

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,

Electronically Filed  
NO. 77780  
Aug 26 2019 04:15 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

Appellants,

vs.

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

Respondents.

---

**APPENDIX TO APPELLANTS' OPENING BRIEFS**

**VOLUME 6 OF 19**

Submitted for all appellants by:

ROBERT L. EISENBERG (SBN 950)  
LEMONS, GRUNDY & EISENBERG  
6005 Plumas Street, Third Floor  
Reno, NV 89519  
775-786-6868

RICHARD D. WILLIAMSON (SBN 1001)  
JONATHAN TEW (SBN 9932)  
ROBERTSON, JOHNSON, MILLER & WILLIAMSON  
50 West Liberty Street, Suite 600  
Reno, NV 89501  
775-329-5600

ATTORNEYS FOR APPELLANTS  
LARRY J. WILLARD, et al.

**CHRONOLOGICAL INDEX TO APPELLANTS' APPENDIX**

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>  | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|---|--------------------|--------------------|------------------------|
| 1.                | Complaint   | 08/08/14           | 1                  | 1-20                   |
|                   | Exhibit 1: Lease Agreement<br>(November 18, 2005)                             |                    | 1                  | 21-56                  |
|                   | Exhibit 2: Herbst Offer Letter  |                    | 1                  | 57-72                  |
|                   | Exhibit 3: Herbst Guaranty  |                    | 1                  | 73-78                  |
|                   | Exhibit 4: Lease Agreement<br>(Dec. 2005)                                     |                    | 1                  | 79-84                  |
|                   | Exhibit 5: Interim Operating<br>Agreement (March 2007)                        |                    | 1                  | 85-87                  |
|                   | Exhibit 6: Lease Agreement<br>(Dec. 2, 2005)                                  |                    | 1                  | 88-116                 |
|                   | Exhibit 7: Lease Agreement<br>(June 6, 2006)                                  |                    | 1                  | 117-152                |
|                   | Exhibit 8: Herbst Guaranty<br>(March 2007) Hwy 50                             |                    | 1                  | 153-158                |
|                   | Exhibit 9: Herbst Guaranty<br>(March 12, 2007)                                |                    | 1                  | 159-164                |
|                   | Exhibit 10: First Amendment to<br>Lease Agreement (Mar. 12, 2007)<br>(Hwy 50) |                    | 1                  | 165-172                |
|                   | Exhibit 11: First Amendment to<br>Lease Agreement (Mar. 12, 2007)             |                    | 1                  | 173-180                |
|                   | Exhibit 12: Gordon Silver Letter<br>dated March 18, 2013                      |                    | 1                  | 181-184                |
|                   | Exhibit 13: Gordon Silver Letter<br>dated March 28, 2013                      |                    | 1                  | 185-187                |
| 2.                | Acceptance of Service   | 09/05/14           | 1                  | 188-189                |
| 3.                | Answer to Complaint   | 10/06/14           | 1                  | 190-201                |
| 4.                | Motion to Associate Counsel<br>- Brian P. Moquin, Esq.                        | 10/28/14           | 1                  | 202-206                |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>  | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|---|--------------------|--------------------|------------------------|
| (cont 4)          | Exhibit 1: Verified Application for Association of Counsel Under Nevada Supreme Court Rule 42                       |                    | 1                  | 207-214                |
|                   | Exhibit 2: The State Bar of California's Certificate of Standing  |                    | 1                  | 215-216                |
|                   | Exhibit 3: State Bar of Nevada Statement Pursuant to Supreme Court Rule 42(3)(b)                                    |                    | 1                  | 217-219                |
| 5.                | Pretrial Order  | 11/10/14           | 1                  | 220-229                |
| 6.                | Order Admitting Brain P. Moquin Esq. to Practice  | 11/13/14           | 1                  | 230-231                |
| 7.                | Verified First Amended Complaint  | 01/21/15           | 2                  | 232-249                |
| 8.                | Answer to Amended Complaint   | 02/02/15           | 2                  | 250-259                |
| 9.                | Amended Answer to Amended Complaint and Counterclaim  | 04/21/15           | 2                  | 260-273                |
| 10.               | Errata to Amended Answer to Amended Complaint and Counterclaim  | 04/23/15           | 2                  | 274-277                |
|                   | Exhibit 1: Defendants' Amended Answer to Plaintiffs' Amended Complaint and Counterclaim                             |                    | 2                  | 278-293                |
|                   | Exhibit 1: Operation Agreement  |                    | 2                  | 294-298                |
| 11.               | Plaintiffs Larry J. Willard and Overland Development Corporation's Answer to Defendants' Counterclaim               | 05/27/15           | 2                  | 299-307                |
| 12.               | Motion for Contempt Pursuant to NRCP 45(e) and Motion for Sanctions Against Plaintiffs' Counsel Pursuant to NRCP 37 | 07/24/15           | 2                  | 308-316                |
|                   | Exhibit 1: Declaration of Brian R. Irvine   |                    | 2                  | 317-320                |
|                   | Exhibit 2: Subpoena Duces Tecum to Dan Gluhaich   |                    | 2                  | 321-337                |
|                   | Exhibit 3: June 11, 2015, Email Exchange  |                    | 2                  | 338-340                |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>   | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|--|--------------------|--------------------|------------------------|
| (cont 12)         | Exhibit 4: June 29, 2015, Email<br>Attaching the Subpoena, a form for<br>acceptance of service, and a cover<br>letter listing the deadlines to respond |                    | 2                  | 341-364                |
|                   | Exhibit 5: June 29, 2015, Email<br>Exchange  |                    | 2                  | 365-370                |
|                   | Exhibit 6: July 17, 2015, Email<br>Exchange  |                    | 2                  | 371-375                |
|                   | Exhibit 7: July 20 and July 21, 2015<br>Email  |                    | 2                  | 376-378                |
|                   | Exhibit 8: July 23, 2015, Email  |                    | 2                  | 379-380                |
|                   | Exhibit 9: June 23, 2015, Email  |                    | 2                  | 381-382                |
| 13.               | Stipulation and Order to Continue<br>Trial (First Request)   | 09/03/15           | 2                  | 383-388                |
| 14.               | Stipulation and Order to Continue<br>Trial (Second Request)  | 05/02/16           | 2                  | 389-395                |
| 15.               | Defendants/Counterclaimants'<br>Motion for Partial Summary<br>Judgment   | 08/01/16           | 2                  | 396-422                |
|                   | Exhibit 1: Affidavit of Tim Herbst   |                    | 2                  | 423-427                |
|                   | Exhibit 2: Willard Lease   |                    | 2                  | 428-463                |
|                   | Exhibit 3: Willard Guaranty  |                    | 2                  | 464-468                |
|                   | Exhibit 4: Docket Sheet, Superior<br>Court of Santa Clara, Case No.<br>2013-CV-245021  |                    | 3                  | 469-480                |
|                   | Exhibit 5: Second Amended Motion<br>to Dismiss   |                    | 3                  | 481-498                |
|                   | Exhibit 6: Deposition Excerpts of<br>Larry Willard   |                    | 3                  | 499-509                |
|                   | Exhibit 7: 2014 Federal Tax Return for<br>Overland   |                    | 3                  | 510-521                |
|                   | Exhibit 8: 2014 Willard Federal Tax<br>Return – Redacted   |                    | 3                  | 522-547                |



| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>  | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|---|--------------------|--------------------|------------------------|
| (cont 15)         | Exhibit 9: Seller's Final Closing Statement                               |                    | 3                  | 549                    |
|                   | Exhibit 10: Highway 50 Lease  |                    | 3                  | 550-593                |
|                   | Exhibit 11: Highway 50 Guaranty   |                    | 3                  | 594-598                |
|                   | Exhibit 12: Willard Responses to Defendants' First Set of Interrogatories |                    | 3                  | 599-610                |
|                   | Exhibit 13: Baring Purchase and Sale Agreement                            |                    | 3                  | 611-633                |
|                   | Exhibit 14: Baring Lease  |                    | 3                  | 634-669                |
|                   | Exhibit 15: Baring Property Loan  |                    | 3                  | 670-705                |
|                   | Exhibit 16: Deposition Excerpts of Edward Wooley                          |                    | 3                  | 706-719                |
|                   | Exhibit 17: Assignment of Baring Lease                                    |                    | 4                  | 720-727                |
|                   | Exhibit 18: HUD Statement   |                    | 4                  | 728-730                |
|                   | Exhibit 19: November 2014 Email Exchange                                  |                    | 4                  | 731-740                |
|                   | Exhibit 20: January 2015 Email Exchange                                   |                    | 4                  | 741-746                |
|                   | Exhibit 21: IRS Publication 4681  |                    | 4                  | 747-763                |
|                   | Exhibit 22: Second Amendment to Baring Lease                              |                    | 4                  | 764-766                |
|                   | Exhibit 23: Wooley Responses to Second Set of Interrogatories             |                    | 4                  | 767-774                |
|                   | Exhibit 24: 2013 Overland Federal Income Tax Return                       |                    | 4                  | 775-789                |
|                   | Exhibit 25: Declaration of Brian Irvine                                   |                    | 4                  | 790-794                |
| 16.               | Affidavit of Brian P. Moquin  | 08/30/16           | 4                  | 795-797                |
| 17.               | Affidavit of Edward C. Wooley   | 08/30/16           | 4                  | 798-803                |
| 18.               | Affidavit of Larry J. Willard   | 08/30/16           | 4                  | 804-812                |

| <u>NO.</u> | <u>DOCUMENT</u>  | <u>DATE</u> | <u>VOL.</u> | <u>PAGE NO.</u> |
|------------|--|-------------|-------------|-----------------|
| 19.        | Plaintiffs' Opposition to Defendants' Motion for Partial Summary Judgment  | 08/30/16    | 4           | 813-843         |
|            | Exhibit 1: <i>Purchase and Sale Agreement</i> dated July 1, 2005 for Purchase of the Highway 50 Property                                     |             | 4           | 844-857         |
|            | Exhibit 2: <i>Lease Agreement</i> dated December 2, 2005 for the Highway 50 Property   |             | 4           | 858-901         |
|            | Exhibit 3: <i>Three Year Adjustment Term Note</i> dated January 19, 2007 in the amount of \$2,200,00.00 for the Highway 50 Property          |             | 4           | 902-906         |
|            | Exhibit 4: <i>Deed of Trust, Fixture Filing and Security Agreement</i> dated January 30, 2017, Inst. No. 363893, For the Highway 50 Property |             | 4           | 907-924         |
|            | Exhibit 5: Letter and Attachments from Sujata Yalamanchili, Esq. to Landlords dated February 17, 2007 re Herbst Acquisition of BHI           |             | 4           | 925-940         |
|            | Exhibit 6: <i>First Amendment to Lease Agreement</i> dated March 12, 2007 for the Highway 50 Property  |             | 4           | 941-948         |
|            | Exhibit 7: <i>Guaranty Agreement</i> dated March 12, 2007 for the Highway 50 Property  |             | 4           | 949-953         |
|            | Exhibit 8: <i>Second Amendment to Lease</i> dated June 29, 2011 for the Highway 50 Property  |             | 4           | 954-956         |
|            | Exhibit 9: <i>Purchase and Sale Agreement</i> Dated July 14, 2006 for the Baring Property  |             | 5           | 957-979         |
|            | Exhibit 10: <i>Lease Agreement</i> dated June 6, 2006 for the Baring Property  |             | 5           | 980-1015        |
|            | Exhibit 11: <i>Five Year Adjustable Term Note</i> dated July 18, 2006 in the amount of \$2,100,00.00 for the Baring Property                 |             | 5           | 1016-1034       |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>   | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|--|--------------------|--------------------|------------------------|
| (cont 19)         | Exhibit 12: <i>Deed of Trust, Fixture Filing and Security Agreement</i> dated July 21, 2006, Doc. No. 3415811, for the Highway 50 Property   |                    | 5                  | 1035-1052              |
|                   | Exhibit 13: <i>First Amendment to Lease Agreement</i> dated March 12, 2007 for the Baring Property   |                    | 5                  | 1053-1060              |
|                   | Exhibit 14: <i>Guaranty Agreement</i> dated March 12, 2007 for the Baring Property   |                    | 5                  | 1061-1065              |
|                   | Exhibit 15: <i>Assignment of Entitlements, Contracts, Rent and Revenues (1365 Baring)</i> dated July 5, 2007, Inst. No. 3551275, for the Baring Property                                   |                    | 5                  | 1066-1077              |
|                   | Exhibit 16: <i>Assignment and Assumption of Lease</i> dated December 29, 2009 between BHI and Jacksons Food Stores, Inc.   |                    | 5                  | 1078-1085              |
|                   | Exhibit 17: <i>Substitution of Attorney</i> forms for the Wooley Plaintiffs' file March 6 and March 13, 2014 in the California Case  |                    | 5                  | 1086-1090              |
|                   | Exhibit 18: <i>Joint Stipulation to Take Pending Hearings Off Calendar and to Withdraw Written Discovery Requests Propounded by Plaintiffs</i> filed March 13, 2014 in the California Case |                    | 5                  | 1091-1094              |
|                   | Exhibit 19: Email thread dated March 14, 2014 between Cindy Grinstead and Brian Moquin re Joint Stipulation in California Case   |                    | 5                  | 1095-1099              |
|                   | Exhibit 20: Civil Minute Order on Motion to Dismiss in the California case dated March 18, 2014 faxed to Brian Moquin by the Superior Court  |                    | 5                  | 1100-1106              |

| <u>NO.</u> | <u>DOCUMENT</u>   | <u>DATE</u> | <u>VOL.</u> | <u>PAGE NO.</u> |
|------------|---|-------------|-------------|-----------------|
| (cont 19)  | Exhibit 21: <i>Request for Dismissal</i> without prejudice filed May 19, 2014 in the California case  |             | 5           | 1107-1108       |
|            | Exhibit 22: <i>Notice of Breach and Default and Election to Cause Sale of Real Property Under Deed of Trust</i> dated March 21, 2014, Inst. No. 443186, regarding the Highway 50 Property |             | 5           | 1109-1117       |
|            | Exhibit 23: Email message dated February 5, 2014 from Terrilyn Baron of Union Bank to Edward Wooley regarding cross-collateralization of the Baring and Highway 50 Properties             |             | 5           | 1118-1119       |
|            | Exhibit 24: <i>Settlement Statement (HUD-1)</i> dated May 20, 2014 for sale of the Baring Property  |             | 5           | 1120-1122       |
|            | Exhibit 25: 2014 Federal Tax Return for Edward C. and Judith A. Wooley  |             | 5           | 1123-1158       |
|            | Exhibit 26: 2014 State Tax Balance Due Notice for Edward C. and Judith A. Wooley  |             | 5           | 1159-1161       |
|            | Exhibit 27: <i>Purchase and Sale Agreement</i> dated November 18, 2005 for the Virginia Property  |             | 5           | 1162-1174       |
|            | Exhibit 28: <i>Lease Agreement</i> dated November 18, 2005 for the Virginia Property  |             | 6           | 1175-1210       |
|            | Exhibit 29: <i>Buyer's and Seller's Final Settlement Statements</i> dated February 24, 2006 for the Virginia Property   |             | 6           | 1211-1213       |
|            | Exhibit 30: <i>Deed of Trust, Fixture Filing and Security Agreement</i> dated February 21, 2006 re the Virginia Property securing loan for \$13,312,500.00                                |             | 6           | 1214-1231       |

| <u>NO.</u> | <u>DOCUMENT</u>  | <u>DATE</u> | <u>VOL.</u> | <u>PAGE NO.</u> |
|------------|--|-------------|-------------|-----------------|
| (cont 19)  | Exhibit 31: <i>Promissory Note</i> dated February 28, 2006 for \$13,312,500.00 by Willard Plaintiffs' in favor of Telesis Community Credit Union   |             | 6           | 1232-1236       |
|            | Exhibit 32: <i>Subordination, Attornment And Nondisturbance Agreement</i> dated February 21, 2006 between Willard Plaintiffs, BHI, and South Valley National Bank, Inst. No. 3353293, re the Virginia Property |             | 6           | 1237-1251       |
|            | Exhibit 33: <i>Deed of Trust, Assignment of Rents, and Security Agreement</i> dated March 16, 2006 re the Virginia Property securing loan for \$13,312,500.00  |             | 6           | 1252-1277       |
|            | Exhibit 34: <i>Payment Coupon</i> dated March 1, 2013 from Business Partners to Overland re Virginia Property mortgage   |             | 6           | 1278-1279       |
|            | Exhibit 35: <i>Substitution of Trustee and Full Reconveyance</i> dated April 18, 2006 naming Pacific Capital Bank, N.A. as trustee on the Virginia Property Deed of Trust                                      |             | 6           | 1280-1281       |
|            | Exhibit 36: <i>Amendment to Lease Agreement</i> dated March 9, 2007 for the Virginia Property  |             | 6           | 1282-1287       |
|            | Exhibit 37: <i>Guaranty Agreement</i> dated March 9, 2007 for the Virginia Property  |             | 6           | 1288-1292       |
|            | Exhibit 38: Letter dated March 12, 2013 from L. Steven Goldblatt, Esq. to Jerry Herbst re breach of the Virginia Property lease  |             | 6           | 1293-1297       |
|            | Exhibit 39: Letter dated March 18, 2013 from Gerald M. Gordon, Esq. to L. Steven Goldblatt, Esq. re breach of the Virginia Property lease  |             | 6           | 1298-1300       |

| <u>NO.</u> | <u>DOCUMENT</u>   | <u>DATE</u> | <u>VOL.</u> | <u>PAGE NO.</u> |
|------------|---|-------------|-------------|-----------------|
| (cont 19)  | Exhibit 40: Letter dated April 12, 2013 from Gerald M. Gordon, Esq. to L. Steven Goldblatt, Esq. re breach of the Virginia Property lease   |             | 6           | 1301-1303       |
|            | Exhibit 41: <i>Operation and Management Agreement</i> dated May 1, 2013 between BHI and the Willard Plaintiffs re the Virginia Property   |             | 6           | 1304-1308       |
|            | Exhibit 42: <i>Notice of Intent to Foreclose</i> dated June 14, 2013 from Business Partners to Overland re default on loan for the Virginia Property                                      |             | 6           | 1309-1311       |
|            | Exhibit 43: <i>Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, &amp; Deadlines</i> dated June 18, 2013  |             | 6           | 1312-1315       |
|            | Exhibit 44: <i>Declaration in Support of Motion to Dismiss Case</i> filed by Larry James Willard on August 9, 2013, Northern District of California Bankruptcy Court Case No. 13-53293 CN |             | 6           | 1316-1320       |
|            | Exhibit 45: <i>Substitution of Attorney</i> forms from the Willard Plaintiffs filed March 6, 2014 in the California case  |             | 6           | 1321-1325       |
|            | Exhibit 46: <i>Declaration of Arm's Length Transaction</i> dated January 14, 2014 between Larry James Willard and Longley Partners, LLC re sale of the Virginia Property                  |             | 6           | 1326-1333       |
|            | Exhibit 47: <i>Purchase and Sale Agreement</i> dated February 14, 2014 between Longley Partners, LLC and Larry James Willard re purchase of the Virginia Property for \$4,000,000.00      |             | 6           | 1334-1340       |

| <u>NO.</u> | <u>DOCUMENT</u>  | <u>DATE</u> | <u>VOL.</u> | <u>PAGE NO.</u> |
|------------|--|-------------|-------------|-----------------|
| (cont 19)  | Exhibit 48: <i>Short Sale Agreement</i> dated February 19, 2014 between the National Credit Union Administration Board and the Willard Plaintiffs re short sale of the Virginia Property                                       |             | 6           | 1341-1360       |
|            | Exhibit 49: <i>Consent to Act</i> dated February 25, 2014 between the Willard Plaintiffs and Daniel Gluhaich re representation for short sale of the Virginia Property   |             | 6           | 1361-1362       |
|            | Exhibit 50: <i>Seller's Final Closing Statement</i> dated March 3, 2014 re the Virginia Property   |             | 6           | 1363-1364       |
|            | Exhibit 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 |             | 6           | 1365-1366       |
| 20.        | Defendants' Reply Brief in Support of Motion for Partial Summary Judgment  | 09/16/16    | 6           | 1367-1386       |
|            | Exhibit 1: Declaration of John P. Desmond  |             | 6           | 1387-1390       |
| 21.        | Supplement to Defendants / Counterclaimants' Motion for Partial Summary Judgment   | 12/20/16    | 6           | 1391-1396       |
|            | Exhibit 1: Expert Report of Michelle Salazar   |             | 7           | 1397-1430       |
| 22.        | Plaintiffs' Objections to Defendants' Proposed Order Granting Partial Summary Judgment in Favor of Defendants  | 01/30/17    | 7           | 1431-1449       |
| 23.        | Defendants/Counterclaimants' Response to Plaintiffs' Proposed Order Granting Partial Summary Judgment in Favor of Defendants   | 02/02/17    | 7           | 1450-1457       |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>  | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|---|--------------------|--------------------|------------------------|
| (cont 23)         | Exhibit 1: January 19-25, 2017<br>Email Exchange  |                    | 7                  | 1458-1460              |
|                   | Exhibit 2: January 25, 2017, Email<br>from M. Reel  |                    | 7                  | 1461-1485              |
| 24.               | Stipulation and Order to Continue<br>Trial (Third Request)  | 02/09/17           | 7                  | 1486-1494              |
| 25.               | Order Granting Partial Summary<br>Judgment in Favor of Defendants   | 05/30/17           | 7                  | 1495-1518              |
| 26.               | Notice of Entry of Order re Order<br>Granting Partial Summary<br>Judgment   | 05/31/17           | 7                  | 1519-1522              |
|                   | Exhibit 1: May 30, 2017 Order   |                    | 7                  | 1523-1547              |
| 27.               | Affidavit of Brian P. Moquin<br>re Willard  | 10/18/17           | 7                  | 1548-1555              |
| 28.               | Affidavit of Daniel Gluhaich<br>re Willard  | 10/18/17           | 7                  | 1556-1563              |
| 29.               | Affidavit of Larry Willard  | 10/18/17           | 7                  | 1564-1580              |
| 30.               | Motion for Summary Judgment<br>of Plaintiffs Larry J. Willard and<br>Overland Development Corporation   | 10/18/17           | 7                  | 1581-1621              |
|                   | Exhibit 1: <i>Purchase and Sale<br/>Agreement</i> dated November 18, 2005<br>for the Virginia Property  |                    | 7                  | 1622-1632              |
|                   | Exhibit 2: <i>Lease Agreement</i> dated<br>November 18, 2005 for the Virginia<br>Property   |                    | 8                  | 1633-1668              |
|                   | Exhibit 3: <i>Subordination, Attornment<br/>and Nondisturbance Agreement</i> dated<br>February 21, 2006 between Willard<br>Plaintiffs, BHI, and South Valley<br>National Bank, Inst. No. 3353293,<br>re the Virginia Property |                    | 8                  | 1669-1683              |
|                   | Exhibit 4: Letter and Attachments<br>from Sujata Yalamanchili, Esq. to<br>Landlords dated February 17, 2007<br>re Herbst Acquisition of BHI   |                    | 8                  | 1684-1688              |



| <u>NO.</u> | <u>DOCUMENT</u>   | <u>DATE</u> | <u>VOL.</u> | <u>PAGE NO.</u> |
|------------|---|-------------|-------------|-----------------|
| (cont 30)  | Exhibit 5: <i>Landlord's Estoppel Certificate</i> regarding the Virginia Lease dated on or about March 8, 2007                            |             | 8           | 1689-1690       |
|            | Exhibit 6: <i>Amendment to Lease Agreement</i> dated March 9, 2007 for the Virginia Property  |             | 8           | 1691-1696       |
|            | Exhibit 7: <i>Guaranty Agreement</i> dated March 9, 2007 for the Virginia Property  |             | 8           | 1697-1701       |
|            | Exhibit 8: Berry-Hinckley Industries <i>Financial Analysis</i> on the Virginia Property dated May 2008                                    |             | 8           | 1702-1755       |
|            | Exhibit 9: Appraisal of the Virginia Property by CB Richard Ellis dated October 1, 2008   |             | 8           | 1756-1869       |
|            | Exhibit 10: Letter dated March 12, 2013 from L. Steven Goldblatt, Esq. to Jerry Herbst re breach of the Virginia Lease                    |             | 9           | 1870-1874       |
|            | Exhibit 11: Letter dated March 18, 2013 from Gerald M. Gordon, Esq. to L. Steven Goldblatt, Esq. re breach of the Virginia Property Lease |             | 9           | 1875-1877       |
|            | Exhibit 12: Letter dated April 12, 2013 from Gerald M. Gordon, Esq. to L. Steven Goldblatt, Esq. re breach of the Virginia Property lease |             | 9           | 1878-1880       |
|            | Exhibit 13: <i>Operation and Management Agreement</i> dated May 1, 2013 between BHI and the Willard Plaintiffs re the Virginia Property   |             | 9           | 1881-1885       |
|            | Exhibit 14: Invoice from Gregory M. Breen dated May 31, 2013  |             | 9           | 1886-1887       |

| <u>NO.</u> | <u>DOCUMENT</u>  | <u>DATE</u> | <u>VOL.</u> | <u>PAGE NO.</u> |
|------------|--|-------------|-------------|-----------------|
| (cont 30)  | Exhibit 15: Photographs of the Virginia Property taken by Larry J. Willard on May 26-27, 2013  |             | 9           | 1888-1908       |
|            | Exhibit 16: Photographs of the Virginia Property in 2012 retrieved from Google Historical Street View  |             | 9           | 1909-1914       |
|            | Exhibit 17: Invoice from Tholl Fence dated July 31, 2013   |             | 9           | 1915-1916       |
|            | Exhibit 18: <i>Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, &amp; Deadlines</i> filed June 18, 2018 in case <i>In re Larry James Willard</i> , Northern District of California Bankruptcy Case No. 13-53293 CN  |             | 9           | 1917-1920       |
|            | Exhibit 19: <i>Motion by the National Credit Union Administration Board, Acting in its Capacity as Liquidating Agent for Telesis Community Credit Union, for Order Terminating Automatic Stay or, Alternatively, Requiring Adequate Protection</i> and related declarations and declarations and exhibits thereto filed July 18, 2013 in case <i>In re Larry James Willard</i> , Northern District of California Bankruptcy Case No. 13-53293 CN |             | 9           | 1921-1938       |
|            | Exhibit 20: <i>Order for Relief from Stay</i> filed August 8, 2013 in case <i>In re Larry James Willard</i> , Northern District of California Bankruptcy Case No. 13-53293 CN  |             | 9           | 1939-1943       |
|            | Exhibit 21: <i>Motion to Dismiss Case</i> and related declarations filed August 9, 2013 in case <i>In re Larry James Willard</i> , Northern District of California Bankruptcy Case No. 13-53293 CN   |             | 9           | 1944-1953       |

| <u>NO.</u> | <u>DOCUMENT</u>  | <u>DATE</u> | <u>VOL.</u> | <u>PAGE NO.</u> |
|------------|--|-------------|-------------|-----------------|
| (cont 30)  | Exhibit 22: <i>Proof of Claim</i> and exhibits thereto filed August 27, 2013 in case <i>In re Larry James Willard</i> , Northern District of California Bankruptcy Case No. 13-53293 CN        |             | 9           | 1954-1966       |
|            | Exhibit 23: <i>Objection to Claim</i> filed September 5, 2013 by Stanley A. Zlotoff in case <i>In re Larry James Willard</i> , Northern District of California Bankruptcy Case No. 13-53293 CN |             | 9           | 1967-1969       |
|            | Exhibit 24: <i>Original Preliminary Report</i> dated August 12, 2013 from Stewart Title Company re the Virginia Property   |             | 9           | 1970-1986       |
|            | Exhibit 25: <i>Updated Preliminary Report</i> dated January 13, 2014 from Stewart Title Company re the Virginia Property   |             | 9           | 1987-2001       |
|            | Exhibit 26: Berry-Hinckley Industries Financial Statement on the Virginia Property for the Twelve Months Ending December 31, 2012  |             | 9           | 2002-2006       |
|            | Exhibit 27: Bill Detail from the Washoe County Treasurer website re 2012 property taxes on the Virginia Property   |             | 9           | 2007-2008       |
|            | Exhibit 28: Bill Detail from the Washoe County Treasurer website re 2013 property taxes on the Virginia Property   |             | 9           | 2009-2010       |
|            | Exhibit 29: <i>Order of Case Dismissal</i> filed September 30, 2013 in case <i>In re Larry James Willard</i> , Northern District of California Bankruptcy Case No. 13-53293 CN                 |             | 9           | 2011-2016       |
|            | Exhibit 30: Invoice from Santiago Landscape & Maintenance dated October 24, 2013   |             | 9           | 2017-2018       |

| <u>NO.</u> | <u>DOCUMENT</u>   | <u>DATE</u> | <u>VOL.</u> | <u>PAGE NO.</u> |
|------------|---|-------------|-------------|-----------------|
| (cont 30)  | Exhibit 31: Appraisal of the Virginia Property by David A. Stefan dated February 10, 2014   |             | 9           | 2019-2089       |
|            | Exhibit 32: <i>Seller's Final Closing Statement</i> dated March 6, 2014 re short sale of the Virginia Property from the Willard Plaintiffs to Longley Partners, LLC   |             | 9           | 2090-2091       |
|            | Exhibit 33: Invoices from NV Energy for the Virginia Property   |             | 9           | 2092-2109       |
|            | Exhibit 34: Invoices and related insurance policy documents from Berkshire Hathaway Insurance Company re the Virginia Property  |             | 9           | 2110-2115       |
|            | Exhibit 35: Notice of Violation from the City of Reno re the Virginia Property and correspondence related thereto   |             | 10          | 2116-2152       |
|            | Exhibit 36: Willard Plaintiffs Computation of Damages spreadsheet   |             | 10          | 2153-2159       |
|            | Exhibit 37: E-mail message from Richard Miller to Dan Gluhaich dated August 6, 2013 re Virginia Property Car Wash   |             | 10          | 2160-2162       |
|            | Exhibit 38: E-mail from Rob Cashell to Dan Gluhaich dated February 28, 2014 with attached <i>Proposed and Contract</i> from L.A. Perks dated February 11, 2014 re repairing the Virginia Property   |             | 10          | 2163-2167       |
|            | Exhibit 39: <i>Deed</i> by and between Longley Center Partnership and Longley Center Partners, LLC dated January 1, 2004 regarding the Virginia Property, recorded April 1, 2004 in the Washoe County Recorder's Office as Doc. No. 3016371 |             | 10          | 2168-2181       |

| <u>NO.</u> | <u>DOCUMENT</u>  | <u>DATE</u> | <u>VOL.</u> | <u>PAGE NO.</u> |
|------------|--|-------------|-------------|-----------------|
| (cont 30)  | Exhibit 40: <i>Grant, Bargain and Sale Deed</i> by and between Longley Center Partners, LLC and P.A. Morabito & Co., Limited dated October 4, 2005 regarding the Virginia Property, recorded October 13, 2005 in the Washoe County Recorder's Office as Doc. No. 3291753   |             | 10          | 2182-2187       |
|            | Exhibit 41: <i>Grant, Bargain and Sale Deed</i> by and between P.A. Morabito & Co., Limited and Land Venture Partners, LLC dated September 30, 2005 regarding the Virginia Property, recorded October 13, 2005 in the Washoe County Recorder's Office as Doc. No. 3291760  |             | 10          | 2188-2193       |
|            | Exhibit 42: <i>Memorandum of Lease</i> dated September 30, 2005 by Berry-Hinckley Industries regarding the Virginia Property, recorded October 13, 2005 in the Washoe County Recorder's Office as Doc. No. 3291761   |             | 10          | 2194-2198       |
|            | Exhibit 43: <i>Subordination, Non-Disturbance and Attornment Agreement and Estoppel Certificate</i> by and between Land Venture Partners, LLC, Berry-Hinckley Industries, and M&I Marshall & Isley Bank dated October 3, 2005 regarding the Virginia Property, recorded October 13, 2005 in the Washoe County Recorder's Office as Doc No. 3291766 |             | 10          | 2199-2209       |
|            | Exhibit 44: <i>Memorandum of Lease with Options to Extend</i> dated December 1, 2005 by Winner's Gaming, Inc. regarding the Virginia Property, recorded December 14, 2005 in the Washoe County Recorder's Office as Doc. No. 3323645   |             | 10          | 2210-2213       |

| <u>NO.</u> | <u>DOCUMENT</u>   | <u>DATE</u> | <u>VOL.</u> | <u>PAGE NO.</u> |
|------------|---|-------------|-------------|-----------------|
| (cont 30)  | Exhibit 45: <i>Lease Termination Agreement</i> dated January 25, 2006 by Land Venture Partners, LLC and Berry-Hinckley Industries regarding the Virginia Property, recorded February 24, 2006 in the Washoe County Recorder's Office as Doc. No. 3353288                                    |             | 10          | 2214-2218       |
|            | Exhibit 46: <i>Grant, Bargain and Sale Deed</i> by and between Land Venture Partners, LLC and P.A. Morabito & Co., Limited dated February 23, 2006 regarding the Virginia Property, recorded February 24, 2006 in the Washoe County Recorder's Office as Doc. No. 3353289                   |             | 10          | 2219-2224       |
|            | Exhibit 47: <i>Grant, Bargain and Sale Deed</i> by and between P.A. Morabito & Co., Limited and the Willard Plaintiffs dated January 20, 2006 regarding the Virginia Property, recorded February 24, 2006 in the Washoe County Recorder's Office as Doc. No. 3353290                        |             | 10          | 2225-2230       |
|            | Exhibit 48: <i>Deed of Trust, Fixture Filing and Security Agreement</i> by and between the Willard Plaintiffs and South Valley National Bank dated February 21, 2006 regarding the Virginia Property, recorded February 24, 2006 in the Washoe County Recorder's Office as Doc. No. 3353292 |             | 10          | 2231-2248       |
|            | Exhibit 49: Proposed <i>First Amendment to Lease Agreement</i> regarding the Virginia Property sent to the Willard Plaintiffs in October 2006   |             | 10          | 2249-2251       |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>   | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|--|--------------------|--------------------|------------------------|
| (cont 30)         | Exhibit 50: <i>Assignment of Entitlements, Contracts, Rents and Revenues</i> by and between Berry-Hinckley Industries and First National Bank of Nevada dated June 29, 2007 regarding the Virginia Property, recorded February 24, 2006 in the Washoe County Recorder's Office as Doc. No. 3551284 |                    | 10                 | 2252-2264              |
|                   | Exhibit 51: <i>UCC Financing Statement</i> regarding the Virginia Property, recorded July 5, 2007 in the Washoe County Recorder's Office as Doc. No 3551285  |                    | 10                 | 2265-2272              |
|                   | Exhibit 52: Sales brochure for the Virginia Property prepared by Daniel Gluhaich for marketing purposes in 2012  |                    | 10                 | 2273-2283              |
| 31.               | Defendants'/Counterclaimants' Opposition to Larry Willard and Overland Development Corporation's Motion for Summary Judgment – Oral Arguments Requested  | 11/13/17           | 10                 | 2284-2327              |
|                   | Exhibit 1: Declaration of Brian R. Irvine  |                    | 10                 | 2328-2334              |
|                   | Exhibit 2: December 12, 2014, Plaintiffs Initial Disclosures   |                    | 10                 | 2335-2342              |
|                   | Exhibit 3: February 12, 2015 Letter  |                    | 10                 | 2343-2345              |
|                   | Exhibit 4: Willard July 2015 Interrogatory Responses, First Set  |                    | 10                 | 2346-2357              |
|                   | Exhibit 5: August 28, 2015, Letter   |                    | 11                 | 2358-2369              |
|                   | Exhibit 6: March 3, 2016, Letter   |                    | 11                 | 2370-2458              |
|                   | Exhibit 7: March 15, 2016 Letter   |                    | 11                 | 2459-2550              |
|                   | Exhibit 8: April 20, 2016, Letter  |                    | 11                 | 2551-2577              |
|                   | Exhibit 9: December 2, 2016, Expert Disclosure of Gluhaich   |                    | 11                 | 2578-2586              |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>   | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|--|--------------------|--------------------|------------------------|
| (cont 31)         | Exhibit 10: December 5, 2016 Email   |                    | 11                 | 2587-2593              |
|                   | Exhibit 11: December 9, 2016 Email   |                    | 11                 | 2594-2595              |
|                   | Exhibit 12: December 23, 2016 Email  |                    | 11                 | 2596-2599              |
|                   | Exhibit 13: December 27, 2016 Email  |                    | 11                 | 2600-2603              |
|                   | Exhibit 14: February 3, 2017, Letter   |                    | 12                 | 2604-2631              |
|                   | Exhibit 15: Willard Responses to Defendants' First Set of Requests for Production of Documents |                    | 12                 | 2632-2641              |
|                   | Exhibit 16: April 1, 2016 Email  |                    | 12                 | 2642-2644              |
|                   | Exhibit 17: May 3, 2016 Email  |                    | 12                 | 2645-2646              |
|                   | Exhibit 18: June 21, 2016 Email Exchange   |                    | 12                 | 2647-2653              |
|                   | Exhibit 19: July 21, 2016 Email  |                    | 12                 | 2654-2670              |
|                   | Exhibit 20: Defendants' First Set of Interrogatories on Willard                                |                    | 12                 | 2671-2680              |
|                   | Exhibit 21: Defendants' Second Set of Interrogatories on Willard                               |                    | 12                 | 2681-2691              |
|                   | Exhibit 22: Defendants' First Requests for Production on Willard                               |                    | 12                 | 2692-2669              |
|                   | Exhibit 23: Defendants' Second Request for Production on Willard                               |                    | 12                 | 2700-2707              |
|                   | Exhibit 24: Defendants' Third Request for Production on Willard                                |                    | 12                 | 2708-2713              |
|                   | Exhibit 25: Defendants Requests for Admission to Willard                                       |                    | 12                 | 2714-2719              |
|                   | Exhibit 26: Willard Lease  |                    | 12                 | 2720-2755              |
|                   | Exhibit 27: Willard Response to Second Set of Interrogatories                                  |                    | 12                 | 2756-2764              |



| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>  | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|---|--------------------|--------------------|------------------------|
| (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              |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>   | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|--|--------------------|--------------------|------------------------|
| (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 Responses                         |                    | 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              |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>  | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|---|--------------------|--------------------|------------------------|
| (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              |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>  | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|---|--------------------|--------------------|------------------------|
| (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              |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>   | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|--|--------------------|--------------------|------------------------|
| 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              |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>   | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|--|--------------------|--------------------|------------------------|
| (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 Brian 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              |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>   | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|--|--------------------|--------------------|------------------------|
| (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              |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>   | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|--|--------------------|--------------------|------------------------|
| 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              |



| <b><u>NO.</u></b>                  | <b><u>DOCUMENT</u></b>  | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|------------------------------------|---|--------------------|--------------------|------------------------|
| <b><u>TRANSCRIPTS</u></b>          |   |                    |                    |                        |
| 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              |
| <b><u>ADDITIONAL DOCUMENTS</u></b> |   |                    |                    |                        |
| 68.                                | Order Granting Defendants’ Motion for Partial Summary Judgment [Oral Argument Requested] <sup>1</sup> | 01/04/18           | 19                 | 4353-4357              |

---

<sup>1</sup> This document was inadvertently omitted earlier. It was added here because all of the other papers in the 19-volume appendix had already been numbered.

# EXHIBIT 28

# EXHIBIT 28

## LEASE AGREEMENT

**THIS LEASE AGREEMENT** (this "Lease") is made as of November 18, 2005 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, NV 89511

In consideration of the mutual covenants and agreements herein contained, Lessor and Lessee hereby covenant and agree as follows:

**Certain Defined Terms.** Capitalized terms not defined herein shall have the meanings set forth in Exhibit A hereto.

**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.

**Lease Term; Extension.** The initial term of this Lease ("Initial Term") shall commence February 24, 2006 ("Effective Date") and shall expire at midnight on August 23, 2023 ("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 four (4) 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

Sample Lease  
1/4/2006  
000160/09959 GBDOS 469445v2

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.

Sample Lease  
1/4/2006



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 Protection, 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 Corrective 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

Sample Lease  
1/4/2006



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

Sample Lease  
1/4/2006

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 its 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.

Sample Lease  
1/4/2006



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

Sample Lease  
1/4/2006

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<br>Attn: Paul A. Morabito<br>425 Maestro Drive<br>Reno, NV 89511<br>Telephone: (775) 689-1222<br>Facsimile: (775) 689-1232                  |
| With a copy to: | Hodgson Russ LLP<br>Attn: Sujata Yalamanchili<br>One M&T Plaza, Suite 2000<br>Buffalo, NY 14023<br>Telephone: (716) 848-1657<br>Facsimile: (716) 849-0349             |
| If to Lessor:   | Overland Development Corporation Inc.<br>Attn: Larry Willard<br>133 Glenridge Avenue<br>Los Gatos, CA 95030   |
| With a copy to  | Sam Chuck, Esq.<br>Rossi, Hamerslough, Reischl & Chuck<br>1960 The Alameda, Suite 200<br>San Jose, CA 95126<br>Telephone: (408) 261-4252<br>Facsimile: (408) 261-4292 |

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

Sample Lease  
1/4/2006

22

000160/09959 GBD0CS 469445v4



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.

Sample Lease  
1/4/2006

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:

*Larry Willard*  
LARRY WILLARD

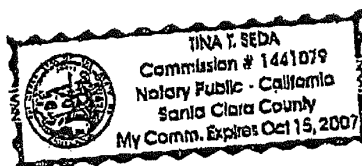
Tax Identification No. [REDACTED]

STATE OF California )  
 ) ss  
COUNTY OF Santa Clara )

The foregoing instrument was acknowledged before me on 12/2/05 by Larry Willard, the President of Overland, on behalf of the limited liability company.

*Tina J. Seda*  
Notary Public

My Commission Expires: 10-15-07



STATE OF CALIFORNIA  
COUNTY OF Santa Clara

) S.S.

On December 2, 2005 before me,

Tina T. Seda

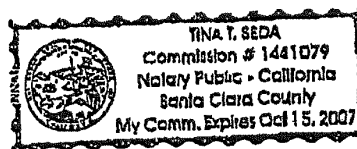
a Notary Public in and for said County and State, personally  
appeared

Larry J. Willard

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.

Signature Tina T. Seda



(This area for official notarial seal)


notyack rev. (01/06/98)

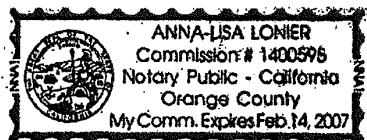
LESSEE:

BERRY-HINCKLEY INDUSTRIES, a Nevada  
corporationBy: Paul Morabito, its Chief Executive Officer  
Tax Identification No. 88-0125101

*California*  
STATE OF ~~NEVADA~~  
*Orange* )ss  
COUNTY OF ~~WASHINGTON~~

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 \$1,464,375.00.

"*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.

A-1

Sample Lease  
Vitt Properties  
1/4/2006

000160/09959 GBDOCS 469445v4



"*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

Sample Lease  
1/4/2006

000160/09959 GBDOS 469445v4

(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.

Sample Lease  
1/4/2006

000160/09959 GBDOS 469445v4

*"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).

Sample Lease  
1/4/2006

000160/09959 GBDOS 469445v4

*"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).

Sample Lease  
1/4/2006

000160/09959 GBDOS 469445v4

**EXHIBIT B****ADDRESS AND LEGAL DESCRIPTION OF PROPERTY**

**PROPERTY ADDRESS:** 7695 - 7699 S. Virginia Street, Reno, Nevada (APN 043-011-48)

**PROPERTY LEGAL DESCRIPTION:****Parcel I**

The land referred to herein is situated in the City of Reno, County of Washoe, State of Nevada, located within a portion of the South Half (S 1/2) of the Northwest Quarter (NW 1/4) of Section 6, Township 19 North, Range 20 East, M.D.M., and being more particularly described as follows:

Commencing at the Southwest corner as Parcel "C", a found nail and tag on a fence post, as shown on Parcel Map No. 218, File No. 388954, on file in the County Records Office, Washoe County, Nevada; thence North 00°16'56" East, a distance of 579.25 feet to the Northerly side of Longley Lane, Thence along said Northerly side South 69°21'09" West, a distance of 21.41 feet to the true point of beginning.

Thence along the said Northerly line of Longley Lane South 69°21'09" West, a distance of 301.22 feet to the Easterly line of U.S. 395; thence along said Easterly line North 21°04'38" West, a distance of 653.04 feet; thence leaving said Easterly line North 14°55'49" East, a distance of 126.66 feet, thence North 89°52'07" East, a distance of 458.81 feet; thence North 19°19'30" West, a distance of 0.78 feet; thence North 84°51'10" East, a distance of 213.17 feet to the Westerly line of South Virginia Street; thence along said Westerly line South 20°39'19" East, a distance of 257.92 feet; thence leaving said westerly line of South Virginia North 89°40'18" West, a distance of 275.76 feet; thence South 00°16'56" West, a distance of 406.67 feet to the true point of beginning.

**Parcel II**

A non-exclusive easement for ingress, egress and access by and for vehicular pedestrian traffic and vehicle parking as set forth in that certain mutual parking and access agreement recorded April 12, 1995 in Book 4282, Page 40 as Instrument No. 1885230 of Official Records, Washoe County Recorder's Office, Washoe County, Nevada.

Note: The above metes and bounds legal description appeared previously in that certain document recorded August 27, 1996, in Book 4656, Page 716, as Instrument No. 2024695.

Sample Lease  
1/4/2006

B-1

000160/09959 GBDOS 469445v4

# EXHIBIT 29

# EXHIBIT 29



**First American Title Insurance Company**  
**National Commercial Services**  
 5 First American Way • Santa Ana, CA 92707

**Seller's Final Settlement Statement**

**Property:** 7695 & 7699 S. Virginia, Reno, NV

**File No:** NCS-203502-SA1

**Officer:** Dawn Niehaus/mlb

**New Loan No:**

**Settlement Date:** 02/24/2006

**Disbursement Date:** 02/24/2006

**Print Date:** 3/16/2006, 11:14 AM

**Buyer:** Overland Development Inc.; Larry James Willard Trust; Xchange Solutions, Inc. as Q.I.

**Address:** c/o Dan Gluhaich, Intero Real Estate, 175 E. Main St., Ste. 130, Morgan Hill, CA 95037

**Seller:** P.A. Morabito & Co., Limited

**Address:** c/o Jiffy Lube International, Inc., 668 N. Pacific Coast Highway, Ste. 517, Laguna Beach, CA 92651

| Charge Description  | Seller Charge | Seller Credit |
|---|---------------|---------------|
| <b>Consideration:</b>   |               |               |
| Total Consideration   |               | 17,750,000.00 |
| <b>Prorations:</b>  |               |               |
| February Rent Credit 02/24/06 to 03/01/06 @\$3870.97/day  | 19,354.85     |               |
| <b>Commission:</b>  |               |               |
| Commission Paid at Settlement to Sperry Van Ness  | 350,000.00    |               |
| <b>Title/Escrow Charges to:</b>   |               |               |
| Leasehold Policy (\$1,464,375) - First American Title Insurance Company National Commercial Services    | 820.05        |               |
| Policy-Standard ALTA 1992 Owner's - First American Title Insurance Company National Commercial Services | 3,550.00      |               |
| Closing-Escrow Fee - First American Title Insurance Company National Commercial Services                | 3,483.75      |               |
| Misc Recording Fees - First American Title Company  | 87.00         |               |
| Documentary Trans Tax (1/2)-County - First American Title Company                                       | 36,387.50     |               |
| <b>Disbursements Paid:</b>  |               |               |
| Transfer to NCS-203502-A to First American Title Insurance Co.  | 17,218,306.40 |               |
| <b>Cash (X To) ( From) Seller</b>   | 118,010.45    |               |
| <b>Totals</b>   | 17,750,000.00 | 17,750,000.00 |



**First American Title Insurance Company**  
**National Commercial Services**  
 5 First American Way • Santa Ana, CA 92707

**Buyer's Final Settlement Statement**

**Property:** 7695 & 7699 S. Virginia, Reno, NV

**File No:** NCS-203502-SA1

**Officer:** Dawn Niehaus/km

**New Loan No:**

**Settlement Date:** 02/24/2006

**Disbursement Date:** 02/24/2006

**Print Date:** 3/1/2006, 12:07 PM

**Buyer:** Overland Development Inc.; Larry James Willard Trust; Xchange Solutions, Inc. as Q.I.

**Address:** c/o Dan Gluhaich, Intero Real Estate, 175 E. Main St., Ste. 130, Morgan Hill, CA 95037

**Seller:** P.A. Morabito & Co., Limited

**Address:** c/o Jiffy Lube International, Inc., 668 N. Pacific Coast Highway, Ste. 517, Laguna Beach, CA 92651

| Charge Description   | Buyer Charge         | Buyer Credit         |
|--|----------------------|----------------------|
| <b>Consideration:</b>  |                      |                      |
| Total Consideration  | 17,750,000.00        |                      |
| <b>Deposits in Escrow:</b>   |                      |                      |
| Receipt No. 164760 on 11/29/2005 by XChange Solutions, Inc. fbo Larry Willard                          |                      | 250,000.00           |
| Receipt No. 166764 on 02/22/2006 by Xchange Solutions, Inc. f/b/o Larry Willard                        |                      | 1,000,000.00         |
| Receipt No. 166786 on 02/23/2006 by Xchange Solutions, Inc. as Q.I. for Overland Dev                   |                      | 3,418,739.49         |
| <b>Prorations:</b>   |                      |                      |
| February Rent Credit 02/24/06 to 03/01/06 @\$3870.97/day   |                      | 19,354.85            |
| <b>New Loan(s):</b>  |                      |                      |
| Lender: South Valley National Bank   |                      |                      |
| New Loan Amount - South Valley National Bank   |                      | 13,250,000.00        |
| Environmental - South Valley National Bank   | 600.00               |                      |
| Appraisal Fee - South Valley National Bank   | 6,000.00             |                      |
| Tax Service Fee - South Valley National Bank   | 1,359.00             |                      |
| Appraisal Review Fee - South Valley National Bank  | 400.00               |                      |
| Facility Fee - South Valley National Bank  | 132,500.00           |                      |
| Flood Search Fee - South Valley National Bank  | 10.00                |                      |
| <b>Title/Escrow Charges to:</b>  |                      |                      |
| Closing-Loan Tie-In Fee - First American Title Insurance Company National Commercial Services          | 125.00               |                      |
| Closing-Escrow Fee - First American Title Insurance Company National Commercial Services               | 3,483.75             |                      |
| Policy-Extended ALTA 1992 Lender - First American Title Insurance Company National Commercial Services | 2,650.00             |                      |
| Misc Recording Fees - First American Title Company   | 107.00               |                      |
| Documentary Trans Tax (1/2)-County - First American Title Company                                      | 36,387.50            |                      |
| <b>Disbursements Paid:</b>   |                      |                      |
| Legal Fees to Robert E. Hales  | 375.00               |                      |
| Legal Fees to Rossi Hamerslough Reischl Chuck  | 3,954.09             |                      |
| Buyer Refund to Xchange Solutions, Inc.  | 143.00               |                      |
| <b>Totals</b>  | <b>17,938,094.34</b> | <b>17,938,094.34</b> |



# EXHIBIT 30

# EXHIBIT 30

**DOC # 3353292**  
 02/24/2000 04:10P Fee:55.00  
 BK1  
 Requested By  
**FIRST AMERICAN TITLE**  
 Washoe County Recorder  
 Kathryn L. Burke - Recorder  
 Pg 1 of 17 RPT 0.00



*203502 RB*

ASSESSOR'S PARCEL NUMBER:043-011-47

**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:**

Larry Willard  
 133 Glenn Ridge Avenue  
 Los Gatos, CA 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 **February 21, 2006**, among **Overland Development Corporation**, a California corporation as an undivided 41% interest and **Larry J. Willard, Trustee of the Larry James Willard Trust dated November 14, 1987** as an undivided 59% interest as tenants in common (collectively and jointly and severally, the "Trustor"), **First American Title Company**, with an address of **5 First American Way, Santa Ana, CA 92707** (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): **7695 and 7699 S. Virginia Street, Reno, Nevada 89512** (the "Address(es)").

This document serves as a fixture filing under Nevada Revised Statutes Section 104.9502.

Trustor Larry James Willard Trust dated November 14, 1987's organizational identification number is 553-54-0904.

Trustor Overland Development Corporation's organizational identification number is 94-1749554.



## 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 Obligations (as hereinafter defined), including without limitation, all amounts due and owing to the Beneficiary and all obligations respecting that certain **One Year Adjustable Term Note**, dated **February 21, 2006**, by **Larry James Willard Trust dated November 14, 1987 and Overland Development Corporation** in favor of the Beneficiary in the original principal amount of **\$13,250,000.00** (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 \$13,250,000.00. 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 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 judgments, 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;



3353292  
62/24/2006  
4 of 17

- (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



3353292  
02/24/2006  
6 of 17

- 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 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;
- (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.

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" 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.



3353292  
02/24/2006  
11 of 17

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.

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

3353292  
02/24/2008  
12 of 17

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.

5.4 Indemnitor's Expenses. If any Indemnitor is made a party defendant to any litigation or any claim is threatened or brought against such Indemnitor 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 Indemnitor harmless from and against all liability by reason of said litigation or claims, including attorneys' fees and expenses incurred by such Indemnitor in connection with any such litigation or claim, whether or not any such litigation or claim is prosecuted to judgment. 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.

3353292  
02/24/2006  
13 of 17

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 or 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 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 JURY WAIVER. THE TRUSTOR AND THE BENEFICIARY EACH HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY, AND AFTER AN OPPORTUNITY TO CONSULT WITH LEGAL COUNSEL, (A) WAIVE ANY AND ALL RIGHTS TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING IN CONNECTION WITH THIS DEED OF TRUST, THE OBLIGATIONS, ALL MATTERS CONTEMPLATED HEREBY AND DOCUMENTS EXECUTED IN CONNECTION HERewith AND (B) AGREE NOT TO CONSOLIDATE ANY SUCH ACTION WITH ANY OTHER ACTION IN WHICH A JURY TRIAL CAN NOT BE, OR HAS NOT BEEN WAIVED. THE TRUSTOR CERTIFIES THAT NEITHER THE BENEFICIARY NOR ANY OF ITS REPRESENTATIVES, AGENTS OR COUNSEL HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT THE BENEFICIARY WOULD NOT IN THE EVENT OF ANY SUCH PROCEEDING SEEK TO ENFORCE THIS WAIVER OF RIGHT TO TRIAL BY JURY.

5.14 Arbitration. IN THE EVENT THAT THE JURY WAIVER SET FORTH ABOVE IS JUDICIALLY DETERMINED TO NOT BE PERMITTED BY LAW, 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.



3353292  
02/24/2006  
14 of 17

EXECUTED under seal as of the date first above written.

Trustor:

Larry James Willard Trust dated November 14, 1987

By:

  
Larry J. Willard, Trustee

Trustor:

Overland Development Corporation

By:

  
Larry J. Willard, President



3353292  
92/24/2996  
15 of 17

STATE OF CALIFORNIA

: SS.

COUNTY OF Santa Clara

On February 22, 2006 before me, Katie Caspary, Notary Public, personally appeared Larry J. Willard, ~~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, and that by his/her/their signature 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.

Katie Caspary  
STATE OF CALIFORNIA

: SS.

COUNTY OF Santa Clara

On February 22, 2006 before me, Katie Caspary, Notary Public, personally appeared Larry J. Willard, ~~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, and that by his/her/their signature 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.

Katie Caspary (SEAL)





3353292  
62/24/2006  
16 of 17

## EXHIBIT A

Property Address: 7695 and 7699 S. Virginia, Reno, Nevada

**Parcel 1:**

The land referred to herein situated in the City of Reno, County of Washoe, State of Nevada, located within a portion of the South  $\frac{1}{2}$  of the Northwest  $\frac{1}{4}$  of Section 6, Township 18 N., Range 20 E., M.D.M., and being more particularly described as follows:

Commencing at the south corner of Parcel "C" a found nail and tag on a fence post, as shown on Parcel Map No. 218, File No. 388954, as on file in the County Recorder's Office of Washoe County, Nevada; thence North  $00^{\circ}16'56''$  East a distance of 579.25 feet to the northerly side of Longley Lane;

Thence along said northerly line South  $69^{\circ}21'09''$  W., a distance of 21.41 feet to the True Point of Beginning;

Thence leaving said northerly line of Longley Lane North  $00^{\circ}16'56''$  East, a distance of 406.67 feet;

Thence South  $89^{\circ}40'18''$  East, a distance of 275.76 feet to the westerly side of South Virginia Street and the northeasterly corner of the parcel of land as shown on record of Survey Map No. 2887, File No. 1902006, on file in the County Recorder's Office of Washoe County, Nevada;

Thence along said westerly line of South Virginia Street South  $20^{\circ}39'19''$  East a distance of 221.13 feet to the beginning of a curve to the right;

Thence along said curve a distance of 94.26 feet, a central angel of  $90^{\circ}00'28''$  and a radius of 60.00 feet to the northerly side of Longley Lane;

Thence along said northerly line of Longley Lane South  $69^{\circ}21'19''$  West a distance of 342.78 feet to the True Point of Beginning.

**Parcel 2:**

A non-exclusive easement for ingress, egress and access by and for vehicular and pedestrian traffic and vehicle parking as set forth in that certain Mutual Parking and Access Agreement recorded April 12, 1995 in Book 4282, page 40 as Instrument No. 1885230 of Official Records, Washoe County Recorder's Office, Washoe County, Nevada

000160/09959 GBDOS 508345v1

3353292  
02/24/2006  
17 of 17

## EXHIBIT A

Property Address: 7695 and 7699 S. Virginia, Reno, Nevada

Parcel 1:

The land referred to herein situated in the City of Reno, County of Washoe, State of Nevada, located within a portion of the South  $\frac{1}{2}$  of the Northwest  $\frac{1}{4}$  of Section 6, Township 18 N., Range 20 E., M.D.M., and being more particularly described as follows:

Commencing at the south corner of Parcel "C" a found nail and tag on a fence post, as shown on Parcel Map No. 218, File No. 388954, as on file in the County Recorder's Office of Washoe County, Nevada; thence North  $00^{\circ}16'56''$  East a distance of 579.25 feet to the northerly side of Longley Lane;

Thence along said northerly line South  $69^{\circ}21'09''$  W., a distance of 21.41 feet to the True Point of Beginning;

Thence leaving said northerly line of Longley Lane North  $00^{\circ}16'56''$  East, a distance of 406.67 feet;

Thence South  $89^{\circ}40'18''$  East, a distance of 275.76 feet to the westerly side of South Virginia Street and the northeasterly corner of the parcel of land as shown on record of Survey Map No. 2887, File No. 1902006, on file in the County Recorder's Office of Washoe County, Nevada;

Thence along said westerly line of South Virginia Street South  $20^{\circ}39'19''$  East a distance of 221.13 feet to the beginning of a curve to the right;

Thence along said curve a distance of 94.26 feet, a central angle of  $90^{\circ}00'28''$  and a radius of 60.00 feet to the northerly side of Longley Lane;

Thence along said northerly line of Longley Lane South  $69^{\circ}21'19''$  West a distance of 342.78 feet to the True Point of Beginning.

Parcel 2:

A non-exclusive easement for ingress, egress and access by and for vehicular and pedestrian traffic and vehicle parking as set forth in that certain Mutual Parking and Access Agreement recorded April 12, 1995 in Book 4282, page 40 as Instrument No. 1885230 of Official Records, Washoe County Recorder's Office, Washoe County, Nevada.

000160/09959 GBDACS 508341v2

# EXHIBIT 31

# EXHIBIT 31



**PROMISSORY NOTE**  
(Nevada)

US \$13,312,500.00

February 28, 2006

FOR VALUE RECEIVED, the undersigned, OVERLAND DEVELOPMENT CORPORATION, INC., a California corporation, and LARRY J. WILLARD, individually, and LARRY J. WILLARD, Trustee of the Larry James Willard Trust dated November 14, 1987 ("Borrower") jointly and severally (if more than one) promise(s) to pay to the order of TELESIS COMMUNITY CREDIT UNION, a California state chartered credit union, the principal sum of THIRTEEN MILLION THREE HUNDRED TWELVE THOUSAND FIVE HUNDRED AND 00/100 DOLLARS (US \$13,312,500.00), with interest on the unpaid principal balance as set forth in Section 3 below.

1. **Defined Terms.** As used in this Note, (i) the term "Lender" means the holder of this Note, and (ii) the term "Indebtedness" means the principal of, interest on, or any other amounts due at any time under, this Note, the Security Instrument or any other Loan Document, including late charges, default interest, and advances to protect the security of the Security Instrument under Section 12 of the Security Instrument. "Event of Default" and other capitalized terms used but not defined in this Note shall have the meanings given to such terms in the Security Instrument.

2. **Address for Payment.** All payments due under this Note shall be payable at c/o Business Partners, LLC, 9301 Winnetka Avenue, Chatsworth, CA 91311, Attn: Commercial Loan Department, or such other place as may be designated by written notice to Borrower from or on behalf of Lender.

3. **Payment of Principal and Interest.** Payments shall be made in immediately available funds as follows:

(a) **General.** Monthly payments will be applied to interest before principal. Any remaining principal and interest shall be due and payable on April 1, 2016 or on any earlier date on which the unpaid principal balance of this Note becomes due and payable, by acceleration or otherwise (the "Maturity Date"). At any time an Event of Default shall have occurred and be continuing and/or after maturity of the Loan, including maturity upon acceleration, the unpaid principal balance, all accrued and unpaid interest and all other amounts payable under the Note shall bear interest at the "Default Rate" set forth in this Note. The unpaid principal balance shall continue to bear interest after the Maturity Date at the Default Rate set forth in this Note until and including the date on which it is paid in full. Any regularly scheduled monthly installment of principal and interest that is received by Lender before the date it is due shall be deemed to have been received on the due date solely for the purpose of calculating interest due. Interest under this Note shall be computed on the basis of a 360-day year consisting of twelve 30-day months. In the event any check given by Borrower to Lender as a payment on this Note is dishonored, or in the event there are insufficient funds in Borrower's designated account to cover any preauthorized monthly debit pursuant to the separate "ACH Debit Authorization," then, without limiting any other charges or remedies, Borrower shall pay to Lender a processing fee of \$25.00 (but not more than the maximum amount allowed by law) for each such event.

(b) **Interest Rate.** The unpaid principal balance of this Note shall accrue interest as follows:

(i) **Initial Interest Rate.** The initial interest rate charged on the unpaid principal of this Note shall be 6.7 percent (6.7%) per annum effective as of the date of disbursement to and excluding April 1, 2011. Thereafter, the interest rate the Borrower will pay may increase (but not decrease) in accordance with this Section 3(b).

(ii) **Interest Rate Changes.** The interest rate the Borrower will pay may change on April 1, 2011 (the "Interest Change Date"). Before the Interest Change Date, the Lender will calculate the Borrower's new interest rate by adding 2.1 percent (2.1%) to the Current Index. The Lender will then round the result of this addition to the nearest one-eighth of one percent (0.125%). If rounded amount so calculated exceeds the initial interest rate set forth in Section 3(b)(i) above, then this rounded amount will be the new interest rate during the balance of the term of this Note.

(iii) **The Index.** On the Interest Change Date, the interest rate may increase (but not decrease) based on an index. The "Index" will be based upon the weekly average yield on United States Treasury securities adjusted to a constant maturity of five years, as made available by the Federal Reserve Board. The most recent Index figure available forty-five (45) days before the Interest Change Date is called the "Current Index." If the Index is no longer available, the Lender will choose a comparable alternate Index. The selection of an alternate Index shall be made in Lender's discretion. Lender will give Borrower notice of such selection.

(iv) **Limit on Interest Rate Reduction.** Throughout the term of this Note, the Borrower's interest rate will never be less than 6.7 percent (6.7%) per annum.

(c) **Payments.** Principal and interest shall be paid as follows:

(i) **Interest Only Payment.** Unless disbursement of principal is made by Lender to Borrower on the first day of the month, interest for the period beginning on the date of disbursement and ending on and including the last day of the month in which such disbursement is made shall be payable upon the initial funding of the loan evidenced by this Note.

(ii) **Additional Interest Only Payments.** Monthly interest only payments shall be due and payable commencing on May 1, 2006 and on the same day of every calendar month thereafter through and including April 1, 2007.



(iii) **Amount of Initial Monthly Payments.** Monthly payments of principal and interest, initially in the amount of EIGHTY-FIVE THOUSAND NINE HUNDRED TWO AND 63/100 DOLLARS (U.S. \$85,902.63) shall be due and payable commencing on May 1, 2007, and on the same day of every calendar month thereafter through and including April 1, 2016. The amount of the initial monthly payment of principal and interest is the amount that would be sufficient to repay the face amount of this Note in full on the Amortization Date in substantially equal monthly payments. For purposes of this Section 3, the "Amortization Date" shall mean April 1, 2037.

(iv) **Change in Monthly Payments.** The monthly payments shall change if the interest rate changes pursuant to Section 3(b) of this Note. The change in monthly payments will reflect the change in the unpaid principal of the loan and in the interest rate. Lender will determine the amount of the new monthly payment in an amount that would be sufficient to repay the unpaid principal that is expected to be owed at the Interest Change Date in full on the Amortization Date at the new interest rate in substantially equal monthly payments.

(d) **Effective Date of Change.** The new interest rate will become effective on the Interest Change Date. Borrower will pay the new monthly payment beginning on the monthly payment due date next following such Interest Change Date.

(e) **Notice of Change.** The Lender will deliver or mail a notice of any change in the Borrower's interest rate and the amount of the new monthly payment promptly upon the calculation of such changes.

(f) **Failure to Make Adjustments.** If for any reason Lender fails to make an adjustment to the interest rate or the monthly payment amount as described in this Note, regardless of any notice requirement, Lender may, upon discovery of such failure, then make such adjustment as if it had been made on time. Borrower further agrees to pay upon demand any additional monies which Borrower may owe as a result of any such adjustment. Borrower agrees not to hold Lender responsible for any damages that may result from Lender's failure to make the adjustment and to allow Lender, at its option, to apply any excess monies which Borrower may have paid to partial prepayment of the unpaid principal balance of this Note.

4. **Application of Payments.** If at any time Lender receives, from Borrower or otherwise, any amount applicable to the Indebtedness which is less than all amounts due and payable at such time, Lender may apply the amount received to amounts then due and payable in any manner and in any order determined by Lender, in Lender's discretion. Borrower agrees that neither Lender's acceptance of a payment from Borrower in an amount that is less than all amounts then due and payable nor Lender's application of such payment shall constitute or be deemed to constitute either a waiver of the unpaid amounts or an accord and satisfaction.

5. **Security.** The Indebtedness is secured, among other things, by that certain deed of trust, mortgage or security deed dated as of the date of this Note and executed by Borrower and the Fee Owner (as defined in the Security Instrument) in favor of Lender (the "Security Instrument"), and reference is made to the Security Instrument for other rights of Lender as to collateral for the Indebtedness.

6. **Acceleration.** If an Event of Default has occurred and is continuing, the entire unpaid principal balance, any accrued interest, and all other amounts payable under this Note and any other Loan Document shall at once become due and payable, at the option of Lender, without any prior notice to Borrower. Lender may exercise this option to accelerate regardless of any prior forbearance.

7. **Late Charge.** If any monthly installment of interest or principal and interest or other amount payable under this Note or under the Security Instrument or any other Loan Document is not received in full by Lender within ten (10) days after the installment or other amount is due (unless applicable law requires a longer period of time before a late charge may be imposed, in which event such longer period shall be substituted), Borrower shall pay to Lender, immediately and without demand by Lender, a late charge equal to five percent (5%) of such installment or other amount due (unless applicable law requires a lesser amount be charged, in which event such lesser amount shall be substituted). Borrower acknowledges that its failure to make timely payments will cause Lender to incur additional expenses in servicing and processing the loan evidenced by this Note (the "Loan") and that it is extremely difficult and impractical to determine those additional expenses. Borrower agrees that the late charge payable pursuant to this Section represents a fair and reasonable estimate, taking into account all circumstances existing on the date of this Note, of the additional expenses Lender will incur by reason of such late payment. The late charge is payable in addition to, and not in lieu of, any interest payable at the Default Rate pursuant to Section 8.

8. **Default Rate.** So long as (a) any monthly installment under this Note remains past due for thirty (30) days or more or (b) any other Event of Default has occurred and is continuing, interest under this Note shall accrue on the unpaid principal balance from the earlier of the due date of the first unpaid monthly installment or the occurrence of such other Event of Default, as applicable, at a rate (the "Default Rate") equal to the lesser of four (4) percentage points above the rate stated in Section 3 of this Note or the maximum interest rate which may be collected from Borrower under applicable law. If the unpaid principal balance and all accrued interest are not paid in full on the Maturity Date, the unpaid principal balance and all accrued interest shall bear interest from the Maturity Date at the Default Rate. Borrower acknowledges that (a) its failure to make timely payments will cause Lender to incur additional expenses in servicing and processing the Loan, (b) during the time that any monthly installment under this Note is delinquent for thirty (30) days or more, Lender will incur additional costs and expenses



arising from its loss of the use of the money due and from the adverse impact on Lender's ability to meet its other obligations and to take advantage of other investment opportunities; and (c) it is extremely difficult and impractical to determine those additional costs and expenses. Borrower also acknowledges that, during the time that any monthly installment under this Note is delinquent for thirty (30) days or more or any other Event of Default has occurred and is continuing, Lender's risk of nonpayment of this Note will be materially increased and Lender is entitled to be compensated for such increased risk. Borrower agrees that the increase in the rate of interest payable under this Note to the Default Rate represents a fair and reasonable estimate, taking into account all circumstances existing on the date of this Note, of the additional costs and expenses Lender will incur by reason of the Borrower's delinquent payment and the additional compensation Lender is entitled to receive for the increased risks of nonpayment associated with a delinquent loan. During any period that the Default Rate is in effect the additional interest accruing over and above the rate stated in Section 3 of this Note shall be immediately due and payable in addition to the regularly scheduled principal and interest payments.

**9. Full Recourse Liability.** Borrower shall have full recourse liability under this Note, the Security Instrument and any and all other Loan Documents for the repayment of the Indebtedness and for the performance of any and all other obligations of Borrower under the Loan Documents.

**10. Voluntary Prepayments.** Borrower may voluntarily prepay all or part of the unpaid principal balance of this Note at any time without payment of penalty or premium. Any prepayment of less than the unpaid principal balance of this Note shall not extend or postpone the due date of any subsequent monthly installments or charge the amount of such installments, unless Lender agrees otherwise in writing.

**11. Costs and Expenses.** To the fullest extent allowed by applicable law, Borrower shall pay all expenses and costs, including fees and out-of-pocket expenses of attorneys (including Lender's in-house attorneys) and expert witnesses and costs of investigation, incurred by Lender as a result of any default under this Note or in connection with efforts to collect any amount due under this Note, or to enforce the provisions of any of the other Loan Documents, including those incurred in post-judgment collection efforts and in any bankruptcy proceeding (including any action for relief from the automatic stay of any bankruptcy proceeding) or judicial or non-judicial foreclosure proceeding.

**12. Forbearance.** Any forbearance by Lender in exercising any right or remedy under this Note, the Security Instrument, or any other Loan Document or otherwise afforded by applicable law, shall not be a waiver of or preclude the exercise of that or any other right or remedy. The acceptance by Lender of any payment after the due date of such payment, or in an amount which is less than the required payment, shall not be a waiver of Lender's right to require prompt payment when due of all other payments or to exercise any right or remedy with respect to any failure to make prompt payment. Enforcement by Lender of any security for Borrower's obligations under this Note shall not constitute an election by Lender of remedies so as to preclude the exercise of any other right or remedy available to Lender.

**13. Waivers.** Presentment, demand, notice of dishonor, protest, notice of acceleration, notice of intent to demand or accelerate payment or maturity, presentment for payment, notice of nonpayment, grace, and diligence in collecting the Indebtedness are waived by Borrower and all endorsers and guarantors of this Note and all other third party obligors.

**14. Loan Charges.** Neither this Note nor any of the other Loan Documents shall be construed to create a contract for the use, forbearance or detention of money requiring payment of interest at a rate greater than the maximum interest rate permitted to be charged under applicable law. If any applicable law limiting the amount of interest or other charges permitted to be collected from Borrower in connection with the Loan is interpreted so that any interest or other charge provided for in any Loan Document, whether considered separately or together with other charges provided for in any other Loan Document, violates that law, and Borrower is entitled to the benefit of that law, that interest or charge is hereby reduced to the extent necessary to eliminate that violation. The amounts, if any, previously paid to Lender in excess of the permitted amounts shall be applied by Lender to reduce the unpaid principal balance of this Note. For the purpose of determining whether any applicable law limiting the amount of interest or other charges permitted to be collected from Borrower has been violated, all Indebtedness that constitutes interest, as well as all other charges made in connection with the Indebtedness that constitute interest, shall be deemed to be allocated and spread ratably over the stated term of the Note. Unless otherwise required by applicable law, such allocation and spreading shall be effected in such a manner that the rate of interest so computed is uniform throughout the stated term of the Note.

**15. Purpose of Indebtedness.** Borrower represents that the Indebtedness is not being incurred by Borrower for personal, family or household purposes.

**16. Counting of Days.** Except where otherwise specifically provided, any reference in this Note to a period of "days" means calendar days, not Business Days.

**17. Governing Law.** This Note shall be governed by the laws of the jurisdiction in which the Land is located.

**18. Captions.** The captions of the paragraphs of this Note are for convenience only and shall be disregarded in construing this Note.

**19. Notices.** All notices, demands and other communications required or permitted to be given by Lender to Borrower pursuant to this Note shall be given in accordance with Section 31 of the Security Instrument.



20. **Consent to Jurisdiction and Venue.** Borrower agrees that any controversy arising under or in relation to this Note shall be litigated exclusively in the jurisdiction in which the Land is located (the "Property Jurisdiction"). The state and federal courts and authorities with jurisdiction in the Property Jurisdiction shall have exclusive jurisdiction over all controversies which shall arise under or in relation to this Note. Borrower irrevocably consents to service, jurisdiction, and venue of such courts for any such litigation and waives any other venue to which it might be entitled by virtue of domicile, habitual residence or otherwise.

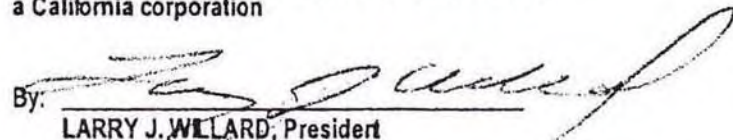
21. **Counterparts.** This Note may be executed in any number of counterparts each of which shall be deemed an original, but all such counterparts together shall constitute but one Note.

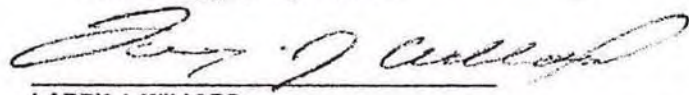
22. **WAIVER OF TRIAL BY JURY.** BORROWER AND LENDER EACH (A) AGREES NOT TO ELECT A TRIAL BY JURY WITH RESPECT TO ANY ISSUE ARISING OUT OF THIS NOTE OR THE RELATIONSHIP BETWEEN THE PARTIES AS LENDER AND BORROWER THAT IS TRIABLE OF RIGHT BY A JURY AND (B) WAIVES ANY RIGHT TO TRIAL BY JURY WITH RESPECT TO SUCH ISSUE TO THE EXTENT THAT ANY SUCH RIGHT EXISTS NOW OR IN THE FUTURE. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS SEPARATELY GIVEN BY EACH PARTY, KNOWINGLY AND VOLUNTARILY WITH THE BENEFIT OF COMPETENT LEGAL COUNSEL.

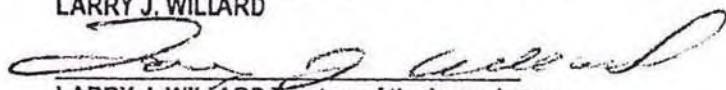
IN WITNESS WHEREOF, and in consideration of the Lender's agreement to lend Borrower the principal amount set forth above, Borrower has signed and delivered this Note under seal or has caused this Note to be signed and delivered under seal by its duly authorized representative.

**BORROWER**

OVERLAND DEVELOPMENT CORPORATION, INC.,  
a California corporation

By:   
LARRY J. WILLARD, President

  
LARRY J. WILLARD

  
LARRY J. WILLARD, Trustee of the Larry James  
Willard Trust dated November 14, 1987

# EXHIBIT 32

# EXHIBIT 32



**DOC # 3353293**  
02/24/2006 04:10P Fee:52.00

BK1  
Requested By  
FIRST AMERICAN TITLE  
Washoe County Recorder  
Kathryn L. Burke - Recorder  
Pg 1 of 14 RPTT 0.00



Recording Requested By:

When Recorded, Return to:  
South Valley National Bank  
PO Box 60654  
Santa Barbara, CA 93160-0654

Loan No 100494160

*203502 RB*

(Space above this line for Recorder's use)

**SUBORDINATION, ATTORNMENT AND NONDISTURBANCE AGREEMENT**  
(subordination to new financing by existing lessee)

**NOTICE: THIS AGREEMENT CONTAINS A SUBORDINATION CLAUSE WHICH MAY RESULT IN YOUR LEASEHOLD INTEREST IN THE PROPERTY BECOMING SUBJECT TO AND OF LOWER PRIORITY THAN THE LIEN OF SOME OTHER OR LATER SECURITY INSTRUMENT.**

**THIS AGREEMENT**, dated for reference purposes as of the 21st day of February, 2006, is entered by and among BERRY-HINCKLEY INDUSTRIES, a Nevada corporation (herein, the "Lessee"), OVERLAND DEVELOPMENT CORPORATION INC., a California corporation, and LARRY J. WILLARD, TRUSTEE OF THE LARRY JAMES WILLARD TRUST, a trust (collectively herein, the "Borrower" or the "Lessor"), and South Valley National Bank, a division of Pacific Capital Bank, NA, (herein, the "Lender"), and is made with reference to the following facts:

**RECITALS:**

A. Lender has agreed to make a loan (herein, the "Loan") to Borrower, to be evidenced by a promissory note (the "Note"), the payment of which will be secured by a Deed of Trust (the "Deed of Trust") on that certain real property more particularly described in Exhibit A, attached hereto and by this reference incorporated herein, and any improvements situated thereon (herein, the "Property").

B. Lessee is the present lessee under that certain lease in which Borrower is named as the Lessor dated November 18, 2005, demising all or some portion of the Property to Lessee (such lease and all amendments thereto being referred to collectively herein as the "Lease").

C. The agreement pursuant to which Lender is making the Loan (herein, the "Loan Agreement") requires the Deed of Trust be the senior encumbrance on the Property and further requires, as a condition precedent to Lender's disbursement of the Loan proceeds, that Lessee subordinate the Lease and its interest in the Property in all respects to the lien of the Deed of Trust.

**NOW, THEREFORE**, for valuable consideration, the parties hereto, intending to be legally bound, hereby agree as follows:

SUBORDINATION, ATTORNMENT & NONDISTURBANCE AGREEMENT: Page 1

02/21/2006

Overland Dev & Willard Trust 060221 - sbrd-nodstrb-attm-rv2.DOC

3353293  
02/24/2006  
2 of 14

## 1. LEASE TERMS

**1.1** Lessor and Lessee (a) have completed and delivered to Lender concurrently with their execution and delivery of this Agreement a Summary of Lease Terms setting forth the salient terms and conditions of the Lease, and (b) certify that (i) the Summary of Lease Terms delivered to Lender is complete and correct, (ii) that the copy of the Lease attached to the Summary of Lease Terms is a true, correct and complete copy, and (iii) that there are no agreements or understandings between Lessor and Lessee with respect to the Lease or the rights of Lessee to use, occupy, develop and acquire the Property that is the subject of the Lease other than as set forth in the documents that are attached to such Summary.

## 2. SUBORDINATION

**2.1 PRIORITY OF DEED OF TRUST.** The Lease is hereby subordinated to the Deed of Trust. Accordingly, the leasehold estate arising under the Lease, and the rights of Lessee in, to or under the Lease and in and to the Property, are and shall remain in all respects and for all purposes junior and subordinate to (a) the lien of the Deed of Trust, (b) all advances made thereunder, (c) any and all amendments, supplements, modifications, renewals, extensions or replacements thereof, and (d) the rights and interest of the holder the Deed of Trust, as fully and with the same effect as if the Deed of Trust had been duly executed, acknowledged and recorded, and the indebtedness secured thereby had been fully disbursed, prior to the execution of the Lease or possession of the Property by Lessee or its predecessors-in-interest.

**2.2 APPROVAL OF LOAN TERMS.** Lessee consents to and approves (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.

**2.3 DISBURSEMENT OF LOAN PROCEEDS.** Lessee acknowledges that Lender is under no obligation or duty to monitor or supervise the application or use of the Loan proceeds. Lender has made no representations to Lessee as to whom the Loan proceeds will be disbursed or how the proceeds will be applied or expended. Any application or use of the Loan proceeds for purposes other than as provided for by the Loan Agreement shall not defeat or impair in whole or in part the subordination of the Lease to the Deed of Trust.

**2.4 RELIANCE BY LENDER.** Lessee intentionally and unconditionally waives, relinquishes and subordinates the lease in favor of the lien or charge of the Deed of Trust in favor of Lender and understands that, in reliance upon, and in consideration of, this waiver, relinquishment and subordination, specific loans and advances are being and will be made and, as part and parcel thereof, specific monetary and other obligations are being and will be entered into which would not be made or entered into but upon this waiver, relinquishment and subordination.

## 3. WARRANTIES AND COVENANTS OF LESSOR AND LESSEE

**3.1 ACCURACY OF LEASE SUMMARY.** Lessor and Lessee each certify that (a) the Summary of Lease Terms completed and delivered to Lender concurrently with the execution of



3353293  
82/24/2006  
3 of 14

this Agreement is true, complete and correct, (b) that the copy of the Lease attached to the Summary is complete and correct, and (c) that there are no agreements or understandings between Lessor and Lessee with respect to the Lease or the rights of Lessee to use, occupy, develop and acquire the Property that is the subject of the Lease other than as set forth in the documents that are attached to such Summary.

**3.2 PREPAID RENTS.** Lessee shall not prepay, and Lessor shall not accept, any of the rents or income due under the Lease for more than one (1) month in advance, except with the written consent of Lender.

**3.3 AMENDMENTS TO LEASE.** Lessor and Lessee shall not alter, amend or terminate the Lease, or enter into an agreement for the cancellation of the Lease or a surrender of the leasehold estate, without the prior written consent of Lender.

**3.4 ASSIGNMENT OF RENTS.** The Deed of Trust contains an assignment by Lessor to Lender of Lessor's interest in and to the rents and other payments due under the Lease, either absolutely or as additional security, subject to a license in favor of Lessor to collect such rents for so long as Lessor is not in default under any of the documents or instruments creating, evidencing, guaranteeing or securing the payment of the Loan (the "Loan Documents"). Should Borrower default in the performance of its obligations under the Loan Documents, Lender may, at its option, require that all rents and other payments due under the Lease be paid directly to Lender. Lessor hereby authorizes and directs Lessee, and the Lessee agrees, to remit any payments due under the terms of the Lease directly to Lender upon Lessee's receipt of notice of any such default from Lender. Lessee shall be credited under the Lease for all amounts remitted to Lender pursuant to this Section 3.4.

**3.5 LENDER'S CURE RIGHTS.** Lessee shall not exercise any right to terminate the Lease, or to assert a claim of partial or total eviction, on account of an alleged default by the Lessor under the Lease, until (a) Lessee has given notice of such alleged default both to Lessor and Lender (a "Default Notice") and (b) Lessor or Lender has failed to remedy the alleged default within the applicable cure period provided by the Lease. In the case of any alleged default by Lessor that the Lender undertakes to remedy but which cannot practically be remedied without possession of the Property, Lender shall be provided with a cure period or a reasonable extension to any cure period in which to remedy the alleged default provided that Lender proceeds with reasonable diligence to obtain possession of the Property and, upon obtaining possession of the Property, proceeds with reasonable diligence to cure the alleged default.

#### **4. RIGHTS AND DUTIES UPON ACQUISITION OF LESSOR'S INTEREST**

**4.1** Should Lender or any other person acquire the interests of the Lessor under the Lease by judicial or nonjudicial foreclosure or by a conveyance in lieu of foreclosure (a "Successor Lessor"), then:

**4.2 ATTORNMET BY LESSEE.** Lessee will attorn to and recognize the Successor Lessor as the substitute Lessor under the Lease, and shall be bound such Successor Lessor under all of the terms, covenants and conditions of the Lease for the balance of the term thereof, and any extensions or renewals thereof effected in accordance with the terms of the Lease.



**4.3 LESSEE'S RIGHTS TO POSSESSION.** So long as Lessee is not in default (beyond any period given to Lessee under the Lease to cure defaults) in the payment of rent or other amounts owing under the Lease or in the performance of any of the terms, covenants or conditions of the Lease or this Agreement, neither Lender nor any other Successor Lessor shall disturb or interfere with Lessee's possession of the Property or Lessee's rights and privileges under the Lease, or any extensions or renewals thereof effected in accordance with the terms of the Lease.

**4.4 PERFORMANCE OF OBLIGATIONS OF LESSOR.** Successor Lessor shall perform the duties and obligations of the Lessor under the Lease to the extent that such duties and obligations arise after the date on which the Successor Lessor has acquired its interest and are susceptible of performance by the Successor Lessor, and subject to the provisions of this Section, Lessee shall have the same remedies against a Successor Lessor for a breach of the Lease as the Lessee would have had against the original Lessor.

**4.5 UNCURED DEFAULTS.** Should any default by a prior Lessor under the Lease remain uncured at the time that a Successor Lessor acquires title to the Property, Lessee will give the Successor Lessor such time as is reasonably required to remedy such default as provided by Section 3.5, above, provided the Successor Lessor proceeds with reasonable diligence to do so. Lessee agrees, that notwithstanding any provision of the Lease to the contrary, (a) Lessee shall not be entitled to abate or offset against the rent any claims Lessee has against any prior Lessor, and (b) Lessee will not be entitled to cancel the Lease, or to exercise any other right or remedy available to Lessee under the Lease, unless and until Lender has been given notice of the default and reasonable opportunity to cure such default as provided herein, notwithstanding any prior failure by a prior Lessor to cure such default within a reasonable period of time after notice thereof.

**4.6 NEW LEASE** If the acquisition by a Successor Lessor of the interests of the Borrower in the Property results in a termination of the Lease, then there shall be deemed to be created a new lease between Lessee and the Successor Lessor on the same terms and conditions as the Lease, including any renewal options, for the remainder of the term of the Lease.

**4.7 RELEASE FROM LIABILITY UPON SALE.** A Successor Lessor shall automatically be released and discharged from and after the sale or other transfer of its interest in the Property from all liabilities first arising under the Lease after the date of such sale or transfer.

## **5. LIMITATION ON LIABILITY OF LENDER**

**5.1** Nothing in this Agreement herein shall be construed to be an assumption by Lender of any of the duties or obligations of Lessor under the Lease. Lender shall not be liable for the performance of any duties or obligations of the Lessor unless and until Lender acquires Lessor's interest in the Lease, and then only for as long as Lender holds such interest.

**5.2 DEFAULTS PRIOR TO ACQUIRING INTEREST.** Lessee shall have no claim against Lender or any other Successor Lessor resulting from, and neither Lender nor any other Successor Lessor shall be liable for, any act, omission and/or breach of the Lease by any prior lessor (including the Borrower) occurring prior to the date on which the Successor Lessor acquires title



to the Property, or for the payment of damages or any other amount to which Lessee might be entitled by reason of any such act or omission.

**5.3 PREPAID RENTS AND SECURITY DEPOSITS.** A Successor Lessor shall not be liable for (1) any security deposit or prepaid rent except to the extent actually received by Lender from Borrower, or (2) any rent or additional rent which Lessee has paid for more than the then-current installment.

**6. CERTAIN OBLIGATIONS.** A Successor Lessor shall not be bound by:

**6.1** Any amendment to the Lease made without Lender's consent; or

**6.1.1** Any provisions of the Lease regarding the commencement or completion of any construction.

**6.1.2** Any provision of the Lease relating to the application of insurance or condemnation proceeds or the restoration of the Property by the Lessor upon the occurrence of a casualty loss thereto or a taking thereof, if such provision is inconsistent with the provisions of the Deed of Trust, to the extent that such provision purports to give the Lessor or the Lessee access to (a) the insurance or condemnation proceeds if Lender's security is impaired and the Property cannot be restored in manner that provides Lender with continuing security comparable in nature and value to the security that existed prior to the damage, destruction or taking or, (b) surplus insurance proceeds if the Lessor or Lessee are permitted to utilize the insurance or condemnation proceeds to restore the Property to a usable condition.

## **7. GENERAL PROVISIONS**

**7.1 SUCCESSORS AND ASSIGNS.** This Agreement and each and every covenant, agreement and other provision hereof shall be binding upon the parties hereto and their respective heirs, administrators, representatives, successors, assigns and personal representatives, including without limitation each and every holder of the Lease or any other person having an interest therein and shall inure to the benefit of the Lender and its successors and assigns.

**7.2 MERGER OF INTERESTS.** If both the Lessor's and the Lessee's estates in the Property or the improvements or both become vested in the same owner, the Lease shall nonetheless survive and shall not be terminated by the merger of such estates except at the express written election of Lender.

**7.3 ADDITIONAL DOCUMENTS.** Lessee's attornment to and recognition of a Successor Lessor shall be upon all of the terms, covenants and conditions set forth in the Lease, as modified by this Agreement, and shall be effective immediately upon Lender's succeeding to the interest of the Lessor under the Lease. Upon request of either party, Lessee and the Successor Lessor shall execute and deliver appropriate agreements of attornment and recognition, or any new lease called for by Section 4.5, above, but this Agreement shall be self-executing and no such separate agreements shall be required to effectuate Lessee's recognition of and attornment to a Successor Lessor as provided herein.



**7.4 NOTICES.** Any notices permitted or required hereunder shall be in writing and shall be deemed to have been given (a) on the date of delivery if delivery of a legible copy was made personally or by facsimile transmission, or (b) on the third business day after the date on which mailed by registered or certified mail, return receipt requested, addressed to the party for whom intended at the address set forth on the signature page of this agreement or such other address, notice of which is given as provided herein.

**7.5 MODIFICATION OR AMENDMENT.** This Agreement may not be amended or modified in any manner other than by agreement in writing signed by all of the parties hereto.

**IN WITNESS WHEREOF,** the parties hereto have each caused this Subordination, Nondisturbance and Attornment Agreement to be executed on the dates set forth below.

**NOTICE: THIS AGREEMENT CONTAINS A SUBORDINATION CLAUSE WHICH ALLOWS THE LESSOR UNDER YOUR LEASE TO OBTAIN A LOAN, A PORTION OF WHICH MAY BE EXPENDED FOR OTHER PURPOSES THAN IMPROVEMENT OF THE LEASED PROPERTY**

**LESSEE:**

Date: February 21, 2006

BERRY-HINCKLEY INDUSTRIES

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

*Paul Morabito*

**BORROWER:**

Date: February 21, 2006

OVERLAND DEVELOPMENT CORPORATION

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

Larry J. Willard, President

LARRY JAMES WILLARD TRUST

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

Larry J. Willard, Trustee

**(ALL SIGNATURES MUST BE ACKNOWLEDGED)**



3353233  
82/24/2886  
7 of 14

**7.4 NOTICES.** Any notices permitted or required hereunder shall be in writing and shall be deemed to have been given (a) on the date of delivery if delivery of a legible copy was made personally or by facsimile transmission, or (b) on the third business day after the date on which mailed by registered or certified mail, return receipt requested, addressed to the party for whom intended at the address set forth on the signature page of this agreement or such other address, notice of which is given as provided herein.

**7.5 MODIFICATION OR AMENDMENT.** This Agreement may not be amended or modified in any manner other than by agreement in writing signed by all of the parties hereto.

**IN WITNESS WHEREOF,** the parties hereto have each caused this Subordination, Nondisturbance and Attornment Agreement to be executed on the dates set forth below.

**NOTICE: THIS AGREEMENT CONTAINS A SUBORDINATION CLAUSE WHICH ALLOWS THE LESSOR UNDER YOUR LEASE TO OBTAIN A LOAN, A PORTION OF WHICH MAY BE EXPENDED FOR OTHER PURPOSES THAN IMPROVEMENT OF THE LEASED PROPERTY**

**LESSEE:**

Date: February 21, 2006

BERRY-HINCKLEY INDUSTRIES

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

**BORROWER:**

Date: February 21, 2006

OVERLAND DEVELOPMENT  
CORPORATION

By:   
Larry J. Willard, President

LARRY JAMES WILLARD TRUST

By:   
Larry J. Willard, Trustee

**(ALL SIGNATURES MUST BE ACKNOWLEDGED)**

SUBORDINATION, ATTORNMENT & NONDISTURBANCE AGREEMENT: Page 6



3353293  
82/24/2996  
8 of 14

# ACKNOWLEDGEMENT OF NOTARY PUBLIC

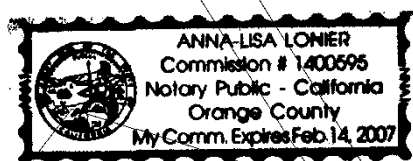
STATE OF CALIFORNIA )

COUNTY OF ORANGE )

On February 23 2006 before me, Anna-Lisa Lonier, a notary public in and for said County and State, personally appeared Paul Mervais D., personally known to me 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 he, or the entity upon behalf of which he acted, executed the instrument.

WITNESS my hand and official seal:

  
Anna-Lisa Lonier



SEAL

COPY





3353293  
02/24/2006  
9 of 14

# CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of

Santa Clara

SS.

On February 22, 2006 before me,

Katie Caspary, Notary

Date

Name and Title of Officer (e.g., "Jane Doe, Notary Public")

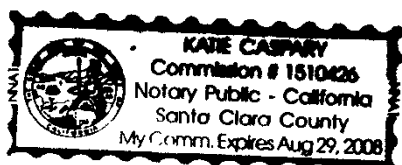
personally appeared

Larry J. Willard

Name(s) of Signer(s)

☐ personally known to me

☒ 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.

Katie Caspary  
Signature of Notary Public

## OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

## Description of Attached Document

Title or Type of Document:

Subordination agreement & nondisturbance

Document Date:

2/22/2006

Number of Pages:

7

Signer(s) Other Than Named Above:

N/A

## Capacity(ies) Claimed by Signer

Signer's Name:

☐ Individual

☐ Corporate Officer — Title(s):

☐ Partner — ☐ Limited ☐ General

☐ Attorney-in-Fact

☐ Trustee

☐ Guardian or Conservator

☐ Other:

Signer Is Representing:

RIGHT THUMBPRINT  
OF SIGNER  
Top of thumb here



## EXHIBIT A

Property Address: 7695 and 7699 S. Virginia, Reno, Nevada

## Parcel 1:

The land referred to herein situated in the City of Reno, County of Washoe, State of Nevada, located within a portion of the South  $\frac{1}{2}$  of the Northwest  $\frac{1}{4}$  of Section 6, Township 18 N., Range 20 E., M.D.M., and being more particularly described as follows:

Commencing at the south corner of Parcel "C" a found nail and tag on a fence post, as shown on Parcel Map No. 218, File No. 388954, as on file in the County Recorder's Office of Washoe County, Nevada; thence North  $00^{\circ}16'56''$  East a distance of 579.25 feet to the northerly side of Longley Lane;

Thence along said northerly line South  $69^{\circ}21'09''$  W., a distance of 21.41 feet to the True Point of Beginning;

Thence leaving said northerly line of Longley Lane North  $00^{\circ}16'56''$  East, a distance of 406.67 feet;

Thence South  $89^{\circ}40'18''$  East, a distance of 275.76 feet to the westerly side of South Virginia Street and the northeasterly corner of the parcel of land as shown on record of Survey Map No. 2887, File No. 1902006, on file in the County Recorder's Office of Washoe County, Nevada;

Thence along said westerly line of South Virginia Street South  $20^{\circ}39'19''$  East a distance of 221.13 feet to the beginning of a curve to the right;

Thence along said curve a distance of 94.26 feet, a central angel of  $90^{\circ}00'28''$  and a radius of 60.00 feet to the northerly side of Longley Lane;

Thence along said northerly line of Longley Lane South  $69^{\circ}21'19''$  West a distance of 342.78 feet to the True Point of Beginning.

## Parcel 2:

A non-exclusive easement for ingress, egress and access by and for vehicular and pedestrian traffic and vehicle parking as set forth in that certain Mutual Parking and Access Agreement recorded April 12, 1995 in Book 4282, page 40 as Instrument No. 1885230 of Official Records, Washoe County Recorder's Office, Washoe County, Nevada.

000160/09959 GBDACS 508341v2



3353293  
02/24/2006  
11 of 14

**APPENDIX I TO  
SUBORDINATION, ATTORNMENT AND NONDISTURBANCE AGREEMENT**

**SUMMARY OF LEASE TERMS**

TO: South Valley National Bank  
PO Box 60654  
Santa Barbara, CA 93160-0654

**THIS SUMMARY OF LEASE TERMS** is being executed and delivered to South Valley National Bank (the "Lender") by the Lessor and the Lessee identified in the Lease described below pursuant to the terms and conditions of a SUBORDINATION, ATTORNMENT AND NONDISTURBANCE AGREEMENT in connection with a loan being made by the Lender to the Lessor under such Lease.

**1. BASIC LEASE DATA**

**1.1 LEASE DATED:** NOVEMBER 18, 2005

**1.2 LANDLORD:** OVERLAND DEVELOPMENT CORPORATION INC. and LARRY J. WILLARD, TRUSTEE OF THE LARRY JAMES WILLARD TRUST

**1.3 TENANT:** BERRY-HINCKLEY INDUSTRIES, a Nevada corporation

**1.4 PROPERTY:** 7695 AND 7699 S VIRGINIA ST, RENO, NV 89512

**1.5 COMMENCEMENT DATE:** The 24th day of February, 2006

**2. LEASE TERMS.**

The Lease commenced on the date set forth in Section 1, above, and is in full force and effect. The salient lease terms are as follows:

**2.1 BASE RENT.** The amount of fixed monthly rent is currently \$ 122,031.25. Rental payments and all other amounts owing under the lease have been paid for all periods through the 21st day of February, 2006.

**2.2 SECURITY DEPOSIT.** The amount of the security deposit (if any) being held by Landlord under the Lease is \$N/A. No other security deposits have been made, and none of the security deposit has been applied by Landlord to the payment of rents or any other amounts due under the Lease.

**2.3 PREPAID RENT.** Landlord is holding the sum of \$N/A as prepaid rent, which is to be credited against the rent for the ([ ] last) ( ) month of the lease term.

**2.4 SCHEDULED EXPIRATION.** The current term of the Lease is scheduled to expire on the \_\_\_\_ day of January, 2026.

**2.5 RENEWAL OPTIONS.** The Tenant has ([ ] no renewal options) ([ X ] 4 renewal options under the Lease for a total of twenty (20) years). The term of the Lease cannot be extended beyond 2046.

SUMMARY OF LEASE TERMS: Page 1



3353293  
02/24/2006  
12 of 14

**2.6 CONCESSIONS AND INDUCEMENTS.** Tenant is not entitled to any free rent, partial rent, rebates, rental abatements, or rent concessions of any kind, other than (☒ X ☐ none) (☐ the following:\_\_\_\_\_

**2.7 TENANT OPTIONS.** Tenant (☐ does) (☒ X ☐ does not] hold an option or right of first refusal to purchase the all or any portion of the Property.

**2.8 LANDLORD OPTIONS.** Landlord (☐ does) (☒ X ☐ does not] hold an option to purchase the leasehold estate or to cancel the lease upon the happening of certain events or by giving the Tenant notice of cancellation.

**2.9 LEASE MODIFICATIONS:** The Lease has not been amended, modified, supplemented, extended, renewed or assigned except by the documents identified below:

| <u>DESCRIPTION OF DOCUMENT (IF NONE, WRITE "None")</u> | <u>DATE</u> |
|--|-------------|
| NONE   |             |
|  |             |
|  |             |
|  |             |
|  |             |

**2.10 COPY OF LEASE** The Lease, as modified and amended to date, represents the entire agreement between the Landlord and the Tenant with respect to the occupancy and use of the Property by the Tenant. A true, correct and complete copy of the Lease and all of the of the amendments, modifications and supplements thereto is attached to this Certificate.

### 3. LEASE PERFORMANCE

**3.1 POSSESSION.** Landlord has tendered possession of the Property to Tenant, and Tenant is in occupancy of the Property pursuant to the Lease.

**3.2 PERFORMANCE BY TENANT.** As of the date on which this Certificate is being executed by the Landlord, there are no defaults by the Tenant under the Lease or events which with notice or the passage of time or both would constitute a default by the Tenant in the performance of any of its obligations, monetary or otherwise, under the terms of the Lease.

**3.3 PERFORMANCE BY LANDLORD.** Landlord has completed any construction, build-out, improvements, alterations, or additions to the leased Property required under the Lease. As of the date on which this Certificate is being executed by the Tenant, there are no defaults by the Landlord under the Lease or events which with notice or the passage of time or both would constitute a default by the Landlord in the performance of any of its obligations under the terms of the Lease.

(Signatures appear on the following page)

SUMMARY OF LEASE TERMS: Page 2



3353293  
02/24/2006  
13 of 14

IN WITNESS WHEREOF, Landlord and Tenant have executed this Summary of Lease Terms on the dates set forth below with the knowledge and understanding that South Valley National Bank will rely on the accuracy of the information contained in this Summary in making the proposed loan to Landlord.

**LANDLORD:**

Date: February 21, 2006

OVERLAND DEVELOPMENT  
CORPORATION

By:   
Larry J. Willard, President

LARRY JAMES WILLARD TRUST

By:   
Larry J. Willard, Trustee

**TENANT:**

Date: February 21, 2006

BERRY-HINCKLEY INDUSTRIES

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

SUMMARY OF LEASE TERMS: Page 3

Exhibit 32-13

3353293  
02/24/2006  
14 of 14

IN WITNESS WHEREOF, Landlord and Tenant have executed this Summary of Lease Terms on the dates set forth below with the knowledge and understanding that South Valley National Bank will rely on the accuracy of the information contained in this Summary in making the proposed loan to Landlord.

**LANDLORD:**

Date: February 21, 2006

OVERLAND DEVELOPMENT  
CORPORATIONBy: \_\_\_\_\_  
Larry J. Willard, President

LARRY JAMES WILLARD TRUST

By: \_\_\_\_\_  
Larry J. Willard, Trustee**TENANT:**

Date: February 21, 2006

BERRY-HINCKLEY INDUSTRIES

By: \_\_\_\_\_  
Paul Morabito

COPY

SUMMARY OF LEASE TERMS: Page 3

# EXHIBIT 33

# EXHIBIT 33

DOC # 3367072  
 03/28/2006 04:05P Fee:63.00  
 BK1  
 Requested By  
 FIRST AMERICAN TITLE  
 Washoe County Recorder  
 Kathryn L. Burke - Recorder  
 Pg 1 of 25 RPTT 0.00



PREPARED BY, AND AFTER RECORDING  
 RETURN TO:

TELESIS COMMUNITY CREDIT UNION  
 c/o Business Partners, LLC  
 9301 Winnetka Avenue  
 Chatsworth, CA 91311  
 Attn: Servicing Department

Tax Parcel Number(s): 043-011-47



Space Above for Recorder's Use

**DEED OF TRUST,  
 ASSIGNMENT OF RENTS  
 AND SECURITY AGREEMENT**

**(NEVADA)**

THIS DEED OF TRUST, ASSIGNMENT OF RENTS AND SECURITY AGREEMENT (the "Instrument") is made to be effective as of February 28, 2006, among OVERLAND DEVELOPMENT CORPORATION, INC., a California corporation, and LARRY J. WILLARD, Individually, and LARRY J. WILLARD, Trustee of the Larry James Willard Trust dated November 14, 1987, whose addresses are 175 E. Main Avenue, Suite 130, Morgan Hill, CA 95037 (jointly and severally referred to herein in the singular as "Borrower") and OVERLAND DEVELOPMENT CORPORATION, INC., a California corporation, as to an undivided 41% interest, and LARRY J. WILLARD, Trustee of the Larry James Willard Trust dated November 14, 1987, as to an undivided 59% interest, as tenants in common, whose addresses are 175 E. Main Avenue, Suite 130, Morgan Hill, CA 95037 (jointly and severally referred to herein in the singular as "Fee Owner"), collectively, as grantor, to T.D. Service Company, a California corporation, as trustee ("Trustee"), for the benefit of TELESIS COMMUNITY CREDIT UNION, a California state chartered credit union, whose address is c/o Business Partners, LLC, 9301 Winnetka Avenue, Chatsworth, CA 91311, Attn: Commercial Loan Department, as beneficiary ("Lender") Borrower's organizational id is: C0621959.

Fee Owner in consideration of the Indebtedness and the trust created by this Instrument, irrevocably grants, conveys and assigns to Trustee, in trust, with power of sale, the Mortgaged Property, including the Land located in Washoe County, State of Nevada and described in Exhibit A attached to this Instrument.

TO SECURE TO LENDER the repayment of the Indebtedness evidenced by Borrower's Promissory Note payable to Lender, dated as of the date of this Instrument, and maturing on April 1, 2016 (the "Maturity Date"), in the principal amount of THIRTEEN MILLION THREE HUNDRED TWELVE THOUSAND FIVE HUNDRED AND 00/100 DOLLARS (US \$13,312,500.00), and all renewals, extensions and modifications of the Indebtedness, and the performance of the covenants and agreements of Borrower contained in the Loan Documents.

Fee Owner represents and warrants that Fee Owner is lawfully seized of the Mortgaged Property and has the right, power and authority to mortgage, grant, convey and assign the Mortgaged Property, and that the Mortgaged Property is unencumbered, except as shown on the schedule of exceptions to coverage in the title policy issued to and accepted by Lender contemporaneously with the execution and recordation of this Instrument and insuring Lender's interest in the Mortgaged Property (the "Schedule of Title Exceptions"). Fee Owner covenants that Fee Owner will warrant and defend generally the title to the Mortgaged Property against all claims and demands, subject to any easements and restrictions listed in the Schedule of Title Exceptions.

Covenants. In consideration of the mutual promises set forth in this Instrument, Borrower, Fee Owner and Lender covenant and agree as follows:

1. **DEFINITIONS.** The following terms, when used in this Instrument (including when used in the above recitals), shall have the following meanings:

Prepared by RoboDocs®  
 Nevada Security Instrument  
 Loan No.: 59409040-02





3367872  
63/28/2666  
2 of 23

(a) "Assignment" means that certain Assignment of Leases and Rents dated the same date as this Instrument, executed by Borrower, as Assignor, in favor of Lender, as Assignee, affecting the Mortgaged Property and given as additional security for the indebtedness.

(b) "Attorneys' Fees and Costs" means (i) fees and out-of-pocket costs of Lender's and Loan Servicer's attorneys, as applicable, including costs of Lender's and Loan Servicer's in-house counsel, support staff costs, costs of preparing for litigation, computerized research, telephone and facsimile transmission expenses, mileage, deposition costs, postage, duplicating, process service, videotaping and similar costs and expenses; (ii) costs and fees of expert witnesses, including appraisers; and (iii) investigatory fees.

(c) "Borrower" means, collectively, Borrower and/or Fee Owner, together with their successors and assigns, as the context may require.

(d) "Borrower Certificate" means that certain Borrower Certificate dated the same date as this Instrument, executed by Borrower in favor of Lender.

(e) "Collateral Agreement" means any separate agreement between Borrower and Lender for the purpose of establishing replacement reserves for the Mortgaged Property, establishing a fund to assure the completion of repairs or improvements specified in that agreement, or assuring reduction of the outstanding principal balance of the indebtedness if the occupancy of or income from the Mortgaged Property does not increase to a level specified in that agreement, or any other agreement or agreements between Borrower and Lender which provide for the establishment of any other fund, reserve or account.

(f) "Controlling Entity" means an entity which owns, directly or indirectly through one or more intermediaries, (A) a general partnership interest or a Controlling Interest of the limited partnership interests in Borrower (if Borrower is a partnership or joint venture), (B) a manager's interest in Borrower or a Controlling Interest of the ownership or membership interests in Borrower (if Borrower is a limited liability company), or (C) a Controlling Interest of any class of voting stock of Borrower (if Borrower is a corporation).

(g) "Controlling Interest" means (i) 51 percent or more of the ownership interests in an entity, or (ii) a percentage ownership interest in an entity of less than 51 percent, if the owner(s) of that interest actually direct(s) the business and affairs of the entity without the requirement of consent of any other party.

(h) "Environmental Indemnity" means that certain Environmental Indemnity Agreement dated the same date as this Instrument, executed by Borrower, as Indemnitor, in favor of Lender, as Indemnitee.

(i) "Environmental Permit" means any permit, license, or other authorization issued under any Hazardous Materials Law with respect to any activities or businesses conducted on or in relation to the Mortgaged Property.

(j) "Event of Default" means the occurrence of any event listed in Section 22.

(k) "Fixtures" means all property owned by Borrower which is so attached to the Land or the improvements as to constitute a fixture under applicable law, including: machinery, equipment, engines, boilers, incinerators, installed building materials; systems and equipment for the purpose of supplying or distributing heating, cooling, electricity, gas, water, air, or light; antennas, cable, wiring and conduits used in connection with radio, television, security, fire prevention, or fire detection or otherwise used to carry electronic signals; telephone systems and equipment; elevators and related machinery and equipment; fire detection, prevention and extinguishing systems and apparatus; security and access control systems and apparatus; plumbing systems; water heaters, ranges, stoves, microwave ovens, refrigerators, dishwashers, garbage disposers, washers, dryers and other appliances; light fixtures, awnings, storm windows and storm doors; pictures, screens, blinds, shades, curtains and curtain rods; mirrors; cabinets, paneling, rugs and floor and wall coverings; fences, trees and plants; swimming pools; and exercise equipment.

(l) "Governmental Authority" means any board, commission, department or body of any municipal, county, state or federal governmental unit, or any subdivision of any of them, that has or acquires jurisdiction over the Mortgaged Property or the use, operation or improvement of the Mortgaged Property.

(m) "Hazard Insurance" is defined in Section 19.

(n) "Hazardous Materials" means petroleum and petroleum products and compounds containing them, including gasoline, diesel fuel and oil; explosives; flammable materials; radioactive materials; polychlorinated biphenyls ("PCBs") and compounds containing them; lead and lead-based paint; asbestos or asbestos-containing materials in any form that is or could become friable; underground or above-ground storage tanks, whether empty or containing any substance; any substance the presence of which on the Mortgaged Property is prohibited by any federal, state or local authority; any substance that requires special handling; and any other material or substance now or in the future defined as a "hazardous substance," "hazardous material," "hazardous waste," "toxic substance," "toxic pollutant," "contaminant," or "pollutant" within the meaning of any Hazardous Materials Law.

(o) "Hazardous Materials Laws" means all federal, state, and local laws, ordinances and regulations and standards, rules, policies and other governmental requirements, administrative rulings and court judgments and decrees in effect now or in the future and including all amendments, that relate to Hazardous Materials or the protection of human health or the



environment and apply to Borrower or to the Mortgaged Property. Hazardous Materials Laws include, but are not limited to, the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9601, *et seq.*, the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901, *et seq.*, the Toxic Substance Control Act, 15 U.S.C. Section 2601, *et seq.*, the Clean Water Act, 33 U.S.C. Section 1251, *et seq.*, the Emergency Planning and Community Right-to-Know Act of 1986, as amended, the Solid Waste Disposal Act, as amended, the Clean Air Act, as amended, the Safe Drinking Water Act, as amended, the Occupational Safety and Health Act, as amended, and the Hazardous Materials Transportation Act, 49 U.S.C. Section 5101, and their state analogs.

(p) "Impositions" and "Imposition Deposits" are defined in Section 7(a).

(q) "Improvements" means the buildings, structures, improvements, and alterations now constructed or at any time in the future constructed or placed upon the Land, including any future replacements and additions.

(r) "Indebtedness" means the principal of, interest at the fixed or variable rate set forth in the Note on, and all other amounts due at any time under, the Note, this Instrument or any other Loan Document, including late charges, default interest, and advances as provided in Section 12 to protect the security of this Instrument.

(s) "Initial Owners" means, with respect to Borrower or any other entity, the person(s) or entity(ies) that (i) on the date of the Note, or (ii) on the date of a Transfer to which Lender has consented, own in the aggregate 100% of the ownership interests in Borrower or that entity.

(t) "Land" means the land described in Exhibit A.

(u) "Leases" means all present and future leases, subleases, licenses, concessions or grants or other possessory interests now or hereafter in force, whether oral or written, covering or affecting the Mortgaged Property, or any portion of the Mortgaged Property, and all modifications, extensions or renewals.

(v) "Lender" means the entity identified as "Lender" in the first paragraph of this Instrument, or any subsequent holder of the Note.

(w) "Loan Documents" means the Note, this Instrument, the Assignment, the Borrower Certificate, the Environmental Indemnity, all guaranties, all Indemnity agreements, all Collateral Agreements, O&M Programs, and any other documents now or in the future executed by Borrower, any guarantor or any other person in connection with the loan evidenced by the Note, as such documents may be amended from time to time.

(x) "Loan Servicer" means the entity that from time to time is designated by Lender to collect payments and deposits and receive notices under the Note, this Instrument and any other Loan Document, and otherwise to service the loan evidenced by the Note for the benefit of Lender. Unless Borrower receives notice to the contrary, the Loan Servicer is the entity identified as "Lender" in the first paragraph of this Instrument.

(y) "Mortgaged Property" means all of Borrower's present and future right, title and interest in and to all of the following: (1) the Land; (2) the Improvements; (3) the Fixtures; (4) the Personality; (5) all current and future rights, including air rights, development rights, zoning rights and other similar rights or interests, easements, tenements, rights-of-way, strips and gores of land, streets, alleys, roads, sewer rights, waters, watercourses, and appurtenances related to or benefiting the Land or the Improvements, or both, and all rights-of-way, streets, alleys and roads which may have been or may in the future be vacated; (6) all proceeds paid or to be paid by any insurer of the Land, the Improvements, the Fixtures, the Personality or any other part of the Mortgaged Property, whether or not Borrower obtained the insurance pursuant to Lender's requirement; (7) all awards, payments and other compensation made or to be made by any municipal, state or federal authority with respect to the Land, the Improvements, the Fixtures, the Personality or any other part of the Mortgaged Property, including any awards or settlements resulting from condemnation proceedings or the total or partial taking of the Land, the Improvements, the Fixtures, the Personality or any other part of the Mortgaged Property under the power of eminent domain or otherwise and including any conveyance in lieu thereof; (8) all contracts, options and other agreements for the sale of the Land, the Improvements, the Fixtures, the Personality or any other part of the Mortgaged Property entered into by Borrower now or in the future, including cash or securities deposited to secure performance by parties of their obligations; (9) all proceeds from the conversion, voluntary or involuntary, of any of the above into cash or liquidated claims, and the right to collect such proceeds; (10) all Rents and Leases; (11) all earnings, royalties, accounts receivable, issues and profits from the Land, the Improvements or any other part of the Mortgaged Property, and all undisbursed proceeds of the loan secured by this Instrument and, if Borrower is a cooperative housing corporation, maintenance charges or assessments payable by shareholders or residents; (12) all Imposition Deposits; (13) all refunds or rebates of Impositions by any municipal, state or federal authority or insurance company (other than refunds applicable to periods before the real property tax year in which this Instrument is dated); (14) all tenant security deposits which have not been forfeited by any tenant under any Lease and any bond or other security in lieu of such deposits; and (15) all names under or by which any of the above Mortgaged Property may be operated or known, and all trademarks, trade names, and goodwill relating to any of the Mortgaged Property.

(z) "Note" means the Promissory Note described on page 1 of this Instrument, including all schedules, riders, allonges and addenda, as such Promissory Note may be amended from time to time.

(aa) "O&M Program" shall have the meaning as defined in the Environmental Indemnity.



3367872  
83/28/2886  
4 of 25

(bb) "Personalty" means all: (i) accounts (including deposit accounts); (ii) equipment and inventory owned by Borrower, which are used now or in the future in connection with the ownership, management or operation of the Land or Improvements or are located on the Land or Improvements, including furniture, furnishings, machinery, building materials, goods, supplies, tools, books, records (whether in written or electronic form), computer equipment (hardware and software); (iii) other tangible personal property including ranges, stoves, microwave ovens, refrigerators, dishwashers, garbage disposers, washers, dryers and other appliances (other than Fixtures); (iv) any operating agreements relating to the Land or the Improvements; (v) any surveys, plans and specifications and contracts for architectural, engineering and construction services relating to the Land or the Improvements; (vi) all other intangible property, general intangibles and rights relating to the operation of, or used in connection with, the Land or the Improvements, including all governmental permits relating to any activities on the Land and including subsidy or similar payments received from any sources, including a governmental authority; and (vii) any rights of Borrower in or under letters of credit.

(cc) "Property Jurisdiction" is defined in Section 30(a).

(dd) "Rents" means all rents, revenues and other income of the Land or the Improvements, including parking fees and vending machine income and fees and charges for other services provided at the Mortgaged Property, whether now due, past due, or to become due, and deposits forfeited by tenants.

(ee) "Taxes" means all taxes, assessments, vault rentals and other charges, if any, general, special or otherwise, including all assessments for schools, public betterments and general or local improvements, which are levied, assessed or imposed by any public authority or quasi-public authority, and which, if not paid, will become a lien, on the Land or the Improvements.

(ff) "Transfer" is defined in Section 21.

## 2. UNIFORM COMMERCIAL CODE SECURITY AGREEMENT.

(a) This Instrument is also a security agreement under the Uniform Commercial Code for any of the Mortgaged Property which, under applicable law, may be subjected to a security interest under the Uniform Commercial Code, whether such Mortgaged Property is owned now or acquired in the future, and all products and cash and non-cash proceeds thereof (collectively, "UCC Collateral"), and Borrower hereby grants to Lender a security interest in the UCC Collateral. Borrower hereby authorizes Lender to prepare and file financing statements, continuation statements and financing statement amendments in such form as Lender may require to perfect or continue the perfection of this security interest and Borrower agrees, if Lender so requests, to execute and deliver to Lender such financing statements, continuation statements and amendments. Borrower shall pay all filing costs and all costs and expenses of any record searches for financing statements and/or amendments that Lender may require. Without the prior written consent of Lender, Borrower shall not create or permit to exist any other lien or security interest in any of the UCC Collateral. Unless Borrower gives Notice to Lender within 30 days after the occurrence of any of the following, and executes and delivers to Lender modifications or supplements of this Instrument (and any financing statement which may be filed in connection with this Instrument) as Lender may require, Borrower shall not (i) change its name, identity, structure or jurisdiction of organization; (ii) change the location of its place of business (or chief executive office if more than one place of business); or (iii) add to or change any location at which any of the Mortgaged Property is stored, held or located. If an Event of Default has occurred and is continuing, Lender shall have the remedies of a secured party under the Uniform Commercial Code, in addition to all remedies provided by this Instrument or existing under applicable law. In exercising any remedies, Lender may exercise its remedies against the UCC Collateral separately or together, and in any order, without in any way affecting the availability of Lender's other remedies. This Instrument constitutes a financing statement with respect to any part of the Mortgaged Property that is or may become a Fixture, if permitted by applicable law.

## 3. ASSIGNMENT OF RENTS; APPOINTMENT OF RECEIVER; LENDER IN POSSESSION.

(a) As part of the consideration for the indebtedness, Borrower absolutely and unconditionally assigns and transfers to Lender all Rents. It is the intention of Borrower to establish a present, absolute and irrevocable transfer and assignment to Lender of all Rents and to authorize and empower Lender to collect and receive all Rents without the necessity of further action on the part of Borrower. Promptly upon request by Lender, Borrower agrees to execute and deliver such further assignments as Lender may from time to time require. Borrower and Lender intend this assignment of Rents to be immediately effective and to constitute an absolute present assignment and not an assignment for additional security only. For purposes of giving effect to this absolute assignment of Rents, and for no other purpose, Rents shall not be deemed to be a part of the "Mortgaged Property" as that term is defined in Section 1. However, if this present, absolute and unconditional assignment of Rents is not enforceable by its terms under the laws of the Property Jurisdiction, then the Rents shall be included as a part of the Mortgaged Property and it is the intention of the Borrower that in this circumstance this Instrument create and perfect a lien on Rents in favor of Lender, which lien shall be effective as of the date of this Instrument.

(b) After the occurrence of an Event of Default, Borrower authorizes Lender to collect, sue for and compromise Rents and directs each tenant of the Mortgaged Property to pay all Rents to, or as directed by, Lender. However, until the occurrence of an Event of Default, Lender hereby grants to Borrower a revocable license to collect and receive all Rents, to hold all Rents in trust for the benefit of Lender and to apply all Rents to pay the installments of interest and principal then due and



3367872  
83/28/2886  
5 of 25

payable under the Note and the other amounts then due and payable under the other Loan Documents, including Imposition Deposits, and to pay the current costs and expenses of managing, operating and maintaining the Mortgaged Property, including utilities, Taxes and Insurance premiums (to the extent not included in Imposition Deposits), tenant improvements and other capital expenditures. So long as no Event of Default has occurred and is continuing, the Rents remaining after application pursuant to the preceding sentence may be retained by Borrower free and clear of, and released from, Lender's rights with respect to Rents under this Instrument. From and after the occurrence of an Event of Default, and without the necessity of Lender entering upon and taking and maintaining control of the Mortgaged Property directly, or by a receiver, Borrower's license to collect Rents shall automatically terminate and Lender shall without notice be entitled to all Rents as they become due and payable, including Rents then due and unpaid. Borrower shall pay to Lender upon demand all Rents to which Lender is entitled. At any time on or after the date of Lender's demand for Rents, Lender may give, and Borrower hereby irrevocably authorizes Lender to give, notice to all tenants of the Mortgaged Property instructing them to pay all Rents to Lender, no tenant shall be obligated to inquire further as to the occurrence or continuance of an Event of Default, and no tenant shall be obligated to pay to Borrower any amounts which are actually paid to Lender in response to such a notice. Any such notice by Lender shall be delivered to each tenant personally, by mail or by delivering such demand to each rental unit. Borrower shall not interfere with and shall cooperate with Lender's collection of such Rents.

(c) Borrower represents and warrants to Lender that Borrower has not executed any prior assignment of Rents (other than an assignment of Rents securing indebtedness that will be paid off and discharged with the proceeds of the loan evidenced by the Note), that Borrower has not performed, and Borrower covenants and agrees that it will not perform, any acts and has not executed, and shall not execute, any instrument which would prevent Lender from exercising its rights under this Section 3, and that at the time of execution of this Instrument there has been no anticipation or prepayment of any Rents for more than two months prior to the due dates of such Rents. Borrower shall not collect or accept payment of any Rents more than one (1) month prior to the due dates of such Rents.

(d) If an Event of Default has occurred and is continuing, Lender may, regardless of the adequacy of Lender's security or the solvency of Borrower and even in the absence of waste, enter upon and take and maintain full control of the Mortgaged Property in order to perform all acts that Lender in its discretion determines to be necessary or desirable for the operation and maintenance of the Mortgaged Property, including the execution, cancellation or modification of Leases, the collection of all Rents, the making of repairs to the Mortgaged Property and the execution or termination of contracts providing for the management, operation or maintenance of the Mortgaged Property, for the purposes of enforcing the assignment of Rents pursuant to Section 3(a), protecting the Mortgaged Property or the security of this Instrument, or for such other purposes as Lender in its discretion may deem necessary or desirable. Alternatively, If an Event of Default has occurred and is continuing, regardless of the adequacy of Lender's security, without regard to Borrower's solvency and without the necessity of giving prior notice (oral or written) to Borrower, Lender may apply to any court having jurisdiction for the appointment of a receiver for the Mortgaged Property to take any or all of the actions set forth in the preceding sentence. If Lender elects to seek the appointment of a receiver for the Mortgaged Property at any time after an Event of Default has occurred and is continuing, Borrower, by its execution of this Instrument, expressly consents to the appointment of such receiver, including the appointment of a receiver *ex parte* if permitted by applicable law. Lender or the receiver, as the case may be, shall be entitled to receive a reasonable fee for managing the Mortgaged Property. Immediately upon appointment of a receiver or immediately upon the Lender's entering upon and taking possession and control of the Mortgaged Property, Borrower shall surrender possession of the Mortgaged Property to Lender or the receiver, as the case may be, and shall deliver to Lender or the receiver, as the case may be, all documents, records (including computer files and other records on electronic or magnetic media), accounts, surveys, plans, and specifications relating to the Mortgaged Property and all security deposits and prepaid Rents. In the event Lender takes possession and control of the Mortgaged Property, Lender may exclude Borrower and its representatives from the Mortgaged Property. Borrower acknowledges and agrees that the exercise by Lender of any of the rights conferred under this Section 3 shall not be construed to make Lender a mortgagee-in-possession of the Mortgaged Property so long as Lender has not itself entered into actual possession of the Land and Improvements.

(e) If Lender enters the Mortgaged Property, Lender shall be liable to account only to Borrower and only for those Rents actually received. Lender shall not be liable to Borrower, anyone claiming under or through Borrower or anyone having an interest in the Mortgaged Property, by reason of any act or omission of Lender under this Section 3, and Borrower hereby releases and discharges Lender from any such liability to the fullest extent permitted by law.

(f) If the Rents are not sufficient to meet the costs of taking control of and managing the Mortgaged Property and collecting the Rents, any funds expended by Lender for such purposes shall become an additional part of the indebtedness as provided in Section 12.

(g) Any entering upon and taking of control of the Mortgaged Property by Lender or the receiver, as the case may be, and any application of Rents as provided in this Instrument shall not cure or waive any Event of Default or invalidate any other right or remedy of Lender under applicable law or provided for in this Instrument.





3367872  
63/28/2888  
6 of 25

**4. ASSIGNMENT OF LEASES; LEASES AFFECTING THE MORTGAGED PROPERTY.**

(a) As part of the consideration for the indebtedness, Borrower absolutely and unconditionally assigns and transfers to Lender all of Borrower's right, title and interest in, to and under the Leases, including Borrower's right, power and authority to modify the terms of any such Lease, or extend or terminate any such Lease. It is the intention of Borrower to establish a present, absolute and irrevocable transfer and assignment to Lender of all of Borrower's right, title and interest in, to and under the Leases. Borrower and Lender intend this assignment of the Leases to be immediately effective and to constitute an absolute present assignment and not an assignment for additional security only. For purposes of giving effect to this absolute assignment of the Leases, and for no other purpose, the Leases shall not be deemed to be a part of the "Mortgaged Property" as that term is defined in Section 1. However, if this present, absolute and unconditional assignment of the Leases is not enforceable by its terms under the laws of the Property Jurisdiction, then the Leases shall be included as a part of the Mortgaged Property and it is the intention of the Borrower that in this circumstance this Instrument create and perfect a lien on the Leases in favor of Lender, which lien shall be effective as of the date of this Instrument.

(b) Until Lender gives notice to Borrower of Lender's exercise of its rights under this Section 4, Borrower shall have all rights, power and authority granted to Borrower under any Lease (except as otherwise limited by this Section or any other provision of this instrument), including the right, power and authority to modify the terms of any Lease or extend or terminate any Lease. Upon the occurrence of an Event of Default, the permission given to Borrower pursuant to the preceding sentence to exercise all rights, power and authority under Leases shall automatically terminate. Borrower shall comply with and observe Borrower's obligations under all Leases, including Borrower's obligations pertaining to the maintenance and disposition of tenant security deposits.

(c) Borrower acknowledges and agrees that the exercise by Lender, either directly or by a receiver, of any of the rights conferred under this Section 4 shall not be construed to make Lender a mortgagee-in-possession of the Mortgaged Property so long as Lender has not itself entered into actual possession of the Land and the Improvements. The acceptance by Lender of the assignment of the Leases pursuant to Section 4(a) shall not at any time or in any event obligate Lender to take any action under this Instrument or to expend any money or to incur any expenses. Lender shall not be liable in any way for any injury or damage to person or property sustained by any person or persons, firm or corporation in or about the Mortgaged Property. Prior to Lender's actual entry into and taking possession of the Mortgaged Property, Lender shall not (i) be obligated to perform any of the terms, covenants and conditions contained in any Lease (or otherwise have any obligation with respect to any Lease); (ii) be obligated to appear in or defend any action or proceeding relating to the Lease or the Mortgaged Property; or (iii) be responsible for the operation, control, care, management or repair of the Mortgaged Property or any portion of the Mortgaged Property. The execution of this Instrument by Borrower shall constitute conclusive evidence that all responsibility for the operation, control, care, management and repair of the Mortgaged Property is and shall be that of Borrower, prior to such actual entry and taking of possession.

(d) Upon delivery of notice by Lender to Borrower of Lender's exercise of Lender's rights under this Section 4 at any time after the occurrence of an Event of Default, and without the necessity of Lender entering upon and taking and maintaining control of the Mortgaged Property directly, by a receiver, or by any other manner or proceeding permitted by the laws of the Property Jurisdiction, Lender immediately shall have all rights, powers and authority granted to Borrower under any Lease, including the right, power and authority to modify the terms of any such Lease, or extend or terminate any such Lease.

(e) Borrower shall, promptly upon Lender's request, deliver to Lender an executed copy of each Lease then in effect.

(f) Borrower further covenants with Lender that (i) all Leases shall be written on a standard form of lease that has been or will be approved in writing in advance by Lender; (ii) upon request, Borrower shall furnish Lender with executed copies of all Leases and all amendments thereto; (iii) no material changes may be made to the Lender-approved standard lease without the prior written consent of Lender; (iv) all renewals of Leases and all proposed Leases shall provide for rental rates comparable to existing local market rates and shall be arm's-length transactions; (v) all Leases shall provide that (A) they are subordinate to this Security Instrument and any other indebtedness now or hereafter secured by the Mortgaged Property, (B) Lessees agree to attorn to Lender (such attornment to be effective upon Lender's acquisition of title to the Mortgaged Property), (C) Lessees agree to execute such further evidences of attornment as Lender may from time to time request, (D) the attornment of Lessees shall not be terminated by foreclosure, (E) Lender may, at Lender's option, accept or reject such attornment, and (F) Lessees agree to execute and acknowledge a subordination, attornment and non-disturbance agreement in form and content acceptable to Lender, and, two times in any calendar year, as Lender may request, a certificate signed by Lessee confirming and containing such factual certifications and representations deemed appropriate by Lender; (vi) Borrower shall not grant any purchase options without the prior written approval of Lender, and (vii) all new Leases shall be subject to the prior written approval of Lender.

(g) Borrower shall not receive or accept Rent under any Lease for more than one (1) month in advance.



3367872  
83/28/2686  
7 of 25

5. **PAYMENT OF INDEBTEDNESS; PERFORMANCE UNDER LOAN DOCUMENTS.** Borrower shall pay the indebtedness when due in accordance with the terms of the Note and the other Loan Documents and shall perform, observe and comply with all other provisions of the Note and the other Loan Documents.

6. **FULL RECOURSE PERSONAL LIABILITY.** Borrower shall have full recourse personal liability under the Note, this instrument and all other Loan Documents for the repayment of the indebtedness and for the performance of any and all other obligations of Borrower under the Note, this instrument and all other Loan Documents.

7. **DEPOSITS FOR TAXES, INSURANCE AND OTHER CHARGES.**

(a) Borrower shall deposit with Lender on the day monthly installments of principal or interest, or both, are due under the Note (or on another day designated in writing by Lender), until the indebtedness is paid in full, an additional amount sufficient to accumulate with Lender the entire sum required to pay, when due (1) any water and sewer charges which, if not paid, may result in a lien on all or any part of the Mortgaged Property, (2) the premiums for fire and other hazard insurance, rent loss insurance and such other insurance as Lender may require under Section 19, (3) Taxes, and (4) amounts for other charges and expenses which Lender at any time reasonably deems necessary to protect the Mortgaged Property, to prevent the imposition of liens on the Mortgaged Property, or otherwise to protect Lender's interests, all as reasonably estimated from time to time by Lender, plus one-sixth of such estimate. The amounts deposited under the preceding sentence are collectively referred to in this instrument as the "Imposition Deposits". The obligations of Borrower for which the Imposition Deposits are required are collectively referred to in this instrument as "Impositions". The amount of the Imposition Deposits shall be sufficient to enable Lender to pay each Imposition before the last date upon which such payment may be made without any penalty or interest charge being added. Lender shall maintain records indicating how much of the monthly Imposition Deposits and how much of the aggregate Imposition Deposits held by Lender are held for the purpose of paying Taxes, insurance premiums and each other obligation of Borrower for which Imposition Deposits are required. Any waiver by Lender of the requirement that Borrower remit Imposition Deposits to Lender may be revoked by Lender, in Lender's discretion, at any time upon notice to Borrower.

(b) Imposition Deposits shall be held in an institution (which may be Lender, if Lender is such an institution) whose deposits or accounts are insured or guaranteed by a federal agency. Lender shall not be obligated to open additional accounts or deposit Imposition Deposits in additional institutions when the amount of the Imposition Deposits exceeds the maximum amount of the federal deposit insurance or guaranty. Lender shall apply the Imposition Deposits to pay Impositions so long as no Event of Default has occurred and is continuing. Unless applicable law requires, Lender shall not be required to pay Borrower any interest, earnings or profits on the Imposition Deposits. Borrower hereby pledges and grants to Lender a security interest in the Imposition Deposits as additional security for all of Borrower's obligations under this instrument and the other Loan Documents. Any amounts deposited with Lender under this Section 7 shall not be trust funds, nor shall they operate to reduce the indebtedness, unless applied by Lender for that purpose under Section 7(e).

(c) If Lender receives a bill or invoice for an Imposition, Lender shall pay the Imposition from the Imposition Deposits held by Lender. Lender shall have no obligation to pay any Imposition to the extent it exceeds Imposition Deposits then held by Lender. Lender may pay an Imposition according to any bill, statement or estimate from the appropriate public office or insurance company without inquiring into the accuracy of the bill, statement or estimate or into the validity of the Imposition.

(d) If at any time the amount of the Imposition Deposits held by Lender for payment of a specific Imposition exceeds the amount reasonably deemed necessary by Lender plus one-sixth of such estimate, the excess shall be credited against future installments of Imposition Deposits. If at any time the amount of the Imposition Deposits held by Lender for payment of a specific Imposition is less than the amount reasonably estimated by Lender to be necessary plus one-sixth of such estimate, Borrower shall pay to Lender the amount of the deficiency within 15 days after written request by Lender.

(e) If an Event of Default has occurred and is continuing, Lender may apply any Imposition Deposits, in any amounts and in any order as Lender determines, in Lender's discretion, to pay any Impositions or as a credit against the indebtedness. Upon payment in full of the indebtedness, Lender shall refund to Borrower any Imposition Deposits held by Lender.

8. **COLLATERAL AGREEMENTS.** Borrower shall deposit with Lender such amounts as may be required by any Collateral Agreement and shall perform all other obligations of Borrower under each Collateral Agreement.

9. **APPLICATION OF PAYMENTS.** If at any time Lender receives, from Borrower or otherwise, any amount applicable to the indebtedness which is less than all amounts due and payable at such time, then Lender may apply that payment to amounts then due and payable in any manner and in any order determined by Lender, in Lender's discretion. Neither Lender's acceptance of an amount which is less than all amounts then due and payable nor Lender's application of such payment in the manner authorized shall constitute or be deemed to constitute either a waiver of the unpaid amounts or an accord and satisfaction. Notwithstanding the application of any such amount to the indebtedness, Borrower's obligations under this instrument and the Note shall remain unchanged.

10. **COMPLIANCE WITH LAWS.** Borrower shall comply with all laws, ordinances, regulations and requirements of any Governmental Authority and all recorded lawful covenants and agreements relating to or affecting the Mortgaged



3367872  
63/28/2886  
8 of 25

Property, including all laws, ordinances, regulations, requirements and covenants pertaining to health and safety, construction of improvements on the Mortgaged Property, fair housing, zoning and land use, and Leases. Borrower also shall comply with all applicable laws that pertain to the maintenance and disposition of tenant security deposits. Borrower shall at all times maintain records sufficient to demonstrate compliance with the provisions of this Section 10. Borrower shall take appropriate measures to prevent, and shall not engage in or knowingly permit, any illegal activities at the Mortgaged Property that could endanger tenants or visitors, result in damage to the Mortgaged Property, result in forfeiture of the Mortgaged Property, or otherwise materially impair the lien created by this Instrument or Lender's interest in the Mortgaged Property. Borrower represents and warrants to Lender that no portion of the Mortgaged Property has been or will be purchased with the proceeds of any illegal activity.

11. **USE OF PROPERTY.** Unless required by applicable law, Borrower shall not (a) except for any change in use approved by Lender, allow changes in the use for which all or any part of the Mortgaged Property is being used at the time this Instrument was executed, or (b) initiate or acquiesce in a change in the zoning classification of the Mortgaged Property, or (c) establish any condominium or cooperative regime with respect to the Mortgaged Property.

12. **PROTECTION OF LENDER'S SECURITY.**

(a) If Borrower fails to perform any of its obligations under this Instrument or any other Loan Document, or if any action or proceeding is commenced which purports to affect the Mortgaged Property, Lender's security or Lender's rights under this Instrument, including eminent domain, insolvency, code enforcement, civil or criminal forfeiture, enforcement of Hazardous Materials Laws, fraudulent conveyance or reorganizations or proceedings involving a bankrupt or decedent, then Lender at Lender's option may make such appearances, disburse such sums and take such actions as Lender reasonably deems necessary to perform such obligations of Borrower and to protect Lender's interest, including (1) payment of fees and out of pocket expenses of attorneys, accountants, inspectors and consultants, (2) entry upon the Mortgaged Property to make repairs or secure the Mortgaged Property, (3) procurement of the insurance required by Section 19, and (4) payment of amounts which Borrower has failed to pay under Sections 15 and 17.

(b) Any amounts disbursed by Lender under this Section 12, or under any other provision of this Instrument that treats such disbursement as being made under this Section 12, shall be added to, and become part of, the principal component of the indebtedness, shall be immediately due and payable and shall bear interest from the date of disbursement until paid at the "Default Rate", as defined in the Note.

(c) Nothing in this Section 12 shall require Lender to incur any expense or take any action.

13. **INSPECTION.** Lender, its agents, representatives, and designees may make or cause to be made entries upon and inspections of the Mortgaged Property (including environmental inspections and tests) during normal business hours, or at any other reasonable time.

14. **BOOKS AND RECORDS; FINANCIAL REPORTING.**

(a) Borrower shall keep and maintain at all times at the Mortgaged Property or the management agent's offices, and upon Lender's request shall make available at the Mortgaged Property, complete and accurate books of account and records (including copies of supporting bills and invoices) adequate to reflect correctly the operation of the Mortgaged Property, and copies of all written contracts, Leases, and other instruments which affect the Mortgaged Property. The books, records, contracts, Leases and other instruments shall be subject to examination and inspection at any reasonable time by Lender.

(b) Borrower shall furnish to Lender all of the following:

- (1) within 120 days after each anniversary date of the initial funding of the Loan, a statement of income and expenses for Borrower's operation of the Mortgaged Property for that fiscal year, a statement of changes in financial position of Borrower relating to the Mortgaged Property for that fiscal year and, when requested by Lender, a balance sheet showing all assets and liabilities of Borrower relating to the Mortgaged Property as of the end of that fiscal year;
- (2) within 120 days after each anniversary date of the initial funding of the Loan, and at any other time upon Lender's request, a rent schedule for the Mortgaged Property showing the name of each tenant, and for each tenant, the space occupied, the lease expiration date, the rent payable for the current month, the date through which rent has been paid, and any related information requested by Lender (and provided that for any tenant who is affiliated with or controlled by Borrower or any guarantor ("Affiliated Tenant"), Borrower shall also furnish current financial statements for such Affiliated Tenant) (and provided further that for any tenant that is required to submit financial reports and information under the terms of their lease ("Reporting Tenant"), then upon Lender's request Borrower shall furnish to Lender copies of all financial reports and information for such Reporting Tenant as and when received from such Reporting Tenant);
- (3) within 120 days after each anniversary date of the initial funding of the Loan, and at any other time upon Lender's request, an accounting of all security deposits held pursuant to all Leases, including the name of the institution (if any) and the names and identification numbers of the accounts (if any) in which such security deposits are held and the name of the person to contact at such

3367872  
03/28/2006  
9 of 25

financial institution, along with any authority or release necessary for Lender to access information regarding such accounts;

- (4) within 120 days after each anniversary date of the initial funding of the Loan, and at any other time upon Lender's request, a statement that identifies all owners of any interest in Borrower and any Controlling Entity and the interest held by each, if Borrower or a Controlling Entity is a corporation, all officers and directors of Borrower and the Controlling Entity, and if Borrower or a Controlling Entity is a limited liability company, all managers who are not members;
- (5) upon Lender's request, quarterly income and expense statements for the Mortgaged Property;
- (6) upon Lender's request at any time when an Event of Default has occurred and is continuing, monthly income and expense statements for the Mortgaged Property;
- (7) upon Lender's request, a monthly property management report for the Mortgaged Property, showing the number of inquiries made and rental applications received from tenants or prospective tenants and deposits received from tenants and any other information requested by Lender;
- (8) upon Lender's request, a balance sheet, a statement of income and expenses for Borrower, each guarantor, each Affiliated Tenant and each Reporting Tenant and a statement of changes in financial position of Borrower, each guarantor, each Affiliated Tenant and each Reporting Tenant for Borrower's or guarantor's or Affiliated Tenant's or Reporting Tenant's most recent fiscal year; and
- (9) within thirty (30) days after filing, copies of all federal and state income tax returns filed by Borrower, each guarantor and each Affiliated Tenant and Reporting Tenant (provided that if returns are not filed on time then Lender shall be provided with a copy of any applicable extension filings within thirty (30) days after the filing due date, with the copies of the actual returns to be provided within thirty (30) days after filing).

(c) Each of the statements, schedules, documents, items and reports required by Section 14(b) shall be certified to be complete and accurate by an individual having authority to bind Borrower, and shall be in such form and contain such detail as Lender may reasonably require. Lender also may require that any statements, schedules or reports be audited at Borrower's expense by independent certified public accountants acceptable to Lender.

(d) In the event Borrower fails to deliver such statements, schedules, documents, items and reports within the time frames provided in Section 14(b) above (including any required items pertaining to any guarantor or any Affiliated Tenant or any Reporting Tenant), then such failure shall constitute an Event of Default and, in addition to any other remedies which may be available to Lender as a result of such Event of Default, Borrower shall pay a late charge equal to five percent (5%) of the monthly payment amount for each late submission of financial reports to compensate Lender or its servicer for the additional administrative expense caused by such failure or delay whether or not Borrower is entitled to any notice and opportunity to cure such failure prior to the exercise of any of the remedies. Failure to provide any reports as required by this Section 14 shall constitute an Event of Default hereunder. Such late charge shall be charged each month that any financial statements remain delinquent. The late charge shall be immediately payable from Borrower upon demand by Lender and, until paid, shall be added to and constitute a part of the indebtedness as provided in Section 12. The financial statement late charge shall be in addition to any other remedies available to Lender as a result of Borrower's default. In no event shall the financial statement late charge constitute a cure of Borrower's default in failing to provide financial statements, nor limit Lender's remedies as a result of such default. In addition, if Borrower fails to provide in a timely manner the statements, schedules and reports required by Section 14(b), then such failure shall constitute an Event of Default and, in addition to any other remedies which may be available to Lender as a result of such Event of Default, Lender shall have the right to have Borrower's books and records audited, at Borrower's expense, by independent certified public accountants selected by Lender in order to obtain such statements, schedules and reports, and all related costs and expenses of Lender shall become immediately due and payable and shall become an additional part of the indebtedness as provided in Section 12.

(e) If an Event of Default has occurred and is continuing, Borrower shall deliver to Lender upon written demand all books and records relating to the Mortgaged Property or its operation.

(f) Borrower authorizes Lender to obtain a credit report on Borrower at any time.

#### 15. TAXES; OPERATING EXPENSES.

(a) Subject to the provisions of Section 15(c) and Section 15(d), Borrower shall pay, or cause to be paid, all Taxes when due and before the addition of any interest, fine, penalty or cost for nonpayment.

(b) Subject to the provisions of Section 15(c), Borrower shall pay the expenses of operating, managing, maintaining and repairing the Mortgaged Property (including insurance premiums, utilities, repairs and replacements) before the last date upon which each such payment may be made without any penalty or interest charge being added.

(c) As long as no Event of Default exists and Borrower has timely delivered to Lender any bills or premium notices that it has received, Borrower shall not be obligated to pay Taxes, insurance premiums or any other individual imposition





to the extent that sufficient Imposition Deposits are held by Lender for the purpose of paying that specific Imposition. If an Event of Default exists, Lender may exercise any rights Lender may have with respect to Imposition Deposits without regard to whether Impositions are then due and payable. Lender shall have no liability to Borrower for failing to pay any Impositions to the extent that any Event of Default has occurred and is continuing, insufficient Imposition Deposits are held by Lender at the time an Imposition becomes due and payable or Borrower has failed to provide Lender with bills and premium notices as provided above.

(d) Borrower, at its own expense, may contest by appropriate legal proceedings, conducted diligently and in good faith, the amount or validity of any Imposition other than insurance premiums, if (1) Borrower notifies Lender of the commencement or expected commencement of such proceedings, (2) the Mortgaged Property is not in danger of being sold or forfeited, (3) Borrower deposits with Lender reserves sufficient to pay the contested Imposition, if requested by Lender, and (4) Borrower furnishes whatever additional security is required in the proceedings or is reasonably requested by Lender, which may include the delivery to Lender of the reserves established by Borrower to pay the contested Imposition.

(e) Borrower shall promptly deliver to Lender a copy of all notices of, and invoices for, Impositions, and if Borrower pays any Imposition directly, Borrower shall promptly furnish to Lender receipts evidencing such payments.

16. **LIENS; ENCUMBRANCES.** Borrower acknowledges that the grant, creation or existence of any mortgage, deed of trust, deed to secure debt, security interest or other lien or encumbrance (a "Lien") on the Mortgaged Property (other than the lien of this Instrument) or on certain ownership interests in Borrower, whether voluntary, involuntary or by operation of law, and whether or not such Lien has priority over the lien of this Instrument, is a "Transfer" which constitutes an Event of Default under Section 21 of this Instrument.

17. **PRESERVATION, MANAGEMENT AND MAINTENANCE OF MORTGAGED PROPERTY.** Borrower (a) shall not commit waste or permit impairment or deterioration of the Mortgaged Property, (b) shall not abandon the Mortgaged Property, (c) shall restore or repair promptly, in a good and workmanlike manner, any damaged part of the Mortgaged Property to the equivalent of its original condition, or such other condition as Lender may approve in writing, whether or not insurance proceeds or condemnation awards are available to cover any costs of such restoration or repair, (d) shall keep the Mortgaged Property in good repair, including the replacement of Personalty and Fixtures with items of equal or better function and quality, (e) shall provide for professional management of the Mortgaged Property by a property manager satisfactory to Lender under a contract approved by Lender in writing, and (f) shall give notice to Lender of and, unless otherwise directed in writing by Lender, shall appear in and defend any action or proceeding purporting to affect the Mortgaged Property, Lender's security or Lender's rights under this Instrument. Borrower shall not (and shall not permit any tenant or other person to) remove, demolish or alter the Mortgaged Property or any part of the Mortgaged Property except in connection with the replacement of tangible Personalty.

18. **ENVIRONMENTAL HAZARDS.** Borrower shall comply with all covenants, conditions, provisions and obligations of Borrower (as Indemnitor) under the Environmental Indemnity Agreement.

19. **PROPERTY AND LIABILITY INSURANCE.**

(a) Borrower shall keep the Improvements insured at all times against such hazards as Lender may from time to time require, which insurance shall include but not be limited to coverage against loss by fire and allied perils, general boiler and machinery coverage, and business income coverage. Lender's insurance requirements may change from time to time throughout the term of the Indebtedness. If Lender so requires, such insurance shall also include sinkhole insurance, mine subsidence insurance, earthquake insurance, and, if the Mortgaged Property does not conform to applicable zoning or land use laws, building ordinance or law coverage. If any of the Improvements is located in an area identified by the Federal Emergency Management Agency (or any successor to that agency) as an area having special flood hazards, and if flood insurance is available in that area, Borrower shall insure such Improvements against loss by flood. All insurance required pursuant to this Section 19(a) shall be referred to as "Hazard Insurance."

(b) All premiums on insurance policies required under Section 19(a) shall be paid in the manner provided in Section 7, unless Lender has designated in writing another method of payment. All such policies shall also be in a form approved by Lender. All policies of property damage insurance shall include a non-contributing, non-reporting mortgage clause in favor of, and in a form approved by, Lender. Lender shall have the right to hold the original policies or duplicate original policies of all insurance required by Section 19(a). Borrower shall promptly deliver to Lender a copy of all renewal and other notices received by Borrower with respect to the policies and all receipts for paid premiums. At least 30 days prior to the expiration date of a policy, Borrower shall deliver to Lender the original (or a duplicate original) of a renewal policy in form satisfactory to Lender.

(c) Borrower shall maintain at all times commercial general liability insurance, workers' compensation insurance and such other liability, errors and omissions and fidelity insurance coverages as Lender may from time to time require.

(d) All insurance policies and renewals of insurance policies required by this Section 19 shall be in such amounts and for such periods as Lender may from time to time require, shall be in such form and contain such endorsements as Lender may from time to time require, and shall be issued by insurance companies satisfactory to Lender.

(e) Borrower shall comply with all insurance requirements and shall not permit any condition to exist on the Mortgaged Property that would invalidate any part of any insurance coverage that this Instrument requires Borrower to maintain.

3367872  
93/28/2888  
11 of 25

(f) In the event of loss, Borrower shall give immediate written notice to the insurance carrier and to Lender. Borrower hereby authorizes and appoints Lender as attorney-in-fact for Borrower to make proof of loss, to adjust and compromise any claims under policies of property damage insurance, to appear in and prosecute any action arising from such property damage insurance policies, to collect and receive the proceeds of property damage insurance, and to deduct from such proceeds Lender's expenses incurred in the collection of such proceeds. This power of attorney is coupled with an interest and therefore is irrevocable. However, nothing contained in this Section 19 shall require Lender to incur any expense or take any action. Lender may, at Lender's option, (1) hold the balance of such proceeds to be used to reimburse Borrower for the cost of restoring and repairing the Mortgaged Property to the equivalent of its original condition or to a condition approved by Lender (the "Restoration"), or (2) apply the balance of such proceeds to the payment of the Indebtedness, whether or not then due. To the extent Lender determines to apply insurance proceeds to Restoration, Lender shall do so in accordance with Lender's then-current policies relating to the restoration of casualty damage on similar properties.

(g) Lender shall not exercise its option to apply insurance proceeds to the payment of the indebtedness if all of the following conditions are met: (1) no Event of Default (or any event which, with the giving of notice or the passage of time, or both, would constitute an Event of Default) has occurred and is continuing; (2) Lender determines, in its discretion, that there will be sufficient funds to complete the Restoration; (3) Lender determines, in its discretion, that the rental income from the Mortgaged Property after completion of the Restoration will be sufficient to meet all operating costs and other expenses, Imposition Deposits, deposits to reserves and loan repayment obligations relating to the Mortgaged Property; and (4) Lender determines, in its discretion, that the Restoration will be completed before the earlier of (A) one year before the maturity date of the Note or (B) one year after the date of the loss or casualty.

(h) If the Mortgaged Property is sold at a foreclosure sale or Lender acquires title to the Mortgaged Property, Lender shall automatically succeed to all rights of Borrower in and to any insurance policies and unearned insurance premiums and in and to the proceeds resulting from any damage to the Mortgaged Property prior to such sale or acquisition.

## 20. CONDEMNATION.

(a) Borrower shall promptly notify Lender of any action or proceeding relating to any condemnation or other taking, or conveyance in lieu thereof, of all or any part of the Mortgaged Property, whether direct or indirect (a "Condemnation"). Borrower shall appear in and prosecute or defend any action or proceeding relating to any Condemnation unless otherwise directed by Lender in writing. Borrower authorizes and appoints Lender as attorney-in-fact for Borrower to commence, appear in and prosecute, in Lender's or Borrower's name, any action or proceeding relating to any Condemnation and to settle or compromise any claim in connection with any Condemnation. This power of attorney is coupled with an interest and therefore is irrevocable. However, nothing contained in this Section 20 shall require Lender to incur any expense or take any action. Borrower hereby transfers and assigns to Lender all right, title and interest of Borrower in and to any award or payment with respect to (i) any Condemnation, or any conveyance in lieu of Condemnation, and (ii) any damage to the Mortgaged Property caused by governmental action that does not result in a Condemnation.

(b) Lender may apply such awards or proceeds, after the deduction of Lender's expenses incurred in the collection of such amounts, at Lender's option, to the restoration or repair of the Mortgaged Property or to the payment of the Indebtedness, with the balance, if any, to Borrower. Unless Lender otherwise agrees in writing, any application of any awards or proceeds to the Indebtedness shall not extend or postpone the due date of any monthly installments referred to in the Note, Section 7 of this Instrument or any Collateral Agreement, or change the amount of such installments. Borrower agrees to execute such further evidence of assignment of any awards or proceeds as Lender may require.

## 21. TRANSFERS OF THE MORTGAGED PROPERTY OR INTERESTS IN BORROWER [RIGHT TO ONE TRANSFER ONLY -- WITH LENDER APPROVAL].

(a) "Transfer" means (A) a sale, assignment, transfer or other disposition (whether voluntary, involuntary or by operation of law); (B) the granting, creating or attachment of a lien, encumbrance or security interest (whether voluntary, involuntary or by operation of law); (C) the issuance or other creation of an ownership interest in a legal entity, including a partnership interest, interest in a limited liability company or corporate stock; (D) the withdrawal, retirement, removal or involuntary resignation of a partner in a partnership or a member or manager in a limited liability company; or (E) the merger, dissolution, liquidation, or consolidation of a legal entity or the reconstitution of one type of legal entity into another type of legal entity. For purposes of defining the term "Transfer," the term "partnership" shall mean a general partnership, a limited partnership, a joint venture and a limited liability partnership, and the term "partner" shall mean a general partner, a limited partner and a joint venturer.

(b) "Transfer" does not include: (i) a conveyance of the Mortgaged Property at a judicial or non-judicial foreclosure sale under this instrument, (ii) the Mortgaged Property becoming part of a bankruptcy estate by operation of law under the United States Bankruptcy Code, or (iii) a lien against the Mortgaged Property for local taxes and/or assessments not then due and payable.

(c) The occurrence of any of the following events shall not constitute an Event of Default under this instrument, notwithstanding any provision of Section 21(a) to the contrary:



3367872  
83/28/2886  
12 of 25

- (i) a Transfer to which Lender has consented;
- (ii) a Transfer that occurs by devise, descent, or by operation of law upon the death of a natural person (unless such death itself is an Event of Default under Section 22(k) of this Instrument);
- (iii) the grant of a leasehold interest approved in writing by Lender;
- (iv) a Transfer of obsolete or worn out Personalty or Fixtures that are contemporaneously replaced by items of equal or better function and quality, which are free of liens, encumbrances and security interests other than those created by the Loan Documents or consented to by Lender;
- (v) the creation of a mechanic's, materialman's, or judgment lien against the Mortgaged Property which is released of record or otherwise remedied to Lender's satisfaction within 60 days of the date of creation;
- (vi) if Borrower is a housing cooperative, any Transfer of the shares in the housing cooperative or any assignment of the occupancy agreements or leases relating thereto by tenant shareholders of the housing cooperative; and
- (vii) any Transfer of an interest in Borrower or any interest in a Controlling Entity (which, if such Controlling Entity were Borrower, would result in an Event of Default) listed in (A) through (F) below (a "Preapproved Transfer"), under the terms and conditions listed as items (1) through (7) below:
  - (A) a sale or transfer to one or more of the transferor's immediate family members; or
  - (B) a sale or transfer to any trust having as its sole beneficiaries the transferor and/or one or more of the transferor's immediate family members; or
  - (C) a sale or transfer from a trust to any one or more of its beneficiaries who are immediate family members of Borrower or a Controlling Entity; or
  - (D) the substitution or replacement of the trustee of any trust with a trustee who is an immediate family member of the transferor; or
  - (E) a sale or transfer to an entity owned and controlled by the transferor or the transferor's immediate family members; or
  - (F) a sale or transfer to an individual or entity that has an existing interest in the Borrower or in a Controlling Entity.

Preapproved Transfer Terms and Conditions:

- (1) Borrower shall provide Lender with prior written Notice of the proposed Preapproved Transfer, which Notice must be accompanied by a non-refundable review fee in the amount of \$500.00
- (2) For the purposes of these Preapproved Transfers, a transferor's immediate family members will be deemed to include a spouse, parent, child or grandchild of such transferor.
- (3) Either directly or indirectly, the Initial Owners shall retain at all times not less than Controlling Interest in the Borrower and a managing interest in the Borrower.
- (4) At the time of the proposed Preapproved Transfer, no Event of Default shall have occurred and be continuing and no event or condition shall have occurred and be continuing that, with the giving of Notice or the passage of time, or both, would become an Event of Default.
- (5) Lender shall be entitled to collect all costs, including the cost of all title searches, title insurance and recording costs, and all Attorneys' Fees and Costs.
- (6) Lender shall not be entitled to collect a transfer fee as a result of these Preapproved Transfers.
- (7) In the event of a Transfer prohibited by or requiring Lender's approval under this Section 21, this Section (c)(vii) may be modified or rendered void by Lender at Lender's option by Notice to Borrower and the transferee(s), as a condition of Lender's consent.

(d) The occurrence of any of the following Transfers shall not constitute an Event of Default under this Instrument, provided that Borrower has notified Lender in writing within 30 days following the occurrence of any of the following, and such Transfer does not constitute an Event of Default under any other Section of this Instrument:

- (i) a change of the Borrower's name, provided that UCC financing statements and/or amendments sufficient to continue the perfection of Lender's security interest have been properly filed and copies have been delivered to Lender;
- (ii) a change of the form of the Borrower not involving a transfer of the Borrower's assets and not resulting in any change in liability of any Initial Owner, provided that UCC financing statements

3367872  
03/28/2006  
13 of 25

- and/or amendments sufficient to continue the perfection of Lender's security interest have been properly filed and copies have been delivered to Lender;
- (iii) the merger of the Borrower with another entity when the Borrowing entity is the surviving entity;
  - (iv) [intentionally omitted];
  - (v) the grant of an easement, if before the grant Lender determines that the easement will not materially affect the operation or value of the Mortgaged Property or Lender's interest in the Mortgaged Property, and Borrower pays to Lender, upon demand, all costs and expenses, including Attorneys' Fees and Costs, incurred by Lender in connection with reviewing Borrower's request.
- (e) The occurrence of any of the following events shall constitute an Event of Default under this Instrument:
- (i) a Transfer of all or any part of the Mortgaged Property or any interest in the Mortgaged Property (including without limitation the creation or existence of any Lien as provided in Section 16 of this Instrument);
  - (ii) if Borrower is a limited partnership, a Transfer of (A) any general partnership interest, or (B) limited partnership interests in Borrower that would cause the Initial Owners of Borrower to own less than a Controlling Interest of all limited partnership interests in Borrower;
  - (iii) if Borrower is a general partnership or a joint venture, a Transfer of any general partnership or joint venture interest in Borrower;
  - (iv) if Borrower is a limited liability company, (A) a Transfer of any membership interest in Borrower which would cause the Initial Owners to own less than a Controlling Interest of all the membership interests in Borrower, (B) a Transfer of any membership or other interest of a manager in Borrower that results in a change of manager, or (C) a change of a nonmember manager;
  - (v) if Borrower is a corporation, (A) the Transfer of any voting stock in Borrower which would cause the Initial Owners to own less than a Controlling Interest of any class of voting stock in Borrower or (B) if the outstanding voting stock in Borrower is held by 100 or more shareholders, one or more transfers by a single transferor within a 12-month period affecting an aggregate of 5% or more of that stock;
  - (vi) If Borrower is a trust, (A) a Transfer of any beneficial interest in Borrower which would cause the Initial Owners to own less than a Controlling Interest of all the beneficial interests in Borrower, or (B) the termination or revocation of the trust, or (C) the removal, appointment or substitution of a trustee of Borrower; and
  - (vii) a Transfer of any interest in a Controlling Entity which, if such Controlling Entity were Borrower, would result in an Event of Default under any of Sections 21(a)(i) through (vi) above.

Lender shall not be required to demonstrate any actual impairment of its security or any increased risk of default in order to exercise any of its remedies with respect to an Event of Default under this Section 21.

(f) Lender shall not unreasonably withhold or delay its consent, *one time only*, to a Transfer that would otherwise violate this Section 21 if, prior to the Transfer, Borrower has satisfied each of the following requirements:

- (i) the submission to Lender in writing of all information required by Lender to make the determination required by this Section 21(f), which written submission shall be made at least sixty (60) days before the date of the proposed Transfer;
- (ii) the absence of any Event of Default;
- (iii) the transferee (A) is a qualified member of Lender and otherwise meets all of the eligibility, credit, management and other standards (including but not limited to any standards with respect to previous relationships between Lender and the transferee and the organization of the transferee) customarily applied by Lender at the time of the proposed Transfer to the approval of borrowers in connection with the origination or purchase of similar mortgages on similar properties; and (B) the transferee's organization, credit and experience in the management of similar properties are deemed by the Lender, in its discretion, to be appropriate to the overall structure and documentation of the existing financing;
- (iv) the Mortgaged Property, at the time of the proposed Transfer, meets all standards as to its physical condition, occupancy, net operating income and the collection of reserves that are customarily applied by Lender at the time of the proposed Transfer to the approval of properties in connection with the origination or purchase of similar mortgages on similar properties;
- (v) the loan to value ratio at the time of the proposed Transfer is 75% or less ("loan to value ratio" means the ratio of (A) the outstanding principal balance of the indebtedness to (B) the value of the Mortgaged Property, as determined by Lender, expressed as a percentage);





3367872  
63/28/2866  
14 of 25

- (vi) the debt service coverage ratio for the last twelve full months preceding the proposed Transfer was 1.25 or more ("debt service coverage ratio" means the ratio of (A) the annual net operating income from the Mortgaged Property's operations during that month which is available for repayment of debt, after deducting operating expenses and reasonable reserves, to (B) the annual principal and interest payable under the Note);
- (vii) in the case of a Transfer of all or any part of the Mortgaged Property, (A) the execution by the transferee Lender's then-standard assumption agreement that, among other things, requires the transferee to perform all obligations of Borrower set forth in the Note, this Instrument and any other Loan Documents, and may require that the transferee comply with any provisions of this Instrument or any other Loan Document which previously may have been waived by Lender, and (B) if Lender requires, the transferee causes one or more individuals or entities acceptable to Lender to execute and deliver to Lender a guaranty in a form acceptable to Lender, and (C) the transferee executes such additional Collateral Agreements as Lender may require;
- (viii) in the case of a Transfer of any Interest in a Controlling Entity, if a guaranty has been executed and delivered in connection with the Note, this Instrument or any of the other Loan Documents, the Borrower causes one or more individuals or entities acceptable to Lender to execute and deliver to Lender a guaranty in a form acceptable to Lender;
- (ix) Execution of such documents by Borrower, the proposed transferee, and guarantors, if any, as Lender may require (which documentation shall affirm that Lender's approval of the proposed transfer shall not relieve or release Borrower or any guarantor from liability under the Note and this Instrument);
- (x) Receipt of such title policy endorsements and/or other title assurances, if any, as Lender may require in its discretion; and
- (xi) Lender's receipt of all of the following:
  - (A) a nonrefundable review fee in the amount of \$500.00;
  - (B) a transfer fee in an amount equal to 1% of the unpaid principal balance of the Indebtedness immediately before the applicable Transfer; and
  - (C) the amount of Lender's out-of-pocket costs (including reasonable attorneys' fees) incurred in reviewing the Transfer request.

**22. EVENTS OF DEFAULT.** The occurrence of any one or more of the following shall constitute an Event of Default under this Instrument:

- (a) any failure by Borrower to pay or deposit when due any amount required by the Note, this Instrument or any other Loan Document;
- (b) any failure by Borrower to maintain the insurance coverage required by Section 19;
- (c) [Intentionally Omitted.]
- (d) fraud or material misrepresentation or material omission by Borrower, any of its officers, directors, trustees, general partners or managers or any guarantor in connection with (A) the application for or creation of the Indebtedness, (B) any financial statement, rent roll, or other report or information provided to Lender during the term of the Indebtedness, or (C) any request for Lender's consent to any proposed action, including a request for disbursement of funds under any Collateral Agreement;
- (e) any Event of Default under Section 21;
- (f) the commencement of a forfeiture action or proceeding, whether civil or criminal, which, in Lender's reasonable judgment, could result in a forfeiture of the Mortgaged Property or otherwise materially impair the lien created by this Instrument or Lender's interest in the Mortgaged Property;
- (g) any failure by Borrower to perform any of its obligations under this Instrument (other than those specified in Sections 22(a) through (f)), as and when required, which continues for a period of 30 days after notice of such failure by Lender to Borrower. However, no such notice or grace period shall apply in the case of any such failure which could, in Lender's judgment, absent immediate exercise by Lender of a right or remedy under this Instrument, result in harm to Lender, impairment of the Note or this Instrument or any other security given under any other Loan Document;
- (h) any failure by Borrower to perform any of its obligations as and when required under any Loan Document other than this Instrument which continues beyond the applicable cure period, if any, specified in that Loan Document;
- (i) any exercise by the holder of any debt instrument secured by a mortgage, deed of trust or deed to secure debt on the Mortgaged Property of a right to declare all amounts due under that debt instrument immediately due and payable;
- (j) Borrower makes a general assignment for the benefit of creditors, voluntarily files for bankruptcy protection under the United States Bankruptcy Code or voluntarily becomes subject to any reorganization, receivership, insolvency proceeding or other similar proceeding pursuant to any other federal or state law affecting debtor and creditor rights, or an



3367872  
03/28/2006  
15 of 25

Involuntary case is commenced against Borrower by any creditor (other than Lender) of Borrower pursuant to the United States Bankruptcy Code or other federal or state law affecting debtor and creditor rights and is not dismissed or discharged within 60 days after filing; and

(k) Borrower (if Borrower is a natural person) or any general partner or trustee or guarantor who is a natural person dies, or becomes incompetent, or purports to revoke or dispute the validity of, or liability under, any of the Loan Documents or any guaranty; provided, however, that in the event of a death, Lender, in its sole, absolute and unfettered discretion, may permit the deceased Borrower's, general partner's, or guarantor's estate or the successor trustee or beneficiaries of the trust to assume unconditionally the obligations of such deceased person under the Loan Documents and/or guaranty, in a manner satisfactory to Lender, and, in doing so, cure such Event of Default.

23. **REMEDIES CUMULATIVE.** Each right and remedy provided in this Instrument is distinct from all other rights or remedies under this Instrument or any other Loan Document or afforded by applicable law, and each shall be cumulative and may be exercised concurrently, independently, or successively, in any order.

24. **FORBEARANCE.**

(a) Lender may (but shall not be obligated to) agree with Borrower, from time to time, and without giving notice to, or obtaining the consent of, or having any effect upon the obligations of, any guarantor or other third party obligor, to take any of the following actions: extend the time for payment of all or any part of the Indebtedness; reduce the payments due under this Instrument, the Note, or any other Loan Document; release anyone liable for the payment of any amounts under this Instrument, the Note, or any other Loan Document; accept a renewal of the Note; modify the terms and time of payment of the Indebtedness; join in any extension or subordination agreement; release any Mortgaged Property; take or release other or additional security; modify the rate of interest or period of amortization of the Note or change the amount of the monthly installments payable under the Note; and otherwise modify this Instrument, the Note, or any other Loan Document.

(b) Any forbearance by Lender in exercising any right or remedy under the Note, this Instrument, or any other Loan Document or otherwise afforded by applicable law, shall not be a waiver of or preclude the exercise of any right or remedy. The acceptance by Lender of payment of all or any part of the Indebtedness after the due date of such payment, or in an amount which is less than the required payment, shall not be a waiver of Lender's right to require prompt payment when due of all other payments on account of the Indebtedness or to exercise any remedies for any failure to make prompt payment. Enforcement by Lender of any security for the Indebtedness shall not constitute an election by Lender of remedies so as to preclude the exercise of any other right available to Lender. Lender's receipt of any awards or proceeds under Sections 19 and 20 shall not operate to cure or waive any Event of Default.

25. **LOAN CHARGES.** If any applicable law limiting the amount of interest or other charges permitted to be collected from Borrower is interpreted so that any charge provided for in any Loan Document, whether considered separately or together with other charges levied in connection with any other Loan Document, violates that law, and Borrower is entitled to the benefit of that law, that charge is hereby reduced to the extent necessary to eliminate that violation. The amounts, if any, previously paid to Lender in excess of the permitted amounts shall be applied by Lender to reduce the principal of the Indebtedness. For the purpose of determining whether any applicable law limiting the amount of interest or other charges permitted to be collected from Borrower has been violated, all Indebtedness which constitutes interest, as well as all other charges levied in connection with the Indebtedness which constitute interest, shall be deemed to be allocated and spread over the stated term of the Note. Unless otherwise required by applicable law, such allocation and spreading shall be effected in such a manner that the rate of interest so computed is uniform throughout the stated term of the Note.

26. **WAIVER OF STATUTE OF LIMITATIONS.** Borrower hereby waives the right to assert any statute of limitations as a bar to the enforcement of the lien of this Instrument or to any action brought to enforce any Loan Document.

27. **WAIVER OF MARSHALLING.** Notwithstanding the existence of any other security interests in the Mortgaged Property held by Lender or by any other party, Lender shall have the right to determine the order in which any or all of the Mortgaged Property shall be subjected to the remedies provided in this Instrument, the Note, any other Loan Document or applicable law. Lender shall have the right to determine the order in which any or all portions of the Indebtedness are satisfied from the proceeds realized upon the exercise of such remedies. Borrower and any party who now or in the future acquires a security interest in the Mortgaged Property and who has actual or constructive notice of this Instrument waives any and all right to require the marshalling of assets or to require that any of the Mortgaged Property be sold in the inverse order of alienation or that any of the Mortgaged Property be sold in parcels or as an entirety in connection with the exercise of any of the remedies permitted by applicable law or provided in this Instrument.

28. **FURTHER ASSURANCES.** Borrower shall execute, acknowledge, and deliver, at its sole cost and expense, all further acts, deeds, conveyances, assignments, estoppel certificates, financing statements, transfers and assurances as Lender may require from time to time in order to better assure, grant, and convey to Lender the rights intended to be granted, now or in the future, to Lender under this Instrument and the Loan Documents.

29. **ESTOPPEL CERTIFICATE.** Within 10 days after a request from Lender, Borrower shall deliver to Lender a written statement, signed and acknowledged by Borrower, certifying to Lender or any person designated by Lender, as of the



date of such statement, (i) that the Loan Documents are unmodified and in full force and effect (or, if there have been modifications, that the Loan Documents are in full force and effect as modified and setting forth such modifications); (ii) the unpaid principal balance of the Note; (iii) the date to which interest under the Note has been paid; (iv) that Borrower is not in default in paying the Indebtedness or in performing or observing any of the covenants or agreements contained in this Instrument or any of the other Loan Documents (or, if the Borrower is in default, describing such default in reasonable detail); (v) whether or not there are then existing any setoffs or defenses known to Borrower against the enforcement of any right or remedy of Lender under the Loan Documents; and (vi) any additional facts requested by Lender.

**30. GOVERNING LAW; CONSENT TO JURISDICTION AND VENUE.**

(a) This Instrument, and any Loan Document which does not itself expressly identify the law that is to apply to it, shall be governed by the laws of the jurisdiction in which the Land is located (the "Property Jurisdiction").

(b) Borrower agrees that any controversy arising under or in relation to the Note, this Instrument, or any other Loan Document shall be litigated exclusively in the Property Jurisdiction. The state and federal courts and authorities with jurisdiction in the Property Jurisdiction shall have exclusive jurisdiction over all controversies which shall arise under or in relation to the Note, any security for the Indebtedness, or any other Loan Document. Borrower irrevocably consents to service, jurisdiction, and venue of such courts for any such litigation and waives any other venue to which it might be entitled by virtue of domicile, habitual residence or otherwise.

**31. NOTICE.**

(a) All notices, demands and other communications ("notice") under or concerning this Instrument shall be in writing. Each notice addressed to the intended recipient at its address set forth in page one of this Instrument (i.e., if to Lender at: TELESIS COMMUNITY CREDIT UNION, a California state chartered credit union, whose address is c/o Business Partners, LLC, 9301 Winnetka Avenue, Chatsworth, CA 91311, Attn: Commercial Loan Department; if to Borrower at: OVERLAND DEVELOPMENT CORPORATION, INC., a California corporation, and LARRY J. WILLARD, 17 5 E. Main Avenue, Suite 130, Morgan Hill, CA 95037), and shall be deemed given on the earliest to occur of (1) the date when the notice is received by the addressee; (2) the first Business Day after the notice is delivered to a recognized overnight courier service, with arrangements made for payment of charges for next Business Day delivery; or (3) the third Business Day after the notice is deposited in the United States mail with postage prepaid, certified mail, return receipt requested. As used in this Section 31, the term "Business Day" means any day other than a Saturday, a Sunday or any other day on which Lender is not open for business.

(b) Any party to this Instrument may change the address to which notices intended for it are to be directed by means of notice given to the other party in accordance with this Section 31. Each party agrees that it will not refuse or reject delivery of any notice given in accordance with this Section 31, that it will acknowledge, in writing, the receipt of any notice upon request by the other party and that any notice rejected or refused by it shall be deemed for purposes of this Section 31 to have been received by the rejecting party on the date so refused or rejected, as conclusively established by the records of the U.S. Postal Service or the courier service.

(c) Any notice under the Note and any other Loan Document which does not specify how notices are to be given shall be given in accordance with this Section 31.

**32. SALE OF NOTE; CHANGE IN SERVICER.** The Note or a partial interest in the Note (together with this Instrument and the other Loan Documents) may be sold one or more times without prior notice to Borrower. A sale may result in a change of the Loan Servicer. There also may be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given notice of the change.

**33. [Intentionally Omitted.]**

**34. SUCCESSORS AND ASSIGNS BOUND.** This Instrument shall bind, and the rights granted by this Instrument shall inure to, the respective successors and assigns of Lender and Borrower. However, a Transfer not permitted by Section 21 shall be an Event of Default.

**35. JOINT AND SEVERAL LIABILITY.** If more than one person or entity signs this Instrument as Borrower, the obligations of such persons and entities under this Instrument, the Note and other Loan Documents shall be joint and several.

**36. RELATIONSHIP OF PARTIES; NO THIRD PARTY BENEFICIARY.**

(a) The relationship between Lender and Borrower shall be solely that of creditor and debtor, respectively, and nothing contained in this Instrument shall create any other relationship between Lender and Borrower.

(b) No creditor of any party to this Instrument and no other person shall be a third party beneficiary of this Instrument or any other Loan Document. Without limiting the generality of the preceding sentence, (1) any arrangement (a "Servicing Arrangement") between the Lender and any Loan Servicer for loss sharing or interim advancement of funds shall constitute a contractual obligation of such Loan Servicer that is independent of the obligation of Borrower for the payment of the Indebtedness, (2) Borrower shall not be a third party beneficiary of any Servicing Arrangement, and (3) no payment by the Loan Servicer under any Servicing Arrangement will reduce the amount of the Indebtedness.





3367872  
83/28/2886  
17 of 25

37. **SEVERABILITY; ENTIRE AGREEMENT; AMENDMENTS.** The parties intend that the provisions of this Instrument and all other Loan Documents shall be legally severable. If any term or provision of this Instrument, or any other Loan Document, to any extent, be determined by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Instrument or of such other Loan Document shall not be affected thereby, and each term and provision shall be valid and be enforceable to the fullest extent permitted by law. This Instrument contains the entire agreement among the parties as to the rights granted and the obligations assumed in this Instrument. This Instrument may not be amended or modified except by a writing signed by the party against whom enforcement is sought.

38. **CONSTRUCTION.** The captions and headings of the sections of this Instrument are for convenience only and shall be disregarded in construing this Instrument. Any reference in this Instrument to an "Exhibit" or a "Section" shall, unless otherwise explicitly provided, be construed as referring, respectively, to an Exhibit attached to this Instrument or to a Section of this Instrument. All Exhibits attached to or referred to in this Instrument are incorporated by reference into this Instrument. Any reference in this Instrument to a statute or regulation shall be construed as referring to that statute or regulation as amended from time to time. Use of the singular in this Agreement includes the plural and use of the plural includes the singular. As used in this Instrument, the term "including" means "including, but not limited to."

39. **LOAN SERVICING.** All actions regarding the servicing of the loan evidenced by the Note, including the collection of payments, the giving and receipt of notice, inspections of the Property, inspections of books and records, and the granting of consents and approvals, may be taken by the Loan Servicer unless Borrower receives notice to the contrary. If Borrower receives conflicting notices regarding the identity of the Loan Servicer or any other subject, any such notice from Lender shall govern.

40. **DISCLOSURE OF INFORMATION.** Lender may furnish information regarding Borrower or the Mortgaged Property to third parties with an existing or prospective interest in the servicing, enforcement, evaluation, performance, purchase or securitization of the Indebtedness, including but not limited to trustees, master servicers, special servicers, rating agencies, and organizations maintaining databases on the underwriting and performance of similar mortgage loans. Borrower irrevocably waives any and all rights it may have under applicable law to prohibit such disclosure, including but not limited to any right of privacy.

41. **NO CHANGE IN FACTS OR CIRCUMSTANCES.** All information in the application for the loan submitted to Lender (the "Loan Application") and in all financial statements, rent rolls, reports, certificates and other documents submitted in connection with the Loan Application are complete and accurate in all material respects. There has been no material adverse change in any fact or circumstance that would make any such information incomplete or inaccurate.

42. **SUBROGATION.** If, and to the extent that, the proceeds of the loan evidenced by the Note are used to pay, satisfy or discharge any obligation of Borrower for the payment of money that is secured by a pre-existing mortgage, deed of trust or other lien encumbering the Mortgaged Property (a "Prior Lien"), such loan proceeds shall be deemed to have been advanced by Lender at Borrower's request, and Lender shall automatically, and without further action on its part, be subrogated to the rights, including lien priority, of the owner or holder of the obligation secured by the Prior Lien, whether or not the Prior Lien is released.

43. [Intentionally Omitted.]

44. **ACCELERATION; REMEDIES.** At any time during the existence of an Event of Default, Lender, at Lender's option, may declare the Indebtedness to be immediately due and payable without further demand, and may invoke the power of sale and any other remedies permitted by applicable law or provided in this Instrument or in any other Loan Document. Borrower acknowledges that the power of sale granted in this Instrument may be exercised by Lender without prior judicial hearing. Borrower has the right to bring an action to assert the non-existence of an Event of Default or any other defense of Borrower to acceleration and sale. Lender shall be entitled to collect all costs and expenses incurred in pursuing such remedies, including attorneys' fees, costs of documentary evidence, abstracts and title reports.

If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute a written notice of the occurrence of an Event of Default and of Lender's election to cause the Mortgaged Property to be sold and shall cause such notice to be recorded in each county in which the Mortgaged Property is located. Lender shall give notice of default in the manner provided by the laws of Nevada to Borrower and to such other persons as the laws of Nevada prescribe. Trustee shall give notice of sale and Trustee shall sell the Mortgaged Property according to the laws of Nevada. Trustee may sell the Mortgaged Property at the time and place and under the terms designated in the notice of sale in one or more parcels and in such order as Trustee may determine. Trustee may postpone sale of all or any part of the Mortgaged Property by public announcement at the time and place of any previously scheduled sale. Lender or Lender's designee may purchase the Mortgaged Property at any sale.

Trustee shall deliver to the purchaser at the sale, within a reasonable time after the sale, a deed conveying the Mortgaged Property so sold without any covenant or warranty, express or implied. The recitals in Trustee's deed shall be prime facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all costs and expenses of the sale, including Trustee's fees not to exceed 5% of the gross sales price, attorneys' fees and



3367672  
83/28/2886  
18 of 25

costs of title evidence; (b) to the Indebtedness in such order as Lender, in Lender's discretion, directs; and (c) the excess, if any, to the person or persons legally entitled thereto.

45. **RECONVEYANCE.** Upon payment of the Indebtedness, Lender shall request Trustee to reconvey the Mortgaged Property and shall surrender this Instrument and the Note to Trustee. Trustee shall reconvey the Mortgaged Property without warranty to the person or persons legally entitled thereto. Such person or persons shall pay Trustee's reasonable costs incurred in so reconveying the Mortgaged Property.

46. **SUBSTITUTE TRUSTEE.** Lender, at Lender's option, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed under this Instrument. Without conveyance of the Mortgaged Property, the successor trustee shall succeed to all the title, power and duties conferred upon the Trustee herein and by applicable law.

47. **WAIVER OF HOMESTEAD.** Borrower waives all right of homestead exemption in the Mortgaged Property.

48. **RECOMMENDATION OF RECEIVER.** Lender shall have the right to recommend to the court the person to be appointed as receiver pursuant to Section 3 or Section 4.

49. **INTERPRETATION.** It is the intention of Borrower and Lender that if any provision of this Instrument or any other Loan Document is capable of two (2) constructions, one of which would render the provision void, and the other of which would render the provision valid, then the provision shall have the meaning which renders it valid. Borrower acknowledges that Lender has attempted in good faith to assure that this Instrument, the Note and all other Loan Documents are in compliance with applicable laws of the Property Jurisdiction and federal laws. Nevertheless, in the event that any provision of this Instrument, the Note or any other Loan Document is not in compliance with any such laws, then the non-complying provision shall be deemed to be deleted or modified to the extent necessary to assure legal compliance. Similarly, in the event any language or disclosure required by applicable laws of the Property Jurisdiction is not contained in the Loan Documents, then the Loan Documents shall be deemed to have been supplemented to add such language or disclosure, or, at Lender's option, Lender may provide such additional language or disclosure. In either event, such legal requirement shall thereby be satisfied and such noncompliance shall be deemed to have been cured for all purposes. Within ten (10) days after written request by Lender, Borrower agrees to execute such documentation as Lender may require to cure any legal compliance issues or deficiencies in the Loan Documents.

50. **FUTURE ADVANCES.** In addition to the Indebtedness, this Instrument shall (to the extent allowed by applicable law) also secure payment of the principal, interest and other charges due on all other future loans or advances made by Lender to Borrower (or any successor in interest to Borrower as the owner of all or any part of the Mortgaged Property) when the promissory note evidencing such loan or advance specifically states that it is secured by this Instrument ("Future Advances"), including all extensions, renewals and modifications of any such Future Advances.

51. **AGREEMENT TO PROVIDE ADDITIONAL DOCUMENTS.** Borrower agrees to execute and acknowledge such additional documents as may be necessary or desirable in order to carry out the intent and purpose of this Instrument and the other Loan Documents, to confirm or establish the lien hereof, or to correct any clerical errors or legal deficiencies. Without limiting the foregoing, Borrower agrees to execute a replacement Note in the event the Note is lost or destroyed and to execute an amended and restated substitute Note to correct any clerical or other errors which may be discovered in the original Note. Failure of Borrower to comply with any request by Lender pursuant to this Section or under Section 28 above within ten (10) days after written request by Lender shall constitute a material Event of Default hereunder.

52. **EXECUTION IN COUNTERPARTS.** This Instrument may be executed in multiple counterparts, and the separate signature pages and notary acknowledgments may then be combined into a single original document for recordation.

53. **PAYMENT OF CLOSING COSTS.** If for any reason the escrow or closing agent fails to reserve and pay for all of Lender's fees, legal, documentation, appraisal, title, recording and other closing costs incurred in connection with the closing and funding of the Loan, then Borrower shall pay or reimburse Lender for any such unpaid fees or costs within ten (10) days after written demand by Lender itemizing the unpaid fees and costs. Failure of Borrower to so pay or reimburse Lender for any such unpaid fees and costs within ten (10) days after written demand by Lender shall constitute an Event of Default and, without limiting any other remedies of Lender, Lender may immediately instate the Default Rate under the Note until such amounts are received by Lender.

[The balance of this page is intentionally left blank.]



3367872  
03/28/2009  
19 of 25

54. **ADDITIONAL NEVADA LAW COVENANTS.** When not inconsistent with the other terms of this Instrument, covenant numbers 1, 2 (full replacement value), 3, 4 (Note rate), 5, 6, 7 (a reasonable percentage), 8, and 9 of NRS Section 107.030 are hereby adopted and made a part of this Instrument. The power of sale under this Instrument shall not be exhausted by any one or more sales (or attempts to sell) as to all or any portion of the Mortgaged Property remaining unsold, but shall continue unimpaired until all of the Mortgaged Property has been sold by exercise of the power of sale herein contained and all indebtedness of Borrower to Lender under this Instrument, the Note or other Loan Documents has been paid in full, in money as defined in NRS 104.1201(24).

55. [Intentionally Deleted]

56. **WAIVER OF TRIAL BY JURY.** BORROWER AND LENDER EACH (A) COVENANTS AND AGREES NOT TO ELECT A TRIAL BY JURY WITH RESPECT TO ANY ISSUE ARISING OUT OF THIS INSTRUMENT OR THE RELATIONSHIP BETWEEN THE PARTIES AS BORROWER AND LENDER THAT IS TRIABLE OF RIGHT BY A JURY AND (B) WAIVES ANY RIGHT TO TRIAL BY JURY WITH RESPECT TO SUCH ISSUE TO THE EXTENT THAT ANY SUCH RIGHT EXISTS NOW OR IN THE FUTURE. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS SEPARATELY GIVEN BY EACH PARTY, KNOWINGLY AND VOLUNTARILY WITH THE BENEFIT OF COMPETENT LEGAL COUNSEL.

**ATTACHED EXHIBIT.** The following Exhibit is attached to this Instrument:

Exhibit "A" Description of the Land


THIS DEED OF TRUST SECURES A FIXED RATE PROMISSORY NOTE. THIS DEED OF TRUST IS A FIRST DEED OF TRUST. NO FURTHER ENCUMBRANCES MAY BE RECORDED AGAINST THE REAL PROPERTY WITHOUT THE PRIOR WRITTEN CONSENT OF LENDER. FAILURE TO COMPLY WITH THIS PROVISION SHALL CONSTITUTE AN EVENT OF DEFAULT AND AT THE LENDER'S OPTION THE LOAN SHALL IMMEDIATELY BECOME DUE AND PAYABLE. CONSENT TO ONE FURTHER ENCUMBRANCE SHALL NOT BE DEEMED TO BE A WAIVER OF THE RIGHT TO REQUIRE SUCH CONSENT TO FUTURE OR SUCCESSIVE ENCUMBRANCES.

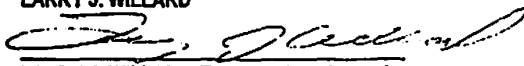
IN WITNESS WHEREOF, Borrower and Fee Owner have signed and delivered this Instrument or have caused this Instrument to be signed and delivered by their duly authorized representatives.

**BORROWER:**

OVERLAND DEVELOPMENT CORPORATION, INC.,  
a California corporation

By   
LARRY J. WILLARD, President

  
LARRY J. WILLARD

  
LARRY J. WILLARD, Trustee of the Larry James  
Willard Trust dated November 14, 1987


**FEE OWNER:**

OVERLAND DEVELOPMENT CORPORATION, INC.,  
a California corporation

By   
LARRY J. WILLARD, President



3367872  
83/28/2866  
28 of 25



LARRY J. WILLARD, Trustee of the Larry  
James Willard Trust dated November 14, 1987



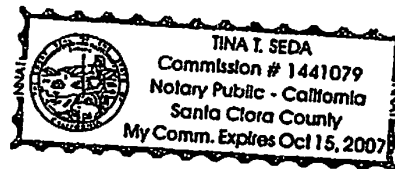
3367872  
03/28/2006  
21 of 25

State of California,  
County of Santa Clara, ss.

This instrument was acknowledged before me on this the 16<sup>th</sup> day  
of March, 2006, by LARRY J. WILLARD, as  
President of OVERLAND DEVELOPMENT CORPORATION, INC.

Tina T. Seda

Signature of Notary Public



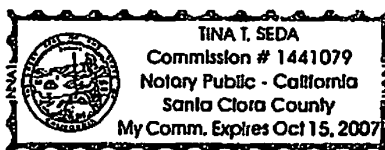


State of California  
County of Santa Clara ss.

This instrument was acknowledged before me on this the 16<sup>th</sup> day  
of March, 2006, by LARRY J. WILLARD

Tina T. Seda

Signature of Notary Public



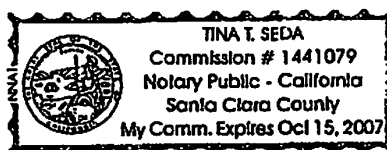


State of California  
County of Santa Clara ss.

This instrument was acknowledged before me on this the 16 day  
of March, 2006, by LARRY J. WILLARD,  
Trustee of the Larry James Willard Trust dated November 14,  
1987

Tina T. Seda

Signature of Notary Public







3367872  
93/28/2896  
24 of 25

STATE OF CALIFORNIA } S.S.  
COUNTY OF Santa Clara

On March 16<sup>th</sup>, 2006 before me,

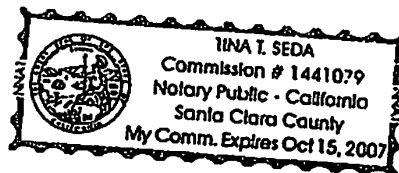
Tina T. Seda  
a Notary Public, personally appeared

Larry J. Willard

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.

Signature Tina T Seda



(This area for official notarial seal)



3367872  
83/28/2886  
25 of 25

**EXHIBIT "A"**  
**DESCRIPTION OF THE LAND**

THE LAND REFERRED TO HEREIN IS SITUATED IN THE COUNTY OF WASHOE, STATE OF NEVADA, AND IS DESCRIBED AS FOLLOWS:

**PARCEL 1:**

THE LAND REFERRED TO HEREIN SITUATED IN THE CITY OF RENO, COUNTY OF WASHOE, STATE OF NEVADA, LOCATED WITHIN A PORTION OF THE SOUTH 1/2 OF THE NORTHWEST 1/4 OF SECTION 6, TOWNSHIP 18N., RANGE 20E., M.D.M., AND BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE SOUTH CORNER OF PARCEL "C" A FOUND NAIL AND TAG ON A FENCE POST, AS SHOWN ON PARCEL MAP NO. 218, FILE NO. 388954, AS ON FILE IN THE COUNTY RECORDER'S OFFICE OF WASHOE COUNTY, NEVADA; THENCE NORTH 00°16'56" EAST A DISTANCE OF 579.25 FEET TO THE NORTHERLY SIDE OF LONGLEY LANE;

THENCE ALONG SAID NORTHERLY LINE SOUTH 69°21'09" W., A DISTANCE OF 21.41 FEET TO THE TRUE POINT OF BEGINNING;

THENCE LEAVING SAID NORTHERLY LINE OF LONGLEY LANE NORTH 00°16'56" EAST, A DISTANCE OF 406.67 FEET;

THENCE SOUTH 89°40'18" EAST, A DISTANCE OF 275.76 FEET TO THE WESTERLY SIDE OF SOUTH VIRGINIA STREET AND THE NORTHEASTERLY CORNER OF THE PARCEL OF LAND AS SHOWN ON RECORD OF SURVEY MAP NO. 2887, FILE NO. 1902006, ON FILE IN THE COUNTY RECORDER'S OFFICE OF WASHOE COUNTY, NEVADA;

THENCE ALONG SAID WESTERLY LINE OF SOUTH VIRGINIA STREET SOUTH 20°39'19" EAST A DISTANCE 221.13 FEET TO THE BEGINNING OF A CURVE TO THE RIGHT;

THENCE ALONG SAID CURVE A DISTANCE OF 94.26 FEET, A CENTRAL ANGLE OF 90°00'28" AND A RADIUS OF 60.00 FEET TO THE NORTHERLY SIDE OF SAID LONGLEY LANE;

THENCE ALONG SAID NORTHERLY LINE OF LONGLEY LANE SOUTH 69°21'19" WEST A DISTANCE OF 342.78 FEET TO THE TRUE POINT OF BEGINNING.

**PARCEL 2:**

A NON-EXCLUSIVE EASEMENT FOR INGRESS, EGRESS AND ACCESS BY AND FOR VEHICULAR AND PEDESTRIAN TRAFFIC AND VEHICLE PARKING AS SET FORTH IN THAT CERTAIN MUTUAL PARKING AND ACCESS AGREEMENT RECORDED APRIL 12, 1995 IN BOOK 4282, PAGE 40 AS INSTRUMENT NO. 1885230 OF OFFICIAL RECORDS, WASHOE COUNTY RECORDER'S OFFICE, WASHOE COUNTY, NEVADA.

PROPERTY ADDRESS: 7695 & 7699 South Virginia Street, Reno, Nevada 89511

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,

NO. 77780

Appellants,

vs.

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

Respondents.

---

**APPENDIX TO APPELLANTS' OPENING BRIEFS**

**VOLUME 6 OF 19**

Submitted for all appellants by:

ROBERT L. EISENBERG (SBN 950)  
LEMONS, GRUNDY & EISENBERG  
6005 Plumas Street, Third Floor  
Reno, NV 89519  
775-786-6868

RICHARD D. WILLIAMSON (SBN 1001)  
JONATHAN TEW (SBN 9932)  
ROBERTSON, JOHNSON, MILLER & WILLIAMSON  
50 West Liberty Street, Suite 600  
Reno, NV 89501  
775-329-5600

ATTORNEYS FOR APPELLANTS  
LARRY J. WILLARD, et al.

**CHRONOLOGICAL INDEX TO APPELLANTS' APPENDIX**

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>  | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|---|--------------------|--------------------|------------------------|
| 1.                | Complaint   | 08/08/14           | 1                  | 1-20                   |
|                   | Exhibit 1: Lease Agreement<br>(November 18, 2005)                             |                    | 1                  | 21-56                  |
|                   | Exhibit 2: Herbst Offer Letter  |                    | 1                  | 57-72                  |
|                   | Exhibit 3: Herbst Guaranty  |                    | 1                  | 73-78                  |
|                   | Exhibit 4: Lease Agreement<br>(Dec. 2005)                                     |                    | 1                  | 79-84                  |
|                   | Exhibit 5: Interim Operating<br>Agreement (March 2007)                        |                    | 1                  | 85-87                  |
|                   | Exhibit 6: Lease Agreement<br>(Dec. 2, 2005)                                  |                    | 1                  | 88-116                 |
|                   | Exhibit 7: Lease Agreement<br>(June 6, 2006)                                  |                    | 1                  | 117-152                |
|                   | Exhibit 8: Herbst Guaranty<br>(March 2007) Hwy 50                             |                    | 1                  | 153-158                |
|                   | Exhibit 9: Herbst Guaranty<br>(March 12, 2007)                                |                    | 1                  | 159-164                |
|                   | Exhibit 10: First Amendment to<br>Lease Agreement (Mar. 12, 2007)<br>(Hwy 50) |                    | 1                  | 165-172                |
|                   | Exhibit 11: First Amendment to<br>Lease Agreement (Mar. 12, 2007)             |                    | 1                  | 173-180                |
|                   | Exhibit 12: Gordon Silver Letter<br>dated March 18, 2013                      |                    | 1                  | 181-184                |
|                   | Exhibit 13: Gordon Silver Letter<br>dated March 28, 2013                      |                    | 1                  | 185-187                |
| 2.                | Acceptance of Service   | 09/05/14           | 1                  | 188-189                |
| 3.                | Answer to Complaint   | 10/06/14           | 1                  | 190-201                |
| 4.                | Motion to Associate Counsel<br>- Brian P. Moquin, Esq.                        | 10/28/14           | 1                  | 202-206                |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>  | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|---|--------------------|--------------------|------------------------|
| (cont 4)          | Exhibit 1: Verified Application for Association of Counsel Under Nevada Supreme Court Rule 42                       |                    | 1                  | 207-214                |
|                   | Exhibit 2: The State Bar of California's Certificate of Standing  |                    | 1                  | 215-216                |
|                   | Exhibit 3: State Bar of Nevada Statement Pursuant to Supreme Court Rule 42(3)(b)                                    |                    | 1                  | 217-219                |
| 5.                | Pretrial Order  | 11/10/14           | 1                  | 220-229                |
| 6.                | Order Admitting Brain P. Moquin Esq. to Practice  | 11/13/14           | 1                  | 230-231                |
| 7.                | Verified First Amended Complaint  | 01/21/15           | 2                  | 232-249                |
| 8.                | Answer to Amended Complaint   | 02/02/15           | 2                  | 250-259                |
| 9.                | Amended Answer to Amended Complaint and Counterclaim  | 04/21/15           | 2                  | 260-273                |
| 10.               | Errata to Amended Answer to Amended Complaint and Counterclaim  | 04/23/15           | 2                  | 274-277                |
|                   | Exhibit 1: Defendants' Amended Answer to Plaintiffs' Amended Complaint and Counterclaim                             |                    | 2                  | 278-293                |
|                   | Exhibit 1: Operation Agreement  |                    | 2                  | 294-298                |
| 11.               | Plaintiffs Larry J. Willard and Overland Development Corporation's Answer to Defendants' Counterclaim               | 05/27/15           | 2                  | 299-307                |
| 12.               | Motion for Contempt Pursuant to NRCP 45(e) and Motion for Sanctions Against Plaintiffs' Counsel Pursuant to NRCP 37 | 07/24/15           | 2                  | 308-316                |
|                   | Exhibit 1: Declaration of Brian R. Irvine   |                    | 2                  | 317-320                |
|                   | Exhibit 2: Subpoena Duces Tecum to Dan Gluhaich   |                    | 2                  | 321-337                |
|                   | Exhibit 3: June 11, 2015, Email Exchange  |                    | 2                  | 338-340                |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>   | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|--|--------------------|--------------------|------------------------|
| (cont 12)         | Exhibit 4: June 29, 2015, Email<br>Attaching the Subpoena, a form for<br>acceptance of service, and a cover<br>letter listing the deadlines to respond |                    | 2                  | 341-364                |
|                   | Exhibit 5: June 29, 2015, Email<br>Exchange  |                    | 2                  | 365-370                |
|                   | Exhibit 6: July 17, 2015, Email<br>Exchange  |                    | 2                  | 371-375                |
|                   | Exhibit 7: July 20 and July 21, 2015<br>Email  |                    | 2                  | 376-378                |
|                   | Exhibit 8: July 23, 2015, Email  |                    | 2                  | 379-380                |
|                   | Exhibit 9: June 23, 2015, Email  |                    | 2                  | 381-382                |
| 13.               | Stipulation and Order to Continue<br>Trial (First Request)   | 09/03/15           | 2                  | 383-388                |
| 14.               | Stipulation and Order to Continue<br>Trial (Second Request)  | 05/02/16           | 2                  | 389-395                |
| 15.               | Defendants/Counterclaimants'<br>Motion for Partial Summary<br>Judgment   | 08/01/16           | 2                  | 396-422                |
|                   | Exhibit 1: Affidavit of Tim Herbst   |                    | 2                  | 423-427                |
|                   | Exhibit 2: Willard Lease   |                    | 2                  | 428-463                |
|                   | Exhibit 3: Willard Guaranty  |                    | 2                  | 464-468                |
|                   | Exhibit 4: Docket Sheet, Superior<br>Court of Santa Clara, Case No.<br>2013-CV-245021  |                    | 3                  | 469-480                |
|                   | Exhibit 5: Second Amended Motion<br>to Dismiss   |                    | 3                  | 481-498                |
|                   | Exhibit 6: Deposition Excerpts of<br>Larry Willard   |                    | 3                  | 499-509                |
|                   | Exhibit 7: 2014 Federal Tax Return for<br>Overland   |                    | 3                  | 510-521                |
|                   | Exhibit 8: 2014 Willard Federal Tax<br>Return – Redacted   |                    | 3                  | 522-547                |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>  | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|---|--------------------|--------------------|------------------------|
| (cont 15)         | Exhibit 9: Seller's Final Closing Statement                               |                    | 3                  | 549                    |
|                   | Exhibit 10: Highway 50 Lease  |                    | 3                  | 550-593                |
|                   | Exhibit 11: Highway 50 Guaranty   |                    | 3                  | 594-598                |
|                   | Exhibit 12: Willard Responses to Defendants' First Set of Interrogatories |                    | 3                  | 599-610                |
|                   | Exhibit 13: Baring Purchase and Sale Agreement                            |                    | 3                  | 611-633                |
|                   | Exhibit 14: Baring Lease  |                    | 3                  | 634-669                |
|                   | Exhibit 15: Baring Property Loan  |                    | 3                  | 670-705                |
|                   | Exhibit 16: Deposition Excerpts of Edward Wooley                          |                    | 3                  | 706-719                |
|                   | Exhibit 17: Assignment of Baring Lease                                    |                    | 4                  | 720-727                |
|                   | Exhibit 18: HUD Statement   |                    | 4                  | 728-730                |
|                   | Exhibit 19: November 2014 Email Exchange                                  |                    | 4                  | 731-740                |
|                   | Exhibit 20: January 2015 Email Exchange                                   |                    | 4                  | 741-746                |
|                   | Exhibit 21: IRS Publication 4681  |                    | 4                  | 747-763                |
|                   | Exhibit 22: Second Amendment to Baring Lease                              |                    | 4                  | 764-766                |
|                   | Exhibit 23: Wooley Responses to Second Set of Interrogatories             |                    | 4                  | 767-774                |
|                   | Exhibit 24: 2013 Overland Federal Income Tax Return                       |                    | 4                  | 775-789                |
|                   | Exhibit 25: Declaration of Brian Irvine                                   |                    | 4                  | 790-794                |
| 16.               | Affidavit of Brian P. Moquin  | 08/30/16           | 4                  | 795-797                |
| 17.               | Affidavit of Edward C. Wooley   | 08/30/16           | 4                  | 798-803                |
| 18.               | Affidavit of Larry J. Willard   | 08/30/16           | 4                  | 804-812                |



| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>   | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|--|--------------------|--------------------|------------------------|
| 19.               | Plaintiffs' Opposition to Defendants' Motion for Partial Summary Judgment  | 08/30/16           | 4                  | 813-843                |
|                   | Exhibit 1: <i>Purchase and Sale Agreement</i> dated July 1, 2005 for Purchase of the Highway 50 Property                                     |                    | 4                  | 844-857                |
|                   | Exhibit 2: <i>Lease Agreement</i> dated December 2, 2005 for the Highway 50 Property   |                    | 4                  | 858-901                |
|                   | Exhibit 3: <i>Three Year Adjustment Term Note</i> dated January 19, 2007 in the amount of \$2,200,00.00 for the Highway 50 Property          |                    | 4                  | 902-906                |
|                   | Exhibit 4: <i>Deed of Trust, Fixture Filing and Security Agreement</i> dated January 30, 2017, Inst. No. 363893, For the Highway 50 Property |                    | 4                  | 907-924                |
|                   | Exhibit 5: Letter and Attachments from Sujata Yalamanchili, Esq. to Landlords dated February 17, 2007 re Herbst Acquisition of BHI           |                    | 4                  | 925-940                |
|                   | Exhibit 6: <i>First Amendment to Lease Agreement</i> dated March 12, 2007 for the Highway 50 Property  |                    | 4                  | 941-948                |
|                   | Exhibit 7: <i>Guaranty Agreement</i> dated March 12, 2007 for the Highway 50 Property  |                    | 4                  | 949-953                |
|                   | Exhibit 8: <i>Second Amendment to Lease</i> dated June 29, 2011 for the Highway 50 Property  |                    | 4                  | 954-956                |
|                   | Exhibit 9: <i>Purchase and Sale Agreement</i> Dated July 14, 2006 for the Baring Property  |                    | 5                  | 957-979                |
|                   | Exhibit 10: <i>Lease Agreement</i> dated June 6, 2006 for the Baring Property  |                    | 5                  | 980-1015               |
|                   | Exhibit 11: <i>Five Year Adjustable Term Note</i> dated July 18, 2006 in the amount of \$2,100,00.00 for the Baring Property                 |                    | 5                  | 1016-1034              |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>   | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|--|--------------------|--------------------|------------------------|
| (cont 19)         | Exhibit 12: <i>Deed of Trust, Fixture Filing and Security Agreement</i> dated July 21, 2006, Doc. No. 3415811, for the Highway 50 Property   |                    | 5                  | 1035-1052              |
|                   | Exhibit 13: <i>First Amendment to Lease Agreement</i> dated March 12, 2007 for the Baring Property   |                    | 5                  | 1053-1060              |
|                   | Exhibit 14: <i>Guaranty Agreement</i> dated March 12, 2007 for the Baring Property   |                    | 5                  | 1061-1065              |
|                   | Exhibit 15: <i>Assignment of Entitlements, Contracts, Rent and Revenues (1365 Baring)</i> dated July 5, 2007, Inst. No. 3551275, for the Baring Property                                   |                    | 5                  | 1066-1077              |
|                   | Exhibit 16: <i>Assignment and Assumption of Lease</i> dated December 29, 2009 between BHI and Jacksons Food Stores, Inc.   |                    | 5                  | 1078-1085              |
|                   | Exhibit 17: <i>Substitution of Attorney</i> forms for the Wooley Plaintiffs' file March 6 and March 13, 2014 in the California Case  |                    | 5                  | 1086-1090              |
|                   | Exhibit 18: <i>Joint Stipulation to Take Pending Hearings Off Calendar and to Withdraw Written Discovery Requests Propounded by Plaintiffs</i> filed March 13, 2014 in the California Case |                    | 5                  | 1091-1094              |
|                   | Exhibit 19: Email thread dated March 14, 2014 between Cindy Grinstead and Brian Moquin re Joint Stipulation in California Case   |                    | 5                  | 1095-1099              |
|                   | Exhibit 20: Civil Minute Order on Motion to Dismiss in the California case dated March 18, 2014 faxed to Brian Moquin by the Superior Court  |                    | 5                  | 1100-1106              |

| <u>NO.</u> | <u>DOCUMENT</u>   | <u>DATE</u> | <u>VOL.</u> | <u>PAGE NO.</u> |
|------------|---|-------------|-------------|-----------------|
| (cont 19)  | Exhibit 21: <i>Request for Dismissal</i> without prejudice filed May 19, 2014 in the California case  |             | 5           | 1107-1108       |
|            | Exhibit 22: <i>Notice of Breach and Default and Election to Cause Sale of Real Property Under Deed of Trust</i> dated March 21, 2014, Inst. No. 443186, regarding the Highway 50 Property |             | 5           | 1109-1117       |
|            | Exhibit 23: Email message dated February 5, 2014 from Terrilyn Baron of Union Bank to Edward Wooley regarding cross-collateralization of the Baring and Highway 50 Properties             |             | 5           | 1118-1119       |
|            | Exhibit 24: <i>Settlement Statement (HUD-1)</i> dated May 20, 2014 for sale of the Baring Property  |             | 5           | 1120-1122       |
|            | Exhibit 25: 2014 Federal Tax Return for Edward C. and Judith A. Wooley  |             | 5           | 1123-1158       |
|            | Exhibit 26: 2014 State Tax Balance Due Notice for Edward C. and Judith A. Wooley  |             | 5           | 1159-1161       |
|            | Exhibit 27: <i>Purchase and Sale Agreement</i> dated November 18, 2005 for the Virginia Property  |             | 5           | 1162-1174       |
|            | Exhibit 28: <i>Lease Agreement</i> dated November 18, 2005 for the Virginia Property  |             | 6           | 1175-1210       |
|            | Exhibit 29: <i>Buyer's and Seller's Final Settlement Statements</i> dated February 24, 2006 for the Virginia Property   |             | 6           | 1211-1213       |
|            | Exhibit 30: <i>Deed of Trust, Fixture Filing and Security Agreement</i> dated February 21, 2006 re the Virginia Property securing loan for \$13,312,500.00                                |             | 6           | 1214-1231       |

| <u>NO.</u> | <u>DOCUMENT</u>  | <u>DATE</u> | <u>VOL.</u> | <u>PAGE NO.</u> |
|------------|--|-------------|-------------|-----------------|
| (cont 19)  | Exhibit 31: <i>Promissory Note</i> dated February 28, 2006 for \$13,312,500.00 by Willard Plaintiffs' in favor of Telesis Community Credit Union   |             | 6           | 1232-1236       |
|            | Exhibit 32: <i>Subordination, Attornment And Nondisturbance Agreement</i> dated February 21, 2006 between Willard Plaintiffs, BHI, and South Valley National Bank, Inst. No. 3353293, re the Virginia Property |             | 6           | 1237-1251       |
|            | Exhibit 33: <i>Deed of Trust, Assignment of Rents, and Security Agreement</i> dated March 16, 2006 re the Virginia Property securing loan for \$13,312,500.00  |             | 6           | 1252-1277       |
|            | Exhibit 34: <i>Payment Coupon</i> dated March 1, 2013 from Business Partners to Overland re Virginia Property mortgage   |             | 6           | 1278-1279       |
|            | Exhibit 35: <i>Substitution of Trustee and Full Reconveyance</i> dated April 18, 2006 naming Pacific Capital Bank, N.A. as trustee on the Virginia Property Deed of Trust                                      |             | 6           | 1280-1281       |
|            | Exhibit 36: <i>Amendment to Lease Agreement</i> dated March 9, 2007 for the Virginia Property  |             | 6           | 1282-1287       |
|            | Exhibit 37: <i>Guaranty Agreement</i> dated March 9, 2007 for the Virginia Property  |             | 6           | 1288-1292       |
|            | Exhibit 38: Letter dated March 12, 2013 from L. Steven Goldblatt, Esq. to Jerry Herbst re breach of the Virginia Property lease  |             | 6           | 1293-1297       |
|            | Exhibit 39: Letter dated March 18, 2013 from Gerald M. Gordon, Esq. to L. Steven Goldblatt, Esq. re breach of the Virginia Property lease  |             | 6           | 1298-1300       |

| <u>NO.</u> | <u>DOCUMENT</u>   | <u>DATE</u> | <u>VOL.</u> | <u>PAGE NO.</u> |
|------------|---|-------------|-------------|-----------------|
| (cont 19)  | Exhibit 40: Letter dated April 12, 2013 from Gerald M. Gordon, Esq. to L. Steven Goldblatt, Esq. re breach of the Virginia Property lease   |             | 6           | 1301-1303       |
|            | Exhibit 41: <i>Operation and Management Agreement</i> dated May 1, 2013 between BHI and the Willard Plaintiffs re the Virginia Property   |             | 6           | 1304-1308       |
|            | Exhibit 42: <i>Notice of Intent to Foreclose</i> dated June 14, 2013 from Business Partners to Overland re default on loan for the Virginia Property                                      |             | 6           | 1309-1311       |
|            | Exhibit 43: <i>Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, &amp; Deadlines</i> dated June 18, 2013  |             | 6           | 1312-1315       |
|            | Exhibit 44: <i>Declaration in Support of Motion to Dismiss Case</i> filed by Larry James Willard on August 9, 2013, Northern District of California Bankruptcy Court Case No. 13-53293 CN |             | 6           | 1316-1320       |
|            | Exhibit 45: <i>Substitution of Attorney</i> forms from the Willard Plaintiffs filed March 6, 2014 in the California case  |             | 6           | 1321-1325       |
|            | Exhibit 46: <i>Declaration of Arm's Length Transaction</i> dated January 14, 2014 between Larry James Willard and Longley Partners, LLC re sale of the Virginia Property                  |             | 6           | 1326-1333       |
|            | Exhibit 47: <i>Purchase and Sale Agreement</i> dated February 14, 2014 between Longley Partners, LLC and Larry James Willard re purchase of the Virginia Property for \$4,000,000.00      |             | 6           | 1334-1340       |

| <u>NO.</u> | <u>DOCUMENT</u>  | <u>DATE</u> | <u>VOL.</u> | <u>PAGE NO.</u> |
|------------|--|-------------|-------------|-----------------|
| (cont 19)  | Exhibit 48: <i>Short Sale Agreement</i> dated February 19, 2014 between the National Credit Union Administration Board and the Willard Plaintiffs re short sale of the Virginia Property                                       |             | 6           | 1341-1360       |
|            | Exhibit 49: <i>Consent to Act</i> dated February 25, 2014 between the Willard Plaintiffs and Daniel Gluhaich re representation for short sale of the Virginia Property   |             | 6           | 1361-1362       |
|            | Exhibit 50: <i>Seller's Final Closing Statement</i> dated March 3, 2014 re the Virginia Property   |             | 6           | 1363-1364       |
|            | Exhibit 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 |             | 6           | 1365-1366       |
| 20.        | Defendants' Reply Brief in Support of Motion for Partial Summary Judgment  | 09/16/16    | 6           | 1367-1386       |
|            | Exhibit 1: Declaration of John P. Desmond  |             | 6           | 1387-1390       |
| 21.        | Supplement to Defendants / Counterclaimants' Motion for Partial Summary Judgment   | 12/20/16    | 6           | 1391-1396       |
|            | Exhibit 1: Expert Report of Michelle Salazar   |             | 7           | 1397-1430       |
| 22.        | Plaintiffs' Objections to Defendants' Proposed Order Granting Partial Summary Judgment in Favor of Defendants  | 01/30/17    | 7           | 1431-1449       |
| 23.        | Defendants/Counterclaimants' Response to Plaintiffs' Proposed Order Granting Partial Summary Judgment in Favor of Defendants   | 02/02/17    | 7           | 1450-1457       |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>  | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|---|--------------------|--------------------|------------------------|
| (cont 23)         | Exhibit 1: January 19-25, 2017<br>Email Exchange  |                    | 7                  | 1458-1460              |
|                   | Exhibit 2: January 25, 2017, Email<br>from M. Reel  |                    | 7                  | 1461-1485              |
| 24.               | Stipulation and Order to Continue<br>Trial (Third Request)  | 02/09/17           | 7                  | 1486-1494              |
| 25.               | Order Granting Partial Summary<br>Judgment in Favor of Defendants   | 05/30/17           | 7                  | 1495-1518              |
| 26.               | Notice of Entry of Order re Order<br>Granting Partial Summary<br>Judgment   | 05/31/17           | 7                  | 1519-1522              |
|                   | Exhibit 1: May 30, 2017 Order   |                    | 7                  | 1523-1547              |
| 27.               | Affidavit of Brian P. Moquin<br>re Willard  | 10/18/17           | 7                  | 1548-1555              |
| 28.               | Affidavit of Daniel Gluhaich<br>re Willard  | 10/18/17           | 7                  | 1556-1563              |
| 29.               | Affidavit of Larry Willard  | 10/18/17           | 7                  | 1564-1580              |
| 30.               | Motion for Summary Judgment<br>of Plaintiffs Larry J. Willard and<br>Overland Development Corporation   | 10/18/17           | 7                  | 1581-1621              |
|                   | Exhibit 1: <i>Purchase and Sale<br/>Agreement</i> dated November 18, 2005<br>for the Virginia Property  |                    | 7                  | 1622-1632              |
|                   | Exhibit 2: <i>Lease Agreement</i> dated<br>November 18, 2005 for the Virginia<br>Property   |                    | 8                  | 1633-1668              |
|                   | Exhibit 3: <i>Subordination, Attornment<br/>and Nondisturbance Agreement</i> dated<br>February 21, 2006 between Willard<br>Plaintiffs, BHI, and South Valley<br>National Bank, Inst. No. 3353293,<br>re the Virginia Property |                    | 8                  | 1669-1683              |
|                   | Exhibit 4: Letter and Attachments<br>from Sujata Yalamanchili, Esq. to<br>Landlords dated February 17, 2007<br>re Herbst Acquisition of BHI   |                    | 8                  | 1684-1688              |



| <u>NO.</u> | <u>DOCUMENT</u>   | <u>DATE</u> | <u>VOL.</u> | <u>PAGE NO.</u> |
|------------|---|-------------|-------------|-----------------|
| (cont 30)  | Exhibit 5: <i>Landlord's Estoppel Certificate</i> regarding the Virginia Lease dated on or about March 8, 2007                            |             | 8           | 1689-1690       |
|            | Exhibit 6: <i>Amendment to Lease Agreement</i> dated March 9, 2007 for the Virginia Property  |             | 8           | 1691-1696       |
|            | Exhibit 7: <i>Guaranty Agreement</i> dated March 9, 2007 for the Virginia Property  |             | 8           | 1697-1701       |
|            | Exhibit 8: Berry-Hinckley Industries <i>Financial Analysis</i> on the Virginia Property dated May 2008                                    |             | 8           | 1702-1755       |
|            | Exhibit 9: Appraisal of the Virginia Property by CB Richard Ellis dated October 1, 2008   |             | 8           | 1756-1869       |
|            | Exhibit 10: Letter dated March 12, 2013 from L. Steven Goldblatt, Esq. to Jerry Herbst re breach of the Virginia Lease                    |             | 9           | 1870-1874       |
|            | Exhibit 11: Letter dated March 18, 2013 from Gerald M. Gordon, Esq. to L. Steven Goldblatt, Esq. re breach of the Virginia Property Lease |             | 9           | 1875-1877       |
|            | Exhibit 12: Letter dated April 12, 2013 from Gerald M. Gordon, Esq. to L. Steven Goldblatt, Esq. re breach of the Virginia Property lease |             | 9           | 1878-1880       |
|            | Exhibit 13: <i>Operation and Management Agreement</i> dated May 1, 2013 between BHI and the Willard Plaintiffs re the Virginia Property   |             | 9           | 1881-1885       |
|            | Exhibit 14: Invoice from Gregory M. Breen dated May 31, 2013  |             | 9           | 1886-1887       |

| <u>NO.</u> | <u>DOCUMENT</u>  | <u>DATE</u> | <u>VOL.</u> | <u>PAGE NO.</u> |
|------------|--|-------------|-------------|-----------------|
| (cont 30)  | Exhibit 15: Photographs of the Virginia Property taken by Larry J. Willard on May 26-27, 2013  |             | 9           | 1888-1908       |
|            | Exhibit 16: Photographs of the Virginia Property in 2012 retrieved from Google Historical Street View  |             | 9           | 1909-1914       |
|            | Exhibit 17: Invoice from Tholl Fence dated July 31, 2013   |             | 9           | 1915-1916       |
|            | Exhibit 18: <i>Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, &amp; Deadlines</i> filed June 18, 2018 in case <i>In re Larry James Willard</i> , Northern District of California Bankruptcy Case No. 13-53293 CN  |             | 9           | 1917-1920       |
|            | Exhibit 19: <i>Motion by the National Credit Union Administration Board, Acting in its Capacity as Liquidating Agent for Telesis Community Credit Union, for Order Terminating Automatic Stay or, Alternatively, Requiring Adequate Protection</i> and related declarations and declarations and exhibits thereto filed July 18, 2013 in case <i>In re Larry James Willard</i> , Northern District of California Bankruptcy Case No. 13-53293 CN |             | 9           | 1921-1938       |
|            | Exhibit 20: <i>Order for Relief from Stay</i> filed August 8, 2013 in case <i>In re Larry James Willard</i> , Northern District of California Bankruptcy Case No. 13-53293 CN  |             | 9           | 1939-1943       |
|            | Exhibit 21: <i>Motion to Dismiss Case</i> and related declarations filed August 9, 2013 in case <i>In re Larry James Willard</i> , Northern District of California Bankruptcy Case No. 13-53293 CN   |             | 9           | 1944-1953       |

| <u>NO.</u> | <u>DOCUMENT</u>  | <u>DATE</u> | <u>VOL.</u> | <u>PAGE NO.</u> |
|------------|--|-------------|-------------|-----------------|
| (cont 30)  | Exhibit 22: <i>Proof of Claim</i> and exhibits thereto filed August 27, 2013 in case <i>In re Larry James Willard</i> , Northern District of California Bankruptcy Case No. 13-53293 CN        |             | 9           | 1954-1966       |
|            | Exhibit 23: <i>Objection to Claim</i> filed September 5, 2013 by Stanley A. Zlotoff in case <i>In re Larry James Willard</i> , Northern District of California Bankruptcy Case No. 13-53293 CN |             | 9           | 1967-1969       |
|            | Exhibit 24: <i>Original Preliminary Report</i> dated August 12, 2013 from Stewart Title Company re the Virginia Property   |             | 9           | 1970-1986       |
|            | Exhibit 25: <i>Updated Preliminary Report</i> dated January 13, 2014 from Stewart Title Company re the Virginia Property   |             | 9           | 1987-2001       |
|            | Exhibit 26: Berry-Hinckley Industries Financial Statement on the Virginia Property for the Twelve Months Ending December 31, 2012  |             | 9           | 2002-2006       |
|            | Exhibit 27: Bill Detail from the Washoe County Treasurer website re 2012 property taxes on the Virginia Property   |             | 9           | 2007-2008       |
|            | Exhibit 28: Bill Detail from the Washoe County Treasurer website re 2013 property taxes on the Virginia Property   |             | 9           | 2009-2010       |
|            | Exhibit 29: <i>Order of Case Dismissal</i> filed September 30, 2013 in case <i>In re Larry James Willard</i> , Northern District of California Bankruptcy Case No. 13-53293 CN                 |             | 9           | 2011-2016       |
|            | Exhibit 30: Invoice from Santiago Landscape & Maintenance dated October 24, 2013   |             | 9           | 2017-2018       |

| <u>NO.</u> | <u>DOCUMENT</u>   | <u>DATE</u> | <u>VOL.</u> | <u>PAGE NO.</u> |
|------------|---|-------------|-------------|-----------------|
| (cont 30)  | Exhibit 31: Appraisal of the Virginia Property by David A. Stefan dated February 10, 2014   |             | 9           | 2019-2089       |
|            | Exhibit 32: <i>Seller's Final Closing Statement</i> dated March 6, 2014 re short sale of the Virginia Property from the Willard Plaintiffs to Longley Partners, LLC   |             | 9           | 2090-2091       |
|            | Exhibit 33: Invoices from NV Energy for the Virginia Property   |             | 9           | 2092-2109       |
|            | Exhibit 34: Invoices and related insurance policy documents from Berkshire Hathaway Insurance Company re the Virginia Property  |             | 9           | 2110-2115       |
|            | Exhibit 35: Notice of Violation from the City of Reno re the Virginia Property and correspondence related thereto   |             | 10          | 2116-2152       |
|            | Exhibit 36: Willard Plaintiffs Computation of Damages spreadsheet   |             | 10          | 2153-2159       |
|            | Exhibit 37: E-mail message from Richard Miller to Dan Gluhaich dated August 6, 2013 re Virginia Property Car Wash   |             | 10          | 2160-2162       |
|            | Exhibit 38: E-mail from Rob Cashell to Dan Gluhaich dated February 28, 2014 with attached <i>Proposed and Contract</i> from L.A. Perks dated February 11, 2014 re repairing the Virginia Property   |             | 10          | 2163-2167       |
|            | Exhibit 39: <i>Deed</i> by and between Longley Center Partnership and Longley Center Partners, LLC dated January 1, 2004 regarding the Virginia Property, recorded April 1, 2004 in the Washoe County Recorder's Office as Doc. No. 3016371 |             | 10          | 2168-2181       |

| <u>NO.</u> | <u>DOCUMENT</u>  | <u>DATE</u> | <u>VOL.</u> | <u>PAGE NO.</u> |
|------------|--|-------------|-------------|-----------------|
| (cont 30)  | Exhibit 40: <i>Grant, Bargain and Sale Deed</i> by and between Longley Center Partners, LLC and P.A. Morabito & Co., Limited dated October 4, 2005 regarding the Virginia Property, recorded October 13, 2005 in the Washoe County Recorder's Office as Doc. No. 3291753   |             | 10          | 2182-2187       |
|            | Exhibit 41: <i>Grant, Bargain and Sale Deed</i> by and between P.A. Morabito & Co., Limited and Land Venture Partners, LLC dated September 30, 2005 regarding the Virginia Property, recorded October 13, 2005 in the Washoe County Recorder's Office as Doc. No. 3291760  |             | 10          | 2188-2193       |
|            | Exhibit 42: <i>Memorandum of Lease</i> dated September 30, 2005 by Berry-Hinckley Industries regarding the Virginia Property, recorded October 13, 2005 in the Washoe County Recorder's Office as Doc. No. 3291761   |             | 10          | 2194-2198       |
|            | Exhibit 43: <i>Subordination, Non-Disturbance and Attornment Agreement and Estoppel Certificate</i> by and between Land Venture Partners, LLC, Berry-Hinckley Industries, and M&I Marshall & Isley Bank dated October 3, 2005 regarding the Virginia Property, recorded October 13, 2005 in the Washoe County Recorder's Office as Doc No. 3291766 |             | 10          | 2199-2209       |
|            | Exhibit 44: <i>Memorandum of Lease with Options to Extend</i> dated December 1, 2005 by Winner's Gaming, Inc. regarding the Virginia Property, recorded December 14, 2005 in the Washoe County Recorder's Office as Doc. No. 3323645   |             | 10          | 2210-2213       |

| <u>NO.</u> | <u>DOCUMENT</u>   | <u>DATE</u> | <u>VOL.</u> | <u>PAGE NO.</u> |
|------------|---|-------------|-------------|-----------------|
| (cont 30)  | Exhibit 45: <i>Lease Termination Agreement</i> dated January 25, 2006 by Land Venture Partners, LLC and Berry-Hinckley Industries regarding the Virginia Property, recorded February 24, 2006 in the Washoe County Recorder's Office as Doc. No. 3353288                                    |             | 10          | 2214-2218       |
|            | Exhibit 46: <i>Grant, Bargain and Sale Deed</i> by and between Land Venture Partners, LLC and P.A. Morabito & Co., Limited dated February 23, 2006 regarding the Virginia Property, recorded February 24, 2006 in the Washoe County Recorder's Office as Doc. No. 3353289                   |             | 10          | 2219-2224       |
|            | Exhibit 47: <i>Grant, Bargain and Sale Deed</i> by and between P.A. Morabito & Co., Limited and the Willard Plaintiffs dated January 20, 2006 regarding the Virginia Property, recorded February 24, 2006 in the Washoe County Recorder's Office as Doc. No. 3353290                        |             | 10          | 2225-2230       |
|            | Exhibit 48: <i>Deed of Trust, Fixture Filing and Security Agreement</i> by and between the Willard Plaintiffs and South Valley National Bank dated February 21, 2006 regarding the Virginia Property, recorded February 24, 2006 in the Washoe County Recorder's Office as Doc. No. 3353292 |             | 10          | 2231-2248       |
|            | Exhibit 49: Proposed <i>First Amendment to Lease Agreement</i> regarding the Virginia Property sent to the Willard Plaintiffs in October 2006   |             | 10          | 2249-2251       |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>   | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|--|--------------------|--------------------|------------------------|
| (cont 30)         | Exhibit 50: <i>Assignment of Entitlements, Contracts, Rents and Revenues</i> by and between Berry-Hinckley Industries and First National Bank of Nevada dated June 29, 2007 regarding the Virginia Property, recorded February 24, 2006 in the Washoe County Recorder's Office as Doc. No. 3551284 |                    | 10                 | 2252-2264              |
|                   | Exhibit 51: <i>UCC Financing Statement</i> regarding the Virginia Property, recorded July 5, 2007 in the Washoe County Recorder's Office as Doc. No 3551285  |                    | 10                 | 2265-2272              |
|                   | Exhibit 52: Sales brochure for the Virginia Property prepared by Daniel Gluhaich for marketing purposes in 2012  |                    | 10                 | 2273-2283              |
| 31.               | Defendants'/Counterclaimants' Opposition to Larry Willard and Overland Development Corporation's Motion for Summary Judgment – Oral Arguments Requested  | 11/13/17           | 10                 | 2284-2327              |
|                   | Exhibit 1: Declaration of Brian R. Irvine  |                    | 10                 | 2328-2334              |
|                   | Exhibit 2: December 12, 2014, Plaintiffs Initial Disclosures   |                    | 10                 | 2335-2342              |
|                   | Exhibit 3: February 12, 2015 Letter  |                    | 10                 | 2343-2345              |
|                   | Exhibit 4: Willard July 2015 Interrogatory Responses, First Set  |                    | 10                 | 2346-2357              |
|                   | Exhibit 5: August 28, 2015, Letter   |                    | 11                 | 2358-2369              |
|                   | Exhibit 6: March 3, 2016, Letter   |                    | 11                 | 2370-2458              |
|                   | Exhibit 7: March 15, 2016 Letter   |                    | 11                 | 2459-2550              |
|                   | Exhibit 8: April 20, 2016, Letter  |                    | 11                 | 2551-2577              |
|                   | Exhibit 9: December 2, 2016, Expert Disclosure of Gluhaich   |                    | 11                 | 2578-2586              |



| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>   | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|--|--------------------|--------------------|------------------------|
| (cont 31)         | Exhibit 10: December 5, 2016 Email   |                    | 11                 | 2587-2593              |
|                   | Exhibit 11: December 9, 2016 Email   |                    | 11                 | 2594-2595              |
|                   | Exhibit 12: December 23, 2016 Email  |                    | 11                 | 2596-2599              |
|                   | Exhibit 13: December 27, 2016 Email  |                    | 11                 | 2600-2603              |
|                   | Exhibit 14: February 3, 2017, Letter   |                    | 12                 | 2604-2631              |
|                   | Exhibit 15: Willard Responses to Defendants' First Set of Requests for Production of Documents |                    | 12                 | 2632-2641              |
|                   | Exhibit 16: April 1, 2016 Email  |                    | 12                 | 2642-2644              |
|                   | Exhibit 17: May 3, 2016 Email  |                    | 12                 | 2645-2646              |
|                   | Exhibit 18: June 21, 2016 Email Exchange   |                    | 12                 | 2647-2653              |
|                   | Exhibit 19: July 21, 2016 Email  |                    | 12                 | 2654-2670              |
|                   | Exhibit 20: Defendants' First Set of Interrogatories on Willard                                |                    | 12                 | 2671-2680              |
|                   | Exhibit 21: Defendants' Second Set of Interrogatories on Willard                               |                    | 12                 | 2681-2691              |
|                   | Exhibit 22: Defendants' First Requests for Production on Willard                               |                    | 12                 | 2692-2669              |
|                   | Exhibit 23: Defendants' Second Request for Production on Willard                               |                    | 12                 | 2700-2707              |
|                   | Exhibit 24: Defendants' Third Request for Production on Willard                                |                    | 12                 | 2708-2713              |
|                   | Exhibit 25: Defendants Requests for Admission to Willard                                       |                    | 12                 | 2714-2719              |
|                   | Exhibit 26: Willard Lease  |                    | 12                 | 2720-2755              |
|                   | Exhibit 27: Willard Response to Second Set of Interrogatories                                  |                    | 12                 | 2756-2764              |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>  | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|---|--------------------|--------------------|------------------------|
| (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              |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>   | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|--|--------------------|--------------------|------------------------|
| (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 Responses                         |                    | 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              |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>  | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|---|--------------------|--------------------|------------------------|
| (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              |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>  | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|---|--------------------|--------------------|------------------------|
| (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              |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>   | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|--|--------------------|--------------------|------------------------|
| 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              |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>   | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|--|--------------------|--------------------|------------------------|
| (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 Brian 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              |



| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>   | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|--|--------------------|--------------------|------------------------|
| (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              |

| <b><u>NO.</u></b> | <b><u>DOCUMENT</u></b>   | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|-------------------|--|--------------------|--------------------|------------------------|
| 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              |

| <b><u>NO.</u></b>                  | <b><u>DOCUMENT</u></b>  | <b><u>DATE</u></b> | <b><u>VOL.</u></b> | <b><u>PAGE NO.</u></b> |
|------------------------------------|---|--------------------|--------------------|------------------------|
| <b><u>TRANSCRIPTS</u></b>          |   |                    |                    |                        |
| 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              |
| <b><u>ADDITIONAL DOCUMENTS</u></b> |   |                    |                    |                        |
| 68.                                | Order Granting Defendants’ Motion for Partial Summary Judgment [Oral Argument Requested] <sup>1</sup> | 01/04/18           | 19                 | 4353-4357              |

---

<sup>1</sup> This document was inadvertently omitted earlier. It was added here because all of the other papers in the 19-volume appendix had already been numbered.

# EXHIBIT 34

# EXHIBIT 34



PO Box 843458 Los Angeles, CA 90084-3458

Overland Development Corp, Inc.  
P.O. Box 591

Burlingame, CA 94011

## Payment Coupon

|                          |                  |
|--------------------------|------------------|
| Loan Number:             | 5940904082       |
| Payment Due Date:        | 03/01/2013       |
| <b>Total Amount Due:</b> | <b>87,077.52</b> |
| Regular Payment:         | \$: _____        |
| Late Charge:             | \$: _____        |
| * Additional Principal:  | \$: _____        |
| Other 1                  | \$: _____        |
| Other 2                  | \$: _____        |
| Total Remitted:          | \$: _____        |

If the address above is no longer valid or is incorrect,  
please contact our office at 1-800-894-8328

\*May be subject to prepayment penalty  
Payment received 10 days after the due date will be assessed  
a late charge of : \$ 4,353.88

Detach and return above portion with payment

## Statement of Activity

for period ending: 2/20/2013

| Activity Date | Description | Total Am  | Interest  | Principal | Late Charge | Remaining Balance |
|---------------|-------------|-----------|-----------|-----------|-------------|-------------------|
| 02/11/2013    | Payment     | 87,077.52 | 68,760.81 | 18,316.71 | 0.00        | 12,297,052.90     |

### Transaction Summary:

|                           |           |
|---------------------------|-----------|
| Total Interest Paid:      | 68,760.81 |
| Total Principal Paid:     | 18,316.71 |
| Total Late Charges Paid:  | 0.00      |
| Total Tax/Insurance Paid: | 0.00      |
| Total Holdback Paid:      | 0.00      |
| Total Reserves Paid:      | 0.00      |
| Total Other Paid:         | 0.00      |

### Account Summary:

|                            |            |
|----------------------------|------------|
| Loan Number:               | 5940904082 |
| Payment Due Date:          | 3/1/13     |
| Payment Amount:            | 87,077.52  |
| Unpaid Late Charges:       | 0.00       |
| Returned Check Charges:    | 0.00       |
| Miscellaneous Fee Charges: | 0.00       |

### REGULAR MAIL:

CU Business Partners, LLC  
PO Box 843458  
Los Angeles CA 90084-3458

### OVERNIGHT/COURIER:

LOCKBOX SERVICES  
CU Business Partners, LLC  
Dept 3458  
3440 Flair Drive  
El Monte, CA 91731

|                          |               |
|--------------------------|---------------|
| Interest Rate:           | 6.700         |
| Principal Balance:       | 12,297,052.90 |
| Tax & Insurance Balance: | 0.00          |
| Reserve Balance:         | 0.00          |
| Holdback Balance:        | 0.00          |
| Replacements Balance:    | 0.00          |
| Unapplied Balance:       | 0.00          |

Please make your check payable to Business Partners, LLC

Customer Service: 800.894.8328

\*\*The interest rate will increase an additional 4% ABOVE THE NOTE RATE as a result of an Event of Default including but not limited to delinquent loan payments (30 days or more), Non-compliance of loan covenants - SUBORDINATE FINANCING, NON-PAYMENT OF TAXES, INSURANCE, etc.

\*\*A 5% late charge fee will be assessed and automatically added for past due property and financial statements for borrowers (and guarantors as applicable).

LJW000254

Exhibit 34-1

# EXHIBIT 35

# EXHIBIT 35

DOC # 3381798

05/01/2006 11:00A Fee:17.00

BK1

Requested By

PACIFIC CAPITAL BANK NA

Washoe County Recorder

Kathryn L. Burke - Recorder

Pg 1 of 1 RPTT 0.00

**Recording Requested By:**

Pacific Capital Bank, N.A.  
Attn: Loan Services c/o Andrew Kunisawa  
PO Box 60654  
Santa Barbara, CA 93160-0654

**When Recorded Mail Document To:**

Larry Willard  
Overland Development Corp  
133 Glen Ridge Ave  
Los Gatos, CA 95030

Escrow/Title No:

Loan No: 0100494160

APN:

- SPACE ABOVE THIS LINE FOR RECORDER'S USE -

### Substitution of Trustee and Full Reconveyance

WHEREAS, First American Title Company, is the present Trustee of record under that certain Deed of Trust executed on the 21st day of February, 2006, by Overland Development Corporation, a California corporation as an undivided 41% interest and Larry J. Willard, Trustee of the Larry James Willard Trust dated November 14, 1987 as an undivided 59% interest as tenants in common, as Trustor(s), to First American Title Company as Trustee, recorded on the 24th day of February, 2006 as Instrument/Document No. 3353292 in Book/Reel --- at Page/Image ---, Official Records in the office of the County Recorder of Washoe County, Nevada, together with all subsequent Renewals, Modifications, Extensions and Addendums;

AND WHEREAS, Pacific Capital Bank, N.A., successor in interest by Consolidation with South Valley National Bank is the present Owner and Holder of the beneficial interest under said Deed of Trust, and hereby appoints Pacific Capital Bank, N.A. as Trustee in place and stead of said First American Title Company under said Deed of Trust;

AND WHEREAS, the indebtedness secured by said Deed of Trust has been fully paid and satisfied: NOW THEREFORE, Pacific Capital Bank, N.A. as substituted Trustee under said Deed of Trust, does hereby reconvey to the parties entitled thereto all rights, title and interest, which was heretofore acquired under said Deed of Trust.

Date of this Instrument: April 18, 2006

Pacific Capital Bank, N.A.

as Substituted Trustee and Beneficiary

  
Terry Ball, Vice President

  
Robin Whatley, Loan Servicing Manager

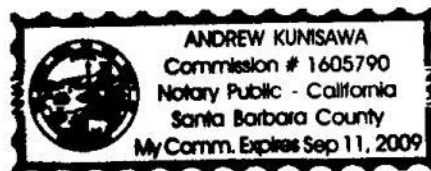
State of California

County of Santa Barbara

On this 26th day of April, 2006, before me, Andrew Kunisawa, Notary Public, personally appeared Terry Ball and Robin Whatley 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.

Signature



(Seal)

# EXHIBIT 36

# EXHIBIT 36



7695 S. Virginia

Amendment to Lease Agreement

THIS AMENDMENT TO LEASE AGREEMENT (this "Amendment") is made and entered into effective as of ~~December 1, 2006~~ <sup>March 9, 2007</sup> by and between OVERLAND DEVELOPMENT CORP. dba LJW ENTERPRISES INC. and LARRY WILLARD, TRUSTEE OF THE LARRY JAMES WILLIARD 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 a Lease Agreement dated as of November 18, 2005 (the "Lease") with respect to real property and improvements as described in the Lease. 7695 S. Virginia, Reno

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., or 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 Limitation, 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:

"*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.** Section 23 is 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:**

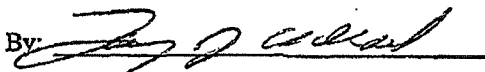
**OVERLAND DEVELOPMENT CORP. INC.  
dba LJW ENTERPRISES**

By: 

Printed Name: LARRY J. WILLARD

Title: President

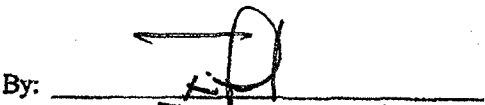
**LARRY WILLARD, TRUSTEE OF THE  
LARRY JAMES WILLARD TRUST**

By: 

Printed Name: LARRY J. WILLARD

**LESSEE:**

**BERRY-HINCKLEY INDUSTRIES**

By: 

Printed Name: Trevor Lloyd

Title: Corporate Secretary

STATE OF California )  
COUNTY OF Santa Clara ) SS:

On March 9, 2007, before me, Mary M. Edgar, a Notary Public in and for said State, personally appeared Larry J. Willard, 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)



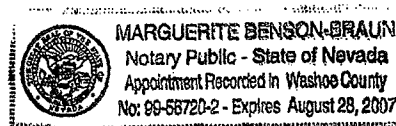
STATE OF Nevada )  
COUNTY OF Washoe ) SS:

On June 19, 2007, before me, Marguerite Benson-Braun, a Notary Public in and for said State, personally appeared Gregory Lloyd, 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.

Marguerite Benson-Braun

(SEAL)



# EXHIBIT 37

# EXHIBIT 37

### GUARANTY AGREEMENT

This GUARANTY AGREEMENT, dated as of this 9<sup>th</sup> day of March, 2007 (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 7695 South Virginia, Reno, 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, 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 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.

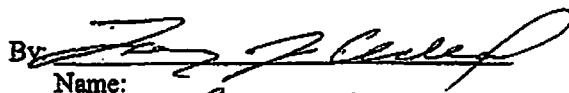
[signature page follows]

IN WITNESS WHEREOF, the undersigned have caused this Guaranty Agreement to be duly executed as of the date first above written.

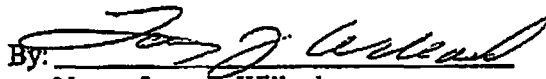
  
JERRY HERBST

Each of the undersigned hereby acknowledges and accepts this Guaranty Agreement as of the date hereof.

OVERLAND DEVELOPMENT CORPORATION INC.

By:   
Name:  
Title: President

LARRY JAMES WILLARD TRUST

By:   
Name: Larry J. Willard  
Title: Trustee

Herbst Lease Guaranty - 7695 South Virginia.DOC

# EXHIBIT 38

# EXHIBIT 38

**The Goldblatt Law Firm**  
***L. STEVEN GOLDBLATT, Esquire***  
***Attorney at Law***  
**22 Martin Street**  
**Gilroy, CA 95037**  
**Telephone: 408-848-4396 Facsimile: 408-847-4174**  
**EMAIL: l.steven.goldblatt@gmail.com**

March 12, 2013

Mr. Jerry Herbst  
Terrible Herbst Corporation  
5195 Las Vegas Blvd.  
Las Vegas, Nevada 89119

Via Facsimile 702-798-8079  
Telephone 702-798-6400

Settlement Privilege

Re: Lease between Berry- Hinckley Industries, a Nevada Corporation, Lessor and Overland Development Corporation, Inc., dba LJW Enterprises, Inc. and Larry J. Willard, Trustee of Larry James Willard Trust Privilege, Lessee and the Guaranty Agreement dated March 9, 2007 by Jerry Herbst, Guarantor for the benefit of Overland Development Corporation, Inc. and Larry J. Willard, Trustee of the Larry James Willard Trust

Sir,

I regret very much that I have to send you this letter on behalf of Mr. Willard.

Mr. Willard has asked me to represent him in this matter.

Knowing you are a true gentleman, I asked Mr. Willard to contact you directly and he did twice with no return call. I truly thought and still believe that this matter can be resolved directly between you and Mr. Willard, and I urge you to contact him.

In any event, I am extremely knowledgeable about Mr. Morabito. He has cost Mr. Willard over \$7-million to date.

I am also intimately familiar with litigation on personal guarantee litigation, having litigated successfully over \$50-million in real estate related litigation in Santa Clara County alone in 2012.

Now, whatever defenses you have with respect to Mr. Morabito, they do not apply and they are not applicable in any guaranty litigation in California or Nevada. Mr. Willard and his entities were bona-fide purchasers/ assignees of the property and leases for the property at 7693, 7695-7699 S. Virginia Street, Reno, Nevada, Washoe County APN 043-011-47 and had no knowledge of any fraud by Mr. Morabito or his sham entities

Moreover, while there has been some thought given to certain Nevada statutes with respect to the leases, these do not apply to either the lease or your guaranty to Mr. Willard under Nevada or California law. It appears that you and the Corporation believe that Nevada statutes exonerate your personal guaranty or protect the Corporation from liability for breach. Such breach will result in consequential damages to Mr. Willard. Now contracts and honoring contracts are central to the rule of law, property rights, and all rights in our country.

I have been advised by the Bank and others that Herbst, the corporate lessee is in breach of the lease, and that the funds have not been wired to Mr. Willard's account in California as of this date.

The failure to pay the March rent in the amount of \$140,175.55 plus the 5% which is \$7,008.78 or a total of \$147,184.33 has and will continue to damage Mr. Willard grievously.

Now you may have received compensation in the millions for Morabito but Mr. Willard has received not a penny.

Business Partners loan is in default and it is being assigned to the REO department effective immediately.

There has been some suggestion that you and your Company have used the non-payment of the contractually due lease payments guaranteed by you as leverage with the bank.

Quite simply sir, if we do not have adequate assurances of performance by Herbst Corporation by wiring \$140,175.55 plus 5% penalty to Mr. Willard's bank account# on file by Friday at 5:00PM, I have been instructed to file suit against the Corporation for the full amount due under the lease in the future including any reasonable mitigation efforts. Regrettably, it will be necessary to add you as defendant as you are an individual Guarantor, 30 days from the date of this letter

In addition to compensatory damages of the value of the lease, we will also be seeking consequential damages for the damage to Mr. Willard, credit, the costs of defending a foreclosure action from the bank and the grievous damages to Mr. Willard's family. Finally, this seems to be a tortious interference with Mr. Willard's contract with the bank and has no justifiable purpose other than to cause the bank to alter the terms of this contract. I do not believe that this is a legitimate business justification to breach an enforceable contract with Mr. Willard in order to obtain leverage to pressure an unrelated third party, the Bank, to modify its contract.

It amounts to a tortious with Mr. Willard's contract with the bank, a third party. The express purpose of same is to extract modifications of other legal and enforceable obligations between Mr. Willard and the Bank, a third party.

I am sensitive to the fact, that Herbst as a retailer whose revenue and pricing is exclusively determined by up-stream producers like OPEC, EXXON-Mobil, etc. I am sensitive to the fact that your company, an independent retailer, an important force for some competition at the price at the pump and Mr. Willard and I aim to support you not litigate with you.

If Mr. Willard's lease is not profitable, you personally guaranteed it and that is what contracts are about, the allocation of risk by parties at arms-length. If Herbst Corporation is free to simply breach the lease, and you attempt to default on your guarantee that specifically induced Mr. Willard to enter into the lease, because it is unprofitable would defeat our free market system.

Now, I am sure your remaining operations are quite profitable. But that is irrelevant.

If you and your Corporation are wrong about the Nevada statutes voiding your personal guaranty to Mr. Willard, then you individually potentially face millions of dollars of liability for compensatory, consequential, and punitive damages.

I believe that Herbst Corporation from its operations in California and your continuing personal presence in California in your former and current home, your sons' homes and your yacht in Newport Beach, subject you and your corporation to the general jurisdiction of the California court and California law will be applied to the guarantee agreement.

I am happy to discuss this matter with your counsel and your Corporation's counsel in a privileged settlement conversation on the telephone which is not admissible in evidence. However, law is not a science and whether California law applies to the Guaranty, as my research demonstrates or whether Nevada statutes govern is not a question that can be answered conclusively. Only a California judge or Nevada judge may make this determination and there is litigation risk for both parties. Further, our position is that we may maintain suit against you and the Corporation based upon the multiple and continuing contacts with California by you and your Corporation related to this agreement. Your counsel will contend that there is no general jurisdiction over you or the Corporation to allow any litigation to proceed in California. No one, neither your attorneys, nor me, would plausibly claim that there is a definitive answer to this issue as well.


I admire you and hope we do not end up having to meet at deposition. I wish you continued success and good health.

However, please forward this letter to your attorneys and please have them advise me in writing that the lease payment of \$140,175.55 plus 5% penalty which is now due will be received by Mr. Willard's bank Comerica Bank Friday, March 15, 2013, or I am prepared to file suit as soon as possible. **THIS IS A FORMAL NOTICE TO YOU THAT YOU ARE IN BREACH OF THE GUARANTY AGREEMENT WITH MR. WILLARD. THIS IS A FORMAL NOTICE THAT HERBST CORPORATION HAS BREACHED THE LEASE BY FAILING TO MAKE THE MARCH 2013 PAYMENT. THIS BREACH MUST BE CURED OR UNDER THE TERMS OF THE GUARANTY, YOU WILL BE IN BREACH 30 DAYS FROM TODAY.**

However, in an effort to spare you, the Corporation and Mr. Willard potentially incurring untold litigation expense, which would be awarded to the prevailing party in addition to the damages above; I urge you to contact Mr. Willard personally and advise him of your intentions. Mr. Willard's phone number is 408-891-7971. If you do not wish to contact Mr. Willard directly and resolve this to your mutual satisfaction, please have your lawyer and the Corporation lawyer advise me in writing that you

both accept service of process. Of course, acceptance of such service of process does not waive your right and the Corporation's right to file a motion to dismiss, to file a motion for change of venue or any other remedy. If I do not hear in writing from you and the Corporation's attorney, I will be forced to serve you personally and the Corporation's registered agent or president with much regret, but with ample cause.

Sincerely,

A handwritten signature in black ink, appearing to read 'L. Goldblatt', with a stylized flourish at the end.

Lewis Steven Goldblatt/CBN 90674  
Goldblatt Law Firm

# EXHIBIT 39

# EXHIBIT 39





March 18, 2013

**VIA EMAIL & CERTIFIED MAIL:**

The Goldblatt Law Firm  
Attn: L. Steven Goldblatt, Esq.  
22 Martin Street  
Gilroy, California 95037

Re: Obligations of Berry-Hinkley Industries Inc. ("BHI") and Jerry Herbst ("Mr. Herbst") with regard to 7695 South Virginia St., Reno, Nevada 89511 (the "Leased Premises")

Dear Mr. Goldblatt:

This office has been retained by Mr. Herbst and BHI with regard to certain outstanding obligations due regarding the Leased Premises. I am in receipt of your letter of March 12, 2013, on behalf of Overland Development Corporation, Inc., dba LJW Enterprises, Inc. and Larry J. Willard, Trustee of Larry James Willard Trust Privilege. According to the records and documents provided to us, BHI is the lessee of the Leased Premises pursuant to a Lease Agreement entered into on November 18, 2005 (together with all amendments and modifications, the "Lease"), and Mr. Herbst is the guarantor of the Lease obligations pursuant to a Guaranty Agreement dated as of the 9th day of March, 2007 (the "Guaranty").

It is my understanding that several years ago BHI and Mr. Herbst approached your clients with regard to compromise and settle the obligations due under the Lease and Guaranty. For various reasons, no agreements were agreed upon in this regard. Over the intervening time the financial and economic situations for both BHI and Mr. Herbst have worsened. BHI is simply not in the position to continue to operate the business located on the Leased Premises and maintain the Lease. As such, there are two options available; (i) an agreement for the orderly turnover of the Leased Premises to your clients and a termination of the Lease on terms acceptable to BHI together with an agreement limiting Mr. Herbst's continued exposure on the Guaranty, or (ii) BHI will seek liquidation under Chapter 7 of the Bankruptcy Code with an immediate termination of business at the Leased Premises, and your clients can pursue a claim in the Chapter 7 case. To the extent that your clients seek to enforce the Guaranty, in light of Mr. Herbst's other outstanding obligations and financial condition, he will have no other option but to seek protection under Chapter 11 of the Bankruptcy Code, and your clients can pursue a claim for damages under the Guaranty.

I believe that you are aware of the limitations on the payment of future lease obligations under Section 502 of the Bankruptcy Code, which limitation is applicable to your clients' claims under the Guaranty. I also believe that you are aware of the provisions for payment of allowed

3960 HOWARD HUGHES PARKWAY, NINTH FLOOR | LAS VEGAS, NEVADA 89169  
T: 702.796.5555 | F: 702.369.2666  
gordonsilver.com

10500-001/1842200\_2

LAS VEGAS | PHOENIX | RENO | WASHINGTON, D.C.

**Exhibit 39-1**

Gordon Silver

Attorneys and Counselors at Law

March 18, 2013

Page 2

unsecured claims against an individual debtor in Chapter 11. As such, your clients' recoveries in the event that Mr. Herbst must seek protection under the Bankruptcy Code will be materially impaired.

Given the outcome in the event of no resolution; no recovery from BHI, a limited recovery under the Guaranty payable over time, and repossession of non-operating locations, BHI is prepared to assist in a coordinated turnover of the Leased Premises, which affords your clients the opportunity to maintain operations and preserve value. Mr. Herbst will agree to amend the Guaranty to provide for a total payment over sixty (60) months of the allowed claim that your clients will have under Section 502(b)(6) of the Bankruptcy Code for future amounts due under the Lease, together with interest at 3% per annum. We believe that this amount will be significantly greater than the amount your clients will receive under Chapter 11.

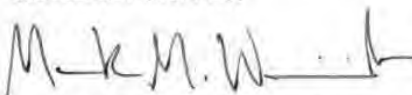
If your clients are interested in pursuing this alternative resolution, please contact me no later than close of business on March 25, 2013. We will provide you with calculations of the amount which Mr. Herbst will agree to pay and discuss the process for the turnover of the Leased Premises. All negotiations must be concluded by April 1, 2013.

Let me be very clear on two points. First, given the amount of moneys involved, agreements must be reached with each holder of a guaranty by Mr. Herbst of a BHI lease or other obligation. Second, the agreements with each landlord will be on the same monetary formula and terms; no agreement will be reached with your clients that is better or worse than the agreements reached with the others lessors.

I have not responded to each of the points you have raised in your letter. However, BHI and Mr. Herbst categorically deny the allegations set forth in the letter regarding the conduct of BHI and Mr. Herbst and any claim for damages associated with such alleged conduct.

Very truly yours,

GORDON SILVER

  
For GERALD M. GORDON, ESQ.

MMW/

# EXHIBIT 40

# EXHIBIT 40

# GORDON SILVER

April 12, 2013

**VIA EMAIL & REGULAR MAIL:**

Email: [l.steven.goldblatt@gmail.com](mailto:l.steven.goldblatt@gmail.com)

The Goldblatt Law Firm  
Attn: L. Steven Goldblatt, Esq.  
22 Martin Street  
Gilroy, California 95037

Re: Berry-Hinkley Industries Inc. ("BHI") Lease Agreement (the "Lease") with regard to 7695 S. Virginia St., Reno, Nevada (the "Leased Premises")

Dear Mr. Goldblatt:

By letter dated March 18, 2013, this office notified your client, Overland Development Corporation Inc., that it had been retained by BHI and Mr. Jerry Herbst with regard to certain outstanding obligations due regarding the Leased Premises. In part, we stated that BHI determined it is simply not in the position to continue to operate the business located on the Leased Premises and maintain the Lease. The losses it is experiencing can no longer be sustained. As such, BHI intended to cease to operate the Leased Premises and offered to assist in a coordinated turnover of the Leased Premises to either your client or its designated party, affording your client the opportunity to maintain operations and preserve value. We proposed that all negotiations in this regard must be concluded by April 1, 2013. By virtue of various delays, and to provide your client more time to consider the alternatives, BHI determined not to enforce this deadline.

While we have exchanged communications with regard to the Lease and the Leased Premises, we have not received any communication with regard to such a turnover. We also understand that Jackson Oil Co. has or will be contacting you with regard to leasing the Leased Premises.

In the absence of any agreement or a demand by you to vacate the Leased Premises, BHI will be vacating the Leased Premises on April 30, 2013. Again, BHI is prepared to coordinate with you, your client or its designee a turnover of the Leased Premises on or before April 30,

3960 HOWARD HUGHES PARKWAY, NINTH FLOOR | LAS VEGAS, NEVADA 89169  
T: 702.796.5555 | F: 702.369.2666  
gordonsilver.com

103565-002/1888559.doc

LJW000259

LAS VEGAS | PHOENIX | RENO | WASHINGTON, D.C.

**Exhibit 40-1**

Gordon Silver

Attorneys and Counselors at Law

April 12, 2013

Page 2

2013. Please contact Chris Kemper at 702-798-6400 immediately, but no later than April 20, to coordinate a transition plan.

Very truly yours,

GORDON SILVER

A handwritten signature in black ink, appearing to read 'G/M/G', is written over the printed name.

GERALD M. GORDON, ESQ.

MMW/crs

cc: Jerry Herbst (via email)  
Chris Kemper (via email)  
Mark M. Weisenmiller, Esq. (via email)  
Marc Berger (via email)

# EXHIBIT 41

# EXHIBIT 41



## OPERATION AND MANAGEMENT AGREEMENT

THIS OPERATION AND MANAGEMENT AGREEMENT (the "**Agreement**"), dated the 1st day of May, 2013 (the "**Effective Date**"), is made and entered into by and between BERRY-HINCKLEY INDUSTRIES, a Nevada corporation (the "**Operator**"), and OVERLAND DEVELOPMENT CORPORATION INC., D/B/A LJW ENTERPRISES, INC., and LARRY WILLARD AS TRUSTEE OF THE WILLARD FAMILY TRUST DATED NOVEMBER 14, 1987 (collectively, the "**Owner**") as follows:

### RECITALS

- A. Owner is the owner of that certain gas station and convenience store located at 7695 S. Virginia Street, Reno, Nevada (the "**Location**").
- B. Operator is the tenant, and Owner is the landlord, under that certain Lease Agreement dated November 18, 2005, which encumbers the Location (as amended, the "**Lease**").
- C. Operator has informed Owner that Operator intends to vacate and cease operations at the Location no later than April 30, 2013. Owner has requested that Operator remain in possession and continue to operate the Location until such time as Owner is able to find a replacement tenant for the Location.
- D. Operator has agreed to remain in possession and continue operating the Location upon the terms and conditions as set forth in this Agreement.

NOW THEREFORE, in consideration of the mutual promises and undertakings contained in this Agreement, the Owner and Operator agree as follows:

### 1. **TERM/TERMINATION.**

This Agreement shall be on a month to month basis commencing on the Effective Date. Either party hereto may terminate this Agreement at any time upon seven (7) days advance written notice to the other party. This Agreement shall automatically terminate on the last day of each month in which this Agreement is in effect if both parties do not agree, in writing, to renew this Agreement for an additional one (1) month period prior to the last day of the then current month.

### 2. **GENERAL SCOPE OF SERVICES.**

Owner hereby hires Operator as an independent contractor and Operator hereby accepts such engagement to provide for the Location such personnel as shall be required to operate and manage the Location as well as such other duties and responsibilities as are necessary to operate the Location (collectively, the "**Services**").

### 3. RELATIONSHIP OF PARTIES.

Nothing in this Agreement shall be construed as reserving to Owner any right to exercise any control over, or to direct in any respect Operator's performance of the Services; the entire control and direction of the Services shall be and remain in Operator, subject only to Operator's performance of the obligations of this Agreement in compliance with all laws and regulations governing the operation of the Location and the Services provided at the Location. It is expressly understood and agreed that it is not the purpose or intention of this Agreement to create between the parties hereto, nor shall the same be construed as creating, nor shall Owner or Operator ever assert that this Agreement creates or created the relation of employer and employee, co-employer or joint employer, any type of partnership relationship, a franchise relationship under the Federal Petroleum Marketing Practices Act or any state franchise laws, or any joint venture. Neither Operator nor any person performing any duties or engaged in any work pursuant to this Agreement for or on behalf of Operator is authorized to impose on Owner any obligations or liability whatsoever except as expressly provided herein.

### 4. COMPENSATION TO OPERATOR.

In consideration of Operator performing the Services and the other mutual covenants set forth herein, Owner shall pay to Operator the sum of Ten Thousand and No/100ths Dollars (\$10,000.00) per month (the "Fee"), and Owner then shall be entitled to all Net Profits (below defined) generated at the Location during each month of the term of this Agreement. The Fee and Net Profits payment shall be payable as set forth below.

Operator shall have fifty (50) days from the end of each month to tender the Net Profits to Owner and provide Owner with an accounting of the subject month's Net Profits. Based thereon, commencing on July 20, 2013, and continuing no later than the twentieth (20<sup>th</sup>) day of each month thereafter as necessary depending on the length of the term of this Agreement, Operator shall tender to Owner the subject month's Net Profits attributable to the Location, minus the Fee, which such Fee shall be retained by Operator. In the event that the Net Profits for any given month are negative or otherwise not sufficient to pay the Fee, Owner shall not be entitled to any payment and shall instead pay to Operator the amount of the negative Net Profits (if applicable) plus the balance of the Fee within three (3) days of receipt of written demand therefore. As used herein, the term Net Profits shall mean the gross receipts collected by Operator in operating the Location in any given month, minus any and all expenses incurred by Operator in operating the Location during such month including, but not limited to, the cost of all insurance required to be carried by Operator as well as the actual cost to Operator of all inventory sold during such month (regardless of whether Operator purchased such inventory during the subject month, or any previous month). Each payment of Net Profits to Owner hereunder (or alternatively, demand by Operator for payment of the Fee and/or negative Net Profits) shall be accompanied by documentation, certified by an officer of Operator to be accurate, supporting Operator's calculation of Net Profits for the subject month.



5. **RENT.**

During the term of this Agreement, Operator shall have no obligation to make the rent payments set forth in the Lease. Owner hereby acknowledges and agrees that the continuous operation of the Location by Operator and the payment of the Net Profits to Owner (if any) constitutes sufficient consideration for Operator's occupation of the Location and shall be in lieu of any obligation to pay rent under the Lease during the term of this Agreement.

6. **OPERATOR'S EMPLOYEES.**

Operator shall select and maintain the staff of employees for the Location as Operator deems necessary for its performance of the Services hereunder. All personnel furnished by Operator for its performance of the Services hereunder shall be the employees of Operator, and Operator shall have the right, in its sole and absolute discretion, to select, hire, pay, supervise, discipline and discharge such employees. Operator shall be responsible for payment and supervision of personnel at the Location.

7. **INSURANCE.**

Operator shall at all times during the term of this Agreement maintain insurance in the types and amounts as is required by the Lease.

8. **DEFAULT -- REMEDIES.**

In the event either Owner or Operator defaults in the performance of any covenant or condition of this Agreement and, as to any such default, fails to remedy the same or fails to implement a corrective action plan acceptable to the non-defaulting Party within three (3) days after the complaining Party gives notice thereof to the other, then the non-defaulting party may, at its option and upon written notice to the other, terminate this Agreement without prejudice to any other rights or remedies such party may have here or by law. Either party's right to require strict performance of the other's obligations under this Agreement shall not be affected by any previous waiver, forbearance, course of dealing, or trade custom or usage.

9. **INDEMNIFICATION.**

Owner shall indemnify and defend Operator, and its officers, directors, owners, employees, affiliates and agents against, and hold them harmless from, any and all costs, expenses, claims, suits, liabilities, loss and damages, including attorneys' fees arising out of or relating to this Agreement and/or the services provided by Operator under this Agreement, excepting therefrom costs, expenses, claims, suits, liabilities, loss and damages arising as a result of Operator's gross negligence. The indemnification obligations set forth herein shall survive the expiration or earlier termination of this Agreement.

# 10. **CONFLICTING PROVISIONS.**

Except as otherwise expressly provided herein, Operator's use and occupancy of the Location shall be on the terms and provisions as set forth in the Lease. In the event of a conflict between the terms and provisions set forth in the Lease and the terms and provisions set forth in this Agreement, the terms and provisions of this Agreement shall control.

IN WITNESS WHEREOF, Owner and Operator have executed this Agreement as of the Effective Date.

## **"OPERATOR"**

**BERRY-HINCKLEY INDUSTRIES,**  
a Nevada corporation

By: 

Name: Chris Kemper

Title: V.P. of Admin.

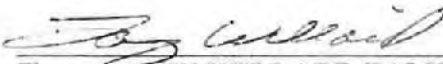
## **"OWNER"**

**OVERLAND DEVELOPMENT  
CORPORATION INC., D/B/A LJW  
ENTERPRISES, INC., a**  
CALIFORNIA corporation

By: 

Name: LARRY WILLARD

Title: President



Trustee, THE WILLARD FAMILY TRUST  
DATED NOVEMBER 14, 1987

# EXHIBIT 42

# EXHIBIT 42



# NOTICE OF INTENT TO FORECLOSE

June 14, 2013

## VIA CERTIFIED & REGULAR MAIL

Overland Development Corporation, Inc.  
826 Vanderbilt Place  
San Diego, CA 92103  
Attn: Larry James Willard

Loan Number: 59409040-82  
Property Address: Winner's Corner  
7695 S. Virginia Avenue  
7699 S. Virginia Avenue  
Reno, NV 89511

Dear Borrower,

We have previously notified you of the existence of the monetary defaults in the Promissory Note ("Note") and Mortgage, Assignment of Rents and Security Agreement ("Security Agreement"), securing this loan.

The monetary default exists due to:

- Non-payment of the March 1, 2013, April 1, 2013, May 1, 2013, and June 1, 2013 monthly loan payments.
- Non-payment of the 2012 Washoe County real estate property taxes in connection with parcel number 04301147 which has resulted in the accrual of penalties and/or interest.

To date, the aforementioned delinquencies have not been cured.

Pursuant to Section 8 of your Note, so long as any monthly installment under the Note remains past due for 30 days or more, or any other Event of Default has occurred and is continuing, the Lender is entitled to and has elected to impose a default rate of 4%, above the Note rate.

Due to the continued monetary loan defaults, your loan is now being called due and payable in full. It is imperative that we receive certified funds in our offices no later than 10:00am on **June 24, 2013** to avoid further action. **IN THE EVENT THAT THE PAYMENTS ARE NOT RECEIVED BY THIS DUE DATE, WE WILL MOVE FORWARD WITH ALL RIGHTS AND REMEDIES UNDER THE LOAN DOCUMENTS.**

Please contact Business Partners, LLC at the phone number provided below to obtain current payoff figures including your unpaid principal balance in the amount of \$12,297,052.90, interest, late fees, and all other outstanding loan related fees.

9 3 0 1 W i n n e t k a A v e n u e - C h a t s w o r t h , C A 9 1 3 1 1

LJW000295

Exhibit 42-1

If you prefer, you may wire these funds to our office using the following wiring instructions:

**Wells Fargo Bank**

**420 Montgomery Street**

**San Francisco, CA 94104**

**Phone: (800) 289-3557**

**ABA No: 121-000-248**

**Credit to: CU Business Partners**

**Account No: 4122168313**

**Reference: Loan 5940904082 / Overland Development Corporation, Inc**

We appreciate your attention to resolving this issue. If you have any questions, please contact the undersigned directly at (818) 836-6337.

Sincerely,

Sean Stephenson

CRE Default Servicing Department

CC'd: William H. Stoddard, Jr.

Lewis Steven Goldblatt

9301 Winnetka Avenue - Chatsworth, CA 91311 - 800-894-8328

LJW000296

Exhibit 42-2

# EXHIBIT 43

# EXHIBIT 43



**UNITED STATES BANKRUPTCY COURT**  
Northern District of California (San Jose)

**Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines**

A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on 6/17/13.

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.

**NOTE:** The staff of the bankruptcy clerk's office cannot give legal advice.

**Creditors — Do not file this notice in connection with any proof of claim you submit to the court.  
See Reverse Side For Important Explanations**

Debtor(s) (name(s) used by the debtor(s) in the last 8 years, including married, maiden, trade, and address):

Larry James Willard  
826 Vanderbilt Place  
San Diego, CA 92103

Case Number:  
13-53293

Social Security/Individual Taxpayer ID/Employer Tax ID/Other  
Nos.:  
[REDACTED]

Attorney for Debtor(s) (name and address):

Stanley A. Zlotoff  
Law Offices of Stanley A. Zlotoff  
300 S 1st St. #215  
San Jose, CA 95113  
Telephone number: (408)287-5087

**Meeting of Creditors**

Date: **July 17, 2013**

Time: **10:30 AM**

Location: **U.S. Federal Bldg., 280 S. First St. #268, San Jose, CA 95113**

**Important Notice to Individual Debtors:** The United States Trustee requires all debtors who are individuals to provide government-issued photo identification and proof of social security number to the trustee at the meeting of creditors.

**Deadlines:**

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

**Deadline to File a Proof of Claim:**

For all creditors (except a governmental unit): **10/15/13**

For a governmental unit: **Must file before 180 days after the date relief was entered.**

**Creditor with a Foreign Address:**

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

**Deadline to File a Complaint to Determine Dischargeability of Certain Debts: 9/16/13**

**Deadline to File a Complaint Objecting to Discharge of the Debtor:**

*First date set for hearing on confirmation of plan.*

*Notice of that date will be sent at a later time.*

**Deadline to Object to Exemptions:**

*Thirty (30) days after the conclusion of the meeting of creditors.*

**Creditors May Not Take Certain Actions:**

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

**Address of the Bankruptcy Clerk's Office:**

280 South First Street  
Room 3035  
San Jose, CA 95113  
Telephone number: 408-278-7500

Hours Open: Monday – Friday 9:00 AM – 4:30 PM

**For the Court:**

Clerk of the Bankruptcy Court:  
Gloria L. Franklin

Date: 6/18/13

## EXPLANATIONS

FORM B9E (12/12)

|   |  |
|---|--|
| Filing of Chapter 11 Bankruptcy Case                        | A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.   |
| Legal Advice  | The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.   |
| Creditors Generally May Not Take Certain Actions            | Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.   |
| Meeting of Creditors  | A meeting of creditors is scheduled for the date, time, and location listed on the front side. <i>The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.</i> Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.   |
| Claims  | A Proof of Claim is a signed statement describing a creditor's claim. A Proof of Claim form ("Official Form B 10") can be obtained at the United States Courts website: ( <a href="http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx">http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx</a> ) or at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is <i>not</i> listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you file a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all <i>or</i> if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim or you might not be paid any money on your claim and may be unable to vote on a plan. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. <b>Filing Deadline for a Creditor with a Foreign Address:</b> The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.<br><i>Do not include this notice with any filing you make with the court.</i> |
| Discharge of Debts  | Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. See Bankruptcy Code § 1141(d). Unless the court orders otherwise, however, the discharge will not be effective until completion of all payments under the plan. A discharge means that you may never try to collect the debt from the debtor except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 1141(d)(3), you must file a complaint with the required filing fee in the bankruptcy clerk's office not later than the first date set for the hearing on confirmation of the plan. You will be sent another notice informing you of that date.  |
| Exempt Property   | The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.   |
| Bankruptcy Clerk's Office                                   | Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.  |
| Creditor with a Foreign Address                             | Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.  |
| — Refer to Other Side for Important Deadlines and Notices — |  |

LJW000266



Form STC

**UNITED STATES BANKRUPTCY COURT**  
**Northern District of California**

In Re: Larry James Willard  
 Debtor(s)

Case No.: 13-53293 CN 11  
 Chapter: 11

**NOTICE OF STATUS CONFERENCE IN CHAPTER 11**

Notice is hereby given that a status conference before the Honorable Charles Novack, United States Bankruptcy Judge, will be held as follows:

|  |                       |
|--|-----------------------|
| <b>DATE:</b> August 8, 2013  | <b>TIME:</b> 11:00 AM |
| <b>LOCATION:</b> U.S. Courthouse and Federal Bldg., 280 S 1st Street, Courtroom 3070 3rd Fl., San Jose, CA 95113 |                       |

Please note that at said status conference, the Court may, among other things, set a deadline for the filing of a plan and disclosure statement.

The Court may hear at the status conference, on fourteen (14) days' notice, the U. S. Trustee's motion, if any, to dismiss the case, convert the case to one under Chapter 7, or appoint a Chapter 11 trustee.

Debtor shall file a Chapter 11 Status Conference Statement no later than seven (7) calendar days prior to the Status Conference. The format can be found on the Court's website under Chapter 11 Status Conference checklist at <http://www.canb.uscourts.gov/procedures/sj/johnson/chapter-11-status-conference-checklist>.

The debtor's attendance (with counsel, if the debtor is represented) is required. If debtor fails to appear or to timely file a Chapter 11 Status Conference Statement, the Court may without further notice or hearing, order at said status conference that the case be dismissed or converted to Chapter 7, or that a Chapter 11 trustee be appointed. Creditor attendance is welcomed, but not required.

Dated: 6/18/13

By the Court:

Charles Novack  
 United States Bankruptcy Court

# EXHIBIT 44

# EXHIBIT 44

1 Stanley A. Zlotoff, State Bar No. 073283

Attorney at Law

2 300 S. First St. Suite 215

San Jose, CA 95113

3 Telephone (408) 287-1313

4 Facsimile (408) 287-7645

5 Attorney for Debtor

6  
7  
8 **UNITED STATES BANKRUPTCY COURT**  
9 **NORTHERN DISTRICT OF CALIFORNIA**

10 In re: ) Chapter 11  
11 )  
12 Larry James Willard, ) Case No. 13-53293 CN  
13 Debtor. ) Date: September 6, 2013  
14 ) Time: 2:00 p.m.  
15 )  
16 )  
17 )  
18 )  
19 )  
20 )  
21 )  
22 )  
23 )  
24 )  
25 )

**DECLARATION IN SUPPORT OF MOTION TO DISMISS CASE**

16 I, Larry James Willard, debtor herein, declare as follows:

17 1. This case was commenced voluntarily on June 17, 2013.  
18 No trustee has been appointed, and I am managing the affairs of  
19 the bankruptcy estate.

20 2. The significant assets of the estate consist of a gas  
21 station, car wash, and convenience store on 2.6 acres of land,  
22 owned in fee and situated in Reno, Nevada ("Reno Property"), and  
23 9.2 acres of undeveloped land in Kauai, Hawaii ("Hawaii  
24 Property"). The Reno Property is under lease to Berry-Hinkley  
25

1 Industries("BHI")and the lease was guaranteed by Jerry  
2 Herbst("Herbst").

3 3. BHI breached the lease in March, 2013, and abandoned  
4 the Reno Property in or about May 2013. The lease payments were  
5 \$137,000 per month and the remaining term of the lease was 10 ½  
6 years. State court litigation against BHI and Herbst was  
7 commenced for breach of contract and other causes of action.  
8 However, BHI and Herbst are actively defending, and the  
9 litigation may not result in an early resolution. Moreover,  
10 Herbst has recently been sending signals that he may shortly be  
11 filing his own bankruptcy case.  
12

13 4. The Reno Property is presently vacant. It may be worth  
14 approximately 8 million, but it is encumbered by a deed of trust  
15 in favor of the National Credit Administration Board ("NCUAB").  
16 NCUAB is owed almost 13 million, and its monthly payments are  
17 approximately \$87,000 per month.

18 5. One reason for commencing this Chapter 11 was to  
19 forestall foreclosure of the Reno Property by NCUAB and to re-  
20 open communication with NCUAB. I was hopeful that the Reno  
21 Property would obtain either a purchaser of my fee interest or  
22 else a lessee, and that NCUAB would accept either disposition as  
23 a satisfaction of the amount owed or, at least as a mitigation  
24 of damages. Prior to filing this case, communications between  
25 myself and NCUAB ceased, and it was reasonably believed that the

1 commencement of a Chapter 11 would re-open lines of  
2 communication.

3         6. Another reason for filing this Chapter 11 was to stop  
4 a pending foreclosure of the Hawaii Property. The Hawaii  
5 Property may be worth 1.3 million, but it is subject to a lien  
6 in favor of Bank of Hawaii in the amount of 1.4 million. In  
7 fact, since filing, discussion with Bank of Hawaii have resumed,  
8 and it is considering a deed in lieu of foreclosure.

9  
10         7. Another reason for filing was to preserve venue in the  
11 Northern District where the BHI litigation was filed. Debtor  
12 now resides in San Diego. However, the state court attorney of  
13 record will be disabled for several months.

14         8. Regarding the Reno Property, the cooperation expected  
15 from NCUAB did not materialize. Moreover, I have not been able  
16 to obtain an offer for purchase or lease of the Reno Property.

17         9. Regarding the unsecured claims, they total \$500,000,  
18 but two of them, to Alan and Sharon Soucy and Specialized Loan  
19 Servicing comprise \$300,000 of that amount. The Soucy debt is  
20 guaranteed by another party, and the Specialized debt is  
21 disputed, because it was a purchase money second deed of trust  
22 on residential property that was lost to a senior lien by way of  
23 a trustee's sale. For that reason, it is my belief that  
24 California's anti-deficiency law will apply.  
25

11 I declare under penalty of perjury that the foregoing is  
12 true and correct. Executed in San Diego, California on July 24,  
13 2013

/s/Larry James Willard

# EXHIBIT 45

# EXHIBIT 45



MC-050

|  |  |   |
|--|--|---|
| ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):<br><b>Brian P. Moquin, Esq. (SBN 257583)</b><br><b>LAW OFFICES OF BRIAN P. MOQUIN</b><br><b>3506 La Castellet Court</b><br><b>San Jose, CA 95148</b><br>TELEPHONE NO.: 408.300.0022 FAX NO. (Optional): 408.843.1678<br>E-MAIL ADDRESS (Optional): bmoquin@lawprism.com<br>ATTORNEY FOR (Name): PLAINTIFF OVERLAND DEVELOPMENT CORPORATION |  | ENFORCED<br>2014 MAR -6 P 4:01<br>J. CAO-NGUYEN |
| SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA<br>STREET ADDRESS: 191 N. First Street<br>MAILING ADDRESS:<br>CITY AND ZIP CODE: San Jose, CA 95113<br>BRANCH NAME:  |  |   |
| CASE NAME:<br><b>WILLARD ET AL. v. HERBST ET AL.</b>   |  |   |
| <b>SUBSTITUTION OF ATTORNEY—CIVIL</b><br><b>(Without Court Order)</b>  |  | CASE NUMBER:<br><b>1-13-CV-245021</b>           |

THE COURT AND ALL PARTIES ARE NOTIFIED THAT (name): OVERLAND DEVELOPMENT CORP. makes the following substitution:

1. **Former legal representative** ☐ Party represented self ☒ Attorney (name): **L. STEVEN GOLDBLATT**
2. **New legal representative** ☐ Party is representing self\* ☒ Attorney
- a. Name: **BRIAN P. MOQUIN** b. State Bar No. (if applicable): **257583**
- c. Address (number, street, city, ZIP, and law firm name, if applicable):  
**3506 La Castellet Court**  
**San Jose, CA 95148**
- d. Telephone No. (include area code): **408.300.0022**
3. The party making this substitution is a ☒ plaintiff ☐ defendant ☐ petitioner ☐ respondent ☐ other (specify):

**\*NOTICE TO PARTIES APPLYING TO REPRESENT THEMSELVES**

- Guardian
- Conservator
- Trustee
- Personal Representative
- Probate fiduciary
- Corporation
- Guardian ad litem
- Unincorporated association

If you are applying as one of the parties on this list, you may NOT act as your own attorney in most cases. Use this form to substitute one attorney for another attorney. SEEK LEGAL ADVICE BEFORE APPLYING TO REPRESENT YOURSELF.

**NOTICE TO PARTIES WITHOUT ATTORNEYS**

A party representing himself or herself may wish to seek legal assistance. Failure to take timely and appropriate action in this case may result in serious legal consequences.

4. I consent to this substitution.  
 Date: **March 5, 2014**  
**LARRY J. WILLARD, PRESIDENT**  
 (TYPE OR PRINT NAME)

  
 (SIGNATURE OF PARTY)

VIA FAX

5. ☒ I consent to this substitution.  
 Date: **March 6, 2014**  
**L. STEVEN GOLDBLATT**  
 (TYPE OR PRINT NAME)

  
 (SIGNATURE OF FORMER ATTORNEY)

VIA FAX

6. ☒ I consent to this substitution.  
 Date: **March 5, 2014**  
**BRIAN P. MOQUIN**  
 (TYPE OR PRINT NAME)

  
 (SIGNATURE OF NEW ATTORNEY)

VIA FAX

(See reverse for proof of service by mail)

Page 1 of 2



MC-050

|   |                                |
|---|--------------------------------|
| CASE NAME:<br>WILLARD ET AL. v. HERBST ET AL. | CASE NUMBER:<br>1-13-CV-245021 |
|---|--------------------------------|

**PROOF OF SERVICE BY MAIL  
Substitution of Attorney—Civil**

**Instructions:** After having all parties served by mail with the Substitution of Attorney—Civil, have the person who mailed the document complete this Proof of Service by Mail. An unsigned copy of the Proof of Service by Mail should be completed and served with the document. Give the Substitution of Attorney—Civil and the completed Proof of Service by Mail to the clerk for filing. If you are representing yourself, someone else must mail these papers and sign the Proof of Service by Mail.

1. I am over the age of 18 and not a party to this cause. I am a resident of or employed in the county where the mailing occurred. My residence or business address is (specify): 3506 La Castellet Court, San Jose, CA 95148
2. I served the Substitution of Attorney—Civil by enclosing a true copy in a sealed envelope addressed to each person whose name and address is shown below and depositing the envelope in the United States mail with the postage fully prepaid.  
  
(1) Date of mailing: March 6, 2014      (2) Place of mailing (city and state): San Jose, CA
3. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: March 6, 2014

BRIAN P. MOQUIN

(TYPE OR PRINT NAME)



(SIGNATURE)

**NAME AND ADDRESS OF EACH PERSON TO WHOM NOTICE WAS MAILED**

4. a. Name of person served: JOHN P. DESMOND, ESQ.  
b. Address (number, street, city, and ZIP): GORDON SILVER  
100 W. Liberty Street, Suite 940  
Reno, Nevada 89501
- c. Name of person served:  
d. Address (number, street, city, and ZIP):
- e. Name of person served:  
f. Address (number, street, city, and ZIP):
- g. Name of person served:  
h. Address (number, street, city, and ZIP):
- i. Name of person served:  
j. Address (number, street, city, and ZIP):

☐ List of names and addresses continued in attachment.

MC-050

|  |  |   |
|--|--|---|
| ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address).<br><b>Brian P. Moquin, Esq. (SBN 257583)</b><br><b>LAW OFFICES OF BRIAN P. MOQUIN</b><br><b>3506 La Castellet Court</b><br><b>San Jose, CA 95148</b><br>TELEPHONE NO.: 408.300.0022 FAX NO. (Optional): 408.843.1678<br>E-MAIL ADDRESS (Optional): bmoquin@lawprism.com<br>ATTORNEY FOR (Name): PLAINTIFF LARRY J. WILLARD |  | FOR COURT USE ONLY<br><br>2014 MAR -6 P 4:00<br>J. CAO-NGUYEN |
| SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA<br>STREET ADDRESS: 191 N. FIRST STREET<br>MAILING ADDRESS:<br>CITY AND ZIP CODE: SAN JOSE, CA 95148<br>BRANCH NAME:  |  |   |
| CASE NAME:<br>WILLARD ET AL. v. HERBST ET AL.  |  |   |
| SUBSTITUTION OF ATTORNEY—CIVIL<br>(Without Court Order)  |  | CASE NUMBER:<br>1-13-CV-245021                                |

THE COURT AND ALL PARTIES ARE NOTIFIED THAT (name): LARRY J. WILLARD makes the following substitution:

1. **Former legal representative** ☐ Party represented self ☒ Attorney (name): L. STEVEN GOLDBLATT
2. **New legal representative** ☐ Party is representing self\* ☒ Attorney
- a. Name: BRIAN P. MOQUIN b. State Bar No. (if applicable): 257583
- c. Address (number, street, city, ZIP, and law firm name, if applicable):  
 3506 La Castellet Court  
 San Jose, CA 95148
- d. Telephone No. (include area code): 408.300.0022
3. The party making this substitution is a ☒ plaintiff ☐ defendant ☐ petitioner ☐ respondent ☐ other (specify):

**\*NOTICE TO PARTIES APPLYING TO REPRESENT THEMSELVES**

- Guardian
- Personal Representative
- Guardian ad litem
- Conservator
- Probate fiduciary
- Unincorporated association
- Trustee
- Corporation

If you are applying as one of the parties on this list, you may NOT act as your own attorney in most cases. Use this form to substitute one attorney for another attorney. SEEK LEGAL ADVICE BEFORE APPLYING TO REPRESENT YOURSELF.

**NOTICE TO PARTIES WITHOUT ATTORNEYS**


A party representing himself or herself may wish to seek legal assistance. Failure to take timely and appropriate action in this case may result in serious legal consequences.

4. I consent to this substitution.

Date: March 5, 2014

LARRY J. WILLARD

(TYPE OR PRINT NAME)

  
 (SIGNATURE OF PARTY)

VIA FAX

5. ☒ I consent to this substitution.

Date: March 6, 2014

L. STEVEN GOLDBLATT

(TYPE OR PRINT NAME)

  
 (SIGNATURE OF FORMER ATTORNEY)

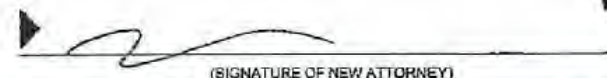
VIA FAX

6. ☒ I consent to this substitution.

Date: March 5, 2014

BRIAN P. MOQUIN

(TYPE OR PRINT NAME)

  
 (SIGNATURE OF NEW ATTORNEY)

VIA FAX

(See reverse for proof of service by mail)

Page 1 of 2



MC-050

|  |                                       |
|--|---------------------------------------|
| CASE NAME:<br><b>WILLARD ET AL. v. HERBST ET AL.</b> | CASE NUMBER:<br><b>1-13-CV-245021</b> |
|--|---------------------------------------|

**PROOF OF SERVICE BY MAIL  
Substitution of Attorney—Civil**

**Instructions:** After having all parties served by mail with the Substitution of Attorney—Civil, have the person who mailed the document complete this Proof of Service by Mail. An unsigned copy of the Proof of Service by Mail should be completed and served with the document. Give the Substitution of Attorney—Civil and the completed Proof of Service by Mail to the clerk for filing. If you are representing yourself, someone else must mail these papers and sign the Proof of Service by Mail.

1. I am over the age of 18 and **not a party to this cause**. I am a resident of or employed in the county where the mailing occurred. My residence or business address is (specify): **3506 La Castellet Court, San Jose, CA 95148**
2. I served the Substitution of Attorney—Civil by enclosing a true copy in a sealed envelope addressed to each person whose name and address is shown below and depositing the envelope in the United States mail with the postage fully prepaid.  
  
(1 ) Date of mailing: **March 6, 2014**                      (2) Place of mailing (city and state): **San Jose, CA**
3. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: **March 6, 2014**

**BRIAN P. MOQUIN**

(TYPE OR PRINT NAME)



(SIGNATURE)

**NAME AND ADDRESS OF EACH PERSON TO WHOM NOTICE WAS MAILED**

4. a. Name of person served: **JOHN P. DESMOND, ESQ.**
- b. Address (number, street, city, and ZIP): **GORDON SILVER  
100 W. Liberty Street, Suite 940  
Reno, Nevada 89501**
- c. Name of person served:
- d. Address (number, street, city, and ZIP):
- e. Name of person served:
- f. Address (number, street, city, and ZIP):
- g. Name of person served:
- h. Address (number, street, city, and ZIP):
- i. Name of person served:
- j. Address (number, street, city, and ZIP):

☐ List of names and addresses continued in attachment.

# EXHIBIT 46

# EXHIBIT 46

### DECLARATION OF ARM'S-LENGTH TRANSACTION

We, LARRY JAMES WILLARD and Longley Partners, LLC. declare under penalty of perjury and before a Notary Public that:

1. LARRY JAMES WILLARD and OVERLAND DEVELOPMENT CORPORATION, INC. (hereinafter collectively "Seller") and Longley Partners, LLC. and any Assignee (hereinafter collectively "Buyer") intend to enter into a Purchase And Sale Agreement ("Purchase Agreement") Pursuant to said Purchase Agreement, Buyer will purchase, and Seller will sell, that certain real property (the "Property") commonly identified as 7695 and 7699 S. Virginia Street, Reno, Nevada, consisting of a gas station, convenience store, car wash, lube center and office building.
2. Seller is the record owner of the Property. Seller is the borrower to a loan dated February 28, 2006 in which Telesis Community Credit Union is the lender. Telesis Community Credit Union loan is secured by the Property.
3. Telesis Community Credit Union has been liquidated. Its assets have been taken over and are controlled by the National Credit Union Administration Board, acting in its capacity as Liquidating Agent for Telesis Community Credit Union (hereinafter the "Liquidating Agent"). By operation of law, the Liquidating Agent succeeded to all rights, title, authorities, and interest of Telesis Community Credit Union and accordingly the Liquidating Agent holds a lien interest in the Property.
4. Buyer is a Nevada limited liability company of which Rob Cashell, Jr. is the Managing Member, and the other members are Steve Johnson, Rob Cashell, Jr., Bob Cashell, and Art Hinckley.
5. Seller, Buyer and their respective agents (including, without limitation, real estate agents, escrow agents, title agents, officers, directors, unit members, managing members, partners and joint ventures) declare, affirm, warrant and represent to the Liquidating Agent that this is an "Arm's-Length Transaction" defined as follows:
  - a) The transaction between Seller and Buyer has been negotiated by unrelated parties, each of whom is acting in his or her own self-interest and that the sales price is based on fair market value of the Property;
  - b) No Buyer or agent of Buyer is a family member or business associate of Seller or the borrower, or the mortgagee, or has any interest, equitable, express or implied, in any business entity of which Seller has an ownership interest;
  - c) No Buyer or agent of Buyer shares a business interest with Seller or the borrower or the mortgagee;
  - d) Declarants Seller and Buyer are not now and have never been related, by blood or marriage;
  - e) Buyer is neither purchasing the Property with funds or credit provided by Seller (or

anyone or any entity affiliated with Seller), nor is Buyer purchasing the Property for Seller's account or for the account of another;

- f) Buyer has not agreed to nor will Buyer resell or reconvey the Property to Seller or to another designated by Seller;
  - g) There are no hidden terms, hidden agreements or special understandings between Seller and Buyer, or among their respective agents, which are not reflected in the Purchase Agreement or the escrow instructions associated with the transaction;
  - h) There is no agreement, whether oral, written or implied, between Seller and Buyer and/or their respective agents which allows Seller to remain in the Property as tenants or to regain ownership of the Property at any time after the consummation of the sale transaction;
  - i) Seller, or any entities or persons with whom Seller is associated, shall not receive any proceeds from the sale of the Property;
  - j) No agent of either Seller or Buyer shall receive any proceeds from this transaction except as is reflected in the final Estimated Closing Statement which shall be provided to the Liquidating Agent/Lender for approval prior to the close of escrow;
  - k) If Seller is an entity and not a natural person, Buyer is not now and has never been a partner, member, shareholder, officer, director, employee or affiliate of Seller; and,
  - l) If Buyer is executing this Declaration on behalf of an entity Buyer, the Buyer entity does not own, is not owned by, nor is it under common ownership or control of another person or entity.
6. Seller, including any person or entity affiliated with Seller in any manner, declares, affirms, warrants and represents that he/she/it will have no continuing beneficial interest arising out of the potential Purchase Agreement transaction or subsequent transactions with Buyer as a result of the sale to Buyer (should it be approved by the Liquidating Agent).
  7. The Declarant for Buyer represents, warrants, declares and states under penalty of perjury that Buyer is not in any manner affiliated with, owned by, controlled by, or associated with Flyers Energy, LLC (including any affiliates, associates, owners, unit holders or interest holders of Flyers Energy, LLC).
  8. Seller, in his capacity as borrower to the Liquidating Agent (Telesis Community Credit Union) expressly acknowledges that the Liquidating Agent is under no obligation, nor any duty whatsoever, to waive, modify or otherwise change any terms of the loan obligation currently in place between Seller, as borrower, and the Liquidating Agent, as lender.
  9. Seller further expressly acknowledges that this Declaration does not constitute, in any form, manner or way, a waiver or modification of the current loan terms between Seller, on the one hand, and the Liquidating Agent (Telesis Community Credit Union), on the other hand. Nor does this Declaration in any manner whatsoever create a waiver of any current or prior breaches by Seller, as borrower. To the extent Seller has breached the terms of the loan agreement, said breach continues.

10. Buyer and Seller acknowledge that the Liquidating Agent is under no obligation whatsoever, express, constructive, or implied, to approve any Purchase Agreement (or any other transaction between Buyer and Seller) in which the Property is sold for an amount less than the loan obligation owed by Seller to the Liquidating Agent (Telesis Community Credit Union).
11. Buyer and Seller expressly acknowledge that this Declaration does not constitute a commitment or agreement, in any form or manner, by the Liquidating Agent to approve any purchase agreement or any transaction for the sale of the Property by Seller to Buyer, or by Seller to anyone.
12. Each signatory to this Declaration expressly acknowledges that the Liquidating Agent is relying upon the representations made herein as consideration for releasing the lien which is secured by a deed of trust encumbering the Property.
13. Each signatory to this Declaration expressly acknowledges that any misrepresentation made by him or her may subject him or her to civil liability.

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

WHOEVER, IN ANY MATTER WITHIN THE JURISDICTION OF ANY DEPARTMENT OR AGENCY OF THE UNITED STATES KNOWINGLY AND WILLFULLY FALSIFIES, CONCEALS, OR COVERS UP BY ANY TRICK, SHCEME, OR DEVICE A MATERIAL FACT; MAKES ANY MATERIALLY FALSE, FICTITIOUS OR FRAUDULENT STATEMENT OR REPRESENTATION; OR MAKES OR USES ANY FALSE WRITING OR ENTRY KNOWING THE SAME TO CONTAIN ANY MATERIALLY FALSE, FICTITIOUS, OR FRAUDULENT STATEMENT OR ENTRY SHALL BE FINED NOT MORE THAN \$10,000 OR IMPRISONED NOT MORE THAN 5 YEARS OR BOTH. 18 U.S.C. § 1001. ANY PROPERTY TREACEABLE TO SUCH OFFENSE IS SUBJECT TO FORFEITURE BY THE UNITED STATES UPON CONVICTION. 18 U.S.C. § 981 (CIVIL) AND 18 U.S.C. § 982 (CRIMINAL).

I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed on the date set forth below.

**Seller:** LARRY JAMES WILLARD, an individual

Signature: *Larry James Willard*

Date: 11-14-14

Print Name: LARRY JAMES WILLARD

Executed at (Address): \_\_\_\_\_

#### ACKNOWLEDGMENT

STATE OF California )  
COUNTY OF Santa Clara ) ss.

On January 14, 2014, before me, Angie Brizano, a Notary Public, personally appeared Larry James Willard, who 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.

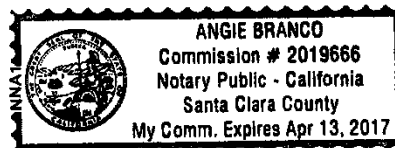
I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



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

Notary Public



WHOEVER, IN ANY MATTER WITHIN THE JURISDICTION OF ANY DEPARTMENT OR AGENCY OF THE UNITED STATES KNOWINGLY AND WILLFULLY FALSIFIES, CONCEALS, OR COVERS UP BY ANY TRICK, SHCEME, OR DEVICE A MATERIAL FACT; MAKES ANY MATERIALLY FALSE, FICTITIOUS OR FRAUDULENT STATEMENT OR REPRESENTATION; OR MAKES OR USES ANY FALSE WRITING OR ENTRY KNOWING THE SAME TO CONTAIN ANY MATERIALLY FALSE, FICTITIOUS, OR FRAUDULENT STATEMENT OR ENTRY SHALL BE FINED NOT MORE THAN \$10,000 OR IMPRISONED NOT MORE THAN 5 YEARS OR BOTH. 18 U.S.C. § 1001. ANY PROPERTY TREACEABLE TO SUCH OFFENSE IS SUBJECT TO FORFEITURE BY THE UNITED STATES UPON CONVICTION. 18 U.S.C. § 981 (CIVIL) AND 18 U.S.C. § 982 (CRIMINAL).

I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed on the date set forth below.

**Seller: OVERLAND DEVELOPMENT CORPORATION,  
INC., a California corporation**

Signature: \_\_\_\_\_

LARRY JAMES WILLARD, President

Date: \_\_\_\_\_

Executed at (Address): \_\_\_\_\_

### ACKNOWLEDGMENT

STATE OF California )  
COUNTY OF Santa Clara ) ss.

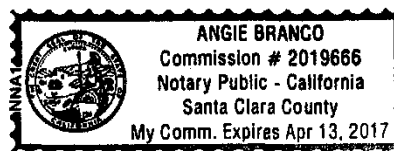
On November 14, 2014 before me, Angie Branco, a Notary Public, personally appeared Larry James Willard, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their 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.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

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

Notary Public



WHOEVER, IN ANY MATTER WITHIN THE JURISDICTION OF ANY DEPARTMENT OR AGENCY OF THE UNITED STATES KNOWINGLY AND WILLFULLY FALSIFIES, CONCEALS, OR COVERS UP BY ANY TRICK, SHCEME, OR DEVICE A MATERIAL FACT; MAKES ANY MATERIALLY FALSE, FICTITIOUS OR FRAUDULENT STATEMENT OR REPRESENTATION; OR MAKES OR USES ANY FALSE WRITING OR ENTRY KNOWING THE SAME TO CONTAIN ANY MATERIALLY FALSE, FICTITIOUS, OR FRAUDULENT STATEMENT OR ENTRY SHALL BE FINED NOT MORE THAN \$10,000 OR IMPRISONED NOT MORE THAN 5 YEARS OR BOTH. 18 U.S.C. § 1001. ANY PROPERTY TREACEABLE TO SUCH OFFFENSE IS SUBJECT TO FORFEITURE BY THE UNITED STATES UPON CONVICTION. 18 U.S.C. § 981 (CIVIL) AND 18 U.S.C. § 982 (CRIMINAL).

I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed on the date set forth below.

Buyer: Longley Partners, LLC.

Signature: \_\_\_\_\_

Rob Cashell, Jr., managing member

Print Name: \_\_\_\_\_

Rob Cashell, Jr.

Date: \_\_\_\_\_

1/13/14

Executed at (Address): \_\_\_\_\_

1200 Financial Blvd.  
Reno, NV. 89502

## ACKNOWLEDGMENT

STATE OF \_\_\_\_\_ )

Nevada

) ss.

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

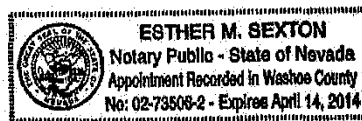
Washoe

On Jan 13, 2014, before me, Debbie M. Dixon, a Notary Public, personally appeared Rob Cashell Jr., who 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.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

By: Esther M. Sexton  
Notary Public



# EXHIBIT 47

# EXHIBIT 47

## PURCHASE AND SALE AGREEMENT

14<sup>th</sup> This Purchase and Sale Agreement (hereinafter "AGREEMENT") is entered into this day of February, 2014 between Longley Partners, LLC and or Assignees ("BUYER") and Overland Development Corporation Inc. and Larry James Willard and or Assignees ("SELLER");

### RECITALS

WHEREAS, SELLER owns the real property ("PROPERTY") described as follows:  
7695-7699 S. Virginia St. Reno, NV. Which is legally described in Exhibit "A" to this AGREEMENT.

WHEREAS, BUYER wishes to acquire the PROPERTY on certain terms and subject to certain conditions; and

WHEREAS, SELLER is willing to sell the PROPERTY to BUYER on those terms and subject to those conditions,

NOW, THEREFORE, in consideration of the agreements and promises set forth below, the parties hereto agree as follows:

### AGREEMENT

FOR GOOD AND VALUABLE CONSIDERATION, the receipt and adequacy of which are acknowledged, the parties agree as follows:

1. Purchase and Sale. Subject to the terms and conditions in this AGREEMENT, SELLER agrees to sell and BUYER agrees to purchase the PROPERTY.

2. Escrow. An escrow shall be opened to consummate the sale of the PROPERTY, (Herein referred to as the "PROPERTY"), pursuant to this AGREEMENT with Nor Cal Escrow Solutions/Stewart Title ("ESCROW AGENT"). The parties to this AGREEMENT shall deliver signed escrow instructions to ESCROW AGENT prior to CLOSE OF ESCROW (as defined below in this Paragraph). The instructions shall not modify or amend this AGREEMENT, provided, however, that the parties shall execute any additional instructions requested by ESCROW AGENT in a manner consistent with this AGREEMENT. All amounts deposited by BUYER with the ESCROW AGENT are to be held in escrow in an interest-bearing account with interest credited to BUYER. Unless the parties to this AGREEMENT mutually agree otherwise in writing to an extension, the escrow shall close ("CLOSE OF ESCROW"), the PROPERTY shall be transferred to BUYER and the PURCHASE PRICE (as defined in Paragraph 3, below) paid to SELLER, no later than 30 days from acceptance of this contract or March 3rd, whichever is sooner except as provided in paragraph 4(a)(i) and 4(a)(ii) below.

3. Purchase Price. Subject to the terms and conditions contained in this AGREEMENT, BUYER agrees to pay SELLER the sum of FOUR MILLION AND 00/100 DOLLARS (\$4,000,000.00) ("PURCHASE PRICE") payable by BUYER to SELLER as follows:

(a) BUYERS shall deposit with ESCROW AGENT the sum of TWENTY-FIVE THOUSAND AND 00/100 DOLLARS (\$25,000.00) as an earnest money deposit ("EARNEST MONEY DEPOSIT") upon the execution of this AGREEMENT by SELLER and BUYERS within Three (3) days of opening of an escrow with ESCROW AGENT. ESCROW AGENT shall deposit the EARNEST MONEY DEPOSIT in an interest bearing escrow account. Upon Buyer removing

Page 1 of 6

PURCHASE AND SALE AGREEMENT  
7695-7699 S. Virginia St. Reno, NV..

Seller's Initials  
Buyer's Initials

*[Signature]*  
*[Signature]*  
UW000332

Exhibit 47-1



their contingencies, Buyer shall increase deposits to a total of (FIFTYTHOUSAND DOLLARS) \$50,000.00, Buyer's deposits of \$50,000.00 (FIFTY THOUSAND DOLLARS), deposits shall become non-refundable and released to Seller, which shall be applied to the purchase price. If BUYER fails to close escrow for any reason other than as a result of the breach of this Agreement by Seller after the second EARNEST MONEY DEPOSIT has been made, then all of the EARNEST MONEY DEPOSIT including interest shall be paid to SELLER, said monies shall be considered Non-Refundable and Released to Seller.

(b) BUYERS shall tender the balance (with credit for accrued interest on the EARNEST MONEY DEPOSIT) in cash or certified funds to ESCROW AGENT at the CLOSE OF ESCROW.

#### 4. Conditions of Escrow.

(a) Buyer's Conditions. The CLOSE OF ESCROW and BUYER'S obligation to purchase the PROPERTY pursuant to this AGREEMENT are conditioned on:

(i) ESCROW AGENT'S delivery of a preliminary title report on the PROPERTY to BUYER within Seven (7) business days after the opening of the escrow. ESCROW AGENT shall deliver the preliminary title report, together with copies of all documents referred to in the report (collectively "PRELIMINARY REPORT") and copies of any effected leases, rental agreement, or any other agreements which are to remain in effect after BUYER takes title. BUYER shall have Five (5) business days to object in writing to any exceptions contained within the PRELIMINARY REPORT ("TITLE PERIOD") from the date BUYER receives the preliminary title report. Any exceptions to title to the PROPERTY shown on the PRELIMINARY REPORT shall be deemed to have been accepted by BUYER unless BUYER transmits written notice of an objection to SELLER and ESCROW AGENT within the TITLE PERIOD. If BUYER objects to any exceptions to the title to the PROPERTY, and the exceptions are not removed before the CLOSE OF ESCROW, all rights and obligations under this AGREEMENT may, at the election of BUYER, terminate, and the EARNEST MONEY DEPOSIT plus any interest thereon shall be returned to BUYER, unless BUYER elects to purchase the PROPERTY subject to the exceptions. BUYER hereby objects to any deeds of trust or mortgages and any delinquent taxes, fees, penalties or assessments, all of which are hereby agreed to be recognized as timely objections to title and which shall be removed from the title exceptions on or before close of escrow. Buyer is aware that Seller must obtain a release from the second deed of trust to obtain clear title.

(ii) Within (Seven) 7 business days of each party executing this AGREEMENT, SELLER shall deliver to BUYER the following documents:

- a. Copy of all leases and related agreements and materials as to all tenants currently under lease;
- b. All building plans, surveys, property environmental (Phase 1) and soils studies and reports, and like materials in SELLER'S possession.
- c. Any other reports or financials that Seller may have in their possession.



BUYER shall have *Twenty-One (21) days from Receipt of all due diligence material in which to perform its initial due diligence* ("CONTINGENCY PERIOD") and inspect the PROPERTY. In the event BUYER fails to send written notice of objection(s) within this Twenty-One (21) day period to SELLER and ESCROW AGENT, BUYER shall be deemed to have waived any and all objection(s) that otherwise may have been made regarding the PROPERTY or the above referenced documentation. If BUYER makes a timely written objection by sending written notice to SELLER and ESCROW AGENT, SELLER shall have a reasonable amount of time to cure any such written objections, which reasonable period shall not exceed Three (3) business days.

All of BUYER'S due diligence shall be performed at BUYER'S sole cost and expense. Should any of the conditions specified in this Paragraph 4(a) and its subsections fail to occur before the CLOSE OF ESCROW, BUYER shall have the right, exercisable by transmitting written notice to SELLER and ESCROW AGENT, to cancel the escrow, terminate this AGREEMENT. The BUYER shall not be entitled to recover the EARNEST MONEY DEPOSIT if termination occurs after the CONTINGENCY PERIOD other than as a result of the breach of this Agreement by SELLER, and the BUYER'S termination shall constitute a waiver any other rights BUYER may have against SELLER for breach of this AGREEMENT.

(iii) The conveyance to BUYER, by grant, bargain and sale deed of good and marketable fee simple title to the PROPERTY, shall be evidenced by a standard form CLTA title insurance policy, in the full amount of the PURCHASE PRICE, issued by ESCROW AGENT, or another title insurance company approved in writing by BUYER, subject only to the exceptions approved by BUYER pursuant to Section 4(a)(i).

(b) Seller's Conditions. The CLOSE OF ESCROW and SELLERS' obligation to sell the PROPERTY pursuant to this AGREEMENT are conditioned on the performance by BUYER of each obligation under this AGREEMENT, including, without limitation, BUYER'S obligations to make payments described in Section 2 within the time period designated. Should these conditions fail to occur, then SELLER shall have the right to cancel the escrow and terminate this AGREEMENT by transmitting written notice to ESCROW AGENT and to BUYER.

(c) Short Sale. Buyer is aware that this is a short sale and requires Bank Approval. This sale is subject to Short Sale approval from the Seller's Lender. See Attached Short Sale Advisory and Hold Harmless Agreement.

5. Pro-rations. ESCROW AGENT shall prorate property taxes, assessments and association fees, if any as of CLOSE OF ESCROW. Utilities, and other expenses of maintaining the PROPERTY shall be prorated as of the CLOSE OF ESCROW. SELLER warrants and represents that there are no tenants, no rental rights or other rights of occupancy held by any third party and therefore there are no rents to prorate or security deposits to credit.

6. Broker's Commissions. There shall be a 3% Commission charged to SELLER and paid to Colliers International on the sales price.

7. Expenses of Escrow. The cost of the CLTA title insurance policy shall be paid by the Seller. If BUYER desires an ALTA title insurance policy, BUYER shall solely bear the additional

Page 3 of 6

PURCHASE AND SALE AGREEMENT  
7695-7699 S. Virginia St. Reno, NV..

Seller's Initials  
Buyer's Initials

LJW000334



cost of the ALTA policy. Real property transfer taxes shall be paid by SELLER AND BUYER TO BE SPLIT 50/50. Escrow fees shall be charged equally between BUYER and SELLER. Recording fees for the grant, bargain and sale deed shall be paid by BUYER. Recording fees and any other charges related to curing title of the delinquency of any objection shall be charged to SELLER. Any other charges of escrow shall be charged according with the customary practices of Escrow Agent.

8. "AS IS" Purchase: Buyer is aware that buyer is purchasing the subject property in "AS IS" condition, Buyer and Seller agree to execute an "AS IS" addendum which shall become a part of this purchase contract. Seller shall not be responsible for the cost of any repairs to the subject property.

8. BROKER DISCLOSURE: Dan Gluhaich is a licensed broker in the State of Nevada and a licensed agent in the state of California.

9. Control of Property During Escrow. BUYER shall have the right, upon reasonable request and at times set by appointment to enter on the PROPERTY for the purpose of conducting soil tests, surveys, inspections and studies, as BUYERS may require to ascertain the suitability of the PROPERTY for BUYER'S purposes. BUYER shall liberally be provided access to perform due diligence.

10. Representations and Warranties by Seller. SELLERS hereby represent and warrants to the best of Seller's Knowledge, to BUYER as follows, which representations and warranties shall be deemed again made and repeated at the time of CLOSE OF ESCROW, as if first made on said date and time:

- (a) The PROPERTY is not encumbered by or subject to any easements (including prescriptive easements), claims of easement, rights, rights-of-way, licenses, restrictions, covenants, interests, discrepancies, conflicts in boundary lines, encroachments, leases, rental agreements, parties in possession (or with possessory rights) or other rights which are not on record in the Official Records of the County Recorder in Washoe County.
- (b) Neither SELLER nor any other party is in violation, breach or default of any instruments which are related to or comprise exceptions in the PRELIMINARY REPORT.
- (c) There are no toxic materials, hazardous wastes or hazardous substances (as those terms are defined in the Resource Conservation and Recovery Act of 1976, as amended, or in the Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended) on the PROPERTY, including, without limitation, any asbestos or asbestos related products.
- (d) SELLER has received no notices of any violation of any law, ordinance or regulation from any governmental authority with respect to the PROPERTY.
- (e) The PROPERTY and all buildings and other improvements located thereon are in full compliance with all applicable zoning, building, fire and other laws, statutes, ordinances, codes and governmental regulations.



- (f) SELLER is not a "foreign person", as that term is defined in Section 1445 of the U.S. Internal Revenue Code of 1986, as amended. (In that regard, SELLER shall deposit into escrow, at or prior to CLOSE OF ESCROW, an affidavit in such form as may be required by the United States Internal Revenue Service, setting forth SELLER'S full name, address and taxpayer identification number and stating under penalty of perjury that SELLER is not a "foreign person" as so defined.)

Prior to CLOSE OF ESCROW, SELLER shall, at its own cost, perform all acts and take all steps necessary to remedy and cure any breach of any of the foregoing warranties discovered or determined prior to CLOSE OF ESCROW and to place the PROPERTY in conformance with the warranties.

11. Destruction. In the event of any damage or other loss to the PROPERTY prior to the CLOSE OF ESCROW, BUYER shall be entitled to terminate this AGREEMENT.

12. Assignment. This AGREEMENT may be assigned by either SELLER or BUYER. Such an assignment is expressly approved by both SELLER and BUYER by this AGREEMENT and no other approval of the BUYER or SELLER is required.

13. Notices. All notices, demands, requests, exercises and other communication under this AGREEMENT by either party shall be in writing and be either be personally delivered or:

(a) sent by United States certified mail, return receipt requested, in which case notice shall be deemed delivered on the day the mail is postmarked;

(b) sent by a nationally recognized overnight courier, in which case notice shall be deemed delivered the same day the notice is delivered to that courier, or

(c) sent by facsimile machine, in which case notice shall be deemed delivered on transmittal by the facsimile machine so long as a transmission report is generated that indicates the notice was successfully transmitted, as follows:

**TO SELLER:**

Larry Willard and or Assignees

\_\_\_\_\_  
\_\_\_\_\_

**TO BUYERS:**

Longley Partners, LLC and or Assignees  
c/o Rob Cashell, Manager  
1200 Financial Blvd  
Reno, NV 89502

These addresses may be changed by written notice to the other party, provided that no notice of a change of address shall be effective until actual receipt of that notice.

13. Alternative Dispute Resolution. All disputes between SELLER and BUYER relating in any manner whatsoever to the enforcement of any terms and conditions of this AGREEMENT shall be resolved by Arbitration in [Washoe County, NV.] unless the parties mutually agree in writing to resolution through another forum (e.g. mediation or through a court action.) Arbitration shall be final and binding upon the Parties and shall be the exclusive remedy for all claims unless the parties agree otherwise in writing. Arbitration of all claims shall be in accordance with the Arbitration Rules of the American Arbitration Association, unless the parties agree otherwise in writing. The fees of the arbitrator shall be split between



both Parties equally. The parties agree that this Paragraph shall survive the termination of this Agreement.

14. Attorney's Fees. If any legal action or any other proceeding, including arbitration or an action for declaratory relief, is brought for the enforcement of this AGREEMENT, or because of an alleged dispute, breach, default, or misrepresentation in connection with or arising from this AGREEMENT, the prevailing party shall be entitled to recover reasonable attorney's fees and other costs, in addition to any other relief to which the party may be entitled. The "PREVAILING PARTY" shall mean: (a) the party who dismisses an action in exchange for sums allegedly due; (b) the party who received performance from the other party of an alleged breach of covenant or a desired remedy where that is substantially equal to the release sought in an action; or (c) the party determined to be the prevailing party by a court of law.

15. Entire Agreement. This instrument contains the entire agreement of the parties; any previous understandings of the parties regarding the subject matter of this AGREEMENT are expressly declared void and are superseded by this AGREEMENT.

16. Time of Essence. Time is of the essence for each condition, term and provision of this AGREEMENT.

17. Counterparts. This AGREEMENT may be executed in one or more counterparts. Each shall be deemed an original and all taken together shall constitute one and the same.

18. Severability. If any term or Provision of this AGREEMENT shall, to any extent, be held invalid or unenforceable, the other portions of this AGREEMENT shall not be affected.

19. Waivers. A waiver or breach of the covenant or provision in this AGREEMENT shall not be deemed a waiver of any other covenant or provision in this AGREEMENT, and no waiver shall be valid unless in writing and executed by the party making the waiver. An extension of time for performance of any obligation or act shall not be deemed an extension of the time for performance of any other obligation or act.

20. Construction. Section headings are solely for the convenience of the parties and are not a part of and shall not be used to interpret this AGREEMENT. The singular form shall include the plural and vice versa. This AGREEMENT shall not be construed as if it had been prepared by one of the parties, but rather, as if both parties had prepared it.

21. Governing Law. This AGREEMENT shall be governed and construed in accordance with California law, and the parties stipulate that any actions, lawsuits, and/or arbitration arising from this AGREEMENT shall take place in Washoe County.

BY INITIALLING EACH PAGE ABOVE AND SIGNING BELOW, THE PARTIES ACKNOWLEDGE THAT THEY HAVE READ AND UNDERSTOOD THE ENTIRE AGREEMENT, AND ENTER INTO THIS AGREEMENT AS OF THE DATE FIRST WRITTEN ABOVE.

SELLER

  
By: Larry Willard and or Assignees

BUYERS

  
By: Longley Partners, LLC and or Assignees

PURCHASE AND SALE AGREEMENT  
7695-7699 S. Virginia St. Reno, NV..

Page 6 of 6

Seller's Initials \_\_\_\_\_  
Buyer's Initials ph  
LJW000337

Exhibit 47-6

# EXHIBIT 48

# EXHIBIT 48

### SHORT SALE AGREEMENT

THIS SHORT SALE AGREEMENT ("**Agreement**") is made as of February \_\_, 2014, by and among the NATIONAL CREDIT UNION ADMINISTRATION BOARD, in its capacity as Liquidating Agent for Telesis Community Credit Union ("**Liquidating Agent**"), OVERLAND DEVELOPMENT CORPORATION, a California corporation, LARRY J. WILLARD, individually, and LARRY J. WILLARD, TRUSTEE OF THE LARRY JAMES WILLARD TRUST, dated November 14, 1987, jointly and severally (collectively "**Borrower**"), and LARRY J. WILLARD and KARIN WILLARD, jointly and severally (collectively "**Guarantor**"), with respect to the following facts:

#### Recitals:

A. Telesis Community Credit Union, a California state chartered credit union ("**Telesis**") acting as a lender, previously made a loan to Borrower in the original principal amount of \$13,312,500.00 ("**Loan**"). The Loan is evidenced by a certain Promissory Note dated as of February 28, 2006 ("**Note**"), executed by Borrower in favor of Telesis.

B. The Loan and Note are secured by, among other things: (i) that certain Deed of Trust, Assignment of Rents and Security Agreement dated as of February 28, 2006 ("**Deed of Trust**"), executed by Borrower, as grantor, in favor of Telesis, as beneficiary, and recorded on March 28, 2006 as Document No. 3367072 of the Official Records of the Washoe County Recorder ("**Official Records**"); (ii) that certain Assignment of Leases and Rents of even date therewith ("**Assignment of Leases**"), executed by Borrower in favor of Telesis, and recorded on March 28, 2006 as Document No. 3367073 of the Official Records, and (iii) one or more UCC-1 Financing Statements ("**UCC-1s**") in favor of Telesis, as secured party (collectively, "**Security Instruments**"). The Security Instruments encumber Borrower's interest in certain real property and other property more particularly described therein ("**Property**").

C. The Loan was guaranteed by Larry J. Willard and Karin Willard, jointly and severally, pursuant to a Guaranty dated as of February 28, 2006 ("**Guaranty**"), executed by Guarantor in favor of Telesis. The Note, Security Instruments, Guaranty and all other documents executed by Borrower or Guarantors in connection with the Loan are sometimes collectively referred to herein as the "**Loan Documents**".

D. After or contemporaneous with its making of the Loan, Telesis assigned partial interests in the Note and other Loan Documents to multiple third party participating lenders (collectively, "**Other Lenders**") pursuant to one or more separate agreements among Telesis and the Other Lenders.

E. On May 31, 2012, Telesis, which was a federally insured California state chartered credit union, was placed into involuntary liquidation by the California Department of Financial Institutions. The National Credit Union Administration Board was appointed as liquidator. The National Credit Union Administration is an independent agency of the executive branch of the United States Government that regulates federally chartered and insured credit unions and some state chartered and federally insured credit unions. The National Credit

Union Administration is managed by the National Credit Union Administration Board pursuant to 12 U.S.C. § 1752a(a).

F. Pursuant to 12 U.S.C. § 1787, the Liquidating Agent has the authority to and did accept appointment as the liquidating agent of Telesis. By operation of law, the National Credit Union Administration Board, acting in its capacity as Liquidating Agent of Telesis succeeded to all rights, title, authorities, and interest of Telesis, including with respect to its position under the Loan and the Loan Documents. The Liquidating Agent is therefore sometimes hereinafter referred to as the “**Lender.**”

G. Borrower desires to sell the Property. However, the current fair market value of the Property is less than the total outstanding balance of the Loan. Subject to the terms and conditions set forth herein, Lender is willing to agree to a short sale of the Property, whereby Lender, for itself and all Other Lenders, at the closing of the sale of the Property, will release the lien of the Deed of Trust and other Security Instruments to facilitate the sale of the Property, and concurrently release Borrower and Guarantors from all of their respective obligations under the Loan Documents.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Lender, Borrower and Guarantor hereby agree as follows:

1. **Representations and Warranties.** Borrower and Guarantor hereby represent and warrant to Lender as follows:

a. To the best knowledge of Borrower and Guarantor, each of the statements made in the recitals at the beginning of this Agreement is correct and complete, and as of the date of this Agreement the outstanding principal balance of the Loan is as set forth in **Exhibit “A”**;

b. Each of the Loan Documents, as modified hereby, is the legal, valid and binding obligation of Borrower and/or Guarantor, as applicable, enforceable by Lender according to its terms, and has not been modified or amended, other than as modified or amended by this Agreement;

c. The execution and delivery of this Agreement by Borrower and Guarantor requires no approvals or authorizations from any person or entity not heretofore obtained; and does not violate, contravene or conflict with any law, order or regulation of any court or governmental authority or any contract or instrument to which Borrower or Guarantor is a party or by which Borrower, Guarantor or the Property may be bound;

d. There is no action, suit, claim, cause of action or other proceeding in court or in any governmental agency now pending against Borrower or Guarantor which involves any claim affecting title to the Property.

e. Neither Borrower nor Guarantor has a direct or indirect interest in Buyer (defined below), and neither Borrower nor Guarantor will directly or indirectly receive any

consideration in the sale of the Property to Buyer (except for Lender's performance of this Agreement);

f. To the current actual knowledge of Borrower and Guarantor, Buyer is not: (i) a person or entity who is identified on the list of specially designated nationals subject to sanctions that is maintained by the U.S. Treasury Department, Office of Foreign Assets Control (accessible through the internet website <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>); or (ii) a person or entity with whom a U.S. citizen is prohibited to engage in transactions by any trade embargo, economic sanction, or other prohibition of United States law or Executive Order of the U.S. President; and

g. To the current actual knowledge of Borrower and Guarantor, Buyer is not, as of the closing of the sale of the Property (the "Closing"), an institution-affiliated party or other person(s) suspended or removed from office in an insured credit union or is prohibited from any participation in the conduct of the affairs of any insured credit union, any insured depository institution, any institution treated as an insured bank or as a savings association, any institution chartered under the Farm Credit Act of 1971, any appropriate Federal Deposit institution regulatory agency, the Federal Finance Housing Board and any Federal home loan bank, and/or the Resolution Trust Corporation.

2. **Reaffirmations.** Borrower and Guarantor confirm, represent, warrant and agree that:

a. Each of the Loan Documents, as modified by this Agreement, remains in full force and effect as valid and binding obligations of the parties thereto and is hereby ratified and reaffirmed by them. The Deed of Trust remains a valid and properly perfected first lien on the Property subject only to encumbrances permitted as of the Loan closing or otherwise permitted under the Loan Documents. Borrower and Guarantor continue to be obligated to Lender under the Loan Documents.

b. Borrower has no existing and asserted (and no known basis for any unasserted) claims, counterclaims, defenses or rights of setoff with respect to any of their payment obligations to the Lender under the Note or any other obligations under any of the Loan Documents.

c. Guarantor has no existing and asserted (and no known basis for any unasserted) claims, counterclaims, defenses or rights of setoff with respect to Guarantor's obligations under the Guaranty.

d. Borrower and Guarantor recognize and affirm the Liquidating Agent's rights as the Lender under the Loan Documents based upon the prior liquidation of Telesis and acknowledge and agree that no defenses to their obligations under the Loan Documents have arisen by virtue of that liquidation.

e. Without limiting the foregoing, Guarantor consents and agrees to the terms hereof and the terms of the Loan as modified hereby, and confirms and reaffirms the

validity of Guarantor's Guaranty of all such obligations of Borrower as described In the Loan Documents as modified hereby.

3. **Sale of Property; Release of Liens and Loan Obligations; Conditions.** Subject to the terms and conditions set forth in this Agreement, Lender acknowledges, covenants and agrees as follows:

a. Lender hereby approves Borrower's sale of the Property to LONGLEY PARTNERS, L.L.C., a Nevada limited liability company, or its assignee (collectively, "**Longley Partners**"), or to another Lender-approved third party not affiliated with Borrower or Guarantor (together with Longley Partners, each a "**Buyer**"), subject to Lender's approval of the transaction closing statement, provided Borrower causes Lender to be paid through the Property sale's escrow ("**Escrow**"), at the Closing and in cash (via wire transfer to Lender), a sum equal to the following:

- A minimum of no less than \$3,725,000.00, if the Closing occurs on or before March 3, 2014; or
- A minimum of no less than \$3,955,000.00 if the Closing occurs after March 3, 2014, but on or before March 21, 2014.

("Short Sale Payment"). Under no circumstances, shall Lender receive an amount lower than the Short Sale Payment specified above, including, without limitation, due to the need for the parties to pay real estate commissions (which, as described below, will not exceed a maximum of three percent (3%) of the sale price of the Property), escrow fees, or any other costs or fees of any kind whatsoever. Further, in no circumstances shall Lender's approval of the short sale contemplated by this Agreement be effective if the Closing of the sale of the Property occurs after March 21, 2014. If Lender approves the closing statement and if payment is received by Lender in at least the amounts set forth above, then Borrower's payment and Lender's receipt of the Short Sale Payment shall be deemed in full and complete satisfaction of the outstanding principal balance of the Loan and other amounts due and owing under the Loan Documents, as set forth in Exhibit A, including all accrued and unpaid interest, any fees, charges and costs payable by Borrower in connection with the Loan, and all other indebtedness, liabilities and other obligations to be paid or performed by Borrower and/or Guarantor under or in connection with the Loan and the Loan Documents (collectively, "**Loan Obligations**").

b. Each party to this Agreement agrees to pay its own attorneys' fees in connection with the sale of the Property and the Closing.

c. At the Closing, subject to Lender's approval of the closing statement and receipt of the Short Sale Payment, Lender agrees to release the liens evidenced by the Deed of Trust and other Security Instruments and any other liens or security interests in its favor securing the Loan and the Loan Documents. Lender, at least one (1) business day before the Closing, shall: (i) deliver to Escrow the original signed Note and the original signed Guaranty, for delivery to Borrower and Guarantor at the Closing subject to Lender's receipt of the Short Sale Payment, with instructions to the escrow agent to mark the Note "Paid-In-Full" and mark the



Guaranty "Canceled" at the time of Closing subject to Lender's approval of the closing statement and receipt of the Short Sale Payment; (ii) execute and deliver to Escrow, for recordation at the Closing, subject to Lender's receipt of the Short Sale Payment, a substitution of trustee and deed of reconveyance, reconveying the Property in full, without warranty, to the person or persons legally entitled thereto; and (iii) deliver to Escrow, for filing or recording with the appropriate governmental entity, as applicable (subject to Lender's receipt of the Short Sale Payment), one or more completed UCC-3 termination statements, terminating the UCC-1s filed or recorded in connection with the Loan.

d. Lender represents and warrants to Borrower and Guarantor that (i) Lender has the right, power and authority, for itself as Liquidating Agent of Telesis and on behalf of each of the Other Lenders, to enter into and perform this Agreement, without the consent of any other person or entity (including any of the Other Lenders), except for consents which have been received by Lender prior to the date of this Agreement, and (ii) upon Lender's execution and delivery of this Agreement, this is the legal, valid and binding obligation of each of Lender and the Other Lenders, enforceable by Borrower and Guarantor according to its terms. Effective as of the Closing, subject to Lender's approval of the closing statement and receipt of the Short Sale Payment, Lender, for itself as Liquidating Agent of Telesis and on behalf of each of the Other Lenders (and their respective predecessors-in-interest, successors and assigns), releases Borrower and Guarantor (and their respective heirs, legal representatives, successors, assigns and other Affiliates [defined below]) from all of their respective Loan Obligations to be paid or performed under or in connection with the Loan and the Loan Documents, including without limitation, the outstanding principal balance of the Loan, as set forth in Exhibit A, and all accrued and unpaid interest, fees, charges, costs and other amounts due and owing under the Loan Documents.

e. It is expressly understood and acknowledged by Borrower and Guarantor that, in the event the net proceeds remaining for distribution at Closing, after payment of any closing costs, commissions, and other miscellaneous expenses as referenced on the closing statement, exceed the minimum amounts to be paid to Lender as set forth above, that Lender shall also be entitled to any such excess, and, in no event shall any net proceeds or other funds be payable to Borrower or Guarantor. Notwithstanding the foregoing, a payment in the amount of One Hundred Fifty Thousand and No/100 Dollars (\$150,000.00) will be permitted by Lender to an entity known as VAAM and Associates, which is the holder of a junior lien against the Property, so long as such payment does not impair the ability of Borrower to pay the Short Sale Payment in full at Closing.

f. As conditions of Lender's obligations under this Agreement:

- (1) Borrower shall continue to operate and manage the Property;
- (2) Borrower shall continue to pay all taxes, insurance, utilities and any other operating expenses of the Property, as and when required by the Loan Documents;
- (3) Borrower and Guarantor shall continue to comply with all other terms and conditions of the Loan Documents;

(4) Borrower shall provide all information and documents as reasonably requested by Buyer, Escrow and/or any applicable title company ("**Title Company**") in connection with the sale of the Property;

(5) Borrower shall execute all documents as may be required by the purchase and sale agreement executed by Borrower and Buyer, and/or as may be reasonably requested by the Title Company;

(6) Borrower may not allow any default under this Agreement to occur or continue;

(7) Buyer shall certify by sworn verification, in the form attached hereto as Exhibit B which Borrower shall cause to be delivered to Lender at the Closing through Escrow, that neither Buyer nor any of its limited or general partners, members, managers, managing members, shareholders, officers, directors, joint venturers, or agents are, an institution-affiliated party or other person(s) suspended or removed from office in an insured credit union, nor prohibited from any participation in the conduct of the affairs of any insured credit union, any insured depository institution, any institution treated as an insured bank or as a savings association, any institution chartered under the Farm Credit Act of 1971, any appropriate Federal Deposit institution regulatory agency, the Federal Finance Housing Board and any Federal home loan bank, and/or the Resolution Trust Corporation.

(8) Nothing in this Agreement requires Lender to forbear from exercising any of its remedies with respect to any breaches or defaults by Borrower or Guarantor arising under the Loan Documents (following the running of any applicable notice and cure periods); and Lender hereby expressly reserves all rights, remedies or interests to which Lender is or may become legally entitled. Nothing in this Agreement obligates any party hereto to pursue any negotiations or further agreement with respect to the Loan Documents or the Property;

(9) The sale of the Property between Borrower (as seller) and Buyer must be made on terms which are "AS IS/WHERE IS", and the purchase and sale agreement for the Property must expressly confirm that Buyer has undertaken necessary due diligence, or waived such due diligence by the time of Closing;

(10) Subject to the additional time expressly allotted under Section 3(a)(1), above, the Closing of the sale of the Property must occur on or before March 3, 2014;

(11) The purchase and sale agreement for the sale of the Property shall expressly provide that any brokerage commission paid to all brokers (collectively) representing the parties shall be limited to a total of three percent (3%) of the sale price; and

(12) The Short Sale Payment shall be made timely by wire transfer from Escrow to Lender.

4. **Defaults.** Each of the following shall constitute a "**Default**" by Borrower and Guarantor hereunder, which would allow Lender, in its sole and absolute discretion, to terminate this agreement and repudiate its promises made hereunder.

a. Borrower's failure to keep or perform any covenant or agreement contained in this Agreement, and such failure continues for more than ten (10) days after written notice thereof by Lender;

b. The occurrence or continuation of any default or event of default under any Loan Document beyond any applicable notice and cure period, unless waived by Lender, via the Closing hereunder being approved by Lender notwithstanding such default;

c. Borrower or Guarantor repudiates or asserts a defense to any obligation or liability under any Loan Document or this Agreement or makes or pursues a claim against Lender;

d. Any representation and warranty given by Borrower or Guarantor in this Agreement proves to be false, misleading or incorrect in any material respect when made or omits to state a material fact; or

e. A petition for relief under any federal or state bankruptcy, reorganization or insolvency statute or law is filed by or against Borrower or Guarantor.

5. **Tax Consequences of Agreement.** As part of its release of Borrower and Guarantors from their respective obligations under the Loan Documents, Lender, on its own behalf and on behalf of the Other Lenders, if and to the extent required by law, may file and issue IRS Form 1099-C Statement(s) to Borrower for the portion of the Loan Obligations that are not paid. Release of the Loan Obligations by Lender may or may not be treated as income to Borrower and be the subject of state and federal taxation. Lender and its legal counsel are not tax attorneys and advise Borrower to seek legal advice on matters of taxation. In the event Lender files or issues such 1099-C, nothing herein precludes or prohibits Borrower from contesting the 1099-C with the Internal Revenue Service or other governmental taxation agency. However, Borrower agrees they will not make any claim against Lender as a result of its filing or issuance of any such 1099-C, and that this Agreement constitutes a bar to any such claim by Borrower against Lender in connection thereto.

6. **Release of Claims.** Subject to the terms and conditions set forth in this Agreement, Borrower and Guarantor agree as follows:

a. **Certain Waivers.** To the fullest extent permitted by law, except as otherwise expressly stated in this Agreement, Borrower and Guarantor each hereby waives and relinquishes the following, effective as of the Closing: (i) any right that it may have to legal or equitable relief to cause any stay, suspension, abatement, postponement, or termination of any enforcement by Lender of its rights and remedies under the Loan Documents or applicable law (excepting its right, if and to the extent applicable, to file a case under the U.S. Bankruptcy Code); and (ii) the pleading of any statute of limitations or similar defense to the collection of the Loan.

b. **Release of All Claims.** Effective as of the Closing, in consideration of, and

as a material inducement to, Lender's entering into this Agreement, Borrower and Guarantor, on behalf of themselves, their Affiliates (as such term is defined in 17 C.F.R. Sec. 230.405), and their respective shareholders, general partners, members, managers, officers, directors, agents, employees, representatives, predecessors-in-interest, successors and assigns, and all persons acting by, through, under or under control of any of the foregoing (collectively, the "**Releasing Parties**"), each hereby waives, releases, forever discharges and covenants not to sue Telesis, the National Credit Union Administration, and the National Credit Union Administration Board, acting heretofore or now or hereafter in any capacity, including as Liquidating Agent and as Lender, Other Lenders, and all of their subsidiaries, affiliates, divisions, officers, directors, members, employees, agents, attorneys, advisors, predecessors-in-interest, successors and assigns (collectively, the "**Released Parties**") from any and all claims, demands, debts, liabilities, damages, costs, expenses, contracts, obligations, indebtedness, defenses, accounts, torts, causes of action or claims for relief of whatever kind or nature, whether known or unknown, suspected or unsuspected, foreseen or unforeseen, direct or indirect, fixed or contingent, liquidated or unliquidated, and disputed or undisputed (collectively, "**Claims**") which the Releasing Parties may have or which may hereafter be asserted or accrue against any of the Released Parties resulting from or in any way relating to any act or omission done or committed by Released Parties at any time prior to the date of the Closing, including without limitation: (i) any Released Party's administration or funding of the Loan on or before the date of this Agreement; (ii) the conduct of any Released Party during the negotiation, documentation, execution and delivery of this Agreement; and (iii) any other acts or omissions by any Released Party on or before the Closing in connection with the Loan or any of the Loan Documents or in connection with the Property or any other real and personal property in which a lien or security interest has been created in favor of Lender or any predecessor-in-interest to Lender pursuant to any of the Loan Documents. Effective as of the Closing, Borrower and Guarantor each represents and warrants that neither it nor its respective Releasing Parties has assigned, conveyed or transferred all or any portion of the released Claims. If any of the Releasing Parties asserts any of the released Claims against any Released Party following the Closing, Borrower or such Guarantor, respectively, shall pay to such Released Party all damages caused thereby and all reasonable attorneys' fees and expenses incurred by such Released Party in defending against such released Claims.

c. Release Includes Unknown Claims. Effective as of the Closing, Borrower and Guarantor each expressly waives and assumes the risk of any and all Claims which may exist as of the date of this Agreement but which it does not know or suspect to exist in its favor for any reason, including ignorance, oversight, error, negligence, or otherwise, and which, if known, would or could affect its decision to enter into this Agreement. Without limiting the generality of the foregoing, effective as of the Closing, each Borrower and each Guarantor expressly waives any and all rights conferred upon it by any statute or law which provides that a release does not extend to claims which the claimant does not know or suspect to exist in his favor at the time of executing the release, which if known by the claimant must have materially affected its settlement with the released party, including, without limitation, all rights under California Civil Code Section 1542, which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH  
THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN

HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

d. Complete Defense. Any release by Releasing Parties shall constitute a complete defense to any Claims that may be instituted, prosecuted, or attempted, in breach of said release.

e. Voluntary Waiver and Release: Subsequent Facts. Borrower and Guarantor each acknowledges that these waivers and releases are voluntary and are given without any duress or undue influence, as part of the consideration for Lender's providing the covenants and agreements set forth herein. Borrower and Guarantor each expressly acknowledges that they (or any of them) may hereafter discover facts different from or in addition to those which they (or any of them) now believes to be true with respect to the release of the Claims, and agrees that, subject to the terms and conditions of this Agreement, effective as of the Closing, the foregoing waivers and releases shall be and remain effective in all respects notwithstanding such different or additional facts.

f. No Admission. Nothing stated or implied in this Agreement shall be construed as an admission by Lender or any of the Released Parties of any liability of any kind, such liability being expressly denied.

g. Limitations. Notwithstanding anything to the contrary contained in this Section 6 or elsewhere herein, none of the Claims released by Borrower and Guarantor herein shall be deemed to include any of Lender's obligations under this Agreement, and none of Borrower's and Guarantor's waivers or releases contained in this Section 6 or elsewhere herein shall be deemed effective unless and until the Closing occurs.

7. Revival of Obligations. If a court of competent jurisdiction shall find or hold that any payment of money or transfer of property pursuant to this Agreement is "fraudulent" within the meaning of any state, federal or foreign law related to fraudulent transfers or conveyances, preferential or otherwise voidable or recoverable, in whole or in part, for any reason, under the U.S. Bankruptcy Code or any other state, federal or foreign law (each such payment or transfer being hereinafter referred to as a "**Voidable Transfer**") and, as a consequence, Lender is required to repay, return or restore the Voidable Transfer, or any portion thereof, then, after that which is repaid, returned or restored pursuant to such Voidable Transfer, the liability of Borrower or Guarantor shall automatically be revived, reinstated and restored to the extent thereof and shall exist as though such Voidable Transfer had never been made to Lender, provided, however, that Borrower and Guarantor shall be credited with, and their liability hereunder shall be deemed satisfied, for such payment or transfer to the extent, if any, the same does not constitute a Voidable Transfer. Borrower and Guarantor each expressly acknowledges and agrees that Lender may rely upon advice of counsel and, if so advised by counsel, may, in the exercise of its good faith business judgment, settle, without defending, any action to avoid any alleged Voidable Transfer, provided Lender first affords Borrower and Guarantor with the opportunity to defend any such action at their sole expense, and that such

settlement shall be deemed to be a repayment or restoration of such Voidable Transfer pursuant to this provision. Nothing set forth herein is an admission that any Voidable Transfer has occurred.

8. **Dispute Resolution.** This Section 8 concerns the resolution of any controversies or claims between or among Borrower, Guarantor, and Lender (and the Other Lenders), whether arising in contract, tort or by statute, including controversies or claims that arise out of or relate to this Agreement or any of the Loan Documents (collectively, "**Disputes**"). To the extent permitted by law, all Disputes that cannot be resolved informally between the parties shall be filed in the United States District Court where the Property is located and resolved by a judge without a jury. Any jury trial waiver set forth in the Loan Documents is hereby incorporated by reference in this Agreement.

This Section 8 does not limit the right of any party to: (i) exercise self-help remedies; (ii) initiate judicial or non-judicial foreclosure against any real or personal property collateral; (iii) exercise any judicial or power of sale rights; or (iv) act in a court of law to obtain an interim remedy, such as but not limited to, injunctive relief, writ of possession or appointment of a receiver, or additional or supplementary remedies. The filing of a court action is not intended to constitute a waiver of the right of any party, including the suing party, thereafter to request or require submittal of the Dispute to judicial reference if and to the extent provided in the Loan Documents.

9. **Notices.** All demands, notices and communications to a party hereunder shall be in writing and shall be deemed to have been duly given if delivered in accordance with the terms of the notice provisions of the Loan Documents. All such demands, notices and communications shall be delivered to a party hereunder at the relevant address specified below (or such other address as such party may designate from time to time by not less than ten (10) days' prior written notice in accordance with this provision):

**If to Borrower and/or Guarantor:** Overland Development Corporation and Larry J. Willard  
c/o Larry James Willard

\_\_\_\_\_  
\_\_\_\_\_

**With a copy to:** Stanley A. Zlotoff, Esq.  
300 South First Street, Suite 215  
San Jose, CA 95113

**If to Buyer:** Longley Partners, L.L.C.

\_\_\_\_\_  
\_\_\_\_\_

Attn: Robert Cashell, Jr., Managing Member

**With a copy to:** \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**If to Lender:**

c/o Business Partners, LLC  
 9301 Corbin Ave., Suite 1200  
 Northridge, California 91324

**With a copy to:**

Albright, Stoddard, Warnick & Albright  
 801 S. Rancho Drive, Suite D-4  
 Las Vegas, Nevada 89106  
 Attention: D. Chris Albright, Esq.

Any notice, demand or other communication hereunder shall be deemed to have been duly given when received on the date delivered to or received at the premises of the addressee (as evidenced, in the case of registered or certified mail, by the date noted on the return receipt) if received or delivered prior to 5:00 p.m. local time and, if received or delivered after such time, shall be deemed to have been received on the next business day). The parties hereby agree that, notwithstanding the foregoing, any failure to send a courtesy copy of a notice, demand or other communication hereunder shall not constitute a material breach of this Agreement nor shall such failure impair the effectiveness of such notice, demand or other communication.

**10. Miscellaneous Provisions.**

a. Binding Nature/No Third Party Beneficiaries. The provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns, except that (i) neither Borrower nor Guarantor may assign, delegate or otherwise transfer any of its rights and obligations under this Agreement without the prior written consent of Lender, and (ii) all of the Other Lenders shall be bound by this Agreement to the extent of their respective interests in the Loan and the Loan Documents. Subject to the foregoing, this Agreement is made and entered into for the sole protection and benefit of the parties hereto and the Released Parties, and no other person or entity shall be a direct or indirect beneficiary of this Agreement.

b. Severability. If any provision of this Agreement or any of the Loan Documents shall for any reason be determined by a court of competent jurisdiction to be unenforceable in any respect, such unenforceability shall not affect any other provision hereof or thereof; and this Agreement or such other Loan Document shall be construed as if such unenforceable provision had not been contained herein or therein.

c. Interpretation; Entire Agreement; Amendment. In the event of any express conflict between this Agreement and any of the Loan Documents, the provisions of this Agreement shall govern. Time is of the essence for all payments to be made and all obligations



to be performed under this Agreement. All representations, warranties, waivers and releases of Borrower and Guarantor made in this Agreement shall survive the termination or other cancellation of this Agreement. This Agreement contains or incorporates the entire agreement of the parties hereto with respect to the matters discussed herein, and there are no other agreements, written or oral, between the parties respecting the subject matter hereof. This Agreement may only be amended by a written instrument executed by each of the parties hereto.

d. No Implied Waiver. Neither the failure nor delay by Lender to exercise its remedies nor the acceptance of any payments hereunder or any other partial performance (whether before or after the date of this Agreement) shall operate as a waiver thereof nor prohibit, restrict, or otherwise inhibit Lender from exercising any right or remedy it may have under any of the Loan Documents (except to the extent of the explicit terms hereof) or constitute a cure of any existing default. No single or partial exercise of any right, power or privilege hereunder shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

e. Counterparts; Signatures. This Agreement may be executed by the parties in any number of counterparts and on separate counterparts, each of which when executed and delivered shall be an original, but all of which shall together constitute one and the same instrument. The parties' signatures may be exchanged by any form of facsimile transmission (including, for this purpose, email transmission of PDF documents), and each party agrees to be bound by its own facsimile signature and to accept the facsimile signature of the other parties, which copies shall also be fully admissible in any court proceedings to the same extent as the originals.

f. Attorneys' Fees. If any party hereto shall bring or participate in any successful legal action or proceeding to enforce, defend or construe any provision of this Agreement or any of the Loan Documents, the prevailing party shall recover from the non-prevailing party all reasonable legal expenses and costs, including reasonable attorneys' fees, as determined by a court of competent jurisdiction, which the prevailing party may incur in connection with such action or proceeding.

g. Governing Law. This Agreement shall be governed by the laws of the State of Nevada. Nothing in this Agreement shall abridge, contradict, contravene or otherwise impair any rights, privileges, powers or protections the NCUA enjoys and/or is obligated to perform as an independent federal agency of the United States Government, including statutes and regulations regarding claims by and against the NCUA or the NCUA Board in its capacity as Liquidating Agent of various credit unions, and accordingly Liquidating Agent reserves the right to have any claim under this agreement heard by the appropriate United States District Court pursuant to 12 U.S.C. § 1789(a)(2).

**[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK. SIGNATURE  
PAGE FOLLOWS.]**

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

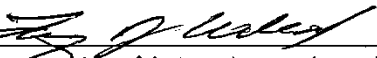
**Lender:**

NATIONAL CREDIT UNION  
ADMINISTRATION BOARD, in its capacity  
as Liquidating Agent for Telesis Community  
Credit Union

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

**Borrower:**

OVERLAND DEVELOPMENT  
CORPORATION, a California  
corporation

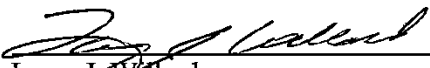
By:   
Name: LARRY J. WILLARD  
Title: President

  
LARRY J. WILLARD, individually

THE LARRY JAMES WILLARD  
TRUST, dated November 14, 1987

  
Larry J. Willard, Trustee

**Guarantor:**

  
Larry J. Willard

\_\_\_\_\_  
Karin Willard

**CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT**

CIVIL CODE § 1189

State of California

County of San DiegoOn Feb. 19, 2014  
Date

before me,

Susan Arledge Notary Public  
Here Insert Name and Title of the Officerpersonally appeared Larry J. Willard  
Name(s) of Signer(s)

who 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.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: [Signature]

Signature of Notary Public

Place Notary Seal Above

**OPTIONAL**

*Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.*

**Description of Attached Document**Title or Type of Document: Short Sale AgreementDocument Date: Feb. 19, 2014

Number of Pages: \_\_\_\_\_

Signer(s) Other Than Named Above: \_\_\_\_\_

**Capacity(ies) Claimed by Signer(s)**

Signer's Name: \_\_\_\_\_

☐ Corporate Officer — Title(s): \_\_\_\_\_☐ Individual☐ Partner — ☐ Limited ☐ General☐ Attorney in Fact☐ Trustee☐ Guardian or Conservator☐ Other: \_\_\_\_\_

Signer Is Representing: \_\_\_\_\_

RIGHT THUMBPRINT  
OF SIGNER  
Top of thumb here

Signer's Name: \_\_\_\_\_

☐ Corporate Officer — Title(s): \_\_\_\_\_☐ Individual☐ Partner — ☐ Limited ☐ General☐ Attorney in Fact☐ Trustee☐ Guardian or Conservator☐ Other: \_\_\_\_\_

Signer Is Representing: \_\_\_\_\_

RIGHT THUMBPRINT  
OF SIGNER  
Top of thumb here

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

**Lender:**

NATIONAL CREDIT UNION  
ADMINISTRATION BOARD, in its capacity  
as Liquidating Agent for Telesis Community  
Credit Union

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

**Borrower:**

OVERLAND DEVELOPMENT  
CORPORATION, a California  
corporation

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

\_\_\_\_\_  
LARRY J. WILLARD, individually

THE LARRY JAMES WILLARD  
TRUST, dated November 14, 1987

\_\_\_\_\_  
Larry J. Willard, Trustee

**Guarantor:**

\_\_\_\_\_  
Larry J. Willard


  
\_\_\_\_\_  
Karin Willard

STATE OF <sup>BC</sup>~~NEVADA~~ )  
COUNTY OF YALE )

On FEB 19, 2014, before me, TARJA MCLEAN personally appeared KARIN WILLARD who 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.

I certify under PENALTY OF PERJURY under the laws of the State of Nevada that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

  
Notary Public

**TARJA K. MCLEAN**  
Notary Public  
423 Cedar Avenue  
Kelowna, BC V1Y 4X2

**EXHIBIT A****OUTSTANDING LOAN BALANCE**

The outstanding principal balance of the Loan as of the date of this Agreement is Thirteen Million Five Hundred Sixty-Five Thousand One Hundred Thirty-Four and No/100 Dollars (\$13,565,134.00), plus accrued interest from January 31, 2014 through the date of this Agreement.

**EXHIBIT B****BUYER'S CERTIFICATION**

LONGLEY PARTNERS, L.L.C., a Nevada limited liability company ("Buyer"), by its authorized representative, hereby certifies as follows:

As of the closing date of its purchase of the property located generally at or about 7695 and 7699 S. Virginia Street, Reno, NV 89511, neither Buyer, nor any of its members, managers, managing members, limited or general partners, shareholders, officers, directors, joint venturers, or agents, are an institution-affiliated party that has been suspended or removed from office in an insured credit union or is prohibited from any participation in the conduct of the affairs of any insured depository institution, any institution treated as an insured bank or as a savings association, any insured credit union, any institution chartered under the Farm Credit Act of 1971, any appropriate Federal banking regulatory agency, the Federal Finance Housing Board and any Federal home loan bank, and/or the Resolution Trust Corporation, and accordingly neither Buyer nor any of its members, managers, managing members, limited or general partners, shareholders, officers, directors, joint venturers, or agents are currently found on the lists of institution-affiliated parties that are prohibited by the FHFA or any appropriate Federal banking regulatory agency, including but not limited to OCC, FDIC, FRB, and NCUA, from said participation in the conduct of affairs of such institutions.

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

DATED: 2/22/14

LONGLEY PARTNERS, L.L.C., a Nevada  
limited liability company

By: [Signature]  
Name: Rob Gishell Jr  
Its: Manager



STATE OF NEVADA )

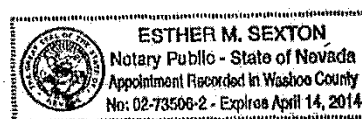
COUNTY OF Washoe )

On Feb. 22, 2014, before me, Esther M. Sexton personally appeared Mr. Paul J. - who 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.

I certify under PENALTY OF PERJURY under the laws of the State of Nevada that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Esther M. Sexton  
Notary Public



# EXHIBIT 49

# EXHIBIT 49



### CONSENT TO ACT

*This form does not constitute a contract for services nor an agreement to pay compensation.*

**DESCRIPTION OF TRANSACTION:** The real estate transaction is the ☒ sale and purchase *or* ☐ lease of

**Property Address:** 7695-7699 S. Virginia Street, Reno, NV

In Nevada, a real estate licensee may act for more than one party in a real estate transaction; however, before the licensee does so, he or she must obtain the written consent of each party. This form is that consent. Before you consent to having a licensee represent both yourself and the other party, you should read this form and understand it.

**Licensee:** The licensee in this real estate transaction is Daniel Gluhaich ("Licensee") whose license number is 0050164 and who is affiliated with Colliers Nevada LLC dba Colliers International ("Brokerage").

**Seller/Landlord** Larry J. Willard, Overland Development Corp, LLC

**Buyer/Tenant** Longley Partners, LLC

**CONFLICT OF INTEREST:** A licensee in a real estate transaction may legally act for two or more parties who have interests adverse to each other. In acting for these parties, the licensee has a conflict of interest.

**DISCLOSURE OF CONFIDENTIAL INFORMATION:** Licensee will not disclose any confidential information for one year after the revocation or termination of any brokerage agreement entered into with a party to this transaction, unless Licensee is required to do so by a court of competent jurisdiction or is given written permission to do so by that party. Confidential information includes, but is not limited to, the client's motivation to purchase, trade or sell, which if disclosed, could harm one party's bargaining position or benefit the other.

**DUTIES OF LICENSEE:** Licensee shall provide you with a "Duties Owed by a Nevada Real Estate Licensee" disclosure form, which lists the duties a licensee owes to all parties of a real estate transaction, and those owed to the licensee's client. When representing both parties, the licensee owes the same duties to both seller and buyer. Licensee shall disclose to both Seller and Buyer all known defects in the property, any matter that must be disclosed by law, and any information that the licensee believes may be material or might affect Seller's/Landlord's or Buyer's/Tenant's decisions with respect to this transaction.

**NO REQUIREMENT TO CONSENT:** You are not required to consent to this licensee acting on your behalf. You may

- Reject this consent and obtain your own agent,
- Represent yourself,
- Request that the licensee's broker assign you your own licensee.

### CONFIRMATION OF DISCLOSURE AND INFORMATION CONSENT

**BY MY SIGNATURE BELOW, I UNDERSTAND AND CONSENT:** I am giving my consent to have the above identified licensee act for both the other party and me. By signing below, I acknowledge that I understand the ramifications of this consent, and that I acknowledge that I am giving this consent without coercion.

**I/We acknowledge receipt of a copy of this list of licensee duties, and have read and understand this disclosure.**

|                    |                |      |              |      |      |
|--------------------|----------------|------|--------------|------|------|
| <u>[Signature]</u> | <u>2.25.14</u> |      |              |      |      |
| Seller/Landlord    | Date           | Time | Buyer/Tenant | Date | Time |
| <u>[Signature]</u> | <u>2.25.14</u> |      |              |      |      |
| Seller/Landlord    | Date           | Time | Buyer/Tenant | Date | Time |

Approved Nevada Real Estate Division  
Replaces all previous editions

524  
Revised 07/08/10

# EXHIBIT 50

# EXHIBIT 50

NorCal Escrow Solutions, Inc. (408) 842-1760

**Seller's Final Closing Statement**

|                |   |                |      |
|----------------|---|----------------|------|
| Seller(s)      | Overland Development Corporation, Inc., 826 Vanderbuilt Place, San Diego, CA 92103<br>Larry J. Willard, Trustee of the Larry James Willard Trust dated 11/14/1987, 826 Vanderbuilt Place, San Diego, CA 92103 |                |      |
| Buyer(s)       | Longley Partners, LLC, 1200 Financial Boulevard, Reno, NV 89502   |                |      |
| Lender         | Heritage Bank of Nevada, 1401 S. Virginia Street, Reno, NV 89502  |                |      |
| Property       | 7693 S Virginia St., Reno, NV 89511   |                |      |
| Closing date   | 03/03/2014  | Proration date | None |
| Bank           | BOW - BANK OF THE WEST  |                |      |
| Escrow Unit    | 1 - NorCal Escrow Solutions, Inc.   |                |      |
| Escrow Officer | Lucinda A. Reineccius   |                |      |

|  | Debit          | Credit       |
|--|----------------|--------------|
| Contract Sales Price .....   |                | 4,000,000.00 |
| Other Adjustments:   |                |              |
| Credit from Realtor for closing costs from Colliers Nevada LLC dba Colliers International..... |                | 354.68       |
| Credit from buyer to seller .....  |                | 50,000.00    |
| Payoffs:   |                |              |
| Payoff of first mortgage loan to National Credit Union Administration Boad.....                | 3,699,802.70   |              |
| Principal Balance Good Thru .....  | \$3,699,802.70 |              |
| Payoff of second mortgage loan to Vaam and Assoc.....  | 150,000.00     |              |
| Principal Balance Good Thru .....  | \$150,000.00   |              |
| Commissions:   |                |              |
| \$120,000.00 to Colliers International.....  | 120,000.00     |              |
| Title Charges:   |                |              |
| Settlement or closing fee to NorCal Escrow Solutions, Inc.....                                 | 1,750.00       |              |
| Owner's title insurance to Stewart Title of Nevada   |                |              |
| Liability amount \$4,000,000.00.....   | 4,000.00       |              |
| Notary Fee to Notary Public.....   | 100.00         |              |
| Document Preparation to NorCal Escrow Solutions, Inc.....                                      | 300.00         |              |
| Courier/Mail Service Fee to NorCal Escrow Solutions, Inc.....                                  | 85.00          |              |
| Wire Fee to NorCal Escrow Solutions, Inc.....  | 60.00          |              |
| Recording/Filing fees for recons & UCC to NorCal Escrow Solutions, Inc.....                    | 120.00         |              |
| Recording Fees/Transfer Charges:   |                |              |
| State tax/stamps to Stewart Title of Nevada.....   | 8,200.00       |              |
| Additional Charges:  |                |              |
| 2012/2013 Tax Year to Washoe County Tax Collector.....   | 65,936.98      |              |
| Subtotal:  | 4,050,354.68   | 4,050,354.68 |
| Balance due to Seller:   |                |              |
| Totals:  | 4,050,354.68   | 4,050,354.68 |

HEREBY CERTIFY THAT THE FOREGOING INSTRUMENT  
IS A TRUE AND CORRECT COPY OF THE ORIGINAL.

BY: \_\_\_\_\_

# EXHIBIT 51

# EXHIBIT 51



☐ CORRECTED (if checked)

|   |  |  |   |  |
|---|--|--|---|--|
| CREDITOR'S name, street address, city or town, state or province, country, ZIP or foreign postal code, and telephone no.<br><b>NCUAB/ TCCU</b><br><b>c/o Business Partners LLC</b><br><b>9301 Corbin, Suite 1200</b><br><b>Northridge, CA 91324</b> |  | 1 Date of identifiable event<br><b>03/06/14</b>  | OMB No. 1545-1424                                       | <b>Cancellation of Debt</b><br><br><b>2014</b><br>Form <b>1099-C</b>   |
|   |  | 2 Amount of debt discharged<br><b>\$ 8597250.20</b>  |   |  |
|   |  | 3 Interest if included in box 2<br><b>\$</b>   |   |  |
| CREDITOR'S federal identification number<br><b>952474638</b>  | DEBTOR'S identification number<br>[REDACTED] | 4 Debt description<br><b>1st Lien Loan</b>   |   | <b>Copy B For Debtor</b><br>This is important tax information and is being furnished to the Internal Revenue Service. If you are required to file a return, a negligence penalty or other sanction may be imposed on you if taxable income results from this transaction and the IRS determines that it has not been reported. |
| DEBTOR'S name, street address, city or town, state or province, country, and ZIP or foreign postal code<br><br><b>Overland Development Corp, Inc</b><br><br><b>175 E. Main Street Suite# 130</b><br><br><b>Morgan Hill, CA 95037</b>                |  | 5 If checked, the debtor was personally liable for repayment of the debt . . . . . <input checked="" type="checkbox"/> |   |  |
| Account number (see instructions)<br><b>5940904082</b>  |  | 6 Identifiable event code  | 7 Fair market value of property<br><b>\$ 3000000.00</b> |  |

Form **1099-C** (keep for your records) [www.irs.gov/form1099c](http://www.irs.gov/form1099c) Department of the Treasury - Internal Revenue Service

LJW-TT-000315

Exhibit 51-1





3795

DICKINSON WRIGHT, PLLC

JOHN P. DESMOND

Nevada Bar No. 5618

BRIAN R. IRVINE

Nevada Bar No. 7758

ANJALI D. WEBSTER

Nevada Bar No. 12515

100 West Liberty Street, Suite 940

Reno, NV 89501

Tel: (775) 343-7500

Fax: (775) 786-0131

Email: [Jdesmond@dickinsonwright.com](mailto:Jdesmond@dickinsonwright.com)

Email: [Brvine@dickinsonwright.com](mailto:Brvine@dickinsonwright.com)

Email: [AWebster@dickinsonwright.com](mailto:AWebster@dickinsonwright.com)

*Attorneys 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 C. 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.

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

Counterclaimants,

CASE NO. CV14-01712

DEPT. 6

1 vs

2  
3 LARRY J. WILLARD, individually and as  
4 trustee of the Larry James Willard Trust  
Fund; OVERLAND DEVELOPMENT  
CORPORATION, a California corporation;  
5  
6 Counter-defendants.

7 **DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION FOR**  
8 **PARTIAL SUMMARY JUDGMENT**

9 Defendants/Counterclaimants Berry-Hinckley Industries ("BHI") and Jerry Herbst  
10 (collectively, "Defendants") hereby respectfully submit this Reply in support of their Motion for  
11 Partial Summary Judgment seeking judgment in Defendants' favor on certain claims for  
12 consequential damages asserted by Plaintiffs.

13 **I. Introduction**

14 Defendants are entitled to judgment in their favor as a matter of law precluding Plaintiffs  
15 Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund, and  
16 Overland Development Corporation (collectively, "Willard") from pursuing damages claims  
17 for: (1) damages related to the short sale of the Willard Property; (2) attorneys' fees allegedly  
18 incurred by Willard in a dismissed action Plaintiffs brought against Defendants in California;  
19 and (3) fees Willard allegedly incurred in his voluntary bankruptcy. Defendants are entitled to  
20 judgment in their favor as to these categories of damages asserted by Willard because none of  
21 the damages were remotely foreseeable at the time the parties entered into the subject lease and  
22 guaranty and because Willard has not even incurred many of these claimed damages.

23 Likewise, Defendants are entitled to judgment in their favor as a matter of law  
24 precluding Plaintiffs Edward C. Wooley and Judith A. Wooley, individually and as trustees of  
25 the Edward C. Wooley and Judith A. Wooley Trust 2000 (collectively, "Wooley") from  
26 pursuing damages for: (1) more than \$600,000 in damages Wooley purportedly incurred from  
27 selling the Baring Property based upon its cross-collateralization with the Highway 50 Property;

and (2) \$45,088 in attorneys' fees that Wooley purportedly incurred in the baseless action that Wooley and Willard improperly initiated against Defendants in California that was ultimately dismissed in part via a motion to dismiss filed by Defendants (and subsequently voluntarily dismissed by Plaintiffs' counsel). Again, Defendants are entitled to judgment in their favor as to these categories of damages asserted by Wooley because none of the damages were remotely foreseeable at the time the parties entered into the subject lease and guaranty.

In their Opposition brief, Willard and Wooley essentially ignore any meaningful analysis of the foreseeability of any of their claimed consequential damages and instead choose to focus on numerous immaterial factual allegations and to cite at length (in a misleading way) from numerous provisions in the Leases. However, Plaintiffs fail to identify any facts that would create an issue of material fact precluding summary judgment, and likewise fail to cite any legal authority that would permit them to recover the consequential damages they are seeking. Accordingly, Defendants are entitled to summary judgment.

Each of the categories of claimed damages for both Willard and Wooley, and the arguments they each attempt to proffer to preserve their right to seek such damages will be discussed in turn in this Reply.

## **II. Legal Argument**

### **A. Willard is not entitled to any "short sale damages" as a matter of law**

In Willard's operative pleading, the First Amended Complaint ("FAC"), Willard seeks three categories of "short sale" damages that he claims to have incurred by being "forced to sell the Willard Property in March 2014 in a short sale" as a result of Defendants' purported breach: (1) earnest money invested in the Willard Property; (2) tax consequences resulting from his mortgage debt cancelled by the short sale; and (3) closing costs. (FAC¶ 15, on file herein).

#### ***1. The short sale damages claimed by Willard were not foreseeable at the time the Willard Lease was executed***

As set forth in the Motion, these damages are categorically not recoverable because the short sale and the resulting claimed damages were not a foreseeable consequence of

1 Defendants' purported breach. There is no allegation by Willard that the short sale damages are  
2 direct damages that would necessarily result from a breach of the Willard Lease, such as lost  
3 rent. Nor does the Willard Lease address these damages in any way. Thus, Willard's request is  
4 properly classified as one for consequential damages that were not foreseeable at the time of  
5 contracting and therefore not recoverable.

6 "Damages are not recoverable for loss that the party in breach did not have reason to  
7 foresee as a probable result of the breach when the contract was made." Restatement (Second)  
8 of Contracts § 351(1); *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.*, 98 Nev.  
9 113, 115, 642 P.2d 1086, 1087 (1982) ("There can be no recovery for damages that are not  
10 reasonably foreseeable at the time of the contract."). Indeed, a contracting party is not "liable in  
11 the event of breach for loss that he did not at the time of contracting have reason to foresee as a  
12 probable result of the breach." Restatement (Second) of Contracts § 351 at cmt. a.

13 Defendants presented affirmative evidence in support of the Motion that shows  
14 conclusively that BHI had no reason to believe, at the time the Willard Lease was executed, that  
15 a breach of the Willard Lease by BHI could cause Willard to be forced to sell the Willard  
16 Property at a short sale, or to incur tax consequences, closing costs or lost earnest money as a  
17 result of that short sale. (See Affidavit of Timothy P. Herbst at ¶¶6-8, attached as Exhibit 1 to  
18 the Motion). Mr. Willard himself testified that he only spoke with Tim Herbst several years  
19 after the execution of the Lease (in 2008, or possibly 2012). (Willard Deposition at 117, 118:20-  
20 25 and 119, Motion at Exhibit 6). Even then, Mr. Willard did not discuss the possibility, much  
21 less probability, of a forced sale. *Id.* Mr. Willard has also not indicated that he spoke with any  
22 other representative of Defendants about these topics. *Id.* Nor were there any objective indicia  
23 that the loss would be foreseeable. In other words, it is undisputed Defendants had no "special  
24 knowledge of the risk [they were] undertaking" at the time they entered into the contracts, and  
25 therefore such a risk cannot be attributed to them. *Margolese v. Bruce*, 902 F.2d 1578 (9<sup>th</sup> Cir.  
26 1990).

1           The only evidence that Willard offers in the Opposition to refute the evidence in support  
2 of the Motion is a February 21, 2006 Lease Subordination, Non-Disturbance and Attornment  
3 Agreement (“Subordination Agreement”) (*see* Opposition at Exhibit 32), which Willard argues  
4 served to inform “BHI of the fact that the Willard Plaintiffs were purchasing the Virginia  
5 Property with Financing from South Valley National Bank.” Opposition at p. 6. However, this  
6 argument misses the point and the Subordination Agreement in no way renders Willard’s short  
7 sale damages foreseeable to BHI.

8           At the time that BHI allegedly executed the Subordination Agreement in February 2006,  
9 the Willard Lease had already been executed by the parties on November 18, 2005, and was in  
10 full force and effect. (*See* Willard Lease, at Exhibit 2 to the Motion). And, when determining  
11 whether consequential damages are available, Nevada courts look to whether such damages  
12 were foreseeable **at the time the contract was made**. *Hilton Hotels Corp.*, 98 Nev. at 115, 642  
13 P.2d at 1087 (“There can be no recovery for damages that are not reasonably foreseeable **at the**  
14 **time of the contract**.”)(emphasis added); *see also* Restatement (Second) of Contracts § 351(1)  
15 (“Damages are not recoverable for loss that the party in breach did not have reason to foresee as  
16 a probable result of the breach **when the contract was made**.”)(emphasis added); *Margolese v.*  
17 *Bruce*, 902 F.2d 1578 (9th Cir. 1990). Accordingly, because the Subordination Agreement was  
18 executed after the Willard Lease, it has no bearing on whether Willard’s claimed damages from  
19 the short sale were foreseeable to BHI at the time it executed the lease several months earlier.

20           In addition, even if the Subordination Agreement had been executed prior to the  
21 execution of the Willard Lease, it must be noted that, at best, the Subordination Agreement  
22 notified BHI that Willard had some financing on the Willard Property. It did not provide BHI  
23 with any information about the amount of the financing, Willard’s monthly payment, or  
24 anything more specific. (*See* Opposition at Exhibit 32). And, it certainly did not give any  
25 indication that a short sale was a possibility, much less likely. Willard has provided no  
26 evidence whatsoever that BHI had any information about the specifics of the South Valley loan,

1 and general knowledge that a landlord had financing in place on the leased premises is simply  
2 not enough to impose consequential damages on a tenant when the landlord loses the leased  
3 property to a foreclosure or short sale. *See, e.g., Margolese*, 902 F.2d at 1578 (“In the case of a  
4 lessee, the lessee generally does not expect that the lessor will lose his property if the lease is  
5 breached. Rather, a lessee would expect to be liable for lost rent and any physical damage to the  
6 premises”); *Enak Realty Corp. v. City of New York*, 109 A.D.2d 814 (N.Y. Sup. 1985) (“We  
7 modify Special Term’s order to the extent of striking plaintiff’s demands for damages resulting  
8 from the foreclosure inasmuch as such damages were not a foreseeable result of the breach of  
9 the lease....”); *Boise Joint Venture v. Moore*, 806 P.2d 707, 710 (Or. Ct. App. 1991) (“To  
10 recover its equity as consequential damages, BJV had to prove that, at the time of contracting,  
11 the parties contemplated that, as the probable result of defendant’s failing to make lease  
12 payments, BJV would allow its interest to be foreclosed and forfeit its equity”).

13 Finally, it is important to note that Willard has provided no evidence that BHI had any  
14 notice whatsoever of the subsequent loan that Willard had through Telesis Credit Union, or any  
15 information about the terms of that loan. Opposition at p. 6. This is also critical because the  
16 Telesis loan, on which Willard eventually failed to make payments, was an entirely different  
17 loan than the loan referenced in the Subordination Agreement, and the Telesis loan was entered  
18 into after the Lease was executed. Therefore, the Subordination Agreement, which was for the  
19 South Valley Bank Loan, has even less relevance to the foreseeability of Willard’s short sale  
20 damages allegedly incurred because Willard failed to pay an entirely different loan.

21 Willard’s failure to provide any evidence that the short sale damages were foreseeable to  
22 and contemplated by BHI at the time the Willard Lease was executed is fatal, as the burden of  
23 proving foreseeability is on the plaintiff. *Margolese*, 902 F.2d 1578 (discussing what the  
24 plaintiff must prove). Willard has failed to provide any evidence that such damages were  
25 foreseeable, and has not requested additional discovery on this issue under NRCP 56(f),  
26 therefore, this Court should enter summary judgment in favor of BHI as to Willard’s short sale  
27



1 damages. *See Wood v. Safeway*, 121 Nev. 724, 732 (2005)(when a motion for summary  
2 judgment is made and supported as required under NRCP 56, the non-moving party must not  
3 rest upon the general allegations and conclusions, but must by affidavit or otherwise set forth  
4 specific facts demonstrating issues of material fact).

5 **2. *Willard's new claim for alleged tax damages is***  
6 ***even less foreseeable and must be precluded***

7 In the FAC, Willard claims to have incurred “at least \$3,000,000 in tax consequences”  
8 from the short sale. (FAC ¶ 15, on file herein). Through discovery, Willard revised that  
9 estimate to be \$2,430,000 for Overland and \$3,152,000 for Mr. Willard. (Responses to First Set  
10 of Interrogatories at 7, Exhibit 12 to the Motion). Now, Willard has abandoned his claim for tax  
11 consequences for the debt forgiveness income allegedly incurred as part of the short sale,  
12 **because he finally admits that he paid no taxes.** Opposition at p. 10 (“since the Willard  
13 Plaintiffs’ respective total debt was greater than their respective total assets immediately prior to  
14 the debt cancellation, these tax liabilities were not reported as income and consequently are no  
15 longer being claimed as damages flowing from Defendants’ breach in the instant action.”).

16 However, now Willard now attempts to change his damages model, and for the first time  
17 in this case is claiming that “the Willard Plaintiffs were forced to give up the Virginia Property  
18 via the short sale, Willard lost \$1,018,200.00 in Capital Loss Carryovers that he had been  
19 carrying as an asset and Overland lost \$3,671,800.00 in Capital Loss Carryovers that it had been  
20 carrying as an asset under the 1031 Exchange through which the Willard Plaintiffs had  
21 purchased the Virginia Property.” Opposition at p. 10. This new claim for short sale damages  
22 is even more attenuated and even less foreseeable than the debt forgiveness tax damages  
23 previously claimed by Willard. Certainly, there is no evidence before this Court that BHI  
24 would have known, at the time of contracting, the details of how Willard purchased the  
25 property, including whether he used 1031 exchange funds to purchase the property, or about  
26  
27  
28

1 Willard's tax treatment of the Willard Property such that these type of damages would even be  
2 remotely foreseeable.

3 B. **Wooley is not entitled as a matter of law to the more than \$600,000 in**  
4 **damages purportedly incurred from selling the Baring Property**  
5 **because of its cross-collateralization with the Highway 50 Property**

6 In the FAC, Wooley claims that he is entitled to damages in the amount of \$147,847.30  
7 "because the [Baring] Property was cross-collateralized with the Highway 50 Property, [and]  
8 the Wooley Plaintiffs were forced to sell the [Baring] Property at a loss" and damages in an  
9 amount to be proven at trial but which is at least \$600,000 "because the [Baring] Property was  
10 cross-collateralized with the Highway 50 Property and the Wooley Plaintiffs were forced to sell  
11 the [Baring] Property, the Wooley Plaintiffs incurred tax liabilities." FAC at ¶¶40-41. As set  
12 forth in the Motion, there is nothing in the Highway 50 Lease that even remotely implies that  
13 BHI would be liable for damages incurred in selling one of Wooley's other properties, the  
14 Baring Property, if BHI were to breach the Highway 50 Lease. (Highway 50 Lease, Exhibit 10  
15 to the Motion). And, there is no evidence whatsoever that such damages, which were allegedly  
16 incurred because the Highway 50 Property and the Baring Property were cross-collateralized,  
17 were foreseeable to and contemplated by the parties at the time the Highway 50 Lease was  
18 executed. This would be absolutely impossible, as the Baring Property was purchased **after** the  
19 Highway 50 Lease had been executed, and the cross-collateralization language is contained in  
20 the loan for the Baring Property, which was entered into more than seven months after the  
21 Highway 50 Lease was executed. (Highway 50 Lease, Exhibit 10 to the Motion; Baring  
22 Property Loan at ECW78 1.7, Exhibit 15 to the Motion).

23 In addition to the contents of the Highway 50 Lease and the Baring Property Loan  
24 documents, Defendants have offered additional competent evidence showing that BHI had no  
25 knowledge of Wooley's financing for either the Highway 50 Property or the Baring Property,  
26 and no knowledge of the cross-collateralization language in the Baring Loan documents. (See  
27  
28

1 Motion at p. 23; Exhibit 1 to the Motion at ¶17; Exhibit 16 to the Motion at p. 120; Exhibit 23  
2 to the Motion at p. 4.)

3 Wooley literally points to no facts that would contradict the facts proffered by  
4 Defendants in support of the Motion or create a genuine issue of material fact that would  
5 preclude summary judgment. Instead, Wooley simply says that: “Defendants do not dispute the  
6 fact that the Baring Property and the Highway 50 Property were cross-collateralized, nor have  
7 they countered the fact that as a result, due to Defendants’ breach the Wooley Plaintiffs were  
8 forced to sell the Baring Property in order to not lose both properties.” Opposition at p. 21.  
9 Again, Plaintiffs have missed the point. The fact that the properties were cross-collateralized is  
10 not relevant to the inquiry of whether damages related to that cross-collateralization were  
11 reasonably foreseeable to and contemplated by BHI at the time the Highway 50 Lease was  
12 executed. Because the Baring Property was purchased (and cross-collateralized with the  
13 Highway 50 property) after the Highway 50 Lease was already in place, BHI could not have  
14 contemplated a potential future sale of the Baring Property or having to pay damages related to  
15 the financing of Baring Property following that potential future sale. Plaintiffs have simply  
16 provided no evidence to contradict this basic and dispositive fact, and Defendants are therefore  
17 entitled to summary judgment.

18 C. **Plaintiffs’ citation to various provisions in the Leases does not**  
19 **eliminate the requirement under Nevada law that all consequential**  
20 **damages be foreseeable**

21 Both Plaintiffs have cited to various “remedies” provisions in the Leases that they argue  
22 provide “very strong protections for the Lessor in the event of a breach by the Lessee,”  
23 (Opposition at pp. 14-16), and argue that those Lease provisions authorize Plaintiffs “to recover  
24 ‘any and all’ damages proximately flowing from a breach.” (*Id.* at p. 21). However, Plaintiffs  
25 misstate which Lease provisions provide them with remedies against BHI in the event of a  
26 breach, and their argument ignores the fundamental requirement under Nevada law that, in order  
27 for a plaintiff to recover consequential damages, the plaintiff must prove that the breaching  
28

1 party had reason to foresee, at the time the contract was executed, that those damages would be  
2 a probable result of a breach. This is true even in the face of contract provisions that purport to  
3 address the issue.

4  
5 ***1. Plaintiffs misstate what provisions in the Leases provide them  
with remedies in the event of a breach by BHI***

6 A plain reading of the Leases shows that all of the Landlords' remedies for a breach of  
7 the Leases by Tenants are found in the same place. Paragraph 20(B) of each Lease details all of  
8 the remedies available to the Landlord following an Event of Default by the Tenant. Plaintiffs'  
9 attempts to characterize other Lease provisions as "remedies," such as Section 4(D), Section 8  
10 and Section 15, should be rejected by this Court.

11 Section 4(D) of each Lease is part of the Lease detailing the tenants' obligations to pay  
12 rent (and is entitled "Rental and Other Monetary Obligations"), and has no bearing on and  
13 provides no support for Plaintiffs' claims for consequential damages. (Exhibit 2 to the Motion,  
14 Willard Lease at §4; Exhibit 10 to the Motion, Highway 50 Lease at §4). Similarly, Section 8  
15 of each Lease details the tenants' obligations to pay "all taxes and assessments of every type or  
16 nature assessed against or imposed upon the Property or Lessee during the Lease Term."  
17 (Exhibit 2 to the Motion, Willard Lease at §8; Exhibit 10 to the Motion, Highway 50 Lease at  
18 §8). Again, this provision in the Lease has no bearing on and provides no support for Plaintiffs'  
19 claims for consequential damages.

20 Section 15 of each Lease details the tenants' obligations to indemnify the landlords from  
21 claims against third-parties related to tenants' activities under the Leases. Plaintiffs seem to  
22 attempt to argue that the indemnification provisions in the Leases somehow relieve them of  
23 their respective burdens to show that the damages they are seeking were foreseeable at the time  
24 the Leases were executed. Specifically, they each cite what they characterize as "an extremely  
25 broad express indemnification provision" to support the argument that Defendants are liable for  
26

1 all consequential damages that Willard and Wooley claim to have incurred, whether those  
2 damages are foreseeable or not. Opposition at p. 16. However, this argument is untenable.

3 It is axiomatic that express indemnity provisions in commercial leases such as the ones  
4 at issue in this case do not apply to claims between the lessor and lessee, but rather only to  
5 actions by third parties. *Boise Joint Venture*, 806 P.2d at 709-10; *PacificCorp v.*  
6 *SimplexGrinnell, LP*, 303 P.2d 949, 952-53 (Or.App. 2013) (indemnity clause intended to  
7 protect a party against claims made by third parties and does not apply to actions between the  
8 contracting parties); *May Dept. Stores Co. v. University Hills, Inc.*, 789 P.2d 434, 438  
9 (Colo.App. 1989) (“Generally, indemnity language . . . is construed to apply only to claims  
10 asserted by third parties against the indemnitee, not to claims based upon injuries or damages  
11 suffered directly by that party.”); *In re Kmart Corp.*, 362 B.R. 361, 393 (N.D. Ill. 2007) (general  
12 indemnity provision was intended to protect claimants “from claims originating from outside  
13 sources (which is the typical reason for and purpose of an indemnity), not for claims between”  
14 the contracting parties).

15 This basic principle is supported by the structure of the Leases themselves. All of the  
16 landlords’ remedies for a breach of the Leases by tenants are found in the same place:  
17 Paragraph 20(B). The indemnity provisions cited by Plaintiffs in the Opposition are found at  
18 Paragraph 15 of each Lease, not in the remedies paragraph, which provides further support for  
19 the conclusion that the unambiguous indemnity provisions were not intended to serve as  
20 additional remedies in a direct action between the landlord and tenant. When reading the  
21 Leases in harmony, as required under Nevada law, *see Siggelkow v. Phoenix Ins. Co.*, 109 Nev.  
22 42, 44 (1993) (a reading of a contractual provision must include reference to the entire contract  
23 and be read as a whole to give reasonable and harmonious meaning to the entire contract), it is  
24 abundantly clear that Plaintiffs’ attempted reliance on the indemnity provisions of the Lease to  
25 support their claim for consequential damages is absurd.

26 ///

1                               **2.       Plaintiffs’ argument that the Leases authorize them to recover**  
 2                               **any and all consequential damages “proximately flowing from**  
 3                               **a breach” by BHI, without regard to foreseeability, is**  
                               **contradicted by Nevada law**

4               Plaintiffs attempt to rely on various provisions in the Leases to support their claim for  
 5 consequential damages, apparently arguing that the Court can award those damages without  
 6 analyzing whether the damages were foreseeable to the parties at the time the Leases were  
 7 executed.<sup>1</sup> See Opposition at pp. 13-15. Specifically, Plaintiffs attempt to avoid an analysis of  
 8 whether the consequential damages they are seeking were foreseeable to BHI at the time the  
 9 Leases were executed by relying on the inapplicable indemnity provision in the Leases  
 10 (addressed at Section (II)(C)(1), above, herein), and on a portion of the liquidated damages  
 11 section of the Leases, Section 20(B)(i)(vi). They also cite to *Gilman v. Gilman*, 114 Nev. 416,  
 12 956 P.2d 761 (1998). However, the *Gilman* case actually supports Defendants’ arguments here,  
 13 not Plaintiffs’ arguments, and the Lease provisions cited by Plaintiffs do not serve to render the  
 14 consequential damages addressed in the Motion foreseeable.

15               The facts of the *Gilman* case are illustrative. First, the *Gilman* case addresses a scenario  
 16 where an ex-husband is attempting to reduce spousal support payments after his ex-wife began

---

17               <sup>1</sup> Plaintiffs also cite to various provisions in the Guaranties to support this argument.  
 18 Opposition at p. 17. However, any liability of Jerry Herbst under the Guaranties is derivative of  
 19 BHI’s liability (if any) under the Leases pursuant to the express language of those Guaranties.  
 20 Specifically, Mr. Herbst only agreed to “unconditionally, absolutely and irrevocably guarantee[]  
 21 the timely payment and performance of BHI’s obligations arising out of and under the Lease.”  
 22 (Willard Guaranty, Exhibit 3 to the Motion at §1; Highway 50 Guaranty, Exhibit 11 to the  
 23 Motion at §1). There are no independent obligations imposed on Mr. Herbst under the  
 24 Guaranties – he was obligated to guaranty BHI’s payment obligations under the Leases and  
 25 nothing more. Under Nevada law, the obligations of a guarantor are strictly construed. *Dobron*  
 26 *v. Bunch*, 125 Nev. 460, 464 (2009) (“the obligation of a guarantor will be strictly construed,  
 27 *Adelson v. Wilson & Co.*, 81 Nev. 15, 21, 398 P.2d 106, 109 (1965), and we will not require the  
 28 guarantor to be responsible for anything beyond what it clearly agreed to pay. *Homewood Inv.*  
*Co. v. Wilt*, 97 Nev. 378, 381, 632 P.2d 1140, 1143 (1981)”). Accordingly, there is no reason to  
 even consider the provisions of the Guaranties when examining whether the consequential  
 damages sought by Plaintiffs were foreseeable to BHI when the Leases were executed. Instead,  
 the inquiry must be limited to the language of the Leases themselves and to the facts detailing  
 BHI’s knowledge at the time the Leases were executed.

1 cohabitating with her boyfriend. *Gilman*, 114 Nev. at 419-420. In considering the ex-  
2 husband's request to reduce his monthly alimony payments, the Court noted that the couple's  
3 "divorce decree states that 'the court will consider the issue of spousal support in the event of  
4 cohabitation by [Marjorie] with an adult male who significantly contributes to her support,' and  
5 ruled that "the district court correctly determined that the parties were free to place that  
6 cohabitation provision in their divorce decree." *Id.* at 425. In upholding the district court's  
7 refusal to modify or terminate the spousal support, the Court noted that "when parties to a  
8 contract foresee a condition which may develop and provide in their contract a remedy for the  
9 happening of that condition, the presumption is that the parties intended the prescribed remedy  
10 as the sole remedy for that condition.'" *Id.* at 426.

11 *Gilman*, though it is not a consequential damages case and therefore does not represent  
12 controlling authority for this Court, addresses a scenario where the parties to a contract (the  
13 divorce decree) expressly contemplated a future event (the ex-wife's potential future  
14 cohabitation with another man), and addressed what the Court could consider if and when that  
15 event occurred. Here, the parties to the Leases plainly did not contemplate the events in  
16 question: that Willard might be forced to sell his property at a short sale and incur damages as a  
17 result of BHI stopping rent payments, or that Wooley might be forced to sell the Baring  
18 Property and incur damages as a result of BHI stopping rent payments at the Highway 50  
19 Property. The Leases are absolutely silent as to the possibility of such events occurring, and  
20 none of the Lease language cited by Plaintiffs even remotely indicates that BHI was agreeing,  
21 when it executed the Leases, to be responsible for damages such as Willard's alleged lost  
22 earnest money, for Willard's alleged "Capital Loss Carryovers" that they had "been carrying as  
23 an asset" (*see* Opposition at p. 10) or for Wooley's alleged losses incurred in selling the Baring  
24 Boulevard property because it was cross-collateralized with the Highway 50 property.

25 The undisputed facts show that Defendants were unaware, at the time the Leases were  
26 executed, of the possibility of such damages being incurred by Plaintiffs in the event of a future  
27



1 breach. Plaintiffs reliance on the language in Section 20(B)(i)(vi) to support the idea that any  
2 damages that are proximately caused by a breach (Opposition at p. 21) is misplaced and ignores  
3 the fundamental requirement under Nevada law that any consequential damages must be  
4 foreseeable. Indeed, such a concept would open the door to any damages a plaintiff could claim  
5 as a result of an alleged breach.

6 “Foreseeability is a fundamental prerequisite to the recovery of consequential damages  
7 for breach of contract.” *Basic Capital Management, Inc. v. Dynex Commercial, Inc.*, 348  
8 S.W.3d 894, 901 (Tex. 2011). In fact, the requirement that consequential damages be  
9 reasonably foreseeable to the contracting parties at the time of contract formation before they  
10 can be recovered can be traced back more than 170 years to the seminal case of *Hadley v.*  
11 *Baxendale*, 9 Exch. 341, 354, 156 Eng. Rep. 145, 151 (1854). In that case, the court held that:

12 Where two parties have made a contract which one of them has broken, the  
13 damages which the other party ought to receive in respect of such breach of  
14 contract should be such as may fairly and reasonably be considered either arising  
15 naturally, i.e., according to the usual course of things, from such breach of  
16 contract itself, or such as may reasonably be supposed to have been in the  
contemplation of both parties at the time they made the contract as the probable  
result of the breach of it.

17 And, this requirement clearly remains in place today under Nevada law. *See Hilton Hotels*  
18 *Corp.*, 98 Nev. at 115, 642 P.2d at 1087 (“There can be no recovery for damages that are not  
19 reasonably foreseeable at the time of the contract.”). Indeed, a contracting party is not “liable in  
20 the event of breach for loss that he did not at the time of contracting have reason to foresee as a  
21 probable result of the breach.” Restatement (Second) of Contracts § 351 at cmt. a. Plaintiffs  
22 cannot rely on non-specific language in the remedies portion of the Leases to avoid these  
23 requirements when it is abundantly clear that BHI objectively had no reason to believe that it  
24 would be responsible for the remote and unforeseeable consequential damages sought by  
25 Plaintiffs. If Plaintiffs position were accepted, it would obliterate the foreseeability requirement  
26 for consequential damages imposed by Nevada law.

1           **D.     Willard and Wooley cannot attempt to collect their attorneys' fees**  
2           **and costs incurred in the unsuccessful and inappropriate California**  
3           **case in this action, and Willard cannot attempt to collect his**  
4           **attorneys' fees incurred in his Chapter 11 bankruptcy**

5           Plaintiffs are each seeking as consequential damages the attorneys' fees incurred in a  
6           California action that Plaintiffs brought against Defendants for breach of the Leases. Willard is  
7           also seeking as consequential damages the attorneys' fees incurred in filing (and then  
8           voluntarily dismissing) his Chapter 11 bankruptcy. Plaintiffs are not entitled to these damages  
9           as a matter of law.

10           In the Opposition, Plaintiffs do not dispute that the California action was brought in the  
11           wrong forum (the Leases each contain a Nevada forum provision), that Defendants obtained a  
12           dismissal of most of the claims brought in the California action due to lack of personal  
13           jurisdiction, or that Plaintiffs eventually voluntarily dismissed the entire case and then refiled  
14           the case in this Court. Willard likewise does not dispute that he filed the Chapter 11 bankruptcy  
15           solely to attempt to negotiate with the lender for the Willard Property, or that when such  
16           negotiations proved unsuccessful, he voluntarily dismissed the bankruptcy. Instead, Plaintiffs  
17           recklessly and incorrectly accuse Defendants of fraud in connection with achieving dismissal  
18           for lack of personal jurisdiction and insist that they are entitled to recover such fees as special  
19           damages, despite clear and controlling contrary Nevada authority.

20           First, with regard to Plaintiffs' claims that they can recover such fees as special  
21           damages, Nevada law makes clear that attorneys' fees can only be recovered as special damages  
22           in a narrow set of circumstances: (1) a party to a contract can seek to recover from a breaching  
23           party the attorneys' fees that arise from the breach that caused the former party to accrue  
24           attorneys' fees **in defending himself against a third party's legal action**; and (2) in cases  
25           concerning title to real property, attorneys' fees can be allowable as special damages in slander  
26           of title actions. *Liu v. Christopher Homes, LLC*, 130 Nev. \_\_\_, 321 P.3d 875 (2014). Plaintiffs'  
27           claimed attorneys' fees do not meet either category. Plaintiffs have asserted no claims  
28           concerning title to real property, and the attorneys' fees they are seeking were not incurred in

1 defending themselves against a legal action brought by a third-party due to Defendants' alleged  
2 breach of the Leases. Instead, Plaintiffs are attempting to recover attorneys' fees incurred in  
3 unsuccessfully prosecuting the California action against Defendants. And, Willard is  
4 attempting to recover attorneys' fees for a bankruptcy that he chose to file and that he chose to  
5 dismiss. Accordingly, Plaintiffs are not entitled to pursue such attorneys' fees as special  
6 damages under clear and controlling Nevada law.

7 Second, although Plaintiffs' frivolous allegations that Defendants somehow obtained  
8 dismissal of the California case "via fraud" (*see, e.g.* Opposition at pp. 4 and 19) are not  
9 relevant to this Court's inquiry given the controlling authority cited above, the allegations are  
10 wildly inaccurate and offensive, and Defendants would like to correct the record.

11 Defendants did not obtain dismissal by any fraud. Rather, Defendants filed a  
12 meritorious motion to quash and motion to dismiss based upon lack of personal jurisdiction over  
13 numerous Defendants.<sup>2</sup> (Declaration of John P. Desmond, attached hereto as **Exhibit 1**).  
14 Following the filing of those motions, Plaintiffs' original counsel, Steven Goldblatt, was  
15 removed from the case, and their current counsel, Mr. Moquin, substituted in as counsel for  
16 Plaintiffs. *Id.* Neither Mr. Goldblatt nor Mr. Moquin bothered to file any opposition to  
17 Defendants' motion to quash or motion to dismiss, and the California court therefore granted  
18 Defendants' motion to dismiss as unopposed (and decided that the motion to quash was moot)  
19 without any further action from Defendants.<sup>3</sup> (*Id.*; *see also* Opposition at Exhibit 20-3, noting  
20 that the hearing on the motion to quash was "off calendar" pursuant to a March 13, 2014  
21 stipulation; *and* Opposition at Exhibit 20-5, noting that the motion to dismiss was "uncontested"

---

22 <sup>2</sup> It must be noted that Plaintiffs' California complaint was not only filed in the wrong forum; it  
23 was also absurdly overbroad, naming Herbst family members and third-parties that had nothing  
24 to do with the Leases or Guaranties, such as Maryanne Herbst, Marc Berger, X-Roads Solutions  
25 Group, LLC, Business Partners, LLC and Union Bank. *See* Exhibit 1.

26 <sup>3</sup> As this Court is aware, Plaintiffs also have a history in this case of ignoring motions and  
27 failing to file oppositions. That has occurred twice in this case already, when Plaintiffs failed to  
28 oppose Defendants June 23, 2015 motion to compel and their August 7, 2015 motions to  
compel.

1 and noting no appearance from counsel for Plaintiffs). After the California court granted  
2 Defendants' motion, the court held a telephonic status conference, which was attended by  
3 counsel for Defendants, but counsel for Plaintiffs failed to attend. *Id.* Plaintiffs then voluntarily  
4 dismissed the California case in May 2014. Opposition at Exhibit 21. At no time prior to the  
5 dismissal of the California case did Plaintiffs complain to Defendants or to the court that  
6 Defendants had obtained dismissal by fraud; rather, they have apparently manufactured this  
7 complaint for the purposes of opposing the Motion. *Id.*

### 8 **III. Conclusion**

9 As more fully set forth in the Motion and above, herein, Defendants respectfully request  
10 that this Court enter an order holding that Plaintiffs are not entitled to recover the following as a  
11 matter of law: (1) Willard's "short sale" damages, including tax consequences, closing costs,  
12 and earnest money; (2) Willard's attorneys' fees incurred in the California action; (3) Willard's  
13 attorneys' and accounting fees incurred in the bankruptcy; (4) Wooley's "Baring Property"

14  
15 ///

16  
17 ///

18  
19 ///

20  
21 ///

22  
23 ///

24  
25 ///

1 damages, including tax consequences and purported lost monies as a result of the sale; and (5)  
2 Wooley's attorneys' fees incurred in the California action.

3 **AFFIRMATION**

4 **Pursuant to NRS 239B.030**

5 The undersigned does hereby affirm that the preceding document does not contain the  
6 social security number of any person.

7 DATED this 16th day of September, 2016.

8 DICKINSON WRIGHT, PLLC

9  
10 /s/ Brian R. Irvine

11 JOHN P. DESMOND

12 Nevada Bar No. 5618

13 BRIAN R. IRVINE

14 Nevada Bar No. 7758

15 ANJALI WEBSTER

16 Nevada Bar No. 12515

17 100 West Liberty Street, Suite 940

18 Reno, NV 89501

19 Tel: (775) 343-7500

20 Fax: (775) 786-0131

21 Email: [Jdesmond@dickinsonwright.com](mailto:Jdesmond@dickinsonwright.com)

22 Email: [Birvine@dickinsonwright.com](mailto:Birvine@dickinsonwright.com)

23 Email: [AWebster@dickinsonwright.com](mailto:AWebster@dickinsonwright.com)

24 *Attorneys for Defendants*

25 *Berry Hinckley Industries, and*

26 *Jerry Herbst*

**CERTIFICATE OF SERVICE**

I certify that I am an employee of DICKINSON WRIGHT, PLLC and that on this date, pursuant to NRCP 5(b), I am serving a true and correct copy of the attached **DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** on the parties as set forth below:

X Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, Reno, Nevada, postage prepaid, following ordinary business practices

Certified Mail, Return Receipt Requested

X Via E-Mail

X Via the Court's CM/ECF Electronic Notification System

Placing an original or true copy thereof in a sealed envelope and causing the same to be personally Hand Delivered

Federal Express (or other overnight delivery) Electronic Notification

addressed as follows:

David C. O'Mara  
THE O'MARA LAW FIRM, P.C.  
311 E. Liberty Street  
Reno, Nevada 89501  
[david@omaralaw.net](mailto:david@omaralaw.net)

Brian P. Moquin  
LAW OFFICES OF BRIAN P. MOQUIN  
3287 Ruffino Lane  
San Jose, California 95148  
[bmoquin@lawprism.com](mailto:bmoquin@lawprism.com)

DATED this 16<sup>th</sup> day of September, 2016.

/s/ Mina Reel

An employee of Dickinson Wright, PLLC

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**EXHIBIT TABLE**

| Exhibit | Description                    | Pages <sup>4</sup> |
|---------|--------------------------------|--------------------|
| 1       | Declaration of John P. Desmond | 3                  |

<sup>4</sup> Exhibit Page counts are exclusive of exhibit slip sheets.



# EXHIBIT 1

# EXHIBIT 1

1520  
 DICKINSON WRIGHT  
 JOHN P. DESMOND  
 Nevada Bar No. 5618  
 BRIAN R. IRVINE  
 Nevada Bar No. 7758  
 ANJALI D. WEBSTER  
 Nevada Bar No. 12515  
 100 West Liberty Street, Suite 940  
 Reno, NV 89501  
 Tel: (775) 343-7500  
 Fax: (775) 786-0131  
 Email: [Jdesmond@dickinsonwright.com](mailto:Jdesmond@dickinsonwright.com)  
 Email: [Birvine@dickinsonwright.com](mailto:Birvine@dickinsonwright.com)  
 Email: [Awebster@dickinsonwright.com](mailto: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,

CASE NO. CV14-01712  
 DEPT. 6

Plaintiff,  
 vs.

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

Defendants.

**DECLARATION OF JOHN P. DESMOND  
 IN SUPPORT OF  
 DEFENDANTS/COUNTERCLAIMANTS'  
 REPLY BRIEF IN SUPPORT OF  
 MOTION FOR PARTIAL SUMMARY  
 JUDGMENT**

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

Counterclaimants,  
 vs

LARRY J. WILLARD, individually and as

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

4 Counter-defendants.  
5 \_\_\_\_\_/

6 I, JOHN P. DESMOND, do hereby declare as follows:

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

14 2. I am licensed to practice in California and was counsel of record for Defendants in the  
15 case filed by Plaintiffs Larry J. Willard, individually and as trustee of the Larry James Willard  
16 Trust Fund, Overland Development Corporation, and Edward C. Wooley and Judith A. Wooley,  
17 individually and as trustees of the Edward C. Wooley and Judith A. Wooley Trust 2000 in Santa  
18 Clara County Superior Court in the State of California, Case No. 13CV-245021 (the "California  
19 Action").

20 3. In the California Action, Defendants filed a meritorious motion to quash and motion to  
21 dismiss based upon lack of personal jurisdiction over numerous Defendants in early 2013.

22 4. Following the filing of those motions, Plaintiffs' original counsel, Steven Goldblatt, was  
23 removed from the case, and their current counsel, Mr. Moquin, substituted in as counsel for  
24 Plaintiffs in the California Action.

25 5. Neither Mr. Goldblatt nor Mr. Moquin filed an opposition to Defendants' motion to  
26 quash or motion to dismiss, and the court in the California Action therefore granted Defendants'  
27 motion to dismiss as unopposed (and decided that the motion to quash was moot in light of the  
28 motion to dismiss having been granted) without any further action from Defendants.

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

11 /s/ John P. Desmond  
JOHN P. DESMOND



1 **4105**

DICKINSON WRIGHT

2 JOHN P. DESMOND

Nevada Bar No. 5618

3 BRIAN R. IRVINE

4 Nevada Bar No. 7758

ANJALI D. WEBSTER

5 Nevada Bar No. 12515

100 West Liberty Street, Suite 940

6 Reno, NV 89501

7 Tel: (775) 343-7500

8 Fax: (775) 786-0131

Email: [Jdesmond@dickinsonwright.com](mailto:Jdesmond@dickinsonwright.com)

Email: [Brivine@dickinsonwright.com](mailto:Brivine@dickinsonwright.com)

9 Email: [Awebster@dickinsonwright.com](mailto:Awebster@dickinsonwright.com)

10 *Attorney for Defendants*

*Berry Hinckley Industries and*

11 *Jerry Herbst*

12 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

13 **IN AND FOR THE COUNTY OF WASHOE**

14  
15 LARRY J. WILLARD, individually and as  
trustee of the Larry James Willard Trust Fund;  
OVERLAND DEVELOPMENT  
16 CORPORATION, a California corporation;  
EDWARD E. WOOLEY AND JUDITH A.  
17 WOOLEY, individually and as trustees of the  
Edward C. Wooley and Judith A. Wooley  
18 Intervivos Revocable Trust 2000,

CASE NO. CV14-01712

DEPT. 6

**SUPPLEMENT TO**  
**DEFENDANTS/COUNTERCLAIMANTS'**  
**MOTION FOR PARTIAL SUMMARY**  
**JUDGMENT**

19 Plaintiff,

20 vs.

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

23 Defendants.  
24 \_\_\_\_\_/

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

27 Counterclaimants,

28 vs

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

Counter-defendants.

Defendants/Counterclaimants Berry-Hinckley Industries (“BHI”) and Jerry Herbst (collectively, “Defendants”) hereby respectfully submit this Supplement to their Motion for Partial Summary Judgment to include an expert report by Michelle Salazar addressing Plaintiffs’ brand new claim for tax damages made for the first time in Plaintiffs’ Opposition to Defendants’ Motion. Defendants respectfully submit that this Supplement is necessary and should be considered by this Court because Ms. Salazar’s expert report was just disclosed on December 2, 2016, the deadline for disclosing experts. A true and correct copy of the expert report is attached hereto as **Exhibit 1**, and was also filed with this Court on December 2, 2016.

**MEMORANDUM OF POINTS AND AUTHORITIES**

On August 1, 2016, Defendants/Counterclaimants filed a motion for partial summary judgment on certain claims for consequential damages asserted by Plaintiffs Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund, and Overland Development Corporation (collectively, “Willard”), and Edward C. Wooley and Judith A. Wooley, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Trust 2000 (collectively, “Wooley”).

Pertinent here, Defendants sought, in pertinent part, for judgment in their favor on Willard’s claim for approximately \$5 million in “tax consequence” damages from the March 2014 short sale of the Willard Property. Mot. at 13:15-15:24. Specifically, Defendants argued that Willard was not entitled to the \$5 million in tax damages alleged in their First Amended Complaint because Willard never actually incurred those damages by paying the taxes. *Id.* In Plaintiffs’ Opposition, Plaintiffs admitted that Willard did not pay the taxes that he sought from Defendants as damages, effectively admitting that Plaintiffs’ damages claims are overreaching



1 and unsubstantiated: “Per IRS regulations, since the Willard Plaintiffs’ respective total debt was  
2 greater than their respective total assets immediately prior to the debt cancellation, these tax  
3 liabilities were not reported as income and consequently are no longer being claimed as  
4 damages flowing from Defendants’ breach in the instant action.” Opp. at 10:13-17.

5 However, determined to continue their overreaching approach to damages, Plaintiffs  
6 created a new theory for tax consequence damages for the first time in their Opposition, seeking  
7 damages that are not alleged in the First Amended Complaint and have never been listed as part  
8 of Plaintiffs’ damages calculation (because Plaintiffs still have never provided an NRCP 16.1  
9 damages calculation to Defendants, notwithstanding the NRCP 16.1 requirements to do so).  
10 Specifically, Plaintiffs argue that “because the Willard Plaintiffs were forced to give up the  
11 Virginia Property via short sale, Willard lost \$1,018,200.00 in Capital Loss Carryovers that he  
12 had been carrying as an asset and Overland lost \$3,671,800.00 in Capital Loss Carryovers that  
13 he had been carrying as an asset under the 1031 Exchange through which the Willard Plaintiffs  
14 had purchased the Virginia Property.” Opp. at 10:18-22.

15 Defendants provided their expert, Michelle Salazar, with Plaintiffs’ new damages claim,  
16 and Ms. Salazar provided analysis on this damages claim in her expert report disclosed and filed  
17 on December 2, 2016. (Expert Report, **Exhibit 1**). The purpose of this Supplement is to provide  
18 this Court with Ms. Salazar’s analysis. In brief, Ms. Salazar opines that these claimed damages  
19 are not actually damages at all. First, the amount of damages claimed by the Willard Plaintiffs is  
20 wholly inaccurate: according to Ms. Salazar, capital loss and net operating loss carryovers “do  
21 **not** provide a dollar for dollar benefit to Plaintiffs”; rather, “any carryovers must be multiplied  
22 by the applicable tax rate to arrive at Plaintiffs’ actual lost benefit.” *Id.* at 18. Thus, multiplying  
23 the carriers by the applicable tax rate (15 percent for Willard and 34 percent for Overland), the  
24 actual lost benefit would be \$152,730 for Willard and \$1,248,412 for Overland, a significantly  
25 different and lower number than Plaintiffs’ unsubstantiated claim. *Id.* Second, and even more  
26 importantly, **the Willard Plaintiffs did not actually suffer any loss**. According to Ms. Salazar,  
27 “the actual lost benefit must be compared to the amount of cancelled debt which was derived  
28

1 from Plaintiffs' federal income tax returns." *Id.* Because the amount of debt cancellation  
2 received by Willard (\$4,196,190) and Overland (\$3,463,372) from the short sale was  
3 indisputably higher than the purported capital and net carryover loss benefits, there was no  
4 financial detriment to Willard or Overland, because both Willard and Overland enjoyed the  
5 benefit of not paying the outstanding debt owed, which entirely cancelled out any lost tax  
6 benefit. *Id.*

7 Accordingly, Defendants respectfully request that this Court consider Ms. Salazar's  
8 opinion when determining whether to award Willard's brand new and unsubstantiated request  
9 for tax "damages."

10 **AFFIRMATION**

11 **Pursuant to NRS 239B.030**

12 The undersigned does hereby affirm that the preceding document does not contain the  
13 social security number of any person.

14 DATED this 20th day of December, 2016.

15 DICKINSON WRIGHT

16  
17 /s/ Brian R. Irvine  
18 DICKINSON WRIGHT  
19 JOHN P. DESMOND  
20 Nevada Bar No. 5618  
21 BRIAN R. IRVINE  
22 Nevada Bar No. 7758  
23 ANJALI D. WEBSTER  
24 Nevada Bar No. 12515  
25 100 West Liberty Street, Suite 940  
26 Reno, NV 89501  
27 Email: [Jdesmond@dickinsonwright.com](mailto:Jdesmond@dickinsonwright.com)  
28 Email: [Brivine@dickinsonwright.com](mailto:Brivine@dickinsonwright.com)  
Email: [Awebster@dickinsonwright.com](mailto:Awebster@dickinsonwright.com)

*Attorney for Defendants Berry Hinckley  
Industries and Jerry Herbst*

**CERTIFICATE OF SERVICE**

I certify that I am an employee of DICKINSON WRIGHT PLLC, and that on this date, pursuant to NRCP 5(b); I am serving a true and correct copy of the attached **SUPPLEMENT TO DEFENDANTS/COUNTERCLAIMANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT** on the parties as set forth below:

\_\_\_\_\_ Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, Reno, Nevada, postage prepaid, following ordinary business practices

\_\_\_\_\_ Certified Mail, Return Receipt Requested

\_\_\_\_\_ Via Facsimile (Fax)

  X   Via E-Mail

\_\_\_\_\_ Placing an original or true copy thereof in a sealed envelope and causing the same to be personally Hand Delivered

\_\_\_\_\_ Federal Express (or other overnight delivery)

  X   EM/ECF Electronic Notification

Addressed as follows:

Brian P. Moquin  
LAW OFFICES OF BRIAN P. MOQUIN  
3287 Ruffino Lane  
San Jose, California 95148

David C. O'Mara  
THE O'MARA LAW FIRM  
311 E. Liberty Street  
Reno, Nevada 89501

DATED this 20th day of December, 2016.

/s/ Mina Reel  
An employee of DICKINSON WRIGHT PLLC

**EXHIBIT TABLE**

| <b>Exhibit</b> | <b>Description</b>                | <b>Pages<sup>1</sup></b> |
|----------------|-----------------------------------|--------------------------|
| 1              | Expert Report of Michelle Salazar | 33                       |

---

<sup>1</sup> Exhibit Page counts are exclusive of exhibit slip sheets.