constitution, statute, rule of law, code, ordinance, order, judgment, decree, injunction, rule, regulation, policy, requirement or administrative or judicial determination, even if unforeseen or extraordinary, of every duly constituted Governmental Authority, court or agency, now or hereafter enacted or in effect.

"*Lease Term*" shall have the meaning described in Section 3.

"*Legal Requirements*" means the requirements of all present and future Laws (including without limitation, Environmental Laws and Laws relating to accessibility to, usability by, and discrimination against, disabled individuals), all judicial and administrative interpretations thereof, including any judicial order, consent, decree or judgment, and all covenants, restrictions and conditions now or hereafter of record which may be applicable to Lessee or to the Property, or to the use, manner of use, occupancy, possession, operation, maintenance, alteration, repair or restoration of to the Property, even if compliance therewith necessitates structural changes or improvements or results in interference with the use or enjoyment of the Property.

"*Lessor's Lender*" means any lender of Lessor that has a lien on the Property, including any lenders named in any Deed of Trust.

"*Losses*" means any and all claims, suits, liabilities (including, without limitation, strict liabilities), actions, proceedings, obligations, debts, damages, losses, Costs, diminutions in value, fines, penalties, interest, charges, fees, judgments, awards, amounts paid in settlement and damages of whatever kind or nature, inclusive of bodily injury and property damage to third parties (including, without limitation, attorneys' fees and other Costs of defense).

"*Monetary Obligations*" means all Rental and all other sums payable or reimbursable by Lessee under this Lease to Lessor, to any third party on behalf of Lessor, or to any Indemnified Party.

"*Notices*" has the meaning set forth in Section 24.

"*Permitted Amounts*" shall mean, with respect to any given level of Hazardous Materials or Regulated Substances, that level or quantity of Hazardous Materials or Regulated Substances in any form or combination of forms which does not constitute a violation of any Environmental Laws and is customarily employed in, or associated with, similar businesses located in the states where the Property is located.

"*Permitted Encumbrances*" shall mean those covenants, restrictions, reservations, liens, conditions, encroachments, easements, survey exceptions, parties in possession and other matters of title that affect the Property as of the date of Lessor's acquisition thereof and those items which hereafter affect title as permitted under this Lease, including but not limited to those identified in the owner's policy of title insurance issued to Lessor by First American Title Insurance Company or an agent thereof in conjunction with Lessor's acquisition of the Property.

"*Permitted Facility*" means a gas station with convenience store (and restaurant and postal unit operations within a convenience store), and uses incidental or related thereto including but not limited to a car wash, quick lube/oil change facility, the operation of gaming devices within the convenience store and offices for Lessee's operations, together with uses that are complementary to or extensions of Lessee's gas station and convenience store operations (*e.g.*, quick-service restaurants, deli and sandwich shops, coffee shops, juice shops, postal contract units and/or UPS/Federal Express services) when such uses are not in violation of Legal Requirements or the Permitted Encumbrances.

"*Permitted Sublease*" has the meaning set forth in Section 23.

"*Person*" means any individual, partnership, corporation, limited liability company, trust, unincorporated organization, Governmental Authority or any other form of entity.

"*Property*" means, that parcel or parcels of real estate located at the address set forth in Exhibit B and legally described on Exhibit B attached hereto (which parcels may be fee estates or easement estates), together with all rights, privileges, and appurtenances associated therewith, all buildings, fixtures and other improvements now or hereafter located on such parcels of real estate (whether or not affixed to such real estate).

"*Regulated Substances*" means "petroleum" and "petroleum-based substances" or any similar terms described or defined in any of the Environmental Laws and any applicable federal, state, county or local laws applicable to or regulating USTs.

"*Release*" means any presence, release, deposit, discharge, emission, leaking, spilling, seeping, migrating, injecting, pumping, pouring, emptying, escaping, dumping, disposing or other movement of Hazardous Materials, Regulated Substances or USTs.

"*Remediation*" means any response, remedial, removal, or corrective action, any activity to cleanup, detoxify, decontaminate, contain or otherwise remediate any Hazardous Materials, Regulated Substances or USTs, any actions to prevent, cure or mitigate any Release, any action to comply with any Environmental Laws or with any permits issued pursuant thereto, any inspection, investigation, study, monitoring, assessment, audit, sampling and testing, laboratory or other analysis, or any evaluation relating to any Hazardous Materials, Regulated Substances or USTs.

"*Rental*" means, collectively, the Base Annual Rental and the Additional Rental.

"*Rent Adjustment*" has the meaning set forth in Section 4.B.

"*Successor Lessor*" has the meaning set forth in Section 21.

"*Taking*" means (a) any taking or damaging of all or a portion of the Property (i) in or by condemnation or other eminent domain proceedings pursuant to any Law, general or special, or (ii) by reason of any agreement with any condemnor in settlement of or under threat of any such condemnation or other eminent domain proceeding, or (iii) by any other means, or (b) any de facto condemnation that constitutes a compensable taking under applicable law. The Taking shall be considered to have taken place as of the later of the date actual physical possession is taken by the condemnor, or the date on which the right to compensation and damages accrues under the law applicable to the Property.

"*Threatened Release*" means a substantial likelihood of a Release which requires action to prevent or mitigate damage to the soil, surface waters, groundwaters, land, stream sediments, surface or subsurface strata, ambient air or any other environmental medium comprising or surrounding any Property which may result from such Release.

"*USTs*" means any one or combination of tanks and associated product piping systems used in connection with storage, dispensing and general use of Regulated Substances.

"WGI" means Winner's Gaming, Inc.

"*WGI Agreement*" means any and all agreements of Lessee with WGI pursuant to which WGI currently operates gaming machines or devices and related equipment (or the technological evolution thereof) on the Property and any Substitute WGI Agreement (as defined in Section 12.F).

EXHIBIT B

ADDRESS AND LEGAL DESCRIPTION OF PROPERTY

PROPERTY ADDRESS:

PROPERTY LEGAL DESCRIPTION:

EXHIBIT C

SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT AND ESTOPPEL CERTIFICATE

THIS AGREEMENT, made effective as of _____, 2005, by and _____, having a mailing address of _____ ("Lessor"), and _____, having a mailing address of _____ ("Lessee") and _____, _____ ("Lender"), having a mailing address of _____, and/or its participants, successors or assigns.

W I T N E S S E T H:

A. WHEREAS, by Lease Agreement dated _____, 2005 (hereinafter referred to as the "Lease"), Lessor leased and rented to Lessee the real property having a street address of _____, in _____, Nevada, a legal description of which is attached as **Exhibit A** (the "Property"), which Lease is evidenced by a Memorandum of Lease dated _____, 2005 and filed of record in the records of the County of _____, State of Nevada (the "Official Records") in Book _____, Page _____ as Document No. _____; and

B. WHEREAS, Lessor has obtained a loan from Lender secured by, among other things, a Deed of Trust, Assignment of Rents and Leases, Security Agreement and Financing Statement encumbering, among other things, the Property dated _____, 2005 and filed of record in the Official Records in Book _____, Page _____ as Document No. _____ (the "Deed of Trust"), and as a condition to making such loan, it was agreed between Lessor and Lender that Lessor would obtain from Lessee certain written agreements; and

C. WHEREAS, Lessee and Lender desire hereby to establish certain rights, safeguards, obligations and priorities with respect to their respective interests by means of the following agreement.

NOW THEREFORE, for and in consideration of the Property and of the mutual covenants and promises herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Lessee and Lender agree as follows:

1. The Lease and the rights of Lessee thereunder are and shall be subject and subordinate to the lien of the Deed of Trust and to all of the terms, conditions and provisions thereof, to all advances made or to be made thereunder, to the full extent of the principal sum, interest thereon and other amounts from time to time secured thereby, and to any renewal, substitution, extension, modification or replacement thereof, including any increase in the indebtedness secured thereby or any supplements thereto. In the event that Lender or any other person (the Lender, any other such person and their successors and assigns being referred to herein as the "Purchaser") acquires title to the Property pursuant to the exercise of any remedy provided for in the Deed of Trust or by reason of the acceptance of a deed in lieu of foreclosure, Lessee covenants and agrees to attorn to and recognize and be bound to Purchaser as its new Lessor, and subject to the other terms, provisions and conditions of this Agreement, the Lease shall continue in full force and effect as a direct Lease between Lessee and Purchaser.

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

a. the right of possession of Lessee to the Property shall not be terminated or disturbed by any steps or proceedings taken by Lender in the exercise of any of its rights under the Deed of Trust; and

b. the Lease shall not be terminated or affected by said exercise of any remedy provided for in the Deed of Trust, and Lender hereby covenants that any sale by it of the Property pursuant to the exercise of any rights and remedies under the Deed of Trust or otherwise, shall be made subject to the Lease and the rights of Lessee thereunder; Lessee shall not be named in any foreclosure action unless necessary, in the

reasonable judgment of Lender, to complete such foreclosure action under the laws of the state in which the Property is located.

3. In no event shall Lender or any other Purchaser be:

a. liable for any act or omission of any prior landlord;

b. liable for the return of any security deposit which has not been delivered to the Purchaser;

c. subject to any offsets or defenses which the Lessee might have against any prior landlord;

d. bound by any payment of Base Annual Rental, Base Monthly Rental or Additional Rental which the Lessee might have paid to any prior landlord for more than the current month;

e. bound by any provisions of the Lease regarding commencement or completion of construction of the Property; or

f. bound by any warranties of construction provided by Lessor under the Lease.

4. Lessee agrees to give prompt written notice to Lender of any default by the Lessor under the Lease which would entitle Lessee to cancel the Lease or abate the Rental payable thereunder, and agrees that notwithstanding any provision of Lease, no notice of cancellation thereof shall be effective unless Lender has received the notice aforesaid and has failed within 30 days of the date of receipt thereof to cure, or if the default cannot be cured within 30 days, has failed to commence and to pursue diligently the cure of the Lessor's default which gave rise to such right of cancellation or abatement. Lessee further agrees to give such notices to any successor-in-interest of Lender, provided that such successor-in-interest shall have given written notice to Lessee of its acquisition of Lender's interest in the Deed of Trust and designated the address to which such notices are to be sent.

5. Lessee acknowledges that, under the terms of the Deed of Trust, Lessor has assigned to Lender the rentals under the Lease as additional security for said loan, and Lessee hereby expressly consents to and recognizes such Deed of Trust, and agrees to pay the Rental to Lender or its nominee whenever Lender claims or requests the Rental under the terms of said Assignment.

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

a. make a prepayment in excess of one month of Base Monthly Rental thereunder;

b. subordinate or permit subordination of the Lease to any lien subordinate to the Deed of Trust; or

c. make or enter into any amendment or modification to or termination of the Lease.

7. Lessee agrees to certify in writing to Lender, upon request, whether or not any default on the part of the Lessor exists under the Lease and the nature of any such default. Lessee states that as of this date, the Lease is in full force and effect, without modification. Lessee further states as follows:

a. Lessee is the tenant under the Lease for the Property. The Base Monthly Rental presently is $_____ per month.

b. The Lease term commenced or will commence on the Effective Date, as defined in the Lease. The termination date of the Lease term, excluding renewals and extensions, is March 31, 2026. Lessee has the right to extend or renew the Lease for four (4) consecutive five (5) year periods.

c. The Lease has not been assigned, modified, supplemented or amended in any way by Lessee, except as described on the attached sheet (if any). The Lease constitutes the entire agreement between the parties and there are no other agreements concerning the Property, and Lessee is not entitled to receive any concession or benefit (rental or otherwise) or other similar compensation in connection with renting the Property other than as set forth in the Lease.

d. The Lease is valid and in full force and effect, and, to the best of Lessee's knowledge, no party thereto, their successors or assigns is presently in default thereunder. Lessee has no defense, set-off or counterclaim against Lessor arising out of the Lease or in any way relating thereto, and no event has occurred and no condition exists, which with the giving of notice or the passage of time, or both, will constitute a default under the Lease.

e. No Base Monthly Rental or other sum payable under the Lease has been paid more than one month in advance.

f. No security deposit has been given to Lessor to secure Lessee's performance under the Lease.

8. The foregoing provisions shall be self-operative and effective without the execution of any further instruments on the part of either party hereto. However, Lessee agrees to execute and deliver to Lender or to any person to whom Lessee herein agrees to attorn such other instruments as either shall request in order to effect said provisions in form consistent with the terms hereof and reasonably acceptable to Lender, Lessee and such party to whom Lessee has agreed to attorn.

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

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

11. This agreement may be signed in counterparts.

12. If any term or provision of this Agreement shall to any extent be held invalid or unenforceable, the remaining terms and provisions hereof shall not be affected thereby, but each term and provision hereof shall be valid and enforceable to the fullest extent permitted by law.

13. All notices, statements and other communications to be given under the terms of this agreement shall be in writing and delivered by hand against written receipt or sent by certified or registered mail, return receipt requested, postage prepaid and addressed as provided in the first paragraph of this Agreement, or at such other address as from time to time designated by the party receiving the notice.

[Remainder of page intentionally left blank; signatures follow]

IN WITNESS WHEREOF, Lessee and Lender have caused this instrument to be executed as of the day and year first above written.

LESSEE:

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation

By:_____
Its:_____

STATE OF _____)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me on _____, 2005, by _____, the _____ of Berry-Hinckley Industries, a Nevada corporation, for and on behalf of the corporation.

_____
Notary Public

LENDER:

_____

By: _____
Its: _____

STATE OF _____)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me on _____, 2005, by _____, the _____ of _____, a _____, for and on behalf of the _____.

_____
Notary Public

LANDLORD:

_____

By: _____
Its: _____

STATE OF _____)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me on _____, 2005, by _____, the _____ of _____, for and on behalf of the limited liability company.

_____
Notary Public

This instrument was prepared by:

_____
_____
_____
_____

EXHIBIT A TO SNDA

(Legal Description)

F I L E D
Electronically
CV14-01712
2016-08-30 11:18:54 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5685608 : tbritton

EXHIBIT 3

EXHIBIT 3

The Network of Preferred Community Banks™

Loan No. 101112365

THREE YEAR ADJUSTABLE TERM NOTE

January 19, 2007

$2,200,000.00

For value received, the undersigned **Edward C Wooley and Judith A Wooley, as trustees of Edward C Wooley & Judith A Wooley Intervivos Revocable Trust Year 2000, a California trust, Edward C Wooley, an individual,** and **Judith A Wooley, an individual**, each with an address of **41 Peralta Avenue, Los Gatos, California 95030** (collectively, the "Borrower"), jointly and severally, promise to pay to the order of Pacific Capital Bank, N.A., a national banking association, doing business as South Valley National Bank with an address of c/o Loan Services, PO Box 60654, Santa Barbara, California 93160-0654 (together with its successors and assigns, the "Bank"), the principal amount of **Two Million Two Hundred Thousand Dollars and Zero Cents ($2,200,000.00)** on or before **January 15, 2017** (the "Maturity Date"), as set forth below, together with interest from the date hereof on the unpaid principal balance from time to time outstanding until paid in full. The Borrower shall pay consecutive monthly installments of principal and interest, as follows: **$15,323.95** on **February 15, 2007**, and the same amount (except the last installment which shall be the unpaid balance) on the **15th** day of each month thereafter. The aggregate principal balance outstanding shall initially bear interest thereon at a per annum rate equal to **6.75%**. The interest rate on the aggregate principal balance shall change on **January 15, 2010** and again on **January 15, 2013** (each a "Change Date") to a fixed rate equal to **Three Percent** (3.00%) above the Treasury Index (as hereinafter defined) on each such Change Date. On each Change Date each monthly installment due and payable until the next Change Date shall be recalculated (increased or reduced) to reflect the adjusted interest rate, the outstanding principal balance at such time and the remaining term of the **300**-month amortization period commencing on the date of this Note in accordance with the Bank's calculation in the Bank's sole discretion.

Notwithstanding anything to the contrary in this Note, the interest rate on this Note is limited by a floor as follows: the minimum interest rate (i.e. floor) is **5.25%**.

Treasury Index means the weekly average yield on United States Treasury securities, adjusted to a constant maturity equal to the Applicable Treasury Rate Period (as hereinafter defined), or, in the event the Treasury Index is no longer available, the base, reference or other rate then designated by the Bank, in its sole discretion, for general commercial loan reference purposes, it being understood that such rate is a reference rate, not necessarily the lowest, established from time to time, which serves as the basis upon which effective interest rates are calculated for loans making reference thereto. The Applicable Treasury Rate Period is 3 years.

Principal and interest shall be payable at the Bank's main office or at such other place as the Bank may designate in writing in immediately available funds in lawful money of the United States of America without set-off, deduction or counterclaim. Interest shall be calculated on the basis of actual number of days elapsed in a 360-day year.

At the option of the Bank, this Note shall become immediately due and payable without notice or demand upon the occurrence at any time of any of the following events of default (each, an "Event of Default"): (1) default of any liability, obligation or undertaking of the Borrower or any guarantor hereof to the Bank, hereunder or otherwise, including, without limitation, failure to pay in full and when due any installment of principal or interest or default of the Borrower or any guarantor hereof under any other loan document delivered by the Borrower or any guarantor, or in connection with the loan evidenced by this Note or any other agreement by the Borrower or any guarantor with the Bank continuing for 10 days with respect to the payment of money or continuing for 30 days with respect to any other default; (2) failure of

Exhibit 3-1

the Borrower or any guarantor hereof to maintain aggregate collateral security value satisfactory to the Bank continuing for 30 days; (3) default of any material liability, obligation or undertaking of the Borrower or any guarantor hereof to any other party continuing for 30 days; (4) if any statement, representation or warranty heretofore, now or hereafter made by the Borrower or any guarantor hereof in connection with the loan evidenced by this Note or in any supporting financial statement of the Borrower or any guarantor hereof shall be determined by the Bank to have been false in any material respect when made; (5) if the Borrower or any guarantor hereof is a corporation, trust, partnership or limited liability company, the liquidation, termination or dissolution of any such organization, or the merger or consolidation of such organization into another entity, or its ceasing to carry on actively its present business or the appointment of a receiver for its property; (6) the death of the Borrower or any guarantor hereof and, if the Borrower or any guarantor hereof is a partnership or limited liability company, the death of any partner or member; (7) the institution by or against the Borrower or any guarantor hereof of any proceedings under the Bankruptcy Code 11 USC §101 *et seq.* or any other law in which the Borrower or any guarantor hereof is alleged to be insolvent or unable to pay its debts as they mature, or the making by the Borrower or any guarantor hereof of an assignment for the benefit of creditors or the granting by the Borrower or any guarantor hereof of a trust mortgage for the benefit of creditors; (8) the service upon the Bank of a writ in which the Bank is named as trustee of the Borrower or any guarantor hereof; (9) a judgement or judgements for the payment of money shall be rendered against the Borrower or any guarantor hereof, and any such judgement shall remain unsatisfied and in effect for any period of thirty (30) consecutive days without a stay of execution; (10) any levy, lien (including mechanics lien), seizure, attachment, execution or similar process shall be issued or levied on any of the property of the Borrower or any guarantor hereof; (11) the termination or revocation of any guaranty hereof; or (12) the occurrence of such a change in the condition or affairs (financial or otherwise) of the Borrower or any guarantor hereof, or the occurrence of any other event or circumstance, such that the Bank, in its sole discretion, deems that it is insecure or that the prospects for timely or full payment or performance of any obligation of the Borrower or any guarantor hereof to the Bank has been or may be impaired.

Any payments received by the Bank on account of this Note shall, at the Bank's option, be applied first, to accrued and unpaid interest; second, to the unpaid principal balance hereof; third to any costs, expenses or charges then owed to the Bank by the Borrower; and the balance to escrows, if any. Notwithstanding the foregoing, any payments received after the occurrence and during the continuance of an Event of Default shall be applied in such manner as the Bank may determine. The Borrower hereby authorizes the Bank to charge any deposit account which the Borrower may maintain with the Bank for any payment required hereunder without prior notice to the Borrower.

If pursuant to the terms of this Note, the Borrower is at any time obligated to pay interest on the principal balance at a rate in excess of the maximum interest rate permitted by applicable law for the loan evidenced by this Note, the applicable interest rate shall be immediately reduced to such maximum rate and all previous payments in excess of the maximum rate shall be deemed to have been payments in reduction of principal and not on account of the interest due hereunder. More specifically, if from any circumstances whatsoever, fulfillment of any provision of this Note or any other loan document excuted and delivered in connection with this Note, at the time performance of such provision becomes due, would exceed the limit on interest then permitted by any applicable usury statute or any other applicable law, the Bank may, at its option (a) reduce the obligations to be fulfilled to such limit on interest, or (b) apply the amount in excess of such limit on interest to the reduction of the outstanding principal balance of the obligations, and not to the payment of interest, with the same force and effect as though Borrower had specifically designated such sums to be so applied to principal and Bank had agreed to accept such extra payments(s) as a premium-free prepayment, so that in no event shall any exaction be possible under this Note or any other loan document that is in excess of the applicable limit on interest. It is the intention of Borrower and Bank that the total liability for payments in the nature of interest shall not exceed the limits imposed by any applicable state or federal interest rate laws. The provisions of this paragraph shall control every other provision of this Note, and any provision of any other loan document in conflict with this paragraph.

The Borrower represents to the Bank that the proceeds of this Note will not be used for personal, family or household purposes or for the purpose of purchasing or carrying margin stock

or margin securities within the meaning of Regulations U and X of the Board of Governors of the Federal Reserve System, 12 C.F.R. Parts 221 and 224.

The Borrower and each guarantor hereof grant to the Bank a continuing lien on and security interest in any and all deposits or other sums at any time credited by or due from the Bank (or any of its banking or lending affiliates, or any bank acting as a participant under any loan arrangement between the Bank and the Borrower, or any third party acting on the Bank's behalf (collectively, the "Bank Affiliates")) to the Borrower and each guarantor hereof and any cash, securities, instruments or other property of the Borrower and each guarantor hereof in the possession of the Bank or any Bank Affiliate, whether for safekeeping or otherwise, or in transit to or from the Bank or any Bank Affiliate (regardless of the reason the Bank or Bank Affiliate had received the same or whether the Bank or Bank Affiliate has conditionally released the same) as security for the full and punctual payment and performance of all of the liabilities and obligations of the Borrower and any guarantor hereof to the Bank or any Bank Affiliate and such deposits and other sums may be applied or set off against such liabilities and obligations of the Borrower or any guarantor hereof to the Bank or any Bank Affiliate at any time, whether or not such are then due, whether or not demand has been made and whether or not other collateral is then available to the Bank or any Bank Affiliate.

No delay or omission on the part of the Bank in exercising any right hereunder shall operate as a waiver of such right or of any other right of the Bank, nor shall any delay, omission or waiver on any one occasion be deemed a bar to or waiver of the same or any other right on any future occasion. The Borrower and every guarantor of this Note, regardless of the time, order or place of signing, waives presentment, demand, protest, notice of intent to accelerate, notice of acceleration and all other notices of every kind in connection with the delivery, acceptance, performance or enforcement of this Note and assents to any extension or postponement of the time of payment or any other indulgence, to any substitution, exchange or release of collateral, and to the addition or release of any other party or person primarily or secondarily liable and waives all recourse to suretyship and guarantor defenses generally, including any defense based on impairment of collateral.

The Borrower and each guarantor of this Note shall indemnify, defend and hold the Bank and the Bank Affiliates and their directors, officers, employees, agents and attorneys harmless against any claim brought or threatened against the Bank by the Borrower, by any guarantor, or by any other person (as well as from attorneys' reasonable fees and expenses in connection therewith) on account of the Bank's relationship with the Borrower or any guarantor hereof (each of which may be defended, compromised, settled or pursued by the Bank with counsel of the Bank's selection, but at the expense of the Borrower and any guarantor), except for any claim arising out of the gross negligence or willful misconduct of the Bank.

The Borrower and each guarantor of this Note agree to pay, upon demand, costs of collection of all amounts under this Note including, without limitation, principal and interest, or in connection with the enforcement of, or realization on, any security for this Note, including, without limitation, to the extent permitted by applicable law, reasonable attorneys' fees and expenses. Upon the occurrence and during the continuance of an Event of Default, interest shall accrue at a rate per annum equal to the aggregate of 3.0% plus the rate provided for herein. If any payment due under this Note is unpaid for 15 days or more, the Borrower shall pay, in addition to any other sums due under this Note (and without limiting the Bank's other remedies on account thereof), a late charge equal to the greater of $10.00 or 10.0% of such unpaid amount.

This Note shall be binding upon the Borrower and each guarantor hereof and upon their respective heirs, successors, assigns and legal representatives, and shall inure to the benefit of the Bank and its successors, endorsees and assigns.

The Borrower and each guarantor, if any, hereby waive presentment, demand, protest, notice of dishonor, notice of protest and all other notices and demands of every kind, and all suretyship defenses of any kind, in each case that would otherwise be available in connection with this Note including, without limitation, any right (whether now or hereafter existing) to require the holder hereof to first proceed against the Borrower, or any guarantor, for any security.

Exhibit 3-3

Executed as of **January 19, 2007.**

Borrower:

Edward C. Wooley, trustee of Edward C. Wooley & Judith A. Wooley Intervivos Revocable Trust 2 Year 2000

Judith A. Wooley, Trustee of Edward C. Wooley & Judith A. Wooley Intervivos Revocable Trust Year 2000

41 Peralta Avenue
Los Gatos, California
95030

Borrower:

Edward C. Wooley, individually

41 Peralta Avenue
Los Gatos, California
95030

Borrower:

Judith A. Wooley, individually

41 Peralta Avenue
Los Gatos, California
95030

© 2007 PCI Corp. - Tel. (888) 391-7900

Exhibit 3-4

F I L E D
Electronically
CV14-01712
2016-08-30 11:18:54 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5685608 : tbritton

Exhibit 4

Exhibit 4

RECORDED AT THE REQUEST OF

FIRST AMERICAN TITLE CO.

2007 JAN 30 AM 8:21

FILE NO. 363893

ALAN GLOVER
CARSON CITY RECORDER

FEE $55.00 DEP

APN 002-368-27

APN

APN

FOR RECORDER'S USE ONLY

DEED OF TRUST, FIXTURE FILING AND SECURITY AGREEMENT

TITLE OF DOCUMENT

☒ I, the undersigned, hereby affirm that the attached document, including any exhibits, hereby submitted for recording does not contain the social security number of any person or persons. (NRS 239B.030)

☐ I, the undersigned, hereby affirm that the attached document, including any exhibits, hereby submitted for recording does contain the social security number of a person or persons as required by law. State specific law:

Signature

W.D. BERNARD - TITLE OFFICER

Print Name & Title

WHEN RECORDED MAIL TO:

PACIFIC CAPITAL BANK, N.A.
C/O LOAN SERVICES
P.O. BOX 60654

SANTA BARBARA, CA 93160-0654

363893

Exhibit 4-1

The Network of Preferred Community Banks℠

250609 RB

ASSESSOR'S PARCEL NUMBER:002-368-27

UPON RECORDATION RETURN TO:

Pacific Capital Bank, N.A.

c/o Loan Services, PO Box 60654

Santa Barbara, California 93160-0654

MAIL TAX STATEMENTS TO:

The Edward C Wooley and Judith A Wooley Intervivos Revocable Trust Year 2000

41 Peralta Avenue

Los Gatos, California 95030

DEED OF TRUST, FIXTURE FILING AND SECURITY AGREEMENT

This DEED OF TRUST, FIXTURE FILING AND SECURITY AGREEMENT (this "Deed of Trust") entered into as of **January 19, 2007**, among **Edward C Wooley** and **Judith A Wooley**, Trustees of **The Edward C Wooley and Judith A Wooley Intervivos Revocable Trust Year 2000**, a **California** trust, with an address of **41 Peralta Avenue**, **Los Gatos**, **California 95030** (the "Trustor"), PCB Service Corporation, with an address of c/o Loan Services, PO Box 60654, Santa Barbara, CA 93160 (the "Trustee") for the use and benefit of Pacific Capital Bank, N.A., a national banking association, doing business as South Valley National Bank, with an address of c/o Loan Services, PO Box 60654, Santa Barbara, California 93160-0654 (the "Beneficiary"), and the Beneficiary.

The real property which is the subject matter of this Deed of Trust has the following address(es): **1820 Highway 50 East**, **Carson City**, **Nevada 89704** (the "Address(es)").

This document serves as a fixture filing under Nevada Revised Statutes Section 104.9502.

1. DEED OF TRUST, OBLIGATIONS AND FUTURE ADVANCES

1.1 Deed of Trust. For valuable consideration paid and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Trustor hereby irrevocably and unconditionally mortgages, grants, bargains, transfers, sells, conveys, sets over and assigns to the Trustee and its successors and assigns, IN TRUST, for the benefit and security of the Beneficiary forever, WITH POWER OF SALE AND RIGHT OF ENTRY AND POSSESSION, all of Trustor's right, title and interest in and to the "Property" described below, to secure the prompt payment and performance of the

363893

Exhibit 4-2

Obligations (as hereinafter defined), including without limitation, all amounts due and owing to the Beneficiary and all obligations respecting that certain **Three Year Adjustable Term Note**, dated **January 19, 2007**, by **Edward C Wooley & Judith A Wooley Intervivos Revocable Trust Year 2000, Edward C Wooley and Judith A Wooley** in favor of the Beneficiary in the original principal amount of **$2,200,000.00** (the "Note"; and collectively, along with all other agreements, documents, certificates and instruments delivered in connection therewith, the "Loan Documents"), and any substitutions, modifications, extensions or amendments to any of the Loan Documents.

This Deed of Trust shall secure the principal amount of Obligations of up to **$2,200,000.00**. The maximum amount of principal secured hereby may be increased or decreased by amendment to this Deed of Trust. This Deed of Trust shall nevertheless secure payment and performance of all Obligations including, without limitation, any other liabilities and future advances, direct or indirect, absolute or contingent, now existing or hereafter arising from the Trustor to the Beneficiary. Future advances hereunder are governed by Nevada Revised Statutes Sections 106.300 to 106.400, inclusive.

1.2 Security Interest in Property. As continuing security for the Obligations the Trustor hereby pledges, assigns and grants to the Beneficiary, and its successors and assigns, a security interest in any of the Property (as hereinafter defined) constituting personal property or fixtures. This Deed of Trust is and shall be deemed to be a security agreement, fixture filing and financing statement pursuant to the terms of the Uniform Commercial Code of Nevada (the "Uniform Commercial Code") as to any and all personal property and fixtures and as to all such property the Beneficiary shall have the rights and remedies of a secured party under the Uniform Commercial Code in addition to its rights hereunder. This Deed of Trust constitutes a financing statement filed as a fixture filing under Section 104.9502(c) of the Uniform Commercial Code covering any Property which now is or later may become a fixture.

1.3 Collateral Assignment of Leases and Rents. The Trustor hereby irrevocably and unconditionally assigns to the Beneficiary, and its successors and assigns, as collateral security for the Obligations all of the Trustor's rights and benefits under any and all Leases (as hereinafter defined) and any and all rents and other amounts now or hereafter owing with respect to the Leases or the use or occupancy of the Property. This collateral assignment shall be absolute and effective immediately, but the Trustor shall have a license, revocable by the Beneficiary, to continue to collect rents owing under the Leases until an Event of Default (as hereinafter defined) occurs and the Beneficiary exercises its rights and remedies to collect such rents as set forth herein.

1.4 Conditions to Grant. To have and to hold the above granted Property unto and to the use and benefit of the Trustee, IN TRUST, for the benefit and security of the Beneficiary, and to the Beneficiary, as the case may be, and their successors and assigns, forever; provided, however, the conveyances, grants and assignments contained in this Deed of Trust are upon the express condition that, if Trustor shall pay and perform the Obligations in full, including, without limitation, all principal, interest and premium thereon and other charges, if applicable, in accordance with the terms and conditions in the Loan Documents and this Deed of Trust, shall pay and perform all other Obligations as set forth in this Deed of Trust and shall abide by and comply with each and every covenant and condition set forth herein and in the Loan Documents, the conveyances, grants and assignments contained in this Deed of Trust shall cease, terminate and be void.

1.5 Property. The term "Property," as used in this Deed of Trust, shall mean that certain parcel of land and the fixtures, structures and improvements and all personal property constituting fixtures, as that term is defined in the Uniform Commercial Code, now or hereafter thereon located at the Address(es), as more particularly described in Exhibit A attached hereto, together with: (i) all rights now or hereafter existing, belonging, pertaining or appurtenant thereto; (ii) the following categories of assets as defined in the Uniform Commercial Code: goods (including inventory, equipment and any accessions thereto), instruments (including promissory notes), documents, accounts (including health-care-insurance receivables), chattel paper (whether tangible or electronic), deposit accounts, letter-of-credit rights (whether or not the letter of credit is evidenced by a writing), commercial tort claims, securities and all other investment property, general intangibles (including payment intangibles and software), supporting

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obligations and any and all proceeds of any thereof, whether now owned or hereafter acquired, that are located on or used in connection with, or that arise in whole or in part out of the Trustor's use of or business conducted on or respecting, the Property and any substitutions, replacements, accessions and proceeds of any of the foregoing; (iii) all judgements, awards of damages and settlements hereafter made as a result or in lieu of any Taking, as hereinafter defined; (iv) all of the rights and benefits of the Trustor under any present or future leases and agreements relating to the Property, including, without limitation, rents, issues and profits, or the use or occupancy thereof together with any extensions and renewals thereof, specifically excluding all duties or obligations of the Trustor of any kind arising thereunder (the "Leases"); and (v) all contracts, permits and licenses respecting the use, operation or maintenance of the Property.

1.6 Obligations. The term "Obligation(s)," as used in this Deed of Trust, shall mean without limitation all loans, advances, indebtedness, notes, liabilities, rate swap transactions, basis swaps, forward rate transactions, commodity swaps, commodity options, equity or equity index swaps, equity or equity index options, bond options, interest rate options, foreign exchange transactions, cap transactions, floor transactions, collar transactions, forward transactions, currency swap transactions, cross-currency rate swap transactions, currency options and amounts, liquidated or unliquidated, now or hereafter owing by the Trustor to the Beneficiary at any time, of each and every kind, nature and description, whether arising under this Deed of Trust or otherwise, and whether secured or unsecured, direct or indirect (that is, whether the same are due directly by the Trustor to the Beneficiary; or are due indirectly by the Trustor to the Beneficiary as endorser, guarantor or other surety, or as obligor of obligations due third persons which have been endorsed or assigned to the Beneficiary, or otherwise), absolute or contingent, due or to become due, now existing or hereafter contracted, including, without limitation, payment of all amounts outstanding when due pursuant to the terms of any of the Loan Documents. Said term shall also include all interest and other charges chargeable to the Trustor or due from the Trustor to the Beneficiary from time to time and all advances, costs and expenses referred to in this Deed of Trust, including without limitation the costs and expenses (including reasonable attorney's fees) of enforcement of the Beneficiary's rights hereunder or pursuant to any document or instrument executed in connection herewith.

1.7 Cross-Collateral and Future Advances. It is the express intention of the Trustor that this Deed of Trust secure payment and performance of all of the Obligations, whether now existing or hereinafter incurred by reason of future advances by the Beneficiary or otherwise, and regardless of whether such Obligations are or were contemplated by the parties at the time of the granting of this Deed of Trust. Notice of the continuing grant of this Deed of Trust shall not be required to be stated on the face of any document evidencing any of the Obligations, nor shall such documents be required to otherwise specify that they are secured hereby.

2. REPRESENTATIONS, WARRANTIES, COVENANTS

2.1 Representations and Warranties. The Trustor represents and warrants that:

(a) This Deed of Trust has been duly executed and delivered by the Trustor and is the legal, valid and binding obligation of the Trustor enforceable in accordance with its terms, except as limited by bankruptcy, insolvency, reorganization, moratorium or other laws affecting the enforcement of creditors' rights generally;

(b) The Trustor is the sole legal owner of the Property, holding good and marketable fee simple title to the Property, subject to no liens, encumbrances, leases, security interests or rights of others, other than as set forth in any title insurance policy, title report, or final title opinion issued in favor of, and accepted by, the Bank in connection with this Deed of Trust (the "Permitted Encumbrances");

(c) The Trustor is the sole legal owner of the entire lessor's interest in Leases, if any, with full power and authority to encumber the Property in the manner set forth herein, and the Trustor

has not executed any other assignment of Leases or any of the rights or rents arising thereunder;

(d) As of the date hereof, there are no Hazardous Substances (as hereinafter defined) in, on or under the Property, except as disclosed in writing to and acknowledged by the Beneficiary; and

(e) Each Obligation is a commercial obligation and does not represent a loan used for personal, family or household purposes and is not a consumer transaction.

2.2 Recording; Further Assurances. The Trustor covenants that it shall, at its sole cost and expense and upon the request of the Beneficiary, cause this Deed of Trust, and each amendment, modification or supplement hereto, to be recorded and filed in such manner and in such places, and shall at all times comply with all such statutes and regulations as may be required by law in order to establish, preserve and protect the interest of the Beneficiary in the Property and the rights of the Beneficiary under this Deed of Trust. Trustor will from time to time execute and deliver to the Beneficiary such documents, and take or cause to be taken, all such other further action, as the Beneficiary may request in order to effect and confirm or vest more securely in the Beneficiary all rights contemplated by this Deed of Trust (including, without limitation, to correct clerical errors) or to vest more fully in, or assure to the Beneficiary the security interest in, the Property or to comply with applicable statute or law. To the extent permitted by applicable law, Trustor authorizes the Beneficiary to file financing statements, continuation statements or amendments without Trustor's signature appearing thereon, and any such financing statements, continuation statements or amendments may be signed or authenticated by the Beneficiary on behalf of Trustor, if necessary, and may be filed at any time in any jurisdiction. The Beneficiary may at any time and from time to time file financing statements, continuation statements and amendments thereto that describe the Property as "all assets of Trustor" or words of similar effect and which contain any other information required by Article 9 of the Uniform Commercial Code for the sufficiency or filing office acceptance of any financing statement, continuation statement or amendment, including whether Trustor is an organization, the type of organization and any organization identification number issued to Trustor; Trustor also authorizes the Beneficiary to file financing statements describing any agricultural liens or other statutory liens held by the Beneficiary. Trustor agrees to furnish any such information to the Beneficiary promptly upon request. In addition, Trustor shall at any time and from time to time, take such steps as the Beneficiary may reasonably request for the Beneficiary (i) to obtain an acknowledgement, in form and substance satisfactory to the Beneficiary, of any bailee having possession of any of the Property that the bailee holds such Property for the Beneficiary, (ii) to obtain "control" of any investment property, deposit accounts, letter-of-credit rights or electronic chattel paper (as such terms are defined in Article 9 of the Uniform Commercial Code relating to what constitutes "control" for such items of Property), with any agreements establishing control to be in form and substance satisfactory to the Beneficiary, and (iii) otherwise to insure the continued perfection and priority of the Beneficiary's security interest in any of the Property and the preservation of its rights therein. Trustor hereby constitutes the Beneficiary its attorney-in-fact to execute and file all filings required or so requested for the foregoing purposes, all acts of such attorney being hereby ratified and confirmed; and such power, being coupled with an interest, shall be irrevocable until this Deed of Trust terminates in accordance with its terms, all Obligations are paid in full and the Property is released.

2.3 Restrictions on the Trustor. The Trustor covenants that it will not, nor will it permit any other person to, directly or indirectly, without the prior written approval of the Beneficiary in each instance:

(a) Sell, convey, assign, transfer, mortgage, pledge, hypothecate, lease or dispose of all or any part of any legal or beneficial interest in the Trustor or the Property or any part thereof or permit any of the foregoing, except as expressly permitted by the terms of this Deed of Trust;

(b) Permit the use, generation, treatment, storage, release or disposition of any oil or other material or substance constituting hazardous waste or hazardous materials or substances under any applicable Federal or state law, regulation or rule ("Hazardous Substances"); or

(c) Permit to be created or suffer to exist any mortgage, lien, security interest, attachment or other encumbrance or charge on the Property or any part thereof or interest therein (except for the Permitted Encumbrances), including, without limitation, (i) any lien arising under any Federal, state or local statute, rule, regulation or law pertaining to the release or cleanup of Hazardous Substances and (ii) any mechanics' or materialmen's lien. The Trustor further agrees to give the Beneficiary prompt written notice of the imposition, or notice, of any lien referred to in this Section and to take any action necessary to secure the prompt discharge or release of the same. The Trustor agrees to defend its title to the Property and the Beneficiary's interest therein against the claims of all persons and, unless the Beneficiary requests otherwise, to appear in and diligently contest, at the Trustor's sole cost and expense, any action or proceeding that purports to affect the Trustor's title to the Property or the priority or validity of this Deed of Trust or the Beneficiary's interest hereunder.

2.4 Operation of Property. The Trustor covenants and agrees as follows:

(a) The Trustor will not permit the Property to be used for any unlawful or improper purpose, will at all times comply with all Federal, state and local laws, ordinances and regulations, and the provisions of any Lease, easement or other agreement affecting all or any part of the Property, and will obtain and maintain all governmental or other approvals relating to the Trustor, the Property or the use thereof, including without limitation, any applicable zoning or building codes or regulations and any laws or regulations relating to the handling, storage, release or cleanup of Hazardous Substances, and will give prompt written notice to the Beneficiary of (i) any violation of any such law, ordinance or regulation by the Trustor or relating to the Property, (ii) receipt of notice from any Federal, state or local authority alleging any such violation and (iii) the presence or release on the Property of any Hazardous Substances;

(b) The Trustor will at all times keep the Property insured for such losses or damage, in such amounts and by such companies as may be required by law and which the Beneficiary may require, provided that, in any case, the Trustor shall maintain: (i) physical hazard insurance on an "all risks" basis in an amount not less than 100% of the full replacement cost of the Property; (ii) flood insurance if and as required by applicable Federal law and as otherwise required by the Beneficiary; (iii) comprehensive commercial general liability insurance; (iv) rent loss and business interruption insurance; and (v) such other insurance as the Beneficiary may require from time to time, including builder's risk insurance in the case of construction loans. All policies regarding such insurance shall be issued by companies licensed to do business in the state where the policy is issued and also in the state where the Property is located, be otherwise acceptable to the Beneficiary, provide deductible amounts acceptable to the Beneficiary, name the Beneficiary as mortgagee, loss payee and additional insured, and provide that no cancellation or material modification of such policies shall occur without at least Thirty (30) days prior written notice to the Beneficiary. Such policies shall include (i) a mortgage endorsement determined by the Beneficiary in good faith to be equivalent to the "standard" mortgage endorsement so that the insurance, as to the interest of the Beneficiary, shall not be invalidated by any act or neglect of the Trustor or the owner of the Property, any foreclosure or other proceedings or notice of sale relating to the Property, any change in the title to or ownership of the Property, or the occupation or use of the Property for purposes more hazardous than are permitted at the date of inception of such insurance policies; (ii) a replacement cost endorsement; (iii) an agreed amount endorsement; (iv) a contingent liability from operation endorsement; and (v) such other endorsements as the Beneficiary may request. The Trustor will furnish to the Beneficiary upon request such original policies, certificates of insurance or other evidence of the foregoing as are acceptable to the Beneficiary. The terms of all insurance policies shall be such that no coinsurance provisions apply, or if a policy does contain a coinsurance provision, the Trustor shall insure the Property in an amount sufficient to prevent the application of the coinsurance provisions;

(c) Trustor will not enter into or modify the Leases in any material respect without the prior written consent of the Beneficiary, execute any assignment of the Leases except in favor of the

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Beneficiary, or accept any rentals under any Lease for more than one month in advance and will at all times perform and fulfill every term and condition of the Leases;

(d) Trustor will at all times (i) maintain complete and accurate records and books regarding the Property in accordance with generally accepted accounting principles and (ii) permit the Beneficiary and the Beneficiary's agents, employees and representatives, at such reasonable times as the Beneficiary may request, to enter and inspect the Property and such books and records; and

(e) Trustor will at all times keep the Property in good and first-rate repair and condition (damage from casualty not excepted) and will not commit or permit any strip, waste, impairment, deterioration or alteration of the Property or any part thereof.

2.5 Nevada Covenants. Where not otherwise inconsistent with the other provisions of this Deed of Trust, Covenants Nos. 1; 2 (full replacement value); 3; 4 (highest rate permitted under the Note); 5; 6; 7 (a reasonable percentage); 8; and 9 of Nevada Revised Statutes Section 107.030, are hereby adopted and made a part of this Deed of Trust.

2.6 Payments. The Trustor covenants to pay when due: all Federal, state, municipal, real property and other taxes, betterment and improvement assessments and other governmental levies, water rates, sewer charges, insurance premiums and other charges on the Property, this Deed of Trust or any Obligation secured hereby that could, if unpaid, result in a lien on the Property or on any interest therein. If and when requested by the Beneficiary, the Trustor shall deposit from time to time with the Beneficiary sums determined by the Beneficiary to be sufficient to pay when due the amounts referred to in this Section. The Trustor shall have the right to contest any notice, lien, encumbrance, claim, tax, charge, betterment assessment or premium filed or asserted against or relating to the Property; provided that it contests the same diligently and in good faith and by proper proceedings and, at the Beneficiary's request, provides the Beneficiary with adequate cash security, in the Beneficiary's reasonable judgement, against the enforcement thereof. The Trustor shall furnish to the Beneficiary the receipted real estate tax bills or other evidence of payment of real estate taxes for the Property within thirty (30) days prior to the date from which interest or penalty would accrue for nonpayment thereof. The Trustor shall also furnish to the Beneficiary evidence of all other payments referred to above within fifteen (15) days after written request therefor by the Beneficiary. If Trustor shall fail to pay such sums, the Beneficiary may, but shall not be obligated to, advance such sums. Any sums so advanced by the Beneficiary shall be added to the Obligations, shall bear interest at the highest rate specified in any note evidencing the Obligations, and shall be secured by the lien of this Deed of Trust.

2.7 Notices; Notice of Default. The Trustor will deliver to the Beneficiary, promptly upon receipt of the same, copies of all notices or other documents it receives that affect the Property or its use, or claim that the Trustor is in default in the performance or observance of any of the terms hereof or that the Trustor or any tenant is in default of any terms of the Leases. The Trustor further agrees to deliver to the Beneficiary written notice promptly upon the occurrence of any Event of Default hereunder or event that with the giving of notice or lapse of time, or both, would constitute an Event of Default hereunder.

2.8 Takings. In case of any condemnation or expropriation for public use of, or any damage by reason of the action of any public or governmental entity or authority to, all or any part of the Property (a "Taking"), or the commencement of any proceedings or negotiations that might result in a Taking, the Trustor shall promptly give written notice to the Beneficiary, describing the nature and extent thereof. The Beneficiary may, at its option, appear in any proceeding for a Taking or any negotiations relating to a Taking and the Trustor shall promptly give to the Beneficiary copies of all notices, pleadings, determinations and other papers relating thereto. The Trustor shall in good faith and with due diligence and by proper proceedings file and prosecute its claims for any award or payment on account of any Taking. The Trustor shall not settle any such claim without the Beneficiary's prior written consent. The Trustor shall hold any amounts received with respect to such awards or claims, by settlement, judicial decree or otherwise, in trust for the Beneficiary and promptly pay the same to the Beneficiary. The

Trustor authorizes any award or settlement due in connection with a Taking to be paid directly to the Beneficiary in amounts not exceeding the Obligations. The Beneficiary may apply such amounts to the Obligations in such order as the Beneficiary may determine.

2.9 Insurance Proceeds. The proceeds of any insurance resulting from any loss with respect to the Property shall be paid to the Beneficiary and, at the option of the Beneficiary, be applied to the Obligations in such order as the Beneficiary may determine; provided, however, that if the Beneficiary shall require repair of the Property, the Beneficiary may release all or any portion of such proceeds to the Trustor for such purpose. Any insurance proceeds paid to the Trustor shall be held in trust for the Beneficiary and promptly paid to it.

3. CERTAIN RIGHTS OF THE BENEFICIARY

3.1 Legal Proceedings. The Beneficiary shall have the right, but not the duty, to intervene or otherwise participate in any legal or equitable proceeding that, in the Beneficiary's reasonable judgement, might affect the Property or any of the rights created or secured by this Deed of Trust. The Beneficiary shall have such right whether or not there shall have occurred an Event of Default hereunder.

3.2 Appraisals/Assessments. The Beneficiary shall have the right, at the Trustor's sole cost and expense, to obtain appraisals, environmental site assessments or other inspections of the portions of the Property that are real estate at such times as the Beneficiary deems necessary or as may be required by applicable law, or its prevailing credit or underwriting policies.

3.3 Financial Statements. The Beneficiary shall have the right, at the Trustor's sole cost and expense, to require delivery of financial statements in form and substance acceptable to the Beneficiary from the Trustor or any guarantor of any of the Obligations and the Trustor hereby agrees to deliver such financial statements and/or cause any such guarantor to so deliver any such financial statement when required by the Beneficiary.

3.4 Substitution of Trustee. The Beneficiary may from time to time, without notice to the Trustor or Trustee and with or without cause and with or without the resignation of Trustee, substitute a successor or successors to the Trustee named herein or acting hereunder. Upon such appointment, the successor trustee shall be vested with all title, powers and duties conferred upon the Trustee named herein or acting hereunder. Each such appointment and substitution shall be made by a writing executed by Beneficiary and when duly recorded in the appropriate office shall be conclusive proof of proper appointment of such successor Trustee. The procedure herein provided for substitution of the Trustee shall be conclusive of all other provisions for substitution, statutory or otherwise.

3.5 Leases and Rent Roll. The Trustor shall deliver to the Beneficiary during each calendar year and at such other times as the Beneficiary shall request a rent roll for the Property, in form acceptable to the Beneficiary, listing all tenants and occupants and describing all of the Leases.

4. DEFAULTS AND REMEDIES

4.1 Events of Default. Event of Default shall mean the occurrence of any one or more of the following events:

(a) default of any liability, obligation or undertaking of the Trustor or any guarantor of the Obligations to the Beneficiary, hereunder or otherwise, including, without limitation, failure to pay in full and when due any installment of principal or interest or default of the Trustor or any guarantor of the Obligations under any other Loan Document or any other agreement with the Beneficiary continuing for 10 days with respect to the payment of money or continuing for 30 days with respect to any other default;

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(b) failure by the Trustor to perform, observe or comply with any of the covenants, agreements, terms or conditions set forth in this Deed of Trust or the Loan Documents continuing for 30 days;

(c) the (i) occurrence of any material loss, theft, damage or destruction of, or (ii) issuance or making of any levy, seizure, attachment, execution or similar process on a material portion of the Property;

(d) failure of the Trustor or any guarantor of the Obligations to maintain aggregate collateral security value satisfactory to the Beneficiary continuing for 30 days;

(e) default of any material liability, obligation or undertaking of the Trustor or any guarantor of the Obligations to any other party continuing for 30 days;

(f) if any statement, representation or warranty heretofore, now or hereafter made by the Trustor or any guarantor of the Obligations in connection with this Deed of Trust or in any supporting financial statement of the Trustor or any guarantor of the Obligations shall be determined by the Beneficiary to have been false in any material respect when made;

(g) if the Trustor or any guarantor of the Obligations is a corporation, trust, partnership or limited liability company, the liquidation, termination or dissolution of any such organization, or the merger or consolidation of such organization into another entity, or its ceasing to carry on actively its present business or the appointment of a receiver for its property;

(h) the death of the Trustor or any guarantor of the Obligations and, if the Trustor or any guarantor of the Obligations is a partnership or limited liability company, the death of any partner or member;

(i) the institution by or against the Trustor or any guarantor of the Obligations of any proceedings under the Bankruptcy Code 11 USC §101 *et seq.* or any other law in which the Trustor or any guarantor of the Obligations is alleged to be insolvent or unable to pay its debts as they mature, or the making by the Trustor or any guarantor of the Obligations of an assignment for the benefit of creditors or the granting by the Trustor or any guarantor of the Obligations of a trust mortgage for the benefit of creditors;

(j) the service upon the Beneficiary of a writ in which the Beneficiary is named as trustee of the Trustor or any guarantor of the Obligations;

(k) a judgement or judgements for the payment of money shall be rendered against the Trustor or any guarantor of the Obligations, and any such judgement shall remain unsatisfied and in effect for any period of thirty (30) consecutive days without a stay of execution;

(l) any levy, lien (including mechanics lien), seizure, attachment, execution or similar process shall be issued or levied on any of the property of the Trustor or any guarantor of the Obligations;

(m) the termination or revocation of any guaranty of the Obligations; or

(n) the occurrence of such a change in the condition or affairs (financial or otherwise) of the Trustor or any guarantor of the Obligations, or the occurrence of any other event or circumstance, such that the Beneficiary, in its sole discretion, deems that it is insecure or that the prospects for timely or full payment or performance of any obligation of the Trustor or any guarantor of the Obligations to the Beneficiary has been or may be impaired.

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4.2 Remedies. On the occurrence of any Event of Default the Beneficiary may, at any time thereafter, at its option and, to the extent permitted by applicable law, without notice, exercise any or all of the following remedies:

(a) Declare the Obligations due and payable, and the Obligations shall thereupon become immediately due and payable, without presentment, protest, demand or notice of any kind, all of which are hereby expressly waived by the Trustor except for Obligations due and payable on demand, which shall be due and payable on demand whether or not an event of default has occurred hereunder;

(b) Enter, take possession of, manage and operate the Property (including all personal property and all records and documents pertaining thereto) and any part thereof and exclude the Trustor therefrom, take all actions it deems necessary or proper to preserve the Property and operate the Property as a mortgagee in possession with all the powers as could be exercised by a receiver or as otherwise provided herein or by applicable law; provided, however, the entry by the Beneficiary upon the Property for any reason shall not cause the Beneficiary to be a mortgagee in possession, except upon the express written declaration of the Beneficiary;

(c) With or without taking possession, receive and collect all rents, income, issues and profits ("Rents") from the Property (including all real estate and personal property and whether past due or thereafter accruing), including as may arise under the Leases, and the Trustor appoints the Beneficiary as its true and lawful attorney with the power for the Beneficiary in its own name and capacity to demand and collect Rents and take any action that the Trustor is authorized to take under the Leases. The Beneficiary shall (after payment of all costs and expenses incurred) apply any Rents received by it to the Obligations in such order as the Beneficiary determines, or in accordance with any applicable statute, and the Trustor agrees that exercise of such rights and disposition of such funds shall not be deemed to cure any default or constitute a waiver of any foreclosure once commenced nor preclude the later commencement of foreclosure for breach thereof. The Beneficiary shall be liable to account only for such Rents actually received by the Beneficiary. Lessees under the Leases are hereby authorized and directed, following notice from the Beneficiary, to pay all amounts due the Trustor under the Leases to the Beneficiary, whereupon such lessees shall be relieved of any and all duty and obligation to the Trustor with respect to such payments so made;

(d) In addition to any other remedies, to sell the Property or any part thereof or interest therein pursuant to exercise of its power of sale or otherwise at public auction on terms and conditions as the Beneficiary may determine, or otherwise foreclose this Deed of Trust in any manner permitted by law, and upon such sale the Trustor shall execute and deliver such instruments as the Beneficiary may request in order to convey and transfer all of the Trustor's interest in the Property, and the same shall operate to divest all rights, title and interest of the Trustor in and to the Property. In the event this Deed of Trust shall include more than one parcel of property or subdivision (each hereinafter called a "portion"), the Beneficiary shall, in its sole and exclusive discretion and to the extent permitted by applicable law, be empowered to foreclose upon any such portion without impairing its right to foreclose subsequently upon any other portion or the entirety of the Property from time to time thereafter. In addition, the Beneficiary may in its discretion subordinate this Deed of Trust to one or more Leases for the sole purpose of preserving any such Lease in the event of a foreclosure;

(e) Cause one or more environmental assessments to be taken, arrange for the cleanup of any Hazardous Substances or otherwise cure the Trustor's failure to comply with any statute, regulation or ordinance relating to the presence or cleanup of Hazardous Substances, and the Trustor shall provide the Beneficiary or its agents with access to the Property for such purposes; provided that the exercise of any of such remedies shall not be deemed to have relieved the Trustor from any responsibility therefor or given the Beneficiary "control" over the Property or cause the Beneficiary to be considered to be a mortgagee in possession, "owner"

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or "operator" of the Property for purposes of any applicable law, rule or regulation pertaining to Hazardous Substances; and

(f) Take such other actions or proceedings as the Beneficiary deems necessary or advisable to protect its interest in the Property and ensure payment and performance of the Obligations, including, without limitation, appointment of a receiver (and the Trustor hereby waives any right to object to such appointment) and exercise of any of the Beneficiary's remedies provided herein or in any other document evidencing, securing or relating to any of the Obligations or available to a secured party under the Uniform Commercial Code or under other applicable law.

In addition, the Trustee and the Beneficiary shall have all other remedies provided by applicable law, including, without limitation, the right to pursue a judicial sale of the Property or any portion thereof.

The Trustor agrees and acknowledges that the acceptance by the Trustee or the Beneficiary of any payments from either the Trustor or any guarantor after the occurrence of any Event of Default, the exercise by the Trustee or the Beneficiary of any remedy set forth herein or the commencement, discontinuance or abandonment of foreclosure proceedings against the Property shall not waive the Trustee's or the Beneficiary's subsequent or concurrent right to foreclose or operate as a bar or estoppel to the exercise of any other rights or remedies of the Trustee or the Beneficiary. The Trustor agrees and acknowledges that the Trustee or the Beneficiary, by making payments or incurring costs described herein, shall be subrogated to any right of the Trustor to seek reimbursement from any third parties, including, without limitation, any predecessor in interest to the Trustor's title or other party who may be responsible under any law, regulation or ordinance relating to the presence or cleanup of Hazardous Substances.

4.3 Advances. If the Trustor fails to pay or perform any of its obligations respecting the Property, the Beneficiary may in its sole discretion do so without waiving or releasing Trustor from any such obligation. Any such payments may include, but are not limited to, payments for taxes, assessments and other governmental levies, water rates, insurance premiums, maintenance, repairs or improvements constituting part of the Property. Any amounts paid by the Beneficiary hereunder shall be, until paid, part of the Obligations and secured by this Deed of Trust, and shall be due and payable to the Beneficiary, on demand, together with interest thereon to the extent permitted by applicable law, at the highest rate permitted under any of the notes evidencing the Obligations.

4.4 Cumulative Rights and Remedies. All of the foregoing rights, remedies and options (including without limitation the right to enter and take possession of the Property, the right to manage and operate the same, and the right to collect Rents, in each case whether by a receiver or otherwise) are cumulative and in addition to any rights the Beneficiary might otherwise have, whether at law or by agreement, and may be exercised separately or concurrently and none of which shall be exclusive of any other. The Trustor further agrees that the Trustee and the Beneficiary may exercise any or all of its rights or remedies set forth herein without having to pay the Trustor any sums for use or occupancy of the Property.

4.5 Trustor's Waiver of Certain Rights. To the extent permitted by applicable law, the Trustor hereby waives the benefit of all present and future laws (i) providing for any appraisal before sale of all or any portion of the Property or (ii) in any way extending the time for the enforcement of the collection of the Obligations or creating or extending a period of redemption from any sale made hereunder.

4.6 Transfer of Title. Upon the completion of any sale or sales of any Property, Trustee shall execute and deliver to the accepted purchaser or purchasers a good and sufficient deed of conveyance or assignment and transfer, lawfully conveying, assigning, and transferring the Property sold, but without any covenant or warranty, express or implied.

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4.7 Effect of Sale. Any sale or sales made by virtue of or under this Deed of Trust, whether under any power of sale herein granted or through judicial proceedings, shall, to the fullest extent permitted by law, operate to divest all right, title, estate, interest, claim, and demand whatsoever, either at law or in equity, of Trustor in and to the property so sold, or any part thereof from, through or under Trustor, its successors and assigns. The receipt by Trustee shall be full and sufficient discharge to any purchaser of the Property or any part thereof sold as aforesaid for the purchase money; and no purchaser or his representatives, grantees or assigns after paying such purchase money and receiving such receipt, shall be bound to see to the application of such purchase money upon or for any trust or purpose of this Deed of Trust, or in any manner whatsoever be answerable for any loss, misapplication or non-application of any such purchase money or be bound to inquire as to the authorization, necessity, expedience or regularity of any such sale.

4.8 Reconveyance. Upon written request of the Beneficiary and surrender of this Deed of Trust and any Notes to Trustee for cancellation or endorsement, and upon payment of its fees and charges, Trustee shall reconvey, without warranty, all or any part of the Property then subject to this Deed of Trust. Any reconveyance, whether full or partial, may be made in terms to "the person or persons legally entitled thereto," and the recitals in such reconveyance of any matters or facts shall be conclusive proof of the truthfulness thereof.

5. MISCELLANEOUS

5.1 Costs and Expenses. To the extent permitted by applicable law, the Trustor shall pay to the Trustee and the Beneficiary, on demand, all reasonable expenses (including attorneys' fees and expenses and reasonable consulting, accounting, appraisal, brokerage and similar professional fees and charges) incurred by the Trustee and the Beneficiary in connection with the Trustee's and the Beneficiary's interpretation, recordation of this Deed of Trust, exercise, preservation or enforcement of any of its rights, remedies and options set forth in this Deed of Trust and in connection with any litigation, proceeding or dispute whether arising hereunder or otherwise relating to the Obligations, together with interest thereon to the extent permitted by applicable law, until paid in full by the Trustor at the highest rate set forth in any of the notes evidencing the Obligations. Any amounts owed by the Trustor hereunder shall be, until paid, part of the Obligations and secured by this Deed of Trust, and the Beneficiary shall be entitled, to the extent permitted by law, to receive and retain such amounts in any action for a deficiency against or redemption by the Trustor, or any accounting for the proceeds of a foreclosure sale or of insurance proceeds.

5.2 Indemnification Regarding Leases. The Trustor hereby agrees to defend, and does hereby indemnify and hold the Beneficiary, Trustee, and each of their respective directors, officers, employees, agents and attorneys (each an "Indemnitee") harmless from all losses, damages, claims, costs or expenses (including attorneys' fees and expenses) resulting from the assignment of the Leases and from all demands that may be asserted against such Indemnitees arising from any undertakings on the part of the Beneficiary to perform any obligations under the Leases. It is understood that the assignment of the Leases shall not operate to place responsibility for the control or management of the Property upon the Beneficiary or any Indemnitee or make them liable for performance of any of the obligations of the Trustor under Leases, respecting any condition of the Property or any other agreement or arrangement, written or oral, or applicable law.

5.3 Indemnification Regarding Hazardous Substances. The Trustor hereby agrees to defend, and does hereby indemnify and hold harmless each Indemnitee from and against any and all losses, damages, claims, costs or expenses, including, without limitation, litigation costs and attorneys' fees and expenses and fees or expenses of any environmental engineering or cleanup firm incurred by such Indemnitee and arising out of or in connection with the Property or resulting from the application of any current or future law, regulation or ordinance relating to the presence or cleanup of Hazardous Substances on or affecting the Property. The Trustor agrees its obligations hereunder shall be continuous and shall survive termination or discharge of this Deed of Trust and/or the repayment of all debts to the Beneficiary including repayment of all Obligations.

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5.4 Indemnitee's Expenses. If any Indemnitee is made a party defendant to any litigation or any claim is threatened or brought against such Indemnitee concerning this Deed of Trust or the Property or any part thereof or therein or concerning the construction, maintenance, operation or the occupancy or use thereof by the Trustor or other person or entity, then the Trustor shall indemnify, defend and hold each Indemnitee harmless from and against all liability by reason of said litigation or claims, including attorneys' fees and expenses incurred by such Indemnitee in connection with any such litigation or claim, whether or not any such litigation or claim is prosecuted to judgement. The within indemnification shall survive payment of the Obligations, and/or any termination, release or discharge executed by the Beneficiary in favor of the Trustor.

5.5 Waivers. The Trustor waives notice of nonpayment, demand, presentment, protest or notice of protest of the Obligations and all other notices, consents to any renewals or extensions of time of payment thereof, and generally waives any and all suretyship defenses and defenses in the nature thereof. No delay or omission of the Beneficiary in exercising or enforcing any of its rights, powers, privileges, remedies, immunities or discretion (all of which are hereinafter collectively referred to as "the Beneficiary's rights and remedies") hereunder shall constitute a waiver thereof; and no waiver by the Beneficiary of any default of the Trustor hereunder or of any demand shall operate as a waiver of any other default hereunder or of any other demand. No term or provision hereof shall be waived, altered or modified except with the prior written consent of the Beneficiary, which consent makes explicit reference to this Deed of Trust. Except as provided in the preceding sentence, no other agreement or transaction, of whatsoever nature, entered into between the Beneficiary and the Trustor at any time (whether before, during or after the effective date or term of this Deed of Trust) shall be construed as a waiver, modification or limitation of any of the Beneficiary's rights and remedies under this Deed of Trust (nor shall anything in this Deed of Trust be construed as a waiver, modification or limitation of any of the Beneficiary's rights and remedies under any such other agreement or transaction) but all the Beneficiary's rights and remedies not only under the provisions of this Deed of Trust but also under any such other agreement or transaction shall be cumulative and not alternative or exclusive, and may be exercised by the Beneficiary at such time or times and in such order of preference as the Beneficiary in its sole discretion may determine.

5.6 Severability. If any provision of this Deed of Trust or portion of such provision or the application thereof to any person or circumstance shall to any extent be held invalid or unenforceable, the remainder of this Deed of Trust (or the remainder of such provision) and the application thereof to other persons or circumstances shall not be affected thereby.

5.7 Complete Agreement. This Deed of Trust and the other Loan Documents constitute the entire agreement and understanding between and among the parties hereto relating to the subject matter hereof, and supersedes all prior proposals, negotiations, agreements and understandings among the parties hereto with respect to such subject matter.

5.8 Binding Effect of Agreement. This Deed of Trust shall run with the land and be binding upon and inure to the benefit of the respective heirs, executors, administrators, legal representatives, successors and assigns of the parties hereto, and shall remain in full force and effect (and the Beneficiary shall be entitled to rely thereon) until all Obligations are fully and indefeasibly paid. The Beneficiary may transfer and assign this Deed of Trust and deliver any collateral to the assignee, who shall thereupon have all of the rights of the Beneficiary; and the Beneficiary shall then be relieved and discharged of any responsibility or liability with respect to this Deed of Trust and such collateral. Except as expressly provided herein or in the other Loan Documents, nothing, expressed or implied, is intended to confer upon any party, other than the parties hereto, any rights, remedies, obligations or liabilities under or by reason of this Deed of Trust or the other Loan Documents.

5.9 Notices. Any notices under or pursuant to this Deed of Trust shall be deemed duly received and effective if delivered in hand to any officer of agent of the Trustor or the Beneficiary, or if mailed by registered or certified mail, return receipt requested, addressed to the Trustor or the Beneficiary at the

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address set forth in this Deed of Trust or as any party may from time to time designate by written notice to the other party.

5.10 Governing Law. This Deed of Trust shall be governed by Nevada law without giving effect to the conflicts of laws principles thereof.

5.11 Reproductions. This Deed of Trust and all documents which have been or may be hereinafter furnished by the Trustor to the Beneficiary may be reproduced by the Beneficiary by any photographic, photostatic, microfilm, xerographic or similar process, and any such reproduction shall be admissible in evidence as the original itself in any judicial or administrative proceeding (whether or not the original is in existence and whether or not such reproduction was made in the regular course of business).

5.12 Jurisdiction and Venue. The Trustor irrevocably submits to the nonexclusive jurisdiction of any Federal or state court sitting in California and any Federal or state court sitting in Nevada, over any suit, action or proceeding arising out of or relating to this Deed of Trust. The Trustor irrevocably waives, to the fullest extent it may effectively do so under applicable law, any objection it may now or hereafter have to the laying of the venue of any such suit, action or proceeding brought in any such court and any claim that the same has been brought in an inconvenient forum. The Trustor hereby consents to process being served in any such suit, action or proceeding (i) by the mailing of a copy thereof by registered or certified mail, postage prepaid, return receipt requested, to the Trustor's address set forth herein or such other address as has been provided in writing to the Beneficiary and (ii) in any other manner permitted by law, and agrees that such service shall in every respect be deemed effective service upon the Trustor.

5.13 Arbitration. THE PARTIES AGREE TO ATTEMPT IN GOOD FAITH TO RESOLVE ANY DISPUTES WHICH MAY ARISE AMONG THEM IN CONNECTION WITH THE INTERPRETATION OR ENFORCEMENT OF THE PROVISIONS OF THIS AGREEMENT, OR THE APPLICATION OR VALIDITY THEREOF. IN THE EVENT THAT ANY DISPUTE CANNOT BE SO RESOLVED, AND UNLESS THE RELIEF SOUGHT REQUIRES THE EXERCISE OF THE EQUITY POWERS OF A COURT OF COMPETENT JURISDICTION, SUCH DISPUTE SHALL BE SUBMITTED TO ARBITRATION. SUCH ARBITRATION PROCEEDINGS SHALL BE HELD IN THE COUNTY OF SANTA BARBARA, CALIFORNIA, IN ACCORDANCE WITH THE ARBITRATION PROVISIONS OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. THIS AGREEMENT TO ARBITRATE SHALL BE SPECIFICALLY ENFORCEABLE. ANY AWARD RENDERED IN ANY SUCH ARBITRATION PROCEEDINGS SHALL BE FINAL AND BINDING ON EACH OF THE PARTIES HERETO, AND Judgement MAY BE ENTERED THEREON IN ANY COURT OF COMPETENT JURISDICTION. THE FOREGOING AGREEMENT TO ARBITRATE DOES NOT LIMIT THE RIGHT OF ANY PARTY TO (I) FORECLOSE AGAINST REAL OR PERSONAL PROPERTY COLLATERAL; (II) EXERCISE SELF-HELP REMEDIES RELATING TO COLLATERAL OR PROCEEDS OF COLLATERAL SUCH AS SETOFF OR REPOSSESSION; OR (III) OBTAIN PROVISIONAL OR ANCILLARY REMEDIES SUCH AS REPLEVIN, INJUNCTIVE RELIEF, ATTACHMENT OR THE APPOINTMENT OF A RECEIVER, BEFORE DURING OR AFTER THE PENDENCY OF ANY ARBITRATION PROCEEDING. THIS EXCLUSION DOES NOT CONSTITUTE A WAIVER OF THE RIGHT OR OBLIGATION OF ANY PARTY TO SUBMIT ANY DISPUTE TO ARBITRATION HEREUNDER, INCLUDING THOSE ARISING FROM THE EXERCISE OF THE ACTIONS DETAILED IN THE FOREGOING CLAUSES (I), (II) AND (III).

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EXECUTED under seal as of the date first above written.

Trustor:

Edward C Wooley, Trustee of The Edward C Wooley and Judith A Wooley Intervivos Revocable Trust Year 2000

Judith A Wooley, Trustee of The Edward C Wooley and Judith A Wooley Intervivos Revocable Trust Year 2000

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STATE OF CALIFORNIA :
COUNTY OF Santa Clara **SS.** :

On January, 22, 2007 before me, Katie Caspary, Notary, personally appeared **Edward C Wooley**, ~~personally known to me~~ (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

KATIE CASPARY
Commission # 1510426
Notary Public - California
Santa Clara County
My Comm. Expires Aug 29, 2008

WITNESS my hand and offical seal.

SIGNATURE _____ (SEAL)

STATE OF CALIFORNIA :
COUNTY OF Santa Clara **SS.** :

On January, 22, 2007 before me, Katie Caspary, Notary, personally appeared **Judith A Wooley**, ~~personally known to me~~ (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

KATIE CASPARY
Commission # 1510426
Notary Public - California
Santa Clara County
My Comm. Expires Aug 29, 2008

WITNESS my hand and offical seal.

SIGNATURE _____ (SEAL)

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EXHIBIT "A"

Property Description

(B) Title to said estate or interest at the date hereof is vested in:

Edward C. Wooley and Judith A Wooley, Trustees of The Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust Year 2000

4. The land referred to in this Commitment is situated in the County of Carson City, State of Nevada, and is described as follows:

PARCEL 2 OF PARCEL MAP NO. 2566, FILED IN THE OFFICE OF THE RECORDER OF CARSON CITY, STATE OF NEVADA, ON JUNE 30, 2005 IN BOOK 9, PAGE 2566 AS FILE NUMBER 338929.

First American Title Insurance Company

363893

F I L E D
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2016-08-30 11:18:54 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5685608 : tbritton

EXHIBIT 5

EXHIBIT 5

BERRY-HINCKLEY INDUSTRIES

Memorandum

To	Berry-Hinckley Industries - convenience store landlords
Re	Jerry Herbs acquisition of Winners Corner & Chevron convenience stores
Date	Saturday, February 17h, 2007

Over the past several weeks, Jerry Herbst of Terrible Herbst, Inc., in Las Vegas, Nevada, has been in discussions with us to acquire the convenience store assets of Berry-Hinckley Industries.

The Herbst's business is the second largest petroleum provider in Nevada after Berry-Hinckley, they have a 50% retail marketshare in Clark County (Las Vegas), and through a separate company controlled by the Herbst's three sons, operate in excess of 7,000 slot machines on a route and four casinos in Southern Nevada.

As a landlord of one of our properties, Mr. Herbst has requested that you consider certain changes to the leases that you have with Berry-Hinckley as a condition of assignment. We have attached an Estoppel, as well as a Lease modification document. Mr. Herbst has also attached a letter, in which he offers to personally guaranty your lease, as well as a brief summary on his net worth and company description. With this transaction, Mr. Herbst is also acquiring Berry-Hinckley's option to own Winners Gaming, Inc. which operates the slot machines in all of our convenience stores.

Our goal is to have all Estoppels and other documents agreed to and executed by February 23, 2006, and they will then be held by Chicago Title Insurance Company in escrow until closing.

Please address any concerns to Philip Tripoli, Berry-Hinckley's Vice President of Development at (775) 223-3590 or by e-mail at Philip.tripoli@berry-hinckley.com. If you refer this on to your attorney to review, please have them communicate directly with Berry-Hinckley's counsel:

Sujata Yalamanchili, Esq.
Hodgson Russ LLP
One M&T Plaza, Suite 2000
Buffalo, New York 14203
Telephone (716) 848-1657; fax 849-0349
syalaman@hodgsonruss.com

We are looking forward to working with Jerry Herbst and you, reaching a successful conclusion for all parties.

Thank you for your trust and confidence in Berry-Hinckley Industries.

Exhibit 5-1

Sujata Yalamanchili
Direct Dial: 716.848.1657
syalaman@hodgsonruss.com

Hodgson Russ LLP
ATTORNEYS

February 17, 2007

Larry Willard
133 Glenridge Avenue
Los Gatos, CA 95030

Dear Mr. Willard:

Re: Jerry Herbst - Acquisition of Winners Corner & Chevron Convenience Stores
#1 Highway 95A - #195

Enclosed please find the following documents:

1. Gary M. Johnson's Letter dated January 31, 2007;
2. Letter from Jerry Herbst regarding the acquisition of C-Stores dated December 14, 2006;
3. Memo dated December 18, 2006;
4. The Landlord's Estoppel Certificate; and
5. First Amendment to Lease Agreement.

Please feel free to contact me with any questions you may have.

Sincerely yours,

Sujata Yalamanchili

SY/tmr
Enclosures

One M&T Plaza • Suite 2000 • Buffalo, New York 14203-2391 • telephone 716.856.4000 • facsimile 716.849.0349
Albany • Boca Raton • Buffalo • Johnstown • New York City • Toronto • www.hodgsonruss.com

Exhibit 5-2

JOHNSON JACOBSON WILCOX

January 31, 2007

To Whom It May Concern

RE: Jerry Herbst

Our firm has compiled, in accordance with Statements on Standards for Accounting and Review Services issued by the American Institute of Certified Public Accountants, the personal financial statement of Jerry and Maryanna Herbst as of December 31 each year from the 1980's through 2005. A compilation is limited to presenting in the form of financial statements information that is the representation of the individuals whose financial statements are presented. We did not audit or review the personal financial statements of Mr. and Mrs. Herbst and, accordingly, did not express an opinion or any other form of assurance on them.

The net worth of Mr. and Mrs. Herbst, as reported on the statement compiled by us as of December 31, 2005, was in excess of $200 million.

Sincerely,

JOHNSON JACOBSON WILCOX

Gary M. Johnson

GMJ:jkj

7690 W. SAHARA AVE. LAS VEGAS, NV 89117-2737 – TEL 702 304-0404 – FAX 702 304-0414

Exhibit 5-3

"the best bad guy in the west"

December 14, 2006

Dear Sir,

It is with pleasure that I am writing to you to inform you of our proposed transaction with PAMCo, Inc. to acquire the C-Store assets of Berry Hinckley Industries ("BHI"). The BHI C-Stores are strategically important to my family of companies as we are in the process of entering the Northern Nevada market. These assets will create a significant platform for us to grow our business.

In our review of the existing leases we identified a few minor provisions which we feel need modification. We are forwarding to you a contract amendment and consent form that we are asking you to execute and return to us. In exchange for this amendment and consent I will be willing to personally guarantee the lease obligation.

I look forward to establishing a good tenant/landlord relationship with you and am very excited about closing the proposed transaction.

Regards,

Jerry Herbst
Chairman of the Board
Terrible Herbst, Inc.

045651/00080 GBDOCS 696969v2

5195 Las Vegas Boulevard South, Las Vegas, Nevada 89119 • (702) 798-6400 • Fax (702) 736-0819

Exhibit 5-4

TERRIBLE HERBST, INC.

BUSINESS OVERVIEW

Terrible Herbst, Inc. ("Terrible Herbst" or the "Company") is one of the most recognized brands in the Las Vegas metropolitan area. The Terrible Herbst legacy dates back to 1937 when Ed Herbst (Jerry Herbst father) opened his first service station. The Terrible Herbst brand and familiar "Bad Guy" cowboy logo, has been an icon in Nevada since 1959 and is currently used at five casinos, over 100 gasoline stations and convenience stores as well as over 850 slot route locations throughout the state of Nevada.

Terrible Herbst, Inc. is owned by Jerry and Maryanna Herbst who have a combined net worth in excess of approximately $240 million. Terrible Herbst, Inc. operates over 100 gas station and convenience stores, many of which include lube facilities and car washes, throughout Southern Nevada. Terrible Herbst has a leading position in the Southern Nevada and maintains a market share of approximately 50% of total fuel sales, which is equivalent to a statewide market share of approximately 30%.

The Herbst family uses cross-marketing efforts to capitalize on the strong recognition and high level of quality and value associated with the Terrible Herbst trade name and cowboy logo. The company has established strategic and/or marketing alliances with Chevron, ARCO, Pizza Hutt, Burger King, Port of Subs, Coke and McDonalds.

The Terrible Herbst name and logo are also used by Herbst Gaming, which is owned and operated by Ed, Tim and Troy Herbst. Herbst Gaming began operations in 1897 and is now one of the largest slot route operators in Nevada with an excess of 7,200 slot machines. Additionally, Herbst Gaming currently operates eight Terrible's casinos in locations spread throughout Nevada, Iowa and Missouri.

In recent transactions, Herbst Gaming has entered into a contract with MGM Mirage to purchase Buffalo Bill's, Primm Valley and Whiskey Pete's Hotel-Casino in Primm, Nevada. In addition, the Company recently entered the Reno market with is acquisition of the Sands Regent in Reno, Nevada.

Exhibit 5-5

LANDLORD'S ESTOPPEL CERTIFICATE

Landlord hereby certifies as follows:

1. A true, accurate, and complete copy of the Lease is attached hereto as **Exhibit A**. The Lease is in full force and effect and, has not been amended or modified, except as set forth above.

2. That Landlord is the fee owner of the Premises and has not assigned its interest in the Lease. There is no mortgage financing on the Premises, except for _____. The loan documents related to such deed of trust provide that the lender under such deed of trust will not disturb the Lease so long as the Tenant attorns to the Landlord's successor.

3. The original term of the Lease commenced on _____ ___, ____ and has been renewed _____ such that the current term of the Lease expires on _____ ___, _____. The Tenant has ____ additional renewal periods, such that the Lease might expire as late as _____ ____, _____.

4. That the Monthly Rent due under the Lease has been paid through _____ and all Additional Rent due under the Lease has been paid through _____. That there exist at this time no charges, liens, claims, or offsets against the rents or other charges due or to become due under the Lease. That there is no defense, offset, claim or counterclaim by or in favor of Landlord against Tenant under the Lease or against the obligations of Landlord under the Lease.

5. Landlord has no knowledge of any outstanding notice of default given by Tenant. To the best of Landlord's knowledge, Landlord and Tenant are not in default of any of the agreements, terms, amendments, covenants, or conditions of the Lease on the part of Landlord or the Tenant to be performed or complied with, and no condition or set of facts exist which, with the passage of time and/or the giving of notice would constitute a default by either party in the performance of any of the agreements, terms, amendments, covenants, or conditions of the Lease.

6. That the above certifications are made by Landlord knowing that they will be relied upon by _____.

In addition, Landlord hereby consents to the encumbrance of the Tenant's interest in the Lease with a leasehold deed of trust and collateral assignment of the Tenant's interest in favor of First National Bank of Nevada or another lender of the Tenant. Landlord hereby agrees to give such lender notice of any default under the Lease and that such lender has the right (but no obligation) to cure such default within the time period set forth in the Lease with respect to monetary defaults and with respect to non-monetary defaults so long as such lender promptly commences to cure such default and diligently pursues such cure.

First Amendment to Lease Agreement

THIS FIRST AMENDMENT TO LEASE AGREEMENT (this "Amendment") is dated as of December __, 2006 by and between **OVERLAND DEVELOPMENT CORPORATION INC. dba LJW ENTERPRISES INC. and LARRY J. WILLARD, TRUSTEE OF THE LARRY JAMES WILLARD TRUST** ("Lessor"), whose address is 133 Glenridge Avenue, Los Gatos, CA 95030 and **BERRY-HINCKLEY INDUSTRIES**, a Nevada corporation ("Lessee"), whose address is 425 Maestro Drive, Reno, Nevada 89511.

WHEREAS, Lessor and Lessee have entered into that certain Lease Agreement dated as of March 1, 2006 (the "Lease") with respect to real property and improvements as described in the Lease;

WHEREAS, Lessor and Lessee wish to amend certain provisions of the Lease as set forth herein; and

WHEREAS, capitalized terms not defined in this Amendment have the meanings given to them in the Lease.

NOW, THEREFORE, in consideration of the foregoing recitals and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Lessor and Lessee agree as follows:

1. **WGI Agreements**. The following sentence is added to the end of Section 12.G:

"For purposes of clarification, this Section is not deemed to prohibit the early termination of the WGI Agreement; provided, that within sixty (60) days of termination of the WGI Agreement, a new agreement is entered into by Lessee with WGI, Herbst Gaming, Inc., E.T.T. Inc. Slot Route or a substitute gaming operator approved by Lessor (such approval not to be unreasonably withheld, conditioned or delayed)."

2. **Winner's Corner**. Section 12.H is deleted in its entirety.

3. **Default, Conditional Limitations, Remedies and Measure of Damages.**

The following language is deleted in its entirety from the first paragraph of Section 20.B:

"*Remedies*. Upon the occurrence of an Event of Default, with or without notice or demand, except as otherwise expressly provided herein or such other notice as may be required by statute and cannot be waived by Lessee, Lessor shall be entitled to exercise, at its option, concurrently, successively, or in any combination, all remedies available at law or in equity, including without limitation, any one or more of the following:"

and replaced with the following:

Exhibit 5-7

"*Remedies*. Upon the occurrence of an Event of Default, Lessor shall give any lender whose name and notice address information has been provided to Lessor in writing, notice of such Event of Default contemporaneously with the delivery of such notice to Lessee. Additionally, lender shall have the right (with no obligation) to cure such Event of Default within the time period afforded Lessee set forth in the Lease with respect to monetary defaults, and with respect to non-monetary defaults, such time reasonably necessary to cure such Event of Default, as long as the lender promptly commences to cure such Event of Default and diligently pursues such cure to completion. If lender does not elect such option to cure, then, except as otherwise expressly provided herein or such other notice as may be required by statute and cannot be waived by Lessee, Lessor shall be entitled to exercise, at its option, concurrently, successively, or in any combination, all remedies available at law or in equity, including without limitation, any one or more of the following:"

4. **Mortgages, Subordination and Attornment**. Section 21 is hereby amended as follows:

(a) The last sentence of the first paragraph of Section 21 is hereby deleted in its entirety.

(b) The fourth paragraph of Section 21 is deleted in its entirety and replaced with the following: "In the event any purchaser or assignee of any mortgage at a foreclosure sale acquires title to any of the Properties, or in the event that any mortgagee or any assignee otherwise succeeds to the rights of Lessor as landlord under this Lease, Lessee shall attorn to mortgagee or such purchaser or assignee, as the case may be (a "Successor Lessor"), and recognize the Successor Lessor as lessor under this Lease, and Successor Lessor shall recognize and not disturb Lessee's tenancy created hereby. So long as Lessee is not then in default under this Lease, this Lease shall continue in full force and effect as a direct lease between the Successor Lessor and Lessee, provided that the Successor Lessor shall only be liable for any obligations of Lessor under this Lease which accrue from and after the date that such Successor Lessor acquires title to such Property or otherwise succeeds to the rights of Lessor as landlord hereunder. The foregoing provisions shall be self-operative and effective without the execution of further instruments."

5. **Assignment/Subletting**. Section 23 is hereby amended as follows:

(a) The following sentence is added to the end of the first paragraph of Section 23:

"For purposes of clarification, this Section is not and shall not be deemed to prohibit Lessee's right to collaterally assign its interest to any third person or entity, including, without limitation, by placing or granting any lien, encumbrance or other security interest on the Lease or its interests thereunder, all of which such actions may be taken by Lessee without Lessor's consent."

(b) The following paragraph is added to the end of Section 23:

"Notwithstanding any provision to the contrary in this Lease, Lessor consents to the transfer or assignment of Lessee's rights under this Lease upon a foreclosure on Lessee's interests

herein, or deed in lieu of foreclosure, to any lender of Lessee or an affiliate of such lender, and to the first transfer or assignment of such rights subsequent to foreclosure by such lender to a third party, so long as the third party can demonstrate sufficient financial creditworthiness reasonably acceptable to Lessor."

6. **Governing Law**. Sections 37 and 38.H are hereby incorporated in full by this reference.

7. **No Other Modification**. Except as expressly set forth in this Amendment, nothing herein contained shall be deemed to modify, supplement, supersede or otherwise amend any term or condition in the Lease, and the parties hereto acknowledge and agree that all terms and conditions of the Lease are and shall remain in full force and effect.

8. **Condition to Effectiveness**. This Amendment shall only be effective upon the closing of that certain transaction whereby the shareholders of P.A. Morabito & Co., Limited ("PAMCo"), the corporation that owns all the stock of Lessee, will enter into a Stock Purchase Agreement with Jerry Herbst ("Herbst") pursuant to which Herbst will purchase all of the outstanding stock of PAMCo.

9. **Counterparts**. This Amendment may be executed in one or more counterparts, each of which shall be deemed an original.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, Lessor and Lessee have executed this Amendment on the date first above written.

LESSOR:

OVERLAND DEVELOPMENT CORPORATION INC. dba LJW ENTERPRISES INC. and LARRY J. WILLARD, TRUSTEE OF THE LARRY JAMES WILLARD TRUST

By: _____

Printed Name: _____

Title: _____

LESSEE:

BERRY-HINCKLEY INDUSTRIES

By: _____

Printed Name: _____

Title: _____

Exhibit 5-10

STATE OF _____)
) SS:
COUNTY OF _____)

On _____, before me, _____, a Notary Public in and for said State, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

_____

(SEAL)

STATE OF _____)
) SS:
COUNTY OF _____)

On _____, before me, _____, a Notary Public in and for said State, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

_____

(SEAL)

Exhibit 5-11

GUARANTY AGREEMENT

This GUARANTY AGREEMENT, dated as of this ____ day of December, 2006 (this "Agreement"), is made by Jerry Herbst, an individual (the "Guarantor"), for the benefit of Overland Development Corporation Inc. and Larry J. Willard, Trustee of the Larry James Willard Trust (collectively, the "Lessor").

RECITALS:

A. The Lessor and Berry-Hinckley Industries, a Nevada corporation ("BHI"), are parties to that certain Lease Agreement for #1 Highway 95-A & Goldfield, Yerington, Nevada (the "Lease").

B. The Guarantor desires to enter into this Agreement in order to induce the Landlord to (i) provide consent under the Lease to a change of control of P.A. Morabito & Co., Limited ("PAMCo"), the corporation that owns all the stock of BHI and/or (ii) enter into an amendment to the Lease.

AGREEMENT:

NOW, THEREFORE, in consideration of the premises, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Guarantor hereby guarantees, promises and undertakes as follows:

1. Guaranty. The Guarantor unconditionally, absolutely and irrevocably guarantees the timely payment and performance of each of BHI's obligations arising out of and under the Lease (such obligations, the "Guaranteed Obligations"). The Guarantor's guaranty made hereby is a guaranty of timely payment and performance of the Guaranteed Obligations and not merely of collectibility or enforceability of such obligations.

2. Remedies and Rights of the Lessor. The Guarantor agrees that if and to the extent that BHI either (a) fails to satisfy any of the Guaranteed Obligations and fails to remedy such failure within thirty (30) days after receiving written notice from the Lessor of such failure, or (b) is subject to a pending petition for relief under Chapter 6 or Chapter 11 of Title 11 of the United States Code, the Guarantor will be directly responsible for the full extent of any unsatisfied Guaranteed Obligations. This Agreement is an unconditional, absolute, present and continuing guaranty of payment and performance, and will remain in full force and effect without regard to, and the obligations of the Guarantor hereunder shall not be impaired, affected or released by, any of the following: (i) any modification, supplement, extension or amendment of any of the Guaranteed Obligations or the Lease; (ii) any extension, indulgence or other action in respect thereto or therefor; (iii) any failure or delay by the Lessor or BHI in exercising any right or power under the Lease; (iv) any invalidity or unenforceability in any respect of, or any irregularity or other defect in any of, the Lease or Guaranteed Obligations; (v) any exercise or nonexercise of any right, remedy, power or privilege in respect of this Agreement or any of the Guaranteed Obligations; (vi) any transfer of the assets of Lessor to, or any consolidation or merger of the Lessor with or into, any other entity; (vii) any voluntary or involuntary liquidation,

Exhibit 5-12

dissolution, sale or other disposition of all or substantially all of the assets, receivership, insolvency, bankruptcy, reorganization or similar proceeding affecting BHI or any of its assets; or (viii) any allegation or contest of the validity of the Lease or this Agreement. The Guarantor hereby waives any defense to its obligations hereunder that might arise as a result of any of the foregoing, and hereby waives the effect of any fact, circumstance or event of any nature whatsoever that would exonerate, or constitute or give rise to a defense to, the obligation of a surety or guarantor. Without limitation, except to the extent specifically provided in Paragraph 2 hereof, the Guarantor waives any right it may have to require the Lessor, and any obligation the Lessor may have, to proceed first against BHI or exhaust any remedies that it may have against BHI in respect of non-payment or non-performance of the Guaranteed Obligations, before demand for payment or performance by the Guarantor under this Agreement.

The Guarantor acknowledges that the rights and remedies herein provided are not exclusive of any other rights or remedies that the Lessor may otherwise have at law or in equity, and shall not prejudice the Lessor's right to assert any other claim under the Lease.

3. Duration of Agreement. The term of this Agreement will begin on, and this Agreement shall be of no force and effect until, the closing of that certain Stock Purchase Agreement by and among Guarantor, or a company controlled by him, and the stockholders of PAMCo. This Agreement will continue in full force and effect and the obligations of the Guarantor hereunder will not be discharged until the earlier of (i) the date on which the Guaranteed Obligations are fully performed, satisfied and discharged or until BHI's liability to the Lessor under the Lease shall have been completely performed, satisfied and discharged, whichever occurs first, or (ii) the date on which Guarantor no longer owns any interest, directly or indirectly, in BHI. The Guaranteed Obligations will not be considered fully performed, satisfied and discharged (a) unless and until all obligations of BHI to the Lessor pursuant to the Lease have been fully and completely performed, satisfied and discharged, or (b) to the extent any claim by the Lessor against BHI remains outstanding.

4. No Assignment. The rights and obligations of the Guarantor hereunder may not be assigned without the prior written consent of the Lessor or the then beneficiary of this Agreement. Any purported assignment in violation of this section shall be null and void. All covenants and agreements in this Agreement made by the Guarantor shall bind and inure to the benefit of its successors and permitted assigns.

5. Integration; Modification; Waiver. This Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior understandings of the parties. No supplement, modification or amendment of this Agreement will be binding unless executed in writing by the Guarantor and acknowledged and accepted by the Lessor or the then beneficiary of this Agreement. No waiver of any of the provisions of this Agreement will be deemed to be or shall constitute a continuing waiver. No waiver will be binding unless executed in writing by the party making the waiver.

6. No Third Party Beneficiaries. Nothing in this Agreement shall confer any rights or remedies upon any person other than the Lessor and its successors and assigns.

Exhibit 5-13

7. Governing Law. This Agreement will be governed in all respects by the laws of the State of Nevada without regard to conflicts of law principles.

[signatures on following page]

Exhibit 5-14

A.App.939

IN WITNESS WHEREOF, the undersigned have caused this Guaranty Agreement to be duly executed as of the date first above written.

_____
JERRY HERBST

Each of the undersigned hereby acknowledges and accepts this Guaranty Agreement as of the date hereof.

OVERLAND DEVELOPMENT CORPORATION INC.

By: _____
Name:
Title:

LARRY JAMES WILLARD TRUST

By: _____
Name: Larry J. Willard
Title: Trustee

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Exhibit 5-15

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Jacqueline Bryant
Clerk of the Court
Transaction # 5685608 : tbritton

Exhibit 6

Exhibit 6

US Hwy 50

First Amendment to Lease Agreement

THIS FIRST AMENDMENT TO LEASE AGREEMENT (this "Amendment") is dated as of ~~December __, 2006~~ March 12, 2007 by and between **EDWARD C. WOOLEY AND JUDITH A. WOOLEY**, as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust Year 2000 ("Lessor") and **BERRY-HINCKLEY INDUSTRIES**, a Nevada corporation ("Lessee"), whose address is 425 Maestro Drive, Reno, Nevada 89511.

WHEREAS, Lessor and Lessee have entered into that certain Lease Agreement dated as of November 10, 2005 (the "Lease") with respect to real property and improvements located at 1820 U.S. Highway 50, Carson City, Nevada and as further described in Exhibit A;

WHEREAS, Lessor was originally misidentified in the Lease as Edward C. Wooley and Judith A. Wooley;

WHEREAS, Lessor and Lessee wish to amend certain provisions of the Lease as set forth herein; and

WHEREAS, capitalized terms not defined in this Amendment have the meanings given to them in the Lease.

NOW, THEREFORE, in consideration of the foregoing recitals and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Lessor and Lessee agree as follows:

1. **Lessor's Change of Name**. The name of the Lessor is hereby changed, effective as of the date of the Lease listed above, to Edward C. Wooley and Judith A. Wooley, as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust Year 2000.

2. **WGI Agreements**. The following sentence is added to the end of Section 12.G:

"For purposes of clarification, this Section is not deemed to prohibit the early termination of the WGI Agreement; provided, that within sixty (60) days of termination of the WGI Agreement, a new agreement is entered into by Lessee with WGI, Herbst Gaming, Inc., E.T.T. Inc. Slot Route or a substitute gaming operator approved by Lessor (such approval not to be unreasonably withheld, conditioned or delayed)."

3. **Default, Conditional Limitations, Remedies and Measure of Damages**.

(a) The first paragraph of Section 20.B is hereby deleted in its entirety and replaced as follows:

"*Remedies*. Upon occurrence of an Event of Default, Lessor shall give any lender whose name and notice address information has been provided to Lessor in writing, notice of such Event of Default contemporaneously with the delivery of such notice to Lessee. Additionally, lender shall have the right (with no obligation) to cure such Event of Default within the time period afforded Lessee set forth in the Lease with respect to monetary defaults, and with respect

Exhibit 6-1

to non-monetary defaults, such time reasonably necessary to cure such Event of Default, as long as the lender promptly commences to cure such Event of Default and diligently pursues such cure to completion."

(b) The following language is deleted in its entirety from the second paragraph:

"If WGI does not elect either such option, then, except as otherwise expressly provided herein or such other notice as may be required by statute and cannot be waived by Lessee, Lessor shall be entitle to exercise, at its option, concurrently, successively, or in any combination, all remedies available at law or in equity, including without limitation, any one or more of the following:"

and replaced with the following:

"If lender does not elect such option to cure, then, except as otherwise expressly provided herein or such other notice as may be required by statute and cannot be waived by Lessee, Lessor shall be entitled to exercise, at its option, concurrently, successively, or in any combination, all remedies available at law or in equity, including without limitation, any one or more of the following:"

4. **Mortgages, Subordination and Attornment.** Section 21 is hereby amended as follows:

(a) The last sentence of the first paragraph of Section 21 is hereby deleted in its entirety.

(b) The fourth paragraph of Section 21 is deleted in its entirety and replaced with the following: "In the event any purchaser or assignee of any mortgage at a foreclosure sale acquires title to any of the Properties, or in the event that any mortgagee or any assignee otherwise succeeds to the rights of Lessor as landlord under this Lease, Lessee shall attorn to mortgagee or such purchaser or assignee, as the case may be (a "Successor Lessor"), and recognize the Successor Lessor as lessor under this Lease, and Successor Lessor shall recognize and not disturb Lessee's tenancy created hereby. So long as Lessee is not then in default under this Lease, this Lease shall continue in full force and effect as a direct lease between the Successor Lessor and Lessee, provided that the Successor Lessor shall only be liable for any obligations of Lessor under this Lease which accrue from and after the date that such Successor Lessor acquires title to such Property or otherwise succeeds to the rights of Lessor as landlord hereunder. The foregoing provisions shall be self-operative and effective without the execution of further instruments."

5. **Assignment/Subletting**. Section 23 is hereby amended as follows:

(a) The following sentence is added to the end of the first paragraph of Section 23:

"For purposes of clarification, this Section is not and shall not be deemed to prohibit Lessee's right to collaterally assign its interest to any third person or entity, including, without limitation, by placing or granting any lien, encumbrance or other security interest on the Lease or

Exhibit 6-2

its interests thereunder, all of which such actions may be taken by Lessee without Lessor's consent."

(b) The following paragraph is added to the end of Section 23:

"Notwithstanding any provision to the contrary in this Lease, Lessor consents to the transfer or assignment of Lessee's rights under this Lease upon a foreclosure on Lessee's interests herein, or deed in lieu of foreclosure, to any lender of Lessee or an affiliate of such lender, and to the first transfer or assignment of such rights subsequent to foreclosure by such lender to a third party, so long as the third party can demonstrate sufficient financial creditworthiness reasonably acceptable to Lessor."

6. **Governing Law**. Sections 37 and 38.H are hereby incorporated in full by this reference.

7. **No Other Modification**. Except as expressly set forth in this Amendment, nothing herein contained shall be deemed to modify, supplement, supersede or otherwise amend any term or condition in the Lease, and the parties hereto acknowledge and agree that all terms and conditions of the Lease are and shall remain in full force and effect.

8. **Condition to Effectiveness**. This Amendment shall only be effective upon the closing of that certain transaction whereby the shareholders of P.A. Morabito & Co., Limited ("PAMCo"), the corporation that owns all the stock of Lessee, will enter into a Stock Purchase Agreement with Jerry Herbst ("Herbst") pursuant to which Herbst will purchase all of the outstanding stock of PAMCo.

9. **Counterparts**. This Amendment may be executed in one or more counterparts, each of which shall be deemed an original.

[SIGNATURE PAGE FOLLOWS]

Exhibit 6-3

IN WITNESS WHEREOF, Lessor and Lessee have executed this Amendment on the date first above written.

LESSOR:

EDWARD C. WOOLEY AND JUDITH A. WOOLEY

Judith A. Wooley
Judith A. Wooley
Trustee

By: _____

Printed Name: Edward C. Wooley

Title: TRUSTEE

LESSEE:

BERRY-HINCKLEY INDUSTRIES

By: _____

Printed Name: _____

Title: _____

Exhibit 6-4

STATE OF California)
COUNTY OF Santa Clara) SS:

On March 12, 2007, before me, Mary M. Edgar, a Notary Public in and for said State, personally appeared Edward C. Wooley, ~~personally known to me~~ (or proved to me on the basis of satisfactory evidence) to be the person(~~s~~) whose name(~~s~~) is/~~are~~ subscribed to the within instrument and acknowledged to me that he/~~she/they~~ executed the same in his/~~her/their~~ authorized capacity(~~ies~~), and that by his/~~her/their~~ signature(~~s~~) on the instrument the person(~~s~~), or the entity upon behalf of which the person(~~s~~) acted, executed the instrument.

WITNESS my hand and official seal.

Mary M. Edgar

(SEAL)

MARY M. EDGAR
COMM. #1655108
NOTARY PUBLIC • CALIFORNIA
SANTA CLARA COUNTY
Comm. Exp. MARCH 28, 2010
MGC1

STATE OF California)
COUNTY OF Santa Clara) SS:

On March 12, 2007, before me, Mary M. Edgar, a Notary Public in and for said State, personally appeared Judith A. Wooley, ~~personally known to me~~ (or proved to me on the basis of satisfactory evidence) to be the person(~~s~~) whose name(~~s~~) is/~~are~~ subscribed to the within instrument and acknowledged to me that ~~he/she/they~~ executed the same in ~~his/her/their~~ authorized capacity(~~ies~~), and that by ~~his/her/their~~ signature(~~s~~) on the instrument the person(~~s~~), or the entity upon behalf of which the person(~~s~~) acted, executed the instrument.

WITNESS my hand and official seal.

Mary M. Edgar

(SEAL)

MARY M. EDGAR
COMM. #1655108
NOTARY PUBLIC • CALIFORNIA
SANTA CLARA COUNTY
Comm. Exp. MARCH 28, 2010
MGC1

Exhibit 6-5

IN WITNESS WHEREOF, Lessor and Lessee have executed this Amendment on the date first above written.

LESSOR:

EDWARD C. WOOLEY AND JUDITH A. WOOLEY

Judith A. Wooley
Judith A. Wooley
Trustee

By: _____

Printed Name: Edward C. Wooley

Title: TRUSTEE

LESSEE:

BERRY-HINCKLEY INDUSTRIES

By: _____

Printed Name: Trevor Lloyd

Title: Corporate Secretary

Exhibit 6-6

STATE OF NEVADA)
) SS:
COUNTY OF WASHOE)

On June 19, 2007, before me Marguerite Benson-Braun, a Notary Public in an for said State, personally appeared [illegible], personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

Marguerite Benson-Braun

(SEAL)

MARGUERITE BENSON-BRAUN
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 99-65723-2 - Expires August 28, 2007

Exhibit 6-7

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Jacqueline Bryant
Clerk of the Court
Transaction # 5685608 : tbritton

Exhibit 7

Exhibit 7

GUARANTY AGREEMENT

This GUARANTY AGREEMENT, dated as of this ____ day of March, 2007 (this "Agreement"), is made by Jerry Herbst, an individual (the "Guarantor"), for the benefit of Edward C. Wooley and Judith A. Wooley, trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust Year 2000 (the "Lessor").

RECITALS:

A. The Lessor and Berry-Hinckley Industries, a Nevada corporation ("BHI"), are parties to that certain Lease Agreement for property located on U.S. Highway 50 in Sparks, Nevada (the "Lease").

B. The Guarantor desires to enter into this Agreement in order to induce the Landlord to (i) provide consent under the Lease to a change of control of P.A. Morabito & Co., Limited ("PAMCo"), the corporation that owns all the stock of BHI and/or (ii) enter into an amendment to the Lease.

AGREEMENT:

NOW, THEREFORE, in consideration of the premises, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Guarantor hereby guarantees, promises and undertakes as follows:

1. Guaranty. The Guarantor unconditionally, absolutely and irrevocably guarantees the timely payment and performance of each of BHI's obligations arising out of and under the Lease (such obligations, the "Guaranteed Obligations"). The Guarantor's guaranty made hereby is a guaranty of timely payment and performance of the Guaranteed Obligations and not merely of collectibility or enforceability of such obligations.

2. Remedies and Rights of the Lessor. The Guarantor agrees that if and to the extent that BHI either (a) fails to satisfy any of the Guaranteed Obligations and fails to remedy such failure within thirty (30) days after receiving written notice from the Lessor of such failure, or (b) is subject to a pending petition for relief under Chapter 7 or Chapter 11 of Title 11 of the United States Code, the Guarantor will be directly responsible for the full extent of any unsatisfied Guaranteed Obligations. This Agreement is an unconditional, absolute, present and continuing guaranty of payment and performance, and will remain in full force and effect without regard to, and the obligations of the Guarantor hereunder shall not be impaired, affected or released by, any of the following: (i) any modification, supplement, extension or amendment of any of the Guaranteed Obligations or the Lease; (ii) any extension, indulgence or other action in respect thereto or therefor; (iii) any failure or delay by the Lessor or BHI in exercising any right or power under the Lease; (iv) any invalidity or unenforceability in any respect of, or any irregularity or other defect in any of, the Lease or Guaranteed Obligations; (v) any exercise or non-exercise of any right, remedy, power or privilege in respect of this Agreement or any of the Guaranteed Obligations; (vi) any transfer of the assets of Lessor to, or any consolidation or merger of the Lessor with or into, any other entity; (vii) any voluntary or involuntary liquidation,

Exhibit 7-1

dissolution, sale or other disposition of all or substantially all of the assets, receivership, insolvency, bankruptcy, reorganization or similar proceeding affecting BHI or any of its assets; or (viii) any allegation or contest of the validity of the Lease or this Agreement. The Guarantor hereby waives any defense to its obligations hereunder that might arise as a result of any of the foregoing, and hereby waives the effect of any fact, circumstance or event of any nature whatsoever that would exonerate, or constitute or give rise to a defense to, the obligation of a surety or guarantor. Without limitation, except to the extent specifically provided in Paragraph 2 hereof, the Guarantor waives any right it may have to require the Lessor, and any obligation the Lessor may have, to proceed first against BHI or exhaust any remedies that it may have against BHI in respect of non-payment or non-performance of the Guaranteed Obligations, before demand for payment or performance by the Guarantor under this Agreement.

The Guarantor acknowledges that the rights and remedies herein provided are not exclusive of any other rights or remedies that the Lessor may otherwise have at law or in equity, and shall not prejudice the Lessor's right to assert any other claim under the Lease.

3. Duration of Agreement. The term of this Agreement will begin on, and this Agreement shall be of no force and effect until, the closing of that certain Stock Purchase Agreement by and among Guarantor, or a company controlled by him, and the stockholders of PAMCo. This Agreement will continue in full force and effect and the obligations of the Guarantor hereunder will not be discharged until the earlier of (i) the date on which the Guaranteed Obligations are fully performed, satisfied and discharged or until BHI's liability to the Lessor under the Lease shall have been completely performed, satisfied and discharged, whichever occurs first, or (ii) upon a change in the control of BHI provided that the Lessor has consented to such change of control, which consent shall not be unreasonably withheld. For the purpose of the foregoing sentence, "change in the control of BHI" shall mean the transfer, on a cumulative basis, of 50% or more of the voting control of BHI to a party not owned, directly or indirectly, by the Guarantor, Edward Herbst, Timothy Herbst or Troy Herbst. Any transfer of Guarantor's interest in BHI other than upon a change in the control of BHI with Lessor's consent pursuant to section (ii) above will not cause this Agreement or Guarantor's obligations hereunder to terminate. The Guaranteed Obligations will not be considered fully performed, satisfied and discharged (a) unless and until all obligations of BHI to the Lessor pursuant to the Lease have been fully and completely performed, satisfied and discharged, or (b) to the extent any claim by the Lessor against BHI remains outstanding.

4. No Assignment. The rights and obligations of the Guarantor hereunder may not be assigned without the prior written consent of the Lessor or the then beneficiary of this Agreement. Any purported assignment in violation of this section shall be null and void. All covenants and agreements in this Agreement made by the Guarantor shall bind and inure to the benefit of its successors and permitted assigns.

5. Integration; Modification; Waiver. This Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior understandings of the parties. No supplement, modification or amendment of this Agreement will be binding unless executed in writing by the Guarantor and acknowledged and accepted by the Lessor or the then beneficiary of this Agreement. No waiver of any of the

Exhibit 7-2

provisions of this Agreement will be deemed to be or shall constitute a continuing waiver. No waiver will be binding unless executed in writing by the party making the waiver.

6. No Third Party Beneficiaries. Nothing in this Agreement shall confer any rights or remedies upon any person other than the Lessor and its successors and assigns.

7. Governing Law. This Agreement will be governed in all respects by the laws of the State of Nevada without regard to conflicts of law principles.

[signature page follows]

Exhibit 7-3

IN WITNESS WHEREOF, the undersigned have caused this Guaranty Agreement to be duly executed as of the date first above written.

JERRY HERBST

Each of the undersigned hereby acknowledges and accepts this Guaranty Agreement as of the date hereof.

EDWARD C. WOOLEY

JUDITH A. WOOLEY

Herbst Lease Guaranty - US Hwy 50 (Wooley).DOC

Exhibit 7-4

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Clerk of the Court
Transaction # 5685608 : tbritton

Exhibit 8

Exhibit 8

SECOND AMENDMENT TO LEASE

This Second Amendment to Lease ("Second Amendment") is dated as of the _____ day of May 2011 ("Effective Date"), by and between **EDWARD C. WOOLEY AND JUDITH A. WOOLEY**, as Trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust Year 2000 (collectively "Lessor"), and **BERRY-HINCKLEY INDUSTRIES**, a Nevada corporation ("Lessee").

RECITALS:

A. Lessor is the current landlord under and pursuant to that certain lease dated as of December, 2005, entered into between Edward C. Wooley and Judith A. Wooley, as "Lessor," and Lessee, as amended by that First Amendment to Lease Agreement dated December, 2006, between Lessor and Lessee (collectively, the "Lease"), for certain real property located in Carson City, Nevada.

B. Lessor and Lessee desire to amend the Lease all as below set forth.

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth herein, Lessor and Lessee hereby agree as follows:

1. Capitalized Terms. Capitalized terms not otherwise defined in this Second Amendment shall have the meanings ascribed to them in the Lease.

2. Conflicting Terms. To the extent the provisions of this Second Amendment conflict with any of the terms or conditions of the Lease, the provisions of this Second Amendment shall control. Lessor and Lessee acknowledge and agree that, as modified hereby, each of the terms and conditions of the Lease shall remain in full force and effect and are enforceable in accordance with their respective terms.

3. Allowance for Tenant Improvements. Concurrently with the execution of this Second Amendment, Lessor shall release to Lessee an improvement allowance of Two Hundred Thousand and No/100ths Dollars ($200,000.00) (the "Improvement Allowance"). The Improvement Allowance, or some portion thereof, shall be used, at Lessee's discretion, for the construction of certain improvements to the Premises as set forth on Exhibit "A", attached hereto (the "Improvements"). Upon the completion of the Improvements, Lessee shall have no obligation to repay any portion of the Improvement Allowance. Additionally, ~~Lessee agrees that the Improvements must be completed no later than 12 months following the date of execution of this Second Amendment.~~ Lessee shall be entitled to retain any unused portion of the Improvement Allowance following completion of the Improvements.

Lessee shall complete all Improvements within 6 months from the date of execution of this Amendment.

4. Rent. The Lease is hereby amended as necessary to reflect that commencing as of the Effective Date, the Base Monthly Rent due from Lessee to Lessor shall be reduced to Twenty Thousand Twenty-five and 82/100ths Dollars ($20,025.82). For the avoidance of any doubt, the Base Monthly Rent, as amended, shall continue to be subject to the Rent Adjustment provided in

Section 4(B) of the Lease.

5. Assignment/Subletting. Section 23 of the Lease is hereby amended to the extent necessary to provide that Lessee shall be permitted to sublease any portion of the Premises, to any third party, upon notice to Lessor but without the necessity of obtaining Lessor's approval or consent. No such sublease shall operate so as to release Lessee from any obligation or liability under the terms of the Lease. Lessee shall be permitted to assign the Lease, to any third party, upon notice to Lessor and approval of such assignee by Lessor, which approval shall not unreasonably be withheld. In the event of a sublease or assignment on the part of Lessee, any proceeds received by Lessee as a result of such sublease or assignment shall be and remain the property of Lessee, and Lessee shall have no obligation to remit to Lessor any portion of such proceeds.

6. Guarantee. Guarantor hereby consents to this Second Amendment and waives any defense on a claim that this Second Amendment alters the existing Guarantee.

7. Counterparts. This Second Amendment may be executed in any number of counterparts, each of which shall be deemed an original hereof, but all of which shall constitute but one and the same document.

IN WITNESS WHEREOF, the parties have executed this Second Amendment effective as of the date first above written.

LESSOR:

6/29/11

Co-Trustee

EDWARD C. WOOLEY, Co-Trustee of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust Year 2000

6/29/11

Co-Trustee

JUDITH A. WOOLEY, Co-Trustee of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust Year 2000

LESSEE:

BERRY HINCKLEY INDUSTRIES, a Nevada Corporation

By:

Its: Pres.

GUARANTOR:

JERRY E. HERBST

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ECW002077

Exhibit 8-2